

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

RECORDED

Case No. CV 06-4499 ODW (JTLx) Date May 22, 2007  
 Title Chris Ferguson, Andrew Bloch, Annie Duke, Phil Gordon, Joseph Hachem, Howard Lederer, and Greg Raymer v. WPT Enterprises, Inc.

Present: The Honorable OTIS D. WRIGHT II, UNITED STATES DISTRICT JUDGE

Raymond Neal	Not reported	N/A
Deputy Clerk	Court Reporter	Tape No.
Attorneys Present for Plaintiffs:	Attorneys Present for Defendant:	
Not present	Not present	

**Proceedings (In Chambers):** **COURT ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON LIABILITY AND INJUNCTIVE RELIEF UNDER COUNTS I AND II OF THE COMPLAINT**

This is an antitrust case arising out of WPT Enterprises, Inc.'s contractual relations with Plaintiffs. The matter is before the Court on Plaintiffs' Motion for Summary Judgment filed with the Court on March 14, 2007. On April 12, 2007, Defendant filed an Opposition to Plaintiffs' Motion, to which Plaintiffs timely filed a Reply Brief. After review of the parties' submissions and the case file, as well as the arguments advanced by counsel at the hearing, the Court hereby DENIES Plaintiffs' Motion for Summary Judgment.

**I. FACTUAL BACKGROUND**

Unless indicated otherwise, the following facts are deemed to be undisputed.

Plaintiffs Chris Ferguson, Andrew Bloch, Annie Duke, Joseph Hachem, Phil Gordon, Howard Lederer, and Greg Raymer are professional poker players ("Plaintiffs"). Defendant WPT Enterprises, Inc. ("WPTE" or "Defendant") operates the World Poker Tour, a series of televised, high-stakes poker tournaments. (UF<sup>1</sup>, 3.) Plaintiffs have each participated in World Poker Tour events. (UF, 1.) The World Poker Tour is currently in

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Defendant's Statement of Uncontroverted Facts in Opposition to Plaintiffs' Motion for Summary Judgment.

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its fifth season with its tournaments hosted by twelve different casinos.<sup>2</sup> (UF, 4-5.) Defendant has entered into written agreements with all of the casinos except Aviation Club de France, which participates in the World Poker Tour under an oral agreement. (UF, 11.)

The dispute in this case stems from a "Participant Release Form" that each player must sign before participating in any of the tournaments. (UF, 21.) By signing the "Participant Release Form," the Plaintiffs consent to Defendant's use of their intellectual property rights in connection with the broadcast of "the Programs and/or the 'World Poker Tour' and in connection with the distribution, advertising, publicizing, exhibition, and exploitation thereof and of other audio-visual works (including, without limitation, 'behind the scenes' productions and public service announcements) and any and all derivative, allied, subsidiary and/or ancillary uses related thereto (including, without limitation, merchandising, commercial tie-ins, publications, home entertainment, video games, commodities, etc. . . .)" (UF, 18.)

In addition to the Participant Release Forms, WPTE has separate agreements with each participating casino. The casinos' contracts require them, as administrators of the tournaments, to secure a signed release from the participants prior to playing in each tournament. (UF, 21.) The casinos also sign an agreement stating that the "casino shall not itself televise (or transmit moving images of) the Tour Event and shall not license or permit any third party to so televise (or transmit) the Tour Event during the term of the agreement and for (1) year thereafter." (UF, 22.)

On July 19, 2006, Plaintiffs filed their Complaint alleging eight claims for relief.<sup>3</sup>

<sup>2</sup> Bellagio Hotel and Casino, Mandalay Bay Resort and Casino, Grand Sierra Resort and Casino (formerly known as the Reno Hilton), and Mirage Casino-Hotel in Nevada; Bay 101 Casino, Commerce Casino, and Bicycle Casino in California; Foxwoods Resort Casino in Connecticut; Borgata Hotel Casino and Spa in New Jersey; Gold Strike Casino Resort in Canada; and Aviation Club de France in France (hereinafter, "the casinos").

<sup>3</sup> Count I: Section 1 of the Sherman Act (Horizontal Agreements Not to Compete); Count II: Section 1 of Sherman Act (Group Boycott and Horizontal Price Fixing); Count III: California Cartwright Act (Unlawful Restraint of Trade: Horizontal Agreement Not to Compete); Count IV:

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The instant motion for summary judgment only applies to Counts I and II of the complaint.

II. LEGAL STANDARD

Under Rule 56(c), a party is entitled to summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The language of Rule 56(c) mandates the entry of summary judgment 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. *Id.* In such a situation, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial. *Id.*

Regarding the existence of genuine issue of material fact, the United States Supreme Court has held that summary judgment is not appropriate if “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). As required, the facts are construed “in the light most favorable to the party opposing the motion.” *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). “It should also be noted that because antitrust cases consist of primarily factual issues, summary judgment should be used ‘sparingly.’” *American Ad Management, Inc. v. GTE Corp.*, 92 F.3d 781, 788 (9th Cir. 1996) (quoting *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962)).

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California Cartwright Act (Unlawful Restraint of Trade: Group Boycott/Horizontal Price Fixing); Count V: Intentional Interference with Contract; Count VI: Intentional Interference with Prospective Economic Advantage; Count VII: California Business and Professions Code § 17200 et seq. (Unfair Competition); Count VIII: Declaratory Judgment.

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III. DISCUSSION

**Sherman Act § 1**

Section 1 of the Sherman Act prohibits “[e]very contract, combination . . . or conspiracy, in restraint of trade.” 15 U.S.C. § 1. Despite the broad language of the Act, the Supreme Court “has made clear [that] the Sherman Act . . . prohibits only agreements that *unreasonably* restrain trade.” *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 133 (1998) (emphasis in original); *see also Texaco, Inc. v. Dagher*, 547 U.S. 1, 3 (2006). “Ordinarily, whether particular concerted conduct unreasonably restrains competition is determined under a ‘rule of reason’ analysis, which is a case-by-case study in which the ‘fact finder weighs all of the circumstances of a case.’” *Oltz v. St. Peter's Cmty. Hosp.*, 861 F.2d 1440, 1445 (9th Cir. 1988) (quoting *Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977)). However, “[t]here 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.’” *Orson v. Miramax Film Corp.*, 79 F.3d 1358, 1367 n.9 (3rd Cir. 1996). These discrete categories, manifestly anticompetitive in nature, are considered illegal “*per se*.” The *per se* categories are narrowly construed and “reserved for practices that experience has demonstrated are almost always anticompetitive.” *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1480 (9th Cir. 1987); *Cont'l T.V., Inc.*, 433 U.S. at 50 n.16 (1977). In short, the *per se* rule is applied when the practice “‘facially appears to be one that would always or almost always tend to restrict competition and decrease output.’” *American Ad Management*, 92 F.3d at 787 (quoting *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 100 (1984)).

**The Rule of Reason Applies to Plaintiffs’ Sherman Act § 1 Claim**

Plaintiffs argue that the facts in the instant case give rise to the *per se* rule. However, this Court disagrees. Plaintiffs also concede that “[i]f the Court were to conclude that a full blown rule of reason analysis – rather than the *per se* or “quick look” rule – should be applied, then summary judgment would not be appropriate at this time.” (Pls’ Br. at 12 n.5)

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The rule of reason applies in this case. While Plaintiffs urge the Court to apply a *per se* analysis, “[p]er se liability is reserved for only those agreements that are ‘so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality.’” *Texaco, Inc.*, 547 U.S. at 3 (quoting *National Soc. of Professional Eng’rs v. United States*, 435 U.S. 679, 692 (1978)). “Both Federal and California courts are reluctant to pigeonhole all concerted refusals to deal as boycotts and rather have applied the rule of reason where the economic impact of the challenged practice is not obvious.” *Dimidowich*, 803 F.2d at 1480; *Oltz*, 861 F.2d at 1445 n.1. The Supreme Court has warned, that an activity that evidences the potential for increasing economic efficiency and “render[ing] markets more, rather than less competitive,” should not be treated under the *per se* rule. *Nw. Wholesale Stationers v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 295 (1985).

Generally, the only practices that courts have recognized as inherently unlawful fall into the following categories: horizontal price-fixing, purposeful division of markets, group boycotts, tying arrangements, and output limitations. *American Ad Management*, 92 F.3d at 784 (citing *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958); cf. *NYNEX*, 525 U.S. at 134 (noting that the *per se* rule is only applicable in “certain” group boycott cases). The Supreme Court has found that these practices “serve hardly any purpose beyond the suppression of competition.” *N. Pac. Ry. Co.*, 356 U.S. at 6. The Supreme Court has warned against enlarging the rule to encompass behavior that is less clearly violative. See *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 458 (1986); *Cont’l T.V.*, 433 U.S. at 50. A restraint on trade should only be categorized as *per se* unreasonable when “the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output.” *Adaptive Power Solutions, LLC v. Hughes Missile Sys. Co.*, 141 F.3d 947, 949 (9th Cir. 1998) (quoting *NCAA*, 468 U.S. at 100).

The Supreme Court has “expressed reluctance to adopt *per se* rules . . . ‘where the economic impact of certain practices is not immediately obvious.’” *Id.* (quoting *Indiana Dentists*, 476 U.S. at 458-59). Instead, the Supreme Court “presumptively applies [the] rule of reason analysis, under which antitrust plaintiffs must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive before it will be found unlawful.” *Texaco, Inc.*, 547 U.S. at 3.

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In order to establish a violation of the rule of reason, a three-step approach is followed: First, 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. (*Capital Imaging Assocs. P.C. v. Mohawk Valley Medical Assosc.*, 996 F.2d 537, 543 (2d Cir.) If the plaintiff carries its burden, the burden shifts to the defendant to establish the procompetitive “redeeming virtues” of the action. *Id.* Should the defendant carry this burden, the plaintiff must then show that the same procompetitive effect could be achieved through an alternative means that is less restrictive of competition. *Id.*; *Bhan v. NME Hosps. Inc.*, 929 F.2d 1404, 1413 (9th Cir. 1991). Ultimately, the goal is to determine whether restrictions in an agreement among competitors potentially harm consumers. *Metro Intercollegiate Basketball Ass’n v. NCAA*. 337 F. Supp. 2d 563, 571 (S.D.N.Y. 2004). On the state of the record as presently developed, the Court is in no position to make a determination as to the actual effects on the market and the procompetitive justifications of the agreements in issue.

### Analysis

The “Participant Release Forms” and the agreements between Defendant and the casinos at issue in this case are not so manifestly anti-competitive as to warrant treatment under the *per se* rule.<sup>4</sup> Plaintiffs have put forth three arguments in their instant motion. Their first and third arguments deal with WPTE and the casinos as competitors. However, it is disputed as to whether Defendant and the casinos are competitors. (DUF<sup>5</sup>, 4 & 72.) “Precedent limits the *per se* rule in the boycott context to cases involving horizontal agreements among direct competitors.” *See NYNEX*, 525 U.S. at 135. Facially, it appears that WPTE, as a media and entertainment production company, is not

<sup>4</sup> Plaintiffs also argue, in the alternative, that the “quick look” standard should apply. The “quick look” standard applies in cases where, while not falling within the ambit of the *per se* rule, the anti-competitive conduct is manifest. *See, e.g., NCAA*, 468 U.S. at 110; *Indiana Dentists*, 476 U.S. at 459. In these cases, the Court does not engage in a full-blown industry analysis because it is “not required to demonstrate the anti-competitive character of an inherently suspect restraint.” *Orson*, 79 F.3d at 1367 n.9. For the same reasons that *per se* liability is unwarranted in the instant case, this Court concludes that the Defendant cannot be held liable under the “quick look” doctrine.

<sup>5</sup> Defendant’s additional statement of material facts.

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in direct competition with the casinos. (DUF, 1.) At the very least, this question is a triable issue of fact, which negates Plaintiffs' summary judgment motion. If the parties are not in a competitive "horizontal" relationship, the agreement "necessarily consists of a vertical arrangement to which the rule of reason applies." *Rutman Wine Co. v. E & J Gallo Winery*, 829 F.2d 729, 734 (9th Cir. 1987); see also *Cont'l T.V.*, 433 U.S. at 59 ("Where anticompetitive effects are shown to result from particular vertical restrictions they can be adequately policed under the rule of reason, the standard traditionally applied for the majority of anticompetitive practices challenged under § 1 of the [Sherman] Act.").

Plaintiffs have no direct evidence of any conspiratorial or horizontal understanding between the casinos in this case. To survive a motion for summary judgment based on circumstantial evidence of conspiracy, the Supreme Court has held that a plaintiff "must present evidence that tends to exclude the possibility that the alleged conspirators acted independently." *Matsushita*, 475 U.S. at 588. "[T]he courts should not permit factfinders to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter procompetitive conduct." *Id.* at 593 (citing *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 762-64 (1984)).

In Plaintiffs' first argument, they also allege that players must either sign the standard release giving up valuable rights or be boycotted from competing in any World Poker Tour Tournaments. (Pls.' Br. at 2) However, it is undisputed "[i]f a player fails to sign a release to participate in one of the World Poker Tour events, he still may compete in other World Poker Tour events as long as he signs that events' Participant Release." (DUF, 87) This undisputed fact contradicts Plaintiffs' contention and negates a portion of their legal argument. As such, Plaintiffs' motion must be denied.

Plaintiffs' second argument relies on the "price fixing" category of *per se* illegality. However, Plaintiffs have not submitted any evidence demonstrating that the contracts between WPTE and the casinos have any agreement on price. Plaintiffs argue that "price fixing" is present because the contracts, or releases between WPTE and the players, provide compensation to Plaintiffs at the "price" of zero. The Court fails to see the logic in this argument. Even if the "zero compensation" theory is construed as a "price," the agreements do not relate to "price fixing" in the traditional sense. Therefore,

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in light of the Supreme Court's guidance that "the *per se* approach is not to be readily expanded to new arrangements or to business relationships with which the courts are inexperienced," it would be improper for this Court to label the agreement at issue in this case as *per se* illegal. *American Ad Management*, 92 F.3d at 784-85 (citing *Indiana Dentists*, 476 U.S. at 458-59).

There is a disputed issue of material fact pertaining to Plaintiffs' third argument. The disputed fact is whether the agreement between WPTE and the casinos is a non-compete agreement or an exclusive dealing agreement. (DUF, 1.); *see also* (UF, 22.) If WPTE and the casinos are seen as non-competitors, the agreements appear to be exclusive dealing agreements rather than agreements not to compete. In addition to this being a disputed fact between the parties, the Ninth Circuit has held that antitrust challenges to exclusive contracts are evaluated under the rule of reason not the *per se* rule. *Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1162 (9th Cir. 1997). There is also considerable authority finding exclusive dealing agreements reasonable. Thus, this Court finds the *per se* rule or "quick look" test inapplicable on this issue. *See, e.g., Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961); *Omega Envtl., Inc.*, 127 F.3d at 1162; *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 724 (1988).

Finally, in their Reply brief, Plaintiffs attempt to salvage their argument for *per se* analysis by alleging that Defendant's agreements with the casinos constitute a "hub and spoke" conspiracy. However, a key element present in "hub and spoke" conspiracy cases, which justify imposition of the *per se* rule, is a horizontal collaboration between participants. *See Toys "R" Us, Inc. v. FTC*, 221 F.3d 928 (7th Cir. 2000); *see also Impro Prods., Inc. v. John B Herrick*, 715 F.2d 1267, 1279 (8th Cir. 1983) (requiring an overall unlawful "plan" or "common design" amongst all of the participants to support a hub-and-spoke theory of conspiracy); *NYNEX*, 525 U.S. at 135 (holding that, as a general rule, *per se* analysis is only applicable to a boycott when direct competitors work in concert to exclude another competitor by cutting off its access to resources necessary to compete in the market).

The cases Plaintiffs rely upon to seek summary judgment present substantially more evidence of conspiracy than is proffered here. Accordingly, Plaintiffs have failed

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to establish the horizontal arrangement necessary to justify imposing the *per se* rule under a "hub and spoke" theory.

IV. CONCLUSION

This Court is cognizant of "the Supreme Court's repeated statements that the *per se* approach is not to be extended to new factual situations." *American Ad Management*, 92 F.3d at 787 (citing *Indiana Dentists*, 476 U.S. at 458-59; *NCAA*, 468 U.S. at 100; and *Broadcast Music*, 441 U.S. at 9-10). "[T]he *per se* label must be applied with caution and we will expand that class of violations 'only after the courts have had considerable experience with the type of conduct challenged and application of the Rule of Reason has inevitably resulted in a finding of anticompetitive effects.'" *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1108 (7th Cir. 1984) (quoting *Havoco of Am., Ltd. v. Shell Oil Co.*, 626 F.2d 549, 555 (7th Cir. 1980)).

After having spent much effort on determining the true nature of the relationship between the Plaintiffs, casinos, and Defendant, "it is helpful to remember that ultimately the *per se* approach can only be applied to an agreement which 'facially appears to be one that would always or almost always tend to restrict competition and decrease output.'" *American Ad Management*, 92 F.3d at 787 (quoting *NCAA*, 468 U.S. at 100). Neither it nor the "quick look" approach are warranted here. Under the rule of reason, which may greatly benefit from a more fully developed factual framework, the agreements in question do not appear to be unreasonable.

Accordingly, this Court DENIES Plaintiffs' Motion for Summary Judgment.

IT IS SO ORDERED.

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