IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

TUNICA WEB ADVERTISING, INC. and
CHERRY L. GRAZIOSI **PLAINTIFFS**

VS. **CIVIL ACTION NO. 2:03CV234-P-D**

TUNICA COUNTY TOURISM COMMISSION, et al. **DEFENDANTS**

MEMORANDUM OF AUTHORITIES IN SUPPORT OF
HOLLYWOOD CASINO'S RENEWED MOTION FOR SUMMARY JUDGMENT

ORAL ARGUMENT REQUESTED

NOW COMES HWCC-Tunica, Inc. (d/b/a "HOLLYWOOD CASINO TUNICA") (hereinafter HOLLYWOOD CASINO), by counsel, and files this its MEMORANDUM OF AUTHORITIES IN SUPPORT OF HOLLYWOOD CASINO'S RENEWED MOTION FOR SUMMARY JUDGMENT based upon the absence of any genuine issue of material fact with respect to its liability on the remaining federal and state antitrust claims asserted by Plaintiff TWA and based upon its entitlement to judgment as a matter of law.

I. REQUESTED RELIEF

This civil action is before the Court with a trial setting of April 21, 2008. Following reversal and remand by the Fifth Circuit Court of Appeals of this Court's dismissal of Plaintiff TWA's federal and state antitrust claims, the following Casino-Related Defendants remain: Barden Mississippi Gaming, LLC (d/b/a "Fitzgerald's Casino and Hotel"), BL Development Corp. (d/b/a "Grand Casino Tunica"), Robinson Property Group, Ltd. Partnership (d/b/a "Horseshoe Casino & Hotel"), Tunica Partners II L.P.

(d/b/a "Harrah's Tunica Mardi Gras Casino"), Bally's Olympia Limited Partnership (d/b/a "Bally's Saloon & Gambling Hall"), HWCC-Tunica, Inc. (d/b/a "HOLLYWOOD CASINO Tunica"), Boyd Tunica, Inc. (d/b/a "Sam's Town Hotel & Gambling Hall"), and Sheraton Tunica Corporation (d/b/a "Sheraton Casino & Hotel").

All other Casino Defendants besides HOLLYWOOD CASINO are separately seeking summary judgment (Docket Entry 419). HOLLYWOOD CASINO reaffirms and incorporates herein by reference the theories, grounds, argument, authorities and requested relief as set forth in the **RENEWED MOTION FOR SUMMARY JUDGMENT OF THE CASINO-RELATED DEFENDANTS**, **MEMORANDUM BRIEF OF CASINO-RELATED DEFENDANTS IN SUPPORT OF THEIR RENEWED MOTION FOR SUMMARY JUDGMENT, and ITEMIZATION OF MATERIAL FACTS NOT SUBJECT TO GENUINE DISPUTE**, and the pleadings, deposition excerpts, and exhibits on file and made a part of the record in that separate Rule 56 motion.

HOLLYWOOD CASINO further submits that summary judgment in its favor is appropriate (1) because the proof of anti-trust conspiracy claimed by the Plaintiff TWA fails as a matter of law, since HOLLYWOOD CASINO's mere membership in a trade association and its lack of participation in the alleged conspiracy are an insufficient basis for antitrust liability on its part, and (2) because Plaintiff TWA's sole evidence of an alleged antitrust conspiracy is inadmissible hearsay.

II. BASIS FOR RELIEF

HOLLYWOOD CASINO states the following as further and additional grounds in support of its separate **RENEWED MOTION FOR SUMMARY JUDGMENT,**

MEMORANDUM OF AUTHORITIES IN SUPPORT OF RENEWED MOTION FOR SUMMARY JUDGMENT and ITEMIZATION OF MATERIAL FACTS NOT SUBJECT TO GENUINE DISPUTE:

A. MATERIAL FACTS RELATING TO HOLLYWOOD CASINO

In addition to the facts set forth in the **RENEWED MOTION OF CASINO-RELATED DEFENDANTS FOR SUMMARY JUDGMENT, MEMORANDUM BRIEF OF CASINO-RELATED DEFENDANTS IN SUPPORT OF THEIR RENEWED MOTION FOR SUMMARY JUDGMENT and ITEMIZATION OF MATERIAL FACTS NOT SUBJECT TO GENUINE DISPUTE**, all of which are adopted and incorporated herein by reference, HOLLYWOOD CASINO states:

1. No evidence suggests or provides any factual support for the conclusion that HOLLYWOOD CASINO committed any of the illegal acts alleged by Plaintiff TWA. John Osborne, the vice-president and general manager of HOLLYWOOD CASINO, did not attend the May 30, 2001, meeting of the TCOA, nor did he send a substitute in his behalf.[1] Mr. Osborne has no record of the May 30 meeting, no recollection of discussing the meeting with any attendees, and no recollection of receiving any notes from that meeting.[2] This is not surprising, since such notes were often not distributed.[3]

2. The notes made by others at that meeting themselves show that neither Mr. Osborne nor anyone else from HOLLYWOOD CASINO attended the May 30

[1] Exhibit "A," Deposition of John Osborne, pgs. 7-8.
[2] *Id*. at pgs. 8, 10.
[3] *Id*. at pgs. 9-10.

meeting.[4] Clyde Callicott, who did attend the meeting, agrees that Mr. Osborne was absent.[5] It is undisputed that these e-mails and Mr. Callicott are the Plaintiffs' only sources of knowledge regarding the meeting and who attended it.[6] It is undisputed that HOLLYWOOD CASINO was not represented at the May 30 meeting of the TCOA.

3. When Ms. Graziosi sought a meeting with HOLLYWOOD CASINO, she was granted one. In July 2001, John Osborne and his marketing director, Jeff Strang, personally listened to Ms. Graziosi describe the services she could provide through her domain name, www.tunica.com. The meeting was cordial.[7] Ms. Graziosi provided them no specific proposal; she merely stated that it was "a good thing" to do business with her.[8]

4. Mr. Osborne and Mr. Strang decided that HOLLYWOOD CASINO had no need to purchase internet services regarding www.tunica.com, since HOLLYWOOD CASINO had already spent several hundred thousand dollars to create, develop, and market its website under a separate domain name. They felt they already had a large enough investment in the internet.[9]

5. It is undisputed that the only other time HOLLYWOOD CASINO received a solicitation regarding the domain name www.tunica.com was in late 2002 when Rudi Schiffer presented a proposal. Mr. Osborne and Mr. Strang told Mr. Schiffer the same thing they had told Ms. Graziosi–that they were not interested in paying money

[4] Exhibit "B," Deposition of Cherry Graziosi, pg. 688.
[5] Exhibit "C," Deposition of Clyde Callicott, pg. 267.
[6] Exhibit "B," Deposition of Cherry Graziosi, pg. 687.
[7] Exhibit "A," Deposition of John Osborne, pgs. 11-12.
[8] Exhibit "B," Deposition of Cherry Graziosi, pg. 684.
[9] Exhibit "A," Deposition of John Osborne, pgs. 14.

each month for services HOLLYWOOD CASINO already received.[10] Mr. Strang emphasized his satisfaction with the current links and marketing opportunities HOLLYWOOD CASINO already had with its website.[11] Mr. Schiffer found no reason to question the authenticity of these statements; he avers that the rejection he received had nothing to do with the TCOA.[12]

6. Further, no admissible evidence exists that the November 2002 meeting of the TCOA which John Osborne did attend included any reference to, or discussion of, the Plaintiffs or www.tunica.com. Although Clyde Callicott sent two e-mails to Graziosi reporting upon the meeting, he admits that he himself did not attend the meeting and that he based the e-mails' allegations upon the hearsay of Rudi Schiffer.[13] Rudi Schiffer also admits that he did not attend the meeting and has no basis for believing the allegations in Callicott's report.[14] The TCOA members present at the meeting aver that no discussion of the Plaintiffs or www.tunica.com took place.[15] No evidence to the contrary exists, and Plaintiff TWA's claims against TCOA have long since been dismissed.

B. STANDARD OF REVIEW

Under the standard of review applicable to Plaintiff TWAs' federal antitrust claims asserted against HOLLYWOOD CASINO, Plaintiff TWA must produce admissible evidence demonstrating a triable issue of fact as to each element of their claims, and that evidence must be of such a nature that a "fair-minded jury" would be

[10] *Id*. at pg. 17.
[11] Exhibit "D," Deposition of Rudi Schiffer, pg. 13.
[12] *Id.* at pg. 33.
[13] Exhibit "C," Deposition of Clyde Callicott, pgs. 250-251.
[14] Exhibit "D," Deposition of Rudi Schiffer, pgs. 22, 32-33.
[15] Exhibit "E," Deposition of Dominic Mezzetta, pgs. 13, 32; See also, Exhibit "F," Deposition of Karen Sock, pgs. 44, 47.

satisfied if the non-movant is entitled to a verdict in its favor.[16] If Plaintiff fails to meet its burden, summary judgment should be entered.[17]

C. LEGAL ARGUMENT

a. LACK OF PARTICIPATION: HOLLYWOOD CASINO's mere membership in a trade association and its lack of participation in any alleged conspiracy preclude imposition of antitrust liability.

1. Membership in trade associations, attendance at trade association meetings, and participation in trade association activities are not condemned or discouraged by antitrust laws.[18] Mere membership in a trade association is insufficient to make the individual member a co-conspirator under the federal antitrust laws. Evidence must exist that the individual member actually participated in a conspiracy. [19],[20]

[16] ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 249 (1996); ***Conti Commodity Serv., Inc. v. Ragan,*** 63 F.3d 438, 441 (5th Cir. 1995).
[17] ***Fields v. South Houston***, 992 F.2d 1183, 1187 (5th Cir. 1991).

[18] ***Moore v. Boating Indus. Ass'ns***, 819 F.2d 693, 712 (7th Cir. 1984), cert. denied, 484 U.S. 854 (1987).
[19] ***Hunt v. Mobil Oil Corp***., 465 F. Supp. 195, 231 (S.D.N.Y. 1978)("It is black letter law that to hold one as a participant in a conspiracy, he must by word, deed or conduct intentionally join the illicit enterprise; mere association with conspirators and presence at the scene of the conspiracy, even if coupled with knowledge that wrongful conduct by others is being engaged in, are not by themselves sufficient to support the inference of knowing and intentional attachment to an illegal enterprise); ***Carpet Group Intern. v. Oriental Rug Importers Ass'n, Inc.***, 256 F. Supp.2d 249, 273 (D.N.J. 2003)("mere membership, even when coupled with knowledge of wrongful conduct of the association, is insufficient to establish knowing participation"); ***Daniel v. American Bd of Emergency Medicine***, 988 F. Supp.127, 236 (W.D.N.Y. 1997)(mere membership in an independent professional organization is insufficient to establish antitrust liability against a member for the organization's alleged wrongful acts).
[20] These holdings can be fairly applied to the Mississippi antitrust statutes as well. See ***Walker v. U-haul*** , 734 F.2d 1068, 1070 n.5 (5th Cir. 1984)(Mississippi and federal antitrust claims are "analytically identical").

2. Even when the inferences drawn from the underlying facts are viewed in the light most favorable to the Plaintiffs as non-movants, substantive antitrust law expressly limits the range of permissible inferences which may be drawn from ambiguous evidence related to a Sherman Section One claim.[21] Here, the undisputed evidence does not support any permissible inference that Defendant Hollywood participated in a conspiracy to boycott the domain name www.tunica.com. Plaintiff TWA's allegations in this regard are based solely on unfounded speculation, not factual evidence. Quite simply, Plaintiff TWA asks this Court to find HOLLYWOOD CASINO liable for nothing more than being a member of a trade organization. Because such liability is not recognized under either the federal or state antitrust laws, summary judgment for HOLLYWOOD CASINO is now proper.

b. HEARSAY: HOLLYWOOD CASINO is entitled to summary judgment because the sole evidence of an anti- trust conspiracy is inadmissible hearsay and insufficient to create a genuine issue of disputed material fact.

1. Summary of Conspiracy Evidence: The movant has the initial burden of showing the absence of a genuine issue of material facts.[22] The burden then shifts to the non-movant to go beyond the pleadings and produce "specific proof demonstrating a triable issue of fact as to each element required.[23] The evidence proffered by the non-movant *must be admissible* and of such nature that a fair-minded jury would be satisfied that the non-movant is entitled to a verdict

[21] ***Matsushita Elec. Indus. Co. v. Zenith Radio Corp.***, 475 U.S. 585, 587-88 (1986).
[22] ***Home Health Care Affiliates of Miss., Inc., v. North Am. Indem. N.V.***, 299 F. Supp. 2d 645 (N.D. Miss. 2004).
[23] **H*obbs v. The Stroh Brewery Co***., 189 F. Supp. 2d 559, 565 (S.D. Miss. 2001).

in its favor.[24] The proponent of the evidence must prove the preliminary facts that bring the statement within Rule 801(d)(2)(D), by a preponderance of the evidence.[25] TWA's only evidence to support its theory is a series of electronic communications, or e-mails, with Clyde Callicott, which are pure hearsay and thus are inadmissible as evidence.

Plaintiff TWA cannot establish that these e-mails are admissible as an admission of a party opponent, and thus cannot establish that Callicott was an agent of the casinos, or furthering any alleged conspiracy on the part of the casinos.[26] Clyde Callicott was never an employee or authorized agent of HOLLYWOOD CASINO. On the contrary, the Callicott e-mails consist of communications between Callicott and Cherry Graziosi during three distinct time periods when Callicott was employed by individual casinos: Gold Strike (July 1998 to July 2001)[27]; Grand Casino (July 2001 to November 2002)[28]; and, Sheraton and Bally's (Sept. 2002 to Jan. 2003).[29] Furthermore, Plaintiff TWA has failed to put forth sufficient evidence to show that any of Callicott's statements were made in furtherance of any kind of conspiracy.

As shown below, the Callicott e-mails during each of these distinct time periods fail to qualify under either of the two possible hearsay rule exceptions: (1) they do not qualify as a statement of an agent concerning a subject matter within

---

[24] ***Anderson v. Liberty Lobby, Inc***., 447 U.S. 242, 249 (1996*)*; *Conti Commodity Serv., Inc. v. Ragan*, 63 F.3d 438, 441 (5th Cir. 1995). *Emphasis added*.
[25] ***United States v. Bourjaily***, 483 U.S. 171, 174, 97 L. Ed. 2d 144, 107 S. Ct. 2775 (1987).
[26] Fed. R. Evid Rule 801(d)(2)(D)(E).

[27] The dates of the e-mails attached to the deposition of Clyde Callicott are present and confirmed on the following pages. *(See* Exhibit "C," Callicott Dep. at 177; at Ex. 20, 28, 29, 37, 45, 46).
[28] *Id.* at 403, 411-12. (Exhibit "I," Deposition of Clyde Callicott, Docket Entry 299, Attachment 10).

[29] *Id*.

the course and scope of his employment, because Gold Strike is no longer a party to the action and any statements outside of this employment were made in his personal capacity;[30] and (2) they do not qualify as a statement by a conspirator during the course and in furtherance of the conspiracy.[31] Thus, Graziosi has failed to raise a disputed issue of fact as to an anti-trust conspiracy involving HOLLYWOOD CASINO.

a. Callicott's E-Mails During His Employment With Gold Strike

All of the e-mails sent and received by Callicott between April and June of 2001 were to or from Ccallicott@mrgmail.com, his company e-mail account with Gold Strike. These communications make it clear that Callicott had no authority to act as an agent for any of the current Defendants.

April 9, 2001: Graziosi e-mails Callicott via e-mail regarding her negotiations with Gold Strike Casino over its rental of the website tunica.com to which Callicott directs her to contact Scott Ribeiro, his boss.[32]

April 17, 2001: Callicott responds by stating that his boss, Scott Ribeiro of Gold Strike Casino, had instructed him to stay away from the project.[33]

June 5, 2001: It is clearly established in the record that HOLLYWOOD CASINO was not present at the June 2001 meeting, where Graziosi alleges a boycott agreement was made. Following the meeting, Graziosi again initiates email contact with Callicott who responds by explaining that, "his hands are

[30] Rule 801(d)(2)(D), Fed. R. Evid.
[31] Rule 801(d)(2)(E), Fed. R. Evid.
[32] "As for the tunica.comsite you might want to call him (Ribiero) and see how far he is with the deal" (*See* Exhibit "C," Callicott Dep. P. 109 at Ex. 29).
[33] Callicott responds to Graziosi by telling her, prior to the meeting on May 30, that he doesn't make the calls regarding the decision to use tunica.com "From what I'm being told from Scott's office they would prefer me to stay away from this project until the whole legal issue is finalized. My hands are rather tied on this one." (See Exhibit "C," Callicott Dep. P. 125 at Ex. 37).

tied."[34] In short, these communications have nothing to do with HOLLYWOOD CASINO and raise no inference of any authority on the part of Callicott to act as its agent.

Callicott puts Ms. Graziosi on notice that he didn't have the authority to make decisions with regard to this website. Furthermore, Gold Strike is no longer a defendant in this suit and as a result his actions should not be imputable to the other defendants with whom he clearly had no agency relationship. The Fifth Circuit recognized in its Opinion on this case that "the casinos' initial decision (on May 30) was not an unreasonable agreement in restraint of trade…the casinos' decision to reject that proposal is not a concerted action."[35] Based on the Court's recognition that prior to TWA's changed business model, there was no concerted action.[36] This Court is now able to conclude, and should conclude, that without a conspiracy, Callicott's statements could not be imposed on the other Casino defendants.

In ***Staheli v. University of Mississippi***,[37] the statement of a fellow teacher regarding hiring practices of the University were held inadmissible by the Fifth Circuit, as that colleague's position had nothing to do with the decision regarding the plaintiff's tenure and that his statements were not made in his employment capacity. In ***Cook v. Miss. Dept. of Human Services***,[38] a statement by a senator regarding employment practices of the MDHS was held inadmissible by the Fifth Circuit for lack of agency, as the senator

[34] The June 6 e-mail exchange from Callicott responds to an attempt by Graziosi to rekindle a business relationship with Callicott whom, she has already been instructed is no longer in control where he states that again that "his hands have been officially tied", but he states in his deposition that his use of this phrase did not indicate knowledge of an agreement amongst the casinos. (*See* Exhibit "C," Callicott Depo at 165-171) (Exhibit "I," Deposition of Clyde Callicott, Docket Entry 299, Attachment 10).
[35] ***TWA v. TCOA et al***., 2007 U.S. App. Lexis 19279, 13; 2007-2; Docket Entry 409 pg. 8.
[36] ***TWA*** at 6; Docket Entry 409 pg. 4.
[37] 854 F.2d 121 (5th ir.1988).
[38] 108 Fed. Appx. 852, 855 (5th Cir. 2004)(citing ***Hill v. Spiegel, Inc.*** 708 F.2d 233, 237 (6th Cir.1983); ***Yates v. Rexton***, 267 F. 3d 793, 802 (8th Cir. 2001).

was not in a decision-making position and had no participation in the process leading to the challenged decision. By comparison, in the case of ***Corley v. Burger King Corp.***,[39] a statement by a manager of a Burger King that he was on his way to work to repair the drink machine was held admissible by the Fifth Circuit, because the statement was within the scope of his employment. There, the manager admitted that he was acting within the scope of his employment at the time of a wreck.[40] These authorities make it clear that merely being an employee and making statements is not sufficient to excuse hearsay on the basis of agency.[41]

Callicott's Gold Strike employment had nothing to do with any marketing decision by HOLLYWOOD CASINO regarding tunica.com**.** In spite of the April 17, 2001, Callicott e-mail informing Graziosi that the website decision for Gold Strike was no longer his call, she continued to pressure him for business.[42] This led to the June 6, 2001, e-mail from his Gold Strike Casino account where he informs Graziosi that his hands have officially been tied. In sum, Defendant TWA has failed to raise any inference of agency as: (a) Callicott had no authority or role in negotiating web-marketing decisions on behalf of his own employer, since he had already informed her that she should be dealing with Ribiero; (b) Callicott was not employed by HOLLYWOOD CASINO; and, (c) since the Fifth Circuit recognized that there was no conspiracy in effect at this point, these statements cannot be imputed to the other Casinos.

b. E-mails During Employment With Grand Casino:

---

[39] 56 F.3d 709 (5th Cir. 1995).
[40] *Id.*
[41] ***Staheli v. University of Mississippi***, 854 F.2d 121 (5th Cir.1988)(where the declarant had no control over the decision, his statements cannot be imputed onto the principal.).
[42] *See* Exhibit "C," Callicott Dep. at 111; at Ex. 37-45.

The August 30, 2002, e-mail during Callicott's Grand Casino employment demonstrates both a lack of agency and personal interest outside the scope of any duty he might have had with his employer. After over a year without any communication, a series of Callicott e-mails during his employment with Grand Casino demonstrate both a lack of agency to negotiate web marketing for HOLLYWOOD CASINO and a clear departure from furtherance of any business interest of his own employer.

> **August 30, 2002:** Graziosi again initiated contact with Callicott via email regarding possible sale of tunica.com, this time on E-bay. Callicott responded from his Grand Casino e-mail account callicottc@grandcasinos.com on the same day.[43] This e-mail is the only e-mail sent Callicott from this account. In his reply, Callicott informed Graziosi that he doesn't have the same "pull" at the Grand Casino as he did at Gold Strike Casino. Again, this communication has nothing to do with HOLLYWOOD CASINO. In a complete departure from any job duty he might have with the Grand Casino, Callicott solicits or suggests a potential "franchise" project and a desire to put her in touch with Rudi Schiffer for a "project."[44] Following this e-mail, all correspondence between

[43] When asked in this deposition about this e-mail Callicott responded that he did not know what Graziosi may have meant by a "Gentleman's agreement" (*See* Exhibit "C," Callicott Dep. at 202; Ex. 54).
[44] Callicott at this point initiates a business arrangement with Graziosi "a good friend of mine might be interested in talking to you. He owns the local radio show…maybe you could franchise the site with him" (*See* Exhibit "C," Callicott Dep. at Ex. 54) Callicott went on his deposition to explain that if they could make it work he would "get a piece of the action" (*See* Exhibit "C," Callicott Dep. at 206).

Callicott and Graziosi is to or from his personal e-mail at c_callicott@msn.com.[45]

i. Callicott was not acting as an agent of HOLLYWOOD CASINO

Admissibility of hearsay evidence of corporate defendant's participation in the conspiracy for purposes of Rule 801(d)(2)(D), requires foundational proof that an employee's acts were taken during the course and scope of her employment.[46] In his only e-mail from the Grand Casino account, Callicott informs Graziosi that he does not have the same leverage he had at Gold Strike, again putting her on notice that he was not in a position to make decisions about the website. In fact, Callicott's position at the Grand Casino was to oversee player development and special events.[47] The Grand Casino employed a separate advertising team to handle advertising and web ventures.[48] Not only was Callicott's contact with her outside the scope of his employment at the Grand Casino, but she was put on notice that his contact was not on behalf of the Casino. Callicott's potential agency relationship could only exist with regard to the Casinos he worked for, and at some point even that relationship was terminated because of his personal partnership with Graziosi. Furthermore, there is nothing in this e-mail suggesting the existence of a conspiracy.

---

[45] *See* Exhibit "C," Callicott Dep. at Ex. 59, 64, 65, 69; Callicott admits in his deposition that c_callicott@msn.com was his personal/home account. (See Exhibit "C," Callicott Dep. at 392; Exhibit "I," Deposition of Clyde Callicott, Docket Entry 299, Attachment 10).

[46] ***Paul F. Newton & Co. v. Tex. Commerce Bank***, 630 F.2d 1111, 1121 (5th Cir 1980).

[47] "I'll Repeat myself: I was not involved with the advertising element at the Grand" (See Exhibit "C," Callicott Dep. at 193)(Callicott Dep. at Ex. 54).

[48] Callicott stated that the Grand Casino marketing was handled by an advertising group (Exhibit "C," Callicott Dep. at 191).

The nature of Graziosi and Callicott's relationship now shifts to a joint venture. Callicott established a personal interest in marketing the website and its successful sale.[49] Callicott assumed the role of a business partner with Graziosi.[50] No inference arises that he was acting in furtherance of any business interest of HOLLYWOOD CASINO. As a result any comments made by him should be excluded as hearsay since no agency relationship existed.

ii. Callicott's Joint Venture with Graziosi

Callicott's personal pursuits of a joint venture with Graziosi preclude any use of these communications under Rule 801(d)(2)(D), Fed. R. Civ. Proc. In ***United States v. Summers***,[51] the Fifth Circuit held that certain recorded conversations between a defendant and a witness for the government were not admissible under this exception as they were made after the witness had started working for the prosecution, thereby terminating the existing agency relationship. Summers was a city council member found guilty of bribery under the Hobbs Act. Included in evidence used against him at trial were tape recordings of telephone conversations between a co-conspirator and James McCrory, an agent of

[49] Following the one e-mail to the Callicott's Grand Casino Account, TWA entered into an agreement with Calllicott and Rudi Schiffer, about forming a new marketing company. (See Exhibit "B," Graziosi Dep. at 204-209 & Ex. 29-30). Their discussions called for Schiffer to be the front man to deal with the Casino's (*Id*. at Ex. 29; Exhibit "C," Callicott Dep. at 219-21 & Ex. 57). TWA would be a "silent" partner, retaining a 10% interest in any profits. (Exhibit "B," Graziosi Dep. at 251; Exhibit "C," Callicott Dep at 210).

[50] The Fifth Circuit also recognized this partnership in its opinion " In mid-2002, Callicott and Memphis radio-personality Rudi Schiffer also became involved with TWA's efforts to market 'tunica.com' to the casinos" *TWA* at 6; Docket Entry 409 pg. 4.

[51] 598 F. 2d 450, 457 (5th Cir. 1979).

the defendant and informant for the FBI.[52] The government introduced the evidence at trial under the 801(d)(2)(D) exception as a statement by an agent concerning a matter within the scope of his agency.[53] On appeal the court held that because the recordings were made after McCrory had commenced working with the FBI, any agency relationship which might have existed between Summers and McCrory was terminated. The court went on to state that the government would have to prove the agency relationship was in existence at the time the statements were made. *Id.* at 458. The court specifically held that "McCrory could not be working for both the FBI and Summers at the same time."[54]

These legal principles are clearly controlling here. The e-mails and communication between Graziosi and Callicott following the August 30, 2002, e-mail from Callicott to Graziosi are all written from his personal e-mail account and are for the purpose of advancing a partnership with Graziosi and Rudi Schaffer. In this e-mail, Callicott first introduces the idea of franchising the website. This e-mail is in no way connected to his position with the casinos. This e-mail initiated an agreement between Callicott, Graziosi and Schiffer. The e-mails between Graziosi, Schiffer and Callicott from this point on all related to the partnership they had formed for the purpose of advancing the sale of these casinos.[55] Callicot

[52] *Id.*
[53] *Id.*
[54] *Id.* at 459.
[55] TWA would be a "silent" partner, retaining a 10% interest in any profits. (Exhibit "B," Graziosi Dep. at 251; Exhibit "C," Callicott Dep at 210). "It is undisputed that the casinos had no knowledge of either TWA's or Callicott's involvement in the project" (Exhibit "G," Memorandum Opinion: Order on Motion for Summary Judgment; Docket Entry 389.).

also put together a business plan for the arrangement.[56] However, in a taped phone conversation, which is also inadmissible under the same principle, Callicott expressed the need for his anonymity, "I can't get involved because once they know I'm connected, bam, I'm in trouble."[57] This clearly evidences Callicott's transferred loyalty to the joint venture he had with Graziosi. Consistent with ***Summers***, once Callicott took on the role of business partner with Graziosi, any agency relationship he could have had with the Casino Defendants was terminated. Accordingly, all communication between Graziosi, Schiffer and Callicott after the August 30 e-mail fails to fall within Rule 801(d)(2)(D), governing non-hearsay. It would not be fair to allow statements made by Ms. Graziosi's own agent as proof of a conspiracy against her. Such statements clearly do not have the attributes of trustworthiness contemplated by the Advisory Committee Notes to the Rule 801(d)(2)(D) or contemplated by the courts when allowing evidence to be admitted under this exception to the hearsay rule.

c. E-mails During Employment At Sheraton Casino And Bally's Casino:

From early August 2002 to late November 2003, Graziosi, Schiffer and Callicott communicated via multiple e-mails and telephone conversations.[58] The subject of their communication is primarily a partnership or arrangement whereby Schiffer will publicly promote the website to the casinos, and Callicott and Graziosi would act as silent partners. Callicott made it clear to Graziosi that he

[56] Mr. Callicott developed a business plan for tunica.com which he sent to TWA and Schiffer. (See Exhibit "B," Graziosi Dep. at 209 & Ex. 30; Exhibit "C," Callicott Dep. at 205-206 and Ex. 56) (Exhibit "X" Docket Entry 299; Attachment 21).
[57] Exhibit "C," Callicott Dep. at Ex. 63.
[58] Exhibit "C," Callicott Dep. at Ex. 59, 64, 65.

was in fact intentionally hiding his involvement from his employer, stating in a telephone conversation with Graziosi, "once they know I'm connected, bam, I'm in trouble."[59]

The Callicott e-mails sent from his personal e-mail account are not written in his capacity as an employee for either Sheraton Casino or Bally's Casino. Again, there is no inference arising from these communications that Callicott was somehow acting as an employee of HOLLYWOOD CASINO. Yet, here Callicott discusses the rejection of the website by the casinos. His statements were only made as a business partner of Graziosi. Again, no inference arises that his statements were made in any way for the purpose of advancing the agenda of any of the casinos. Instead, Callicott is simply expressing his opinion of where his venture with Graziosi stood in terms of marketing tunica.com through Schiffer. This is evidenced by their discussion and e-mails concerning the potential for a sale to a third-party individual or selling the domain name on E-bay. His purpose was to make money for himself from tunica.com.

It is undisputed that John Osborne, the vice-president and general manager of HOLLYWOOD CASINO, did not attend the May 30, 2001 meeting of the TCOA, nor did he send a substitute in his behalf.[60] Later, when Osborne was contacted directly by the Plaintiff concerning HOLLYWOOD CASINO, Mr. Osborne decided that HOLLYWOOD CASINO had no need to purchase undefined internet services involving www.tunica.com, especially since HOLLYWOOD CASINO had other internet investments which they considered

[59] Exhibit "C," Callicott Dep. at Ex. 63.
[60] Exhibit "A," Osborne Dep. at 7-8; Exhibit "B," Graziosi Dep at 688.

sufficient. The only other solicitation which HOLLYWOOD CASINO received regarding the domain name www.tunica.com came from Rudi Schiffer in late 2002. Osborne told Schiffer the same thing they had told Graziosi, that HOLLYWOOD CASINO was not interested in paying money each month for internet services which HOLLYWOOD CASINO already received.[61] With the Graziosi/Callicott/Schiffer venture actively soliciting business from HOLLYWOOD CASINO, it begs the question to argue that a statement by Callicott could somehow be deemed an admission by HOLLYWOOD CASINO.

c. HOLLYWOOD CASINO is entitled to summary judgment because the Plaintiff has failed to establish a necessary foundation for conspiracy evidence.

A conspiracy must be established before any e-mail communication can be considered admissible.[62] The proponent of the evidence must prove the preliminary facts that bring the statement within Rule 801(d)(2)(D), by a preponderance of the Evidence.

Rule 801(d)(2)(E) excludes from the definition of "hearsay" a statement that "is offered against a party and is ... a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy." A statement may not be offered against the HOLLYWOOD CASINO unless it is proved that (1) a conspiracy existed and (2) that the

[61] Exhibit "A," Osborne Dep. at 11-12; Exhibit "B," Graziosi Dep. at 684.
[62] Rule 801(d)(2)(E), Fed.R.Evid.

HOLLYWOOD CASINO was a party to the conspiracy.[63] Rule 801(d)(2)(E) requires that the declarant be a member of the conspiracy at the time the statement was made.[64] Before admitting evidence under Rule 801(d)(2)(E), the proponent must "establish by a preponderance of the evidence that the declarant and the defendant were involved in a conspiracy and that the statements were made during and in furtherance of the conspiracy."[65] In ***Paul F. Newton & Co. v. Texas Commerce Bank,***[66] the Fifth Circuit recognized a clear standard for determining the admissibility of evidence under this rule. "To remove a statement made by a coconspirator from the application of the hearsay rule the party seeking to introduce the statement must establish by a preponderance of the evidence, independent of the statement itself, that (1) a conspiracy existed; (2) the declarant and the party against whom the statement is offered were members of the conspiracy; and, (3) the declarant made the statement during the course and in furtherance of the conspiracy."[67]

In ***Newton*** the court states that determination of a conspiracy is fact specific and that the district court should make the initial determination based on the declarants' relationship to the alleged coconspirators.[68] In ***Viazis v. American Association of Orthodontists (AAO),*** Viazis, a dentist, brought an action against the AAO and others for

[63] ***United States v. Bourjaily***, 483 U.S. 171, 174, 97 L. Ed. 2d 144, 107 S. Ct. 2775 (1987). Comment: In 1997, the advisory committee to the Federal Rules of Evidence codified this holding under Rule 801(d)(2), Fed. R. Evid.
[64] ***United States v. Summers***, 598 F.2d 450 (5th Cir. 1979).
[65] ***United States v. Broussard***, 80 F.3d 1025, 1038 (5th Cir. 1996); see also ***Bourjaily***, 483 U.S. at 175-76.
[66] 630 F.2d 1111, 1121 (5th Cir. 1980).
[67] *Id*. at 1120 (quoting ***United States v. James***, 590 F.2d 575, 578 (5th Cir.) (*en banc*).
[68] *Id.* at 1121.

violation of the Sherman Act.[69] The dentist claimed that the defendants conspired to prevent the marketing of orthodontic brackets that he had patented. The trial court granted defendant's motion for summary judgment and Viazis appealed arguing among other things that the court erred by excluding a note written by one of the defendants, as it fell within the 801(d)(2)(E) exception. The Fifth Circuit rejected this argument and held that outside of the not, no conspiracy was established.[70] To establish a conspiracy required Viazis to show that the declarant and defendants had a conscious commitment to a common scheme designed to achieve an unlawful objective."[71] Given that you cannot play dual roles as declarant and informant, it is clear that Callicott was in no way an active participant in any decision of this nature. Additionally, in ***United States v. Richards,***[72] the court recognized that the out-of-court statement may be considered in determining the existence of the conspiracy for the purposes of satisfying this exception, but *in itself* is insufficient to support its own admission. Plaintiff TWA cannot use such hearsay statements alone to establish a conspiracy, and in the absence of competent and admissible summary judgment evidence of a conspiracy, Hollywood Casino is entitled to judgment as a matter of law pursuant to Rule 56, Fed. R. Civ. Proc.

[69] 314 F.3d 758, 760 (5th Cir. 2002).
[70] *Id*. at 767.
[71] *Id*. at 763.
[72] 204 F.3d 177, 202 (5th Cir. 2000).

III. Conclusion

Plaintiff TWA's burden as to HOLLYWOOD CASINO is to establish that antitrust injury was caused by the conduct of HOLLYWOOD CASINO. Plaintiff TWA can carry this burden only if it produces admissible, competent evidence that HOLLYWOOD CASINO actually participated in an alleged conspiracy to violate the antitrust laws, and that such conduct brought about an injury to competition within the relevant market. Given that burden and the undisputed material facts set forth above, it is clear that: (1) HOLLYWOOD CASINO did not participate in the alleged "conspiracy" which allegedly originated at the May 30, 2001 meeting of TCOA; (2) Plaintiff TWA has sustained no antitrust injury attributable to any action, omission or other conduct of HOLLYWOOD CASINO; and, (3) Plaintiff TWA has failed to come forward with evidence – indeed, it has none - that establishes that it was injured by unlawful conduct of HOLLYWOOD CASINO.

Because such proof constitutes an indispensable component of the Plaintiff TWA's federal and state antitrust claims, summary judgment regarding such claims should now be entered in favor of HOLLYWOOD CASINO.

Callicott's statements cannot be admitted under this rule under either the 801(d)(2)(D) or 801(d)(2)(E) exceptions to the hearsay rule. First and foremost, Graziosi cannot establish that the declarant Callicott and the casinos were coconspirators. As noted above, Callicott ceased being an agent of the casinos when he and Graziosi became partners. There is also the fact that none of the statements were made in order to further the alleged conspiracy. Callicott's statements in the e-mails written from his corporate accounts were merely responses to solicitation by Graziosi. The e-mails written while at

Gold Strike were simply statements letting Graziosi know that his authority over web advertising had been terminated and the e-mail from his Grand Casino account was referencing the potential franchise/partnership arrangement. Furthermore, the e-mails contained business propositions beyond sale to the casinos, but also to independent parties. These e-mails were clearly more for the purpose of making money off of this website than for furthering any type of conspiracy on behalf of the casinos. If anything, Callicott was furthering an arrangement between him and Graziosi, not the other way around. Clearly such a relationship does not lend itself to trustworthy standards that give merit to any statements made by Callicott. Based on the standard set forth above, the e-mail communication between Callicott and Graziosi fails to fall within either Rule 801(d)(2)(D) or Rule 801(d)(2)(E), and as such, should not be considered by the Court when making a summary judgment determination.

Furthermore, any attempt to circumvent the hearsay rule alleging that Callicott's statements are not being used to prove the truth of the matter asserted, is without merit. There is no other purpose such statements could be offered. The plaintiff has attempted to argue before that they are being used to show the terms of the agreement, but these statements offer no detailed terms. In addition, these statements would be being used to prove that an agreement was in fact made. To use such untrustworthy statements of plaintiff's business partner would be to overlook the safeguard of the hearsay rule.

RESPECTFULLY SUBMITTED this the 25th day of October, 2007.

HOLLYWOOD CASINO
By: /s/ Benjamin E. Griffith
Benjamin E. Griffith, MSB No.5026
Attorney for Hollywood Casino

Of Counsel:

GRIFFITH & GRIFFITH
123 South Court Street
P. O. Drawer 1680
Cleveland, MS 38732
Phone No. 662-843-6100
FAX No. 662-843-8153

CERTIFICATE OF SERVICE

I, Benjamin E. Griffith, an attorney for Defendant Hollywood Casino, do hereby certify that I have this day caused a true and correct copy of the foregoing ***Memorandum of Authorities in Support of Renewed Motion for Summary Motion for Summary Judgment*** to be delivered by the United States District Court ECF System to:

J. Brad Pigott, Esq.
Pigott, Reeves, Johnson & Minor, P.A.
P. O. Box 22725
Jackson, Mississippi 39222-2725
Attorney for Plaintiffs

Mark D. Herbert, Esquire
April D. Reeves, Esquire
Watkins, Ludlam, Winter & Stennis, PA
P.O. Box 427
Jackson, MS 39205-0427
Attorneys for Grand Casino, Sheraton Casino,
Bally's, Sams Town Hotel, and Horseshoe Casino

Robert J. Mims, Esquire
Daniel Coker Horton & Bell
P. O. Box 1396
Oxford, MS 38655
Attorney for Fitzgerald's Casino

DATED this 25th day of October, 2006.

/s/ Benjamin E. Griffith
Benjamin E. Griffith