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

TUNICA WEB ADVERTISING, INC. **PLAINTIFF**

V. **CIVIL ACTION NO. 2:03CV234-A-D**

TUNICA CASINO OPERATORS ASSOCIATION, INC., et al. **DEFENDANTS**

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO HOLLYWOOD CASINO'S SEPARATE MOTION FOR SUMMARY JUDGMENT

Though Hollywood Casino has filed its own third summary judgment motion, that motion effectively incorporates the admissibility arguments also made by the remaining Defendant Casinos. Indeed, Hollywood sets forth in its supporting Brief exactly the same arguments - from exactly the same hearsay-related court opinions - that the remaining Defendant Casinos put forth in their Brief.[1]

Apart from incorporating its earlier responses to the same authorities in its principal Brief in Opposition to the remaining Casinos' Motion, this Memorandum will explain how those same authorities apply to Hollywood's separate Motion, and will demonstrate the clear existence of a hotly disputed issue of fact as to whether and when Hollywood joined the remaining Defendants' agreement, entered at the TCOA meeting on May 30, 2001, "to not utilize" Tunica.com.

In essence, though Hollywood asserts that it did not enter that agreement *on that*

[1]As TWA's response to Hollywood's invocation and analysis of the *Staheli, Cook, Corley, Paul F. Newton,* and *Summers* cases on Pages 10 through 19 of Hollywood's Brief, TWA hereby incorporates its presentation to the Court through Footnotes 32, 33, 37, 38 & 39 on Pages 20 through 22 of its Memorandum in Opposition to the (remaining) Casinos' Motion for Summary Judgment.

date, admissible evidence - indeed, the very kind of "direct evidence" of a boycott agreement pointed to by the Fifth Circuit in its opinion in this case - demonstrates that Hollywood ***did learn of, did act pursuant to, and indeed did "vote" to join in on,*** the same agreement "to not utilize" Tunica.com.

Direct written evidence of that participation by Hollywood includes the written evidence that on November 19, 2002, Clyde Callicott, then the Marketing Director at both the Defendant Sheraton Casino and the Defendant Bally's Casino,[2] emailed TWA's Ms. Graziosi with the following news about yet another "vote" by the casinos as to Tunica.com:

> "The meeting went well . . . however it's (sic) looks like the Tunica casino (the TCOA) is turning their backs on Rudi thanks to a special meeting held last week backed by Dominic from Fitzgeralds. They apparently held a meeting last Tuesday to discuss this . . in a similar fashion as they did when you where (sic) involved. **They voted to stray** (sic) **away from the site** so it could evently (sic) be sold and bought at a later date by them."[3]

Later that same day, Sheraton/Bally's Marketing Director Callicott communicated a further email to Ms. Graziosi which included the following language:

> "Dominic (just as he did with the last TCOA meeting) **asked for a majority vote from each property to see if they would ban advertising on this site** . . his

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[2]See Exhibit 8, at 412-13 & 403-04, and Exhibits 64 and 65 thereto.

[3]See Exhibit 8, at 392-97, 403 & Exhibit 64 thereto. (Emphasis added). The Casino executives meeting as the TCOA had indeed held a meeting one week before that date, on November 12, 2002. (Exhibit 5, at 129-31 & Exhibit 4 thereto). The casinos represented at that meeting, according to the minutes thereof, included Grand Casino, Hollywood Casino, Sheraton Casino, Harrahs Casino, Horseshow Casino, Fitzgerald Casino, Sam's Town Casino, and Gold Strike Casino. (*Ibid.)*

arguement (sic) is that (although valuable) it is not for one individual to profit from. He beleaves (sic) that the state should own the site. With such a strong opponnent (sic), no property will cross that line individual (sic) to advertise with this project."[4]

The TCOA had indeed held a meeting one week before that date, on November 12, 2002.[5] ***The casinos represented at that meeting, according to the minutes thereof, included Hollywood Casino, through the presence at that meeting of its General Manager John Osborne.***[6] That same John Osborne is therefore documented as having attended the November 12, 2002 TCOA meeting and having participated in a "vote" to "ban advertising" again from Tunica.com. A reasonable juror could believe that written and contemporaneous evidence, and find that on that date, whether or not before, Hollywood "voted" to join the boycott agreement.

These November 2002 emails by Casino Marketing Director Callicott to an owner of Tunica.com, an enterprise still hoping to some day do marketing business with the Tunica casinos through some mutually beneficial means, are clearly admissible non-hearsay admissions for exactly the same principal reason - namely FRE Rule 801(d)(2)(D) - that Mr. Callicott's June 2001 email to Ms. Graziosi about the same topic was ruled to be admissible non-hearsay by Judge Pepper in this case in 2004: First, those further emails by Callicott in November of 2002 were made "during the *existence*

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[4]See Exhibit 8, at 397-404, and Exhibit 65 thereto. (Emphasis added).

[5]See Exhibit 5, at Page 131, & Exhibit 4 thereto ("Meeting Minutes" of November 12, 2002 TCOA Meeting)

[6]*Ibid.*

of (his) relationship" as Marketing Director of two of the Defendant Casinos (at least one of which was represented at the subject TCOA meeting).[7] Secondly and finally, the marketing topic of the November 2002 emails was "concerning a matter within the scope of the agency or employment," for exactly the same reasons that Judge Pepper found with respect to the matter involved in the June 2001 email. The matter of whether or not the Tunica casinos for which Mr. Callicott was then the Marketing Director were (or were not) going to do marketing business with Tunica.com concerned a subject matter clearly "within the scope of the agency or employment" of a Casino Marketing Director. This was as true in November of 2002, when Mr. Callicott was Marketing Director of not one but two of the Defendant Casinos, as it was in June of 2001 when he was Marketing Director of Gold Strike Casino (as to which Judge Pepper has already ruled in this case).

Mr. Callicott has testified by deposition in this case that when he composed and sent those two emails to Ms. Graziosi in November of 2002, he was not engaged in simply forwarding or conveying the content of any particular statements ("hearsay" or otherwise) made to him by others.[8] Instead, he has testified that he was conveying to Ms. Graziosi through those emails **his own conclusions about what had happened regarding the casino marketing issues** he addressed in the emails, undeniably communicated during the "existence" of his tenure as Marketing Director at both Bally's

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[7]See Exhibit 8, at 403-04 & 412-13.

[8]See Exhibit 8, at 398-401.

Casino and Sheraton Casino.[9]

Admission as a non-hearsay party admission under FRE Rule 801(d)(2)(D) does ***not*** require ***any*** of the following: (a) that the speaker have been *authorized* by his or her principal *to make* the communication or similar communications,[10] or (b) that the statement advantages or *serves the interests* of the principal,[11] or (c) that the making of the statement itself was *within the scope of the agency,*[12] or (d) that the speaker have been an actual *decision-maker* with respect to the action or decision the statement is describing,[13] or (e) that the speaker otherwise have "*firsthand knowledge*" of the matter

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[9]See Exhibit 8, at 400.

[10]This is where the scope of FRE Rule 801(d)(2)(D) is much broader than the older provision of FRE Rule 801(d)(2)(C), which *does* require "a statement by a person *authorized* by the party to make a statement concerning the subject" of the statement itself. (Emphasis added). *See, e.g., Nekolny v. Painter*, 653 F.2d 1164, 1171 (7th Cir. 1982), cer. denied 455 U.S. 1021 (1982). Hollywood's arguments would have some force if the only ground advanced for admissibility were the specific-authority provision of FRE Rule 801(d)(2)(*C*). **But that is not among the rules of evidence on which Judge Pepper relied, and it is not among the rules of evidence on which TWA relies here for the admissibility of these Casino admissions.**

[11]*See, e.g., United States v. Lauersen,* 348 F.3d 329, 340 (2d Cir. 2003)(admitting as admission by clinic its nurse's statement to patient that other clinic employees had destroyed patient's files to conceal from government, since general matter of custody of patient files was within scope of nurse's job even if making statement was not and even if making of statement incriminated clinic/principal), and *Larch v. Mansfield Municipal Elec. Dept.*, 272 F.3d 63, 72-73 (1st Cir. 2001), and *White v. Honeywell, Inc.*, 141 F.3d 1270, 1276 (8th Cir. 1998)(supervisor's racial slur against employee admissible against employer under FRE Rule 801(d)(2)(D)).

[12]If the *content* of the "*matter*" addressed by the statement is within the scope of the agency, the *making* of the statement need *not* have been made "within the scope" of the agency. *See, e.g., Hoptowit v. Ray*, 682 F.2d 1237, 1262 (9th Cir. 1982). The Fifth Circuit in the *Stahili* case, on which Hollywood relies in its Brief, explained that the modern FRE Rule 801(d)(2)(D) was intended to allow a "somewhat broader" scope of admissibility than any rule limiting party admissions to statements made "in the scope of employment," since - leading up to the broadening of admissibility - "(d)issatisfaction with (the) loss of valuable and helpful evidence (had) been increasing." *Stahili, supra*, at 127.

[13]*See, e.g., United States v. Portsmouth Paving Corp.*, 694 F.2d 312, 321 (4th Cir. 1982)(secretary's statements about what boss said on car radio admitted under FRE Rule 801(d)(2)(D), though secretary clearly did not have decision-making authority over decision reported by her to 3rd party). *See also Cook v. Miss. Dept. of Human Services,* 108 Fed.Appx. 852 (5th Cir. 2004): "To be considered an 'agent' under Rule 801(d)(2)(D), a person need not have been an actual decision-maker in the hiring process." *Id.* at 855 (case relied on by Hollywood).

being described, or (f) that there be any "guarantee of trustworthiness" of any kind. As the Official Advisory Committee explained in their Official Note to FRE Rule 801:

> Admissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule. . . . No guarantee of trustworthiness is required in the case of an admission. The freedom which admissions have enjoyed from techynical demands of searching for an assurance of truthworthiness in some against-interest circumstance, and from the restrictive influences of the opinion rule and the rule requiring firsthand knowledge, when taken with the apparently prevalent satisfaction with the results, calls for general treatment of this avenue to admissibility.[14]

The Emailed Evidence of Hollywood and the other Casinos having "Voted" in November 2002 to continue to "ban advertising" on Tunica.com is also Admissible as Non-Hearsay Statements of the Content of the Boycott Agreement Itself (and thus as "Verbal Acts" of Legal Significance Apart from the Truth of What They Assert)

Even if the same emails reflecting the November 2002 "vote" by Hollywood and other casinos were not clearly admissible as non-hearsay party admissions (or co-conspirator statements) for the reasons described under FRE Rule 801(d)(2), each would nevertheless be admissible for a non-hearsay *purpose* at a trial of this case, which after all hinges on whether or not an agreement not to deal with Tunica.com was entered by the Casinos in the first place.

That further ground for admissibility begins with the definition of hearsay itself, as a statement "offered in evidence to prove *the truth of the matter asserted.*" FRE Rule 801(c)(emphasis added). The original Advisory Committee Note accompanying the formal adoption by the United States Supreme Court of FRE Rule 801(c) explained the

[14]See Exhibit 45 and 46.

kinds of statements which are *not* offered to prove "the truth of the matter asserted," and which are *not* hearsay: "If the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay. . . . The effect is to exclude from hearsay the entire category of 'verbal acts' and 'verbal parts of an act,' in which the statement itself affects the legal rights of the parties or is a circumstance bearing on conduct affecting their rights."[15]

Whether or not the making and content of a particular "statement itself affects the legal rights of the parties" depends, of course, on how the content of the offered statement compares with the elements of the alleged legal violation. If a plaintiff's ability to prove a particular legal right (such as an entitlement to enforce a particular contract with particular content) or a particular legal liability (such as a fraudulent statement or the making of an illegal agreement with a particular content) rises or falls on whether or not *a particular statement was made*, evidence that the statement *was made* is admitted for the direct legal significance thereof, and not for the truth of what the statement asserts. This "verbal acts" doctrine of non-hearsay admissibility applies where "legal consequences flow from the fact that the words were said." *United States v. Pungitore*, 965 F.Supp. 666, 673 n. 1 (E.D.Pa. 1997). Examples are:

-(1) In a case alleging that a defendant had sold illegal narcotics, testimony that the defendant had made an out-of-court statement offering to sell narcotics was admitted as non-hearsay, since it was offered to prove "that it had been made" and not the truth of any matter asserted in the statement. *United States v.*

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[15]56 F.R.D. 183, 293-95. See the fourth and fifth pages of Exhibit 46 hereto for those pages from the Advisory Committee's Note.

Roach, 164 F.3d 403, 410 (8th Cir. 1998).

-(2) In a case alleging that defendants had made fraudulent statements over the telephone as part of a wire fraud scheme, the content of telephone calls by the defendants posing as police officers and trying to obtain credit card numbers of victims was admissible as non -hearsay, since the content of the statements constituted the fraudulent scheme itself. *United States v. Saavedra*, 684 F.2d 1293 (9th Cir. 1982).

-(3) In a case alleging that a defendant had refused to sell the plaintiff a residence for discriminatory reasons, the defendant housing salesman's out-of-court statements declining to sell the plaintiff a house were admissible as non-hearsay. *Yarborough v. City of Warren*, 383 F.Supp. 676 (E.D.Mich. 1974).

-(4) In a case alleging that a defendant had threatened the life of a federal judge at a sentencing hearing, the defendant's statements were admissible as non-hearsay, since the content of them "contain(ed) the operative words of (the) criminal action." *Unites States v. Jones*, 663 F.2d 567, 571 (5th Cir. 1981).

-(5) In a case alleging that defendants had engaged in illegal gambling transactions, statements attributed to them constituting the offer and acceptance of bets were admissible, since they "constitute verbal acts and can be considered part of the offense in question." *United States v. Boyd*, 566 F.2d 929, 937 (5th Cir. 1978).

In this boycott case alleging that the Defendant Casinos renewed in November of 2002 their explicit understanding and agreement "to not utilize" Tunica.com, statements acknowledging the content of what they in fact said to one another, and the content of

their resulting understanding, have direct legal significance in proving that such an agreement did in fact take place. "A conspiracy is an agreement or understanding, express or implied, between the conspirators. The usual way in which people reach agreements or understandings is by the use of words, oral or written. Indeed, it is difficult to conceive of a conspiracy formed or carried forward without the use of any words." *United States v. Calaway*, 524 F.2d 609, 613 (9th Cir. 1975), *cert. denied* 424 U.S. 967 (1976)(admitting as "verbal acts" out-of-court statements by defendants placing and accepting bets in gambling prosecution).

The November 2002 emails directly describe *the content of the Casinos' understanding itself* with respect to dealings with Tunica.com, and are therefore admissible, not in order to prove the truth of what the statements assert, but to prove that the understanding "to not utilize" Tunica.com was reached in the first place. When Mr. Callicott, then Sheraton/Bally's Marketing Director, stated in an email to Ms. Graziosi in November of 2002 that the casino general managers "held a meeting last Tuesday" and that they "voted to stray (sic) away from the site so it could evently (sic) be sold and bought at a later date by them," he was clearly conveying the content of a renewed and re-affirmed understanding (and, indeed, an inter-casino "vote"), making that content itself admissible as a further "verbal act" of a re-stated agreement.

Pre-2002 Circumstantial Evidence of Hollywood's Prior Joinder of the Boycott Agreement

Though he claims not to have attended personally the original TCOA meting on May 30, 2001, Hollywood Casino General Manager Osborne as a casino general manager and TCOA member would have received in the normal course of business his

copy of the minutes of the TCOA meeting of May 30, 2001 reflecting the casinos' "consensus . . . to not utilize Tunica.com." (Exhibit 5, at 109-110, and Exhibit 7 thereto). Those minutes would have been distributed in mid-2001 to "all of the general managers," which of course would have included Osborne. (*Ibid.)*

John Osborne met with Plaintiff Graziosi shortly after that May 30, 2001 meeting, and affirmatively declined and refused to consider doing business with Tunica.com on any terms, acting consistently with the content of the agreement "to not utilize" Tunica.com which had been noted on those minutes sent to him as a Tunica casino general manager. (See Exhibit 1, at 682-92). Though the timing of when Hollywood Casino entered the casinos' conspiracy may be disputed, then, a reasonable juror could certainly infer that at some point Mr. Osborne's conduct, including the vote to "ban advertising" in November of 2002, amounted to a joinder in the conspiracy by Hollywood. Indeed, if the "direct evidence" of a boycott agreement is credited by a jury, no other conclusion would be justified.

Conclusion

Sherman Act cases by their nature are inherently complex factually. It has therefore been the rule in such cases that "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962). As a result, summary judgment is "especially disfavored" in inherently complex and fact-sensitive antitrust cases, as "the nature of the antitrust beast is such that courts cannot frequently say as a matter of law that plaintiffs have no disputed material facts upon

which to proceed to trial." *C. E. Services, Inc. v. Control Data Corp.*, 759 F.2d 1241, 1245 (5th Cir. 1985)(reversing grant of summary judgment as to *Sherman Act* claim).

Of course, it is true of *any* Rule 56 motion that "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Given that summary judgment standard applicable in such complex antitrust cases, and the many factual disputes outlined above, Hollywood Casino's Motion for Summary Judgment as to the antitrust claims under Count 1 and Count 2 in this case should be denied.[16]

This the 23rd day of November, 2007.

Respectfully submitted,

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CERTIFICATE OF SERVICE

[16]Because none of the Defendants in this case have filed any Rule 56 motion seeking to address or dispose of the Plaintiff's Count 3 claim alleging tortious interference with TWA's business relations, this Brief has not addressed whether or not a jury issue would exist as to that common law tort.

I, J. Brad Pigott, do hereby certify that I have this day caused a true and correct copy of the foregoing Brief to be filed with the Clerk of the Court via the ECF system which sent notification of same to the following counsel of record in the above-referenced matter, and also to be served upon each such counsel through prepaid United States Mail:

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This the 23rd day of November, 2007.

s/Brad Pigott
BRAD PIGOTT