No. 91-10

IN THE

Supreme Court of the United States

October Term, 1990

SPECTRUM SPORTS, INC. and KENNETH B. LEIGHTON,
Petitioners,

vs.

SHIRLEY MCQUILLAN and LARRY MCQUILLAN
dba SORBOTURF ENTERPRISES,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

No. 1

Whether a manufacturer's distributor expressly absolved of violating Section 1 of the Sherman Act can, without any evidence of market power or specific intent, be found liable for attempting to monopolize solely by virtue of a unique Ninth Circuit rule?

No. 2

Whether an exclusive distributor which is replaced by the manufacturer can suffer injury warranting the recovery of treble damages where the replacement was devoid of predatory conduct?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the court below are those named in the caption and Sorbothane, Inc., Hamilton-Kent Manufacturing Company, Inc., Kenneth M. Leighton and BTR, Inc. Spectrum Sports, Inc. has no parent or subsidiary corporations.

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No. ______

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Spectrum Sports, Inc. ("Spectrum Sports") and Kenneth B. Leighton respectfully pray that a writ of certiorari issue to review the decision of the Ninth Circuit, dated July 3, 1990, which appears in the Appendix at A1.

This decision affirmed the trial court's judgment solely on the basis of Respondents' attempted monopoly claim, even though no evidence of Spectrum Sports' market power or its specific intent to monopolize was produced. The Ninth Circuit's decision was based on its unique rule, first announced in *Lessig v. Tidewater Oil Company*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964), which eliminates "a dangerous probability of success" and "specific intent to monopolize" as independent elements of an attempt to monopolize claim. This Ninth Circuit rule conflicts with decisions of this Court and of every other Circuit Court of Appeals.

The Ninth Circuit affirmed the imposition of treble damages even though Respondents were not required to—and could not—prove antitrust injury, as defined by this Court in *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. _____, 110 S. Ct. 1884 (1990). Antitrust injury cannot occur because a substitution of exclusive distributors does not harm competition.

OPINIONS BELOW

The Opinion of the Ninth Circuit appears in the Appendix at A1. The judgment of United States District Court for the Southern District of California appears in the Appendix at A29. The order of the Ninth Circuit denying the petition for rehearing appears in the Appendix at A32. All are unreported memorandum decisions.

JURISDICTIONAL STATEMENT

The decision of the Court of Appeals was entered on July 3, 1990. A timely petition for rehearing with suggestion for rehearing *en banc* was denied on April 1, 1991.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2 of the Sherman Act, 15 U.S.C. §2, provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among 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.

Section 4 of the Clayton Act, 15 U.S.C. §15, provides in relevant part:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

Parties.

Respondents, Shirley and Larry McQuillan, doing business as Sorboturf Enterprises, distributed athletic insoles to retailers in the western United States. The insoles were made of sorbothane, a patented, shock-absorbing polymer. Respondents initially purchased the insoles from Hamilton-Kent Manufacturing Company beginning in 1981 and later from Sorbo, Inc., both of which were indirect subsidiaries of BTR, Inc. Spectrum Sports also distributed sorbothane athletic insoles purchased from Hamilton-Kent and Sorbo and resold them in those parts of the United States not served by Respondents. Spectrum Sports and Respondents resold the insoles only in their respective territories as part of the manufacturer's distribution plan. Sorbo terminated Respondents as distributors in 1983 and replaced them with Spectrum Sports which thereafter became the exclusive national distributor of sorbothane athletic insoles.

Respondents' Lawsuit.

Respondents sued Spectrum Sports and its president, Kenneth B. Leighton, Hamilton-Kent, Sorbo and its president, Kenneth M. Leighton, and BTR, Inc. alleging a number of federal and state law violations.[1] After trial, the jury, by special verdict, found Petitioners neither fixed prices in violation of Section 1 of the Sherman Act nor violated California's Cartwright Act prohibiting conspiracies to restrain trade. The jury did find Petitioners had violated Section 2 of the Sherman Act. The jury also found Petitioners did not defraud

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[1] Jurisdiction was based upon 15 U.S.C. §15 and 18 U.S.C. §1964.

Respondents. Nonetheless, the jury held Petitioners liable for three RICO violations based upon these same fraud claims. The jury also found Petitioners liable for state law unfair competition and interference with prospective business advantage claims. The jury awarded damages of $1,743,000 which was trebled by the trial court. The trial court also awarded attorneys fees and costs.

Petitioners' Appeal.

Petitioners appealed, asserting they were entitled to judgment as a matter of law on the Section 2 claim because Respondents offered no proof of Spectrum Sports' market power or of its specific intent to monopolize any relevant market. Petitioners also argued that the trial court had erred by not requiring Respondents to prove antitrust injury.

Petitioners appealed the RICO verdict on the basis that the jury had determined that Petitioners were not liable for the fraud on which the RICO claims were based. Further, under California law, Respondents were not entitled to monetary relief on their unfair competition claim. Finally, the interference claim was meritless because Petitioners did not participate in Sorbo's termination of Respondents' distributorship.

The Ninth Circuit Decision.

The Court of Appeals affirmed the trial court's judgment, stating there to have been adequate evidence to support a judgment of attempt to monopolize under the Ninth Circuit's *Lessig* rule. The Ninth Circuit relied upon evidence of price fixing which the jury had rejected in exonerating Petitioners on the Section 1 price-fixing claim. Appendix, A15-A22. It specifically declined to reach any of the other substantive issues. Appendix at A28.

Petition For Rehearing.

After the case had been argued on April 13, 1990, but before the Ninth Circuit's decision of July 3, 1990, this Court decided the case of *Atlantic Richfield Co. v. USA Petroleum*, 495 U.S. ______, 110 S. Ct. 1884 (1990). Petitioners filed a petition for rehearing with a suggestion for rehearing *en banc* on July 17, 1990.

Petitioners apprised the Ninth Circuit of this Court's rule that a private plaintiff must prove "antitrust injury" as part of its claim. Petitioners also asked the court to reconsider the *Lessig* rule, particularly in light of the jury's exoneration of Petitioners on the Section 1 claim, and because competition was not likely to be harmed in this distributor substitution case.

On April 1, 1991 the Court of Appeals corrected its earlier decision by acknowledging Petitioners had properly objected to the *Lessig* instruction, but nonetheless denied the petition for rehearing. Appendix, A32.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD STRIKE DOWN THE CONCEPTUALLY FLAWED NINTH CIRCUIT RULE WHICH IMPOSES TREBLE DAMAGES WITHOUT REQUIRING EVIDENCE OF CONDUCT ADVERSE TO COMPETITION.

A. *Lessig* Contradicts The Rule Set Forth By This Court.

The curious rule announced in *Lessig v. Tidewater*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964) has plagued parties subject to the jurisdiction of the Ninth Circuit—and has been criticized by highly respected legal commentators—for more than 25 years. Solely on the basis of *Lessig*, the Ninth Circuit imposed treble damages upon Petitioners even though Respondents produced no evidence of Petitioners' market power or of their specific intent to monopolize.

This Court has long required a plaintiff in an attempt to monopolize claim to prove: (1) predatory or anticompetitive conduct, (2) specific intent to monopolize, and (3) a dangerous probability of success. *Lorain Journal Co. v. United States*, 342 U.S. 143, 153 (1951); *United States v. Griffith*, 334 U.S. 100, 105-106 (1948); *Swift & Co. v. United States*, 196 U.S. 375 (1905). Justice Holmes explained the basis for the Court's rule:

> Where acts are not sufficient in themselves to produce a result which the law seeks to prevent,—for instance, the monopoly,—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. But when that intent and the consequent dangerous probability exist, this statute, like many others, and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result.

Swift & Co. v. United States, 196 U.S. at 396 (citation omitted).

The Court again considered the need to prove "dangerous probability of success" in *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 198 U.S. 172 (1965). In *Walker Process*, the defendant asserted plaintiff's fraudulent acquisition and maintenance of a patent constituted an attempt to monopolize in violation of Section 2. The Court held that measuring the "dangerous probability of success element" requires an analysis of market power.

> To establish monopolization or attempt to monopolize a part of trade or commerce under §2 of the Sherman Act, it would then be necessary to appraise the exclusionary power of the illegal patent claim in terms of the relevant market for the product involved. Without a definition of that market there is no way to measure Food Machinery's ability to lessen or destroy competition.

Id. at 177.

The current version of *Lessig*—applied by the Ninth Circuit here—ignores this Court's rule and permits "dangerous probability of success" to be inferred from evidence of specific intent to monopolize which may, in turn, be inferred from anticompetitive or predatory conduct. *See, e.g., Janich Bros. v. American Distilling Co.*, 570 F.2d 848 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978). It does not require evidence of the defendant's share of any relevant market, and makes no distinction between a defendant with a 90% share of a relevant market and one with 9%. Accordingly, liability may be imposed in the Ninth Circuit without any indication of a defendant's ability to monopolize a particular market. This result conflicts directly with the rulings of this Court and requires Supreme Court review.

B. *Lessig* Has Been Rejected By Every Other Circuit Court Of Appeals.

No other Circuit has adopted the Ninth Circuit's shortcut approach.[2] The Second Circuit specifically rejected the *Lessig* rule in *International Distribution Centers, Inc. v. Walsh Trucking Co.*, 812 F.2d 786 (2nd Cir.) *cert. denied*, 482 U.S. 915 (1987) on the basis that to do otherwise would be to unnecessarily extend antitrust law into areas not affecting competition.

> Moreover, IDC's argument ignores the history of judicial interpretations of the term "monopoly" as it relates to both the substantive act and the attempt. We have consistently interpreted both monopoly and the attempt to monopolize as requiring some measure of market power . . .
>
> *Eliminating the dangerous probability element from attempted monopolization would have the effect of extending the coverage of section 2 of the Sherman Act to similar behavior already covered by state and federal law.* The Federal Trade Commission Act, Section Five, 15 U.S.C. Section 45 (1982), regulatory statutes and state business tort law all reach anticompetitive behavior by firms that lack market power . . . There is no unmet need calling for judicial expansion of section 2 to reach similar behavior. *See,* 3 *Areeda & Turner,* Section 833 (D) at 341.

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[2] *E.g., Bright v. Moss Ambulance Service, Inc.,* 824 F.2d 819, 824 (10th Cir. 1987); *Military Services Realty, Inc. v. Realty Consultants of Virginia Ltd.,* 823 F.2d 829 (4th Cir. 1987); *General Industries Corp. v. Hartz Mountain Corp.,* 810 F.2d 795, 804 (8th Cir. 1987); *CVD, Inc. v. Raytheon Co.,* 769 F.2d 842 (1st Cir. 1985), *cert. denied,* 475 U.S. 1016 (1986); *American Key Corp. v. Cole Nat. Corp.,* 762 F.2d 1569, 1579-1581 (11th Cir. 1985); *Multiflex v. Samuel Moore & Co.,* 709 F.2d 980, 991 (5th Cir. 1983), *cert. denied,* 465 U.S. 1100 (1984); *Richter Concrete Corp. v. Hilltop Concrete Corp.,* 691 F.2d 818, 826 (6th Cir. 1982); *Nifty Foods Corp. v. Great Atlantic & Pacific Tea Co.,* 614 F.2d 832, 841 (2d Cir. 1980); *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.,* 637 F.2d 105 (3d Cir. 1980), *cert. denied,* 451 U.S. 911 (1981).

> *Furthermore, any significant reduction in the antitrust plaintiff's burden of proving that the defendant has a dangerous probability of monopolizing the market might discourage the healthy competition that section 2 is intended to nurture.*

Id. at 791 (emphasis added).

Judge Bork, writing for the D.C. Circuit, also considered and rejected the *Lessig* rule, in *Neumann v. Reinforced Earth Company,* 786 F.2d 424 (D.C. Cir.) *cert. denied,* 479 U.S. 851 (1986), a case in which the plaintiff asserted that the defendant was guilty of sham litigation in violation of Section 2. Judge Bork objected to applying antitrust law without some assurance that competition might be harmed.

> It might be argued that there should be no need to prove the element of market power, or a dangerous probability of success, separately. If a tactic, including litigation, is really predatory (i.e., in this same case a sham: known to be without merit), that fact might seem to establish a dangerous probability of success. . . . A company that undertakes sham litigation, it may be supposed, thereby demonstrates that it thinks itself close to success and courts could reasonably take the defendant's informed belief as proof enough. In price fixing cases, after all, courts do not require the plaintiff to prove the defendants' market power, though price fixing by those without market power would be quite harmless, because we suppose that the conspirators know the market best and we take their beliefs as sufficient. That is one of the things that is meant when naked price-fixing is said to be illegal *per se. The required showing of "dangerous probability," however, may provide a court with some assurance, otherwise lacking, that the bad faith litigation constitutes an anticompetitive act and is not merely legal harassment for personal motives.* In the latter case

> the appropriate action would be one in tort for abuse of process or malicious prosecution, not one invoking the full panoply of the antitrust laws, including recovery of triple damages. *In any case, and whatever the reason, the law does require a dangerous probability of success, and Neumann, in order to prevail was required to show RECO's share of the relevant market.* He did not succeed.

Id. at 428 (emphasis added).

Lessig was also specifically rejected in *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 711-712 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980) and *American Hoist & Derrick Co. v. Sowa & Sons, Inc.*, 725 F.2d 1350, 1366 (Fed. Cir.), *cert. denied*, 469 U.S. 821 (1984) (where the court stated *Lessig's* significance was diminished after this Court decided *Walker Process*).

Justice White, in urging this Court to consider the *Lessig* rule, asserted that the notion of *Lessig's* refusal to inquire about the defendant's market power was particularly inappropriate in Section 2 cases where the risk of injury to competition is small.

> Sections 1 and 2 of the Sherman Act are directed to different sorts of threats to competition in our economy. Section 1 proscribes concerted action—contracts, combinations, and conspiracies in restraint of trade. Such concerted action is so inherently threatening to competition that in certain instances it is forbidden without regard to whether it has actually damaged competition in a particular market. Section 2 regulates unilateral conduct by outlawing monopolization and attempted monopolization. Because unilateral conduct is far less likely than concerted action to pose a threat to competition, "[t]he conduct of a single firm is governed by §2 alone and is unlawful only when it threatens actual monopolization." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984).

> Because the *Lessig* doctrine allows a violation of §2 to be found on the basis of a *per se* violation of §1, without regard to the effect of a defendant's conduct in any relevant market, it appears to be in tension with these principles.

Mobil Oil Corporation v. Blanton, 471 U.S. 1007 (1985) (White, J., dissenting).

Every other Circuit has recognized the illogic of the *Lessig* rule. This Court's overturning *Lessig* would promote a consistent and reasoned interpretation of the antitrust laws.

C. *Lessig's* Elimination Of The Dangerous Probability Of Success Element Has Been Soundly Criticized By Legal Commentators.

The *Lessig* rule has been criticized since its conception:

> This is indeed a curious result. If "dangerous probability" has any meaning at all, it must signify an approach to monopoly power. As monopoly power itself is measured in terms of a relevant market, so must dangerous probability also be measured. Unless you know where a defendant is heading, you cannot find out how close he is to the destination. Thus, the concept of dangerous probability is only meaningful in the context of relevant market. . . .
>
> Under the *Lessig* analysis, any business tort may become an attempt to monopolize case . . . In other words, the *Lessig* approach reeks of over kill.

Hibner, *Attempts to Monopolize: A Concept in Search of Analysis*, 34 A.B.A. Antitrust L. J. 165, 171 (1967).

Lessig's survival has prompted further criticism. Areeda and Turner have criticized *Lessig*, pointing out that even where proof exists of a *per se* violation of

Section 1, attempted monopolization cannot be established without identifying a market that may be monopolized. P. Areeda and D. Turner, *Antitrust Law*, §832(1)(a), (1989 Supplement).

Professor Kintner has stated:

> *Lessig* and the less radical departures from the dangerous probability requirement discussed above would profoundly change the attempt to monopolize offense if those departures were eventually adopted by more courts. The plaintiff's burden of proof would be substantially eased because definition and evaluation of the relevant product and geographic markets would no longer be required. The attempt offense would be significantly expanded to encompass at least some unilateral anticompetitive conduct by actors lacking substantial market power. These approaches effectively abandon the traditional view of the attempt offense, which links attempts with monopolization.

E. Kinter, *Federal Antitrust Law*, §13.4 (1980).

The longstanding criticism by academic commentators demonstrates *Lessig's* basic misunderstanding of the antitrust laws and compels its being overturned.

D. Liability For Attempting To Monopolize Should Not Be Imposed Solely Because Of A Defendant's Unfair Behavior.

Until now, the Ninth Circuit limited the application of the *Lessig* rule to cases where a defendant was found liable for a *per se* Section 1 violation. The Section 1 violation then served as the basis to infer the other Section 2 elements. *See e.g., Blanton v. Mobil Oil Corp.*, 721 F.2d 1207, 1214 (9th Cir. 1983), *cert. denied*, 471 U.S. 1007 (1985). Here, however, the jury found

Petitioners *did not* fix prices in violation of Section 1; yet the Ninth Circuit relied on purported evidence of price fixing—which did not rise to the level of anticompetitive conduct—to form the basis of a *Lessig* inference upon an inference. The Ninth Circuit, in this opinion, allowed antitrust liability to be imposed upon the mere showing of *unfair* behavior, Appendix, A17, A19 and A21. Thus in the Ninth Circuit, unfair—not anticompetitive—conduct, may constitute a Section 2 violation and result in the imposition of treble damages. The antitrust laws were not designed to punish this behavior.

E. The *Lessig* Rule Is Particularly Inappropriate In Distributor Substitution Cases Where Competition Is Rarely Affected.

The Ninth Circuit now applies *Lessig* to distributor substitution cases, which, by their nature, are unlikely to negatively affect competition. As Judge (now Justice) Kennedy stated:

> That one distributor will be hurt when another succeeds in taking its line is axiomatic in some markets, as it was here, but the intent to cause the result is not in itself prohibited by the antitrust laws. The intent proscribed by the antitrust laws lies in the purpose to harm competition in the relevant market, not to harm a competitor.

A. H. Cox v. Star Machinery Co., 653 F.2d 1302, 1307 (9th Cir. 1981).

The application of *Lessig* to a distributor substitution case compounds the *Lessig* problem. Not only are treble damages imposed in attempt to monopolize claims without the need for proof of damage to competition, but now that rule is applied to distributor substitutions which, by their very nature, do not harm competition.

The Court of Appeals' decision makes clear that—despite years of criticism—the Ninth Circuit intends not only to continue its adherence to *Lessig*, but to stray further from the rule of this Court and the other Circuits in attempt to monopolize claims. Occasionally, where one court of appeals interprets a statute differently than others, Supreme Court intervention may be unnecessary because, in time, the aberrant circuit may see the error of its ways. But in other cases, as here, where the Ninth Circuit has relied for more than 25 years on the *Lessig* rule and appears to be solidifying its isolation, it is time for the Supreme Court to act. Such action is all the more vital where this divergent rule results in awards of treble damages.

II. THE NINTH CIRCUIT'S FAILURE TO REQUIRE PROOF OF ANTITRUST INJURY IS PARTICULARLY HARMFUL IN THIS DISTRIBUTOR SUBSTITUTION CASE WHERE ANTITRUST INJURY CANNOT BE SHOWN.

A. The Ninth Circuit Ignored This Court's Rule That A Private Plaintiff Must Prove Antitrust Injury.

The Ninth Circuit ignored this Court's recent holding that a private plaintiff may not seek treble damages under Section 4 of the Clayton Act unless it has suffered antitrust injury. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. ______, 110 S. Ct. 1884, 1894 (1990) (stating that the "antitrust injury requirement insured that a plaintiff can recover only if the loss stems from a competition-*reducing* aspect of the defendant's behavior.") (emphasis in original). Antitrust injury is injury that the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487 (1977).

The Ninth Circuit, in determining Respondents suffered antitrust injury, relied upon the same faulty reasoning that led to its reversal in *Atlantic Richfield*:

> Horizontal market division agreements (Section 1 claim) and attempts to monopolize (Section 2 claim) are treated as *per se* violations of the Sherman Act. Injury to competition is presumed to follow from the conduct proscribed by these statutes.

Appendix, A22.

Not only did this Court reverse such a rule in *Atlantic Richfield*, but as demonstrated below, injury to competition cannot be presumed in a distributor substitution case.

B. Since Distributor Substitutions Do Not Harm Competition, No Antitrust Injury Occurs.

To determine if antitrust injury has—or can—be proven, one must first determine why monopolization and attempting to monopolize were prohibited. The Sherman Act sought to prevent monopolization because of the fear the monopolist would be able to control prices and threaten competition. *United States v. E. I. DuPont de Nemours & Co.,* 351 U.S. 377, 386 (1956).

This Court has recognized the minimal impact on competition caused by a change in distributors. In *Continental T.V., Inc. v. GTE Sylvania, Inc.,* 433 U.S. 36 (1977), the Court stated:

> Certainly, there has been no showing ... that vertical restrictions have a "pernicious effect on competition" or that they "lack ... any redeeming virtue. (citation omitted).

Id. at 433 U.S. at 58.

More recently, in *Business Electronics Corp. v. Sharp Electronics Corp.,* 485 U.S. 717 (1988), this Court reaffirmed its position that vertical non-price restraints must be judged by a rule of reason and not a *per se* test because no demonstrable economic harm results from these restraints.

Although in *Sylvania* and *Business Electronics* the Court considered the issue of whether to apply the rule of reason analysis to certain vertical restraints—not the issue of antitrust injury—the reasoning employed in those cases is equally applicable here. If competition is unlikely to be affected when one exclusive distributor is replaced by another—one type of vertical restraint—then certainly the replaced distributor cannot suffer the type of damage the antitrust laws were designed to protect against.

Justice Kennedy addressed this in *A. H. Cox v. Star Machinery Co.*, 653 F.2d 1302 (9th Cir. 1981), where one exclusive distributor was replaced by another:

> Most cases recognizing the right to establish an exclusive manufacturer-dealer relation arise when an arrangement is formed or changed at the request of the manufacturer ... *It is widely recognized moreover, that in most circumstances dealer terminations or substitutions do not adversely affect competition in the market.* (citations omitted)

Id., at 1306-1307 (emphasis added).

The Sixth Circuit has considered distributor terminations several times in the context of Section 1 claims and has consistently dismissed such claims, holding that they may not be analyzed on a *per se* basis and must fail on a rule of reason test. In *Crane & Shovel Sales Corp. v. Bucyrus-Erie Co.*, 854 F.2d 802 (6th Cir. 1988), the court detailed the history of distributor substitution cases in the Sixth Circuit starting with this Court's decision in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, holding that these claims cannot be analyzed on a *per se* basis because the court presumes that interbrand competition is not negatively affected by the mere replacement of one distributor by another.

> We have consistently held that a complaint which simply alleges that a manufacturer substituted one distributor for another fails to state a violation of the rule of reason, *unless* it also alleges anticompetitive effect at the interbrand level. (emphasis in the original)

Id. at 806.

If interbrand competition were damaged by a distributor substitution, then distributors of competing products or retailers might suffer antitrust injury, but not the replaced distributor.

The Ninth Circuit addressed the antitrust injury issue in the context of distributor substitutions in *Rutman Wine Co. v. E.&J. Gallo Winery*, 829 F.2d 729 (9th Cir. 1987). In *Rutman*, the manufacturer replaced one exclusive distributor with another and the disappointed distributor asserted violations of Sections 1 and 2 of the Sherman Act. The court, in affirming the dismissal of the complaint, stated:

> While appellant clearly pleads injury to itself, its conclusion that competition has been harmed thereby does not follow. Rutman charges that its termination was accomplished to prevent, reduce, and unreasonably limit competition in the market. Gallo responds that injury to appellant and injury to Gallo's competitors are not injury to competition. Appellee persuasively argues that appellant can prove no set of facts consistent with the allegations of its complaint which would entitle it to relief.

Id. at 734-735.

The Second Circuit, in *Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126 (2nd Cir.) (*en banc*), *cert. denied*, 439 U.S. 946 (1978), held that the replacement of one distributor by another was not enough to constitute a *per se* violation of Section 1 of the Sherman Act. Although the court held only that distributor terminations should be analyzed under the rule of reason and not on a *per se* test, the court based its decision, in part, on the antitrust injury analysis in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, specifically that the antitrust laws were enacted for the protection for competition, not competitors. *Oreck*, 579 F.2d at 133-134.

The basic issue in a distributor substitution case is not whether to apply a *per se* or rule of reason analysis, but to determine whether or not a replaced distributor can suffer antitrust injury. Here, without injury to competition (intrabrand or interbrand) or control of prices, antitrust injury cannot be established. The only parties that suffered were Respondents; but their injury was not the type of injury the antitrust laws were designed to prevent.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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June 28, 1991

APPENDIX

NOT FOR PUBLICATION

MEMORANDUM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

(Filed July 3, 1990)

Case No. 89-55326
89-55329
89-55332

SHIRLEY McQUILLAN, *et al.*,
Plaintiffs/Appellees/
Cross-Appellants,

vs.

SORBOTHANE, INC., *et al.*,
Defendants/Appellants/
Cross-Appellees.

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
William B. Enright, District Judge, Presiding

Argued and Submitted April 13, 1990
Pasadena, California

Before: TANG and O'SCANNLAIN, *Circuit Judges,* and MARQUEZ, *District Judge.***

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** Honorable Alfredo C. Marquez, United States District Judge for the District of Arizona, sitting by designation.

This is an action brought by Shirley McQuillan and Larry McQuillan, individually and dba Sorboturf Enterprises (McQuillan) against the defendants BTR, Inc., Hamilton-Kent Manufacturing Company (H-K), Sorbothane, Inc. formerly Sorbo, Inc., Kenneth M. Leighton, Sr., Spectrum Sports, Inc. and Kenneth B. Leighton, Jr. Claims were asserted under federal and state antitrust laws, RICO, breach of contract, fraud, unfair competition, bad faith denial of existence of a contract, and conversion.

The jury, after a lengthy trial, found against the defendants BTR, Inc., H-K, Sorbothane, Inc. and Leighton, Sr. on all Counts. Spectrum and Leighton, Jr. were found liable on the claims for unfair competition (Section 17200 California Business and Professions Code), interference with prospective business advantage, violation of Section 2 of the Sherman Act, and violations of the RICO Act, 18 U.S.C. §1962(b), (c), and (d). The jury found that H-K was the agent or alter ego of BTR, Inc.

The jury assessed $1,743,000 in each of the claims on which the defendants were found liable. The District Court entered judgment in the sum of $5,243,000 (compensatory damages trebled), together with reasonable attorneys fees and costs.

McQuillan moved for attorneys fees under the state and federal antitrust laws and the RICO laws. The application sought fees of $1,759,969, reflecting 9,008.4 hours at a rate of $130.94 per hour. McQuillan additionally sought an enhancement for delay of $137,358, and an enhancement of 33% ($436,684) for the risk of non-payment, for total enhancement of $574,042.00 which the Court denied. The Court awarded the sum of $912,032.50 for attorneys fees.

Defendant/Appellants appeal from the jury verdicts and challenge certain trial court rulings relating to the testimony of the plaintiffs' expert, a Motion in Limine granted by the Court, denial of Motions for a New Trial, Directed Verdict, and JNOV, and certain instructions given by the Court.

McQuillan appeals the District Court's denial of the request for enhancement of attorneys fees.

FACTS AND PROCEEDINGS BELOW

Conflicts in the evidence have been resolved in favor of the party who prevailed on a particular claim.

Sorbothane is a viscous elastic polymer invented by Dr. Maurice Hiles in England. It is a solid that absorbs energy like a liquid. Dr. Hiles' work on Sorbothane was funded by British Technology Group [BTG].

BTR, Inc. [BTR], a Delaware corporation, is a holding company which at all relevant times owned, directly or indirectly, H-K and Sorbothane, Inc. [S.I.]. Up to May 1982, S.I. was the Sorbo Division of H-K.

In 1982 S.I. was formed to take over H-K's Sorbothane business.

Spectrum Sports, Inc. [Spectrum] is an Ohio corporation, formerly Ohio Cushions, Inc., and is owned by Kenneth B. Leighton [Jr.] and Michael Silvestro.

Kenneth M. Leighton, Sr. [Sr.] is Jr.'s father. He served as President of H-K and S.I. at all relevant times. He became interested in Sorbothane and in August 1980 an unrestricted license to manufacture and sell Sorbothane "in all world markets" was granted to H-K by B.T.R. Development Services Ltd.

At all times material herein John Cahill was President of BTR, Chairman of H-K, and possibly a Director of H-K. He was also a member of the Board of S.I.

A United Kingdom Company, Birmingham and Leyland [Leyland], was also licensed to manufacture and sell Sorbothane without territorial restrictions.

In 1980, Dr. Hiles was hired as a consultant to H-K in the United States.

When Shirley McQuillan read a magazine article in the spring of 1980 about the shock absorbent qualities of Sorbothane, she thought it might work as a horseshoe pad. McQuillan, along with acquaintance Alby Jardine, contacted Dr. Hiles in England. The McQuillans and the Jardines formed a company called Safe and Sound as a base to develop Sorbothane equestrian products.

Jr. was then Vice President of Marketing for H-K. McQuillan presented to H-K a letter of intent regarding their prospective business relationship. The letter of intent, signed by Sr., President of H-K, anticipated a definitive agreement granting Safe and Sound the exclusive right to purchase Sorbothane for resale as equestrian products.

In the summer of 1981, McQuillan resigned from Safe and Sound. She and her husband Larry formed a company called Sorboturf for their Sorbothane development. While McQuillan was developing a Sorbothane horseshoe pad, H-K was attempting to develop a national market for other Sorbothane products, including athletic shoe inserts and medical products.

Sr., along with H-K's marketing manager Laurene Heinsohn, decided to use regional distributors. In December 1982 Heinsohn left S.I. and was employed by Spectrum Sports.

McQuillan and her company Sorboturf were selected as the distributor for the southwestern United States. Jr., at the time Vice President of Marketing at H-K, decided that he too wanted to be a distributor. In addition to Sorboturf and Jr.'s company Spectrum Sports, the other distributors were Myron McCone (Shirley McQuillan's father) and his company RHR, Inc., Triad Research (Marty Vogel), and Absorbotech (Arnie Lund). The distributorships were established by early August, 1981.

On September 15, 1981, H-K sent to McQuillan a letter enclosing a price list. Sorboturf thereafter began buying and distributing Sorbothane products. Shortly after Sorboturf began distributing Sorbothane in the fall of 1981, McQuillan received from H-K a draft contract. H-K's proposed contract suggested that either party could terminate upon sixty days notice. McQuillan protested that she would not invest substantial time and money in developing the Sorbothane market if H-K could terminate her distributorship without cause.

H-K required its regional distributors to agree to fix wholesale and retail prices. Thus, McQuillan and each distributor were required to agree to sell to retailers at a fixed markup and further, to "police" the retailers to prevent discounting at the retail level. Heinsohn told the distributors that if they learned of retailers discounting the product, the offending retailer was to be cut-off. Heinsohn warned the distributors that violating the pricing agreements would jeopardize their distributorships.

In January 1982, there was a meeting in Jr.'s office involving Sr., Jr., Heinsohn and John Burne. Burne, through his company IEM, had marketed Sorbothane in England. In late 1981, Burne had proposed becoming the national Sorbothane medical distributor in the United States. Heinsohn objected, pointing out that H-K had already committed the medical market to the regional distributors. By the time of the January, 1982 meeting, Sr. had appointed IEM as the national medical distributor.

McQuillan had always paid her H-K invoices within thirty days. In addition to meeting her obligations as an athletic distributor, McQuillan had continued to work diligently with Dr. Hiles to develop a marketable Sorbothane horseshoe pad.

In April 1982, Sr. called a meeting in Chicago with McQuillan, her father, and Heinsohn. Sr. told Heinsohn that the purpose of the meeting was to move McQuillan out of the athletic market by making her right to distribute equestrian products conditional upon the relinquishment of her athletic distributorship.

In May, 1982, McQuillan attended a meeting at the S.I. facility in Ohio. Attendees included Sr., Jr., Heinsohn, Dr. Hiles and John Forsyth, a Sorbo, Inc. engineer. As of May 1982, the Sorbothane business had been moved by BTR, Inc. from H-K to Sorbo, Inc. Heinsohn moved to Sorbo, Inc. as its marketing manager.

After the meeting, Heinsohn made it clear to McQuillan that McQuillan had to sell her athletic distributorship to Jr. to keep the equestrian distributorship rights. Heinsohn scheduled a meeting that afternoon with Jr. for McQuillan to discuss such a "sale." Jr. informed McQuillan at that meeting that she would either come to an agreement with him or she would be "looking for work."

In June 1982, S.I. announced that Intermark would be the new national distributor for the "box shoe trade;" shoe stores that carry a variety of shoes as opposed to simply athletic shoes. Heinsohn testified that the box shoe trade had been part of McQuillan's market.

In late summer or fall of 1982, Heinsohn became aware for the first time that S.I. had involved Dr. Kent Vasko of Sterivet, Inc. in the horseshoe pad project. At the conclusion of a distributor's meeting in the fall of 1982, Sr. casually informed McQuillan that "... we have appointed Sterivet as the national equestrian distributor, and you are no longer involved in equestrian products."

In November, 1982, Sr. presented his "last agreement" for an athletic distributorship with Sorboturf. This one, however, clearly permitted termination without cause. In response, McQuillan submitted her own contract that permitted termination only for cause.

In December 1982, Heinsohn, at Sr.'s direction, instructed Dr. Hiles and Forsyth to deliver test documentation and prototypes for the McQuillan horseshoe pad. In January 1983, S.I. began marketing the horseshoe pad. According to Dr. Hiles, the pad marketed by S.I. was indistinguishable from the pad he and McQuillan had developed.

Although unwilling to sign McQuillan's proposed contract for Sorboturf's athletic distributorship, S.I. did not sever the relationship and continued to treat Sorboturf as a distributor.

On August 1, 1983, with no previous warning or explanation, S.I. notified McQuillan in writing that S.I. "would no longer accept Sorboturf's orders." In August, 1983, McQuillan's father was also terminated as a distributor without explanation, warning or justification. Less than one month later, Sorboturf's customers received notice that Jr.'s company was now the national distributor.

After receiving the August 1, 1983, letter from S.I., McQuillan contacted Dr. Hiles about the possibility of continuing her distributorship using British manufactured Sorbothane. However, Dr. Hiles informed her that Leyland, the other manufacturer of Sorbothane, was unwilling to sell in the United States. Having no alternative source of Sorbothane, McQuillan's distributorship was destroyed.

Birmingham and Leyland, although not restricted from making sales in the United States under its license agreement, had entered into an agreement with H-K that it would not sell in the United States and Canada and H-K, in turn, would not sell in Europe.

There are two groups of defendants/appellants/cross-appellees. They are:

(1) Sorbothane, Inc. [S.I.], Hamilton-Kent, Inc. [H-K], BTR, Inc. and Sr. [S.I. Group]; and

(2) Spectrum Sports, Inc. and Jr. [Spectrum Group].

DISCUSSION

THE SHERMAN ACT SECTION 1 CLAIM

McQuillan claimed an agreement between S.I. and its competitor, Leyland, to allocate the world market for Sorbothane products. The Courts treat horizontal market division agreements as per se violations of the Sherman Act. In *United States v. Topco Associates, Inc.,* 405 U.S. 596, 608, 92 S.Ct. 1126, 1134 (1972). The Supreme Court said:

"It is only after considerable experience with certain business relationships that courts classify them as per se violations of the Sherman Act. . . . One of the classic examples of a per se violation of Section 1 is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition. Such concerted action is usually termed a 'horizontal' restraint, in contra-distinction to combinations of persons at different levels of the market structure, e.g. manufacturers and distributors, which are termed 'vertical' restraints. This court has reiterated time and time again that 'horizontal territorial limitations . . . are naked restraints of trade with no purpose except stifling of competition.' [Citations omitted.] Such limitations are per se violations of the Sherman Act."

An action under Section 1 of the Sherman Act requires proof of a contract, combination, or conspiracy in restraint of trade. 15 U.S.C. Section 1. The essence of a Section 1 claim is concerted action. *Wilcox v. First Interstate Bank of Oregon, N.A.*, 815 F.2d 522, 525 (9th Cir. 1987). Heinsohn and Hiles testified that it was their understanding that there was an agreement by the two companies whereby Leyland would not export any Sorbo products into the United States and S.I. would not export products to Europe. Around October 1982 a United States company called Frelan U.S. was interested in obtaining Sorbothane products. Leyland informed Frelen U.S. that they would supply the materials or parts. This prompted a telex from Heinsohn on behalf of S.I. to Leyland informing them that "the import of finished Sorbo parts to a U.S. customer is in direct opposition to a harmonious marketing relationship between our two companies." This resulted in a telex from a Leyland official to S.I. apologizing for any problems which may have been caused and asking that he be advised if we, Leyland, are guilty of any further infringements at any time.

S.I.'s argument is that Leyland and S.I. are sister corporations and they are incapable of conspiring under the holding of *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 772, 104 S.Ct. 2731, 2741-42 (1984). In *Copperweld* the Supreme Court held as a matter of law that a parent and its wholly-owned subsidiary are not distinct entities for the purpose of establishing the plurality requirement under a Section 1 claim. Since *Copperweld*, some circuits have held that not only wholly-owned subsidiaries and their parents are incapable of conspiring, but that sister subsidiaries are the same entity for purposes of an antitrust conspiracy under Section 1 and thereby do not satisfy the plurality element. The Ninth Circuit declined to reach this question as between sister corporations in *Wilcox v. First Interstate Bank of Oregon, N.A., supra.* S.I. contends that the Court should have directed a verdict or granted JNOV because the jury found that neither Spectrum nor Jr. conspired under the antitrust laws, therefore the only possible conspirators are Leyland and S.I. and they are incapable of conspiring as a matter of law under *Copperweld*.

The District Court denied the Motion for a Directed Verdict and JNOV. While the evidence did show that S.I. and Leyland were licensed by a BTR family member and that they are corporations existing under a family of companies controlled by BTR, PLC, a U.K. Holding Company, the evidence was to the effect that both corporations operated autonomously. This was true of all of the corporations that were in the BTR family. John

Cahill was a defense witness for S.I. He testified that there are about 650 units under the BTR family throughout the world. They are engaged in producing many different types of products and operate as independent units entirely autonomously. Hiles testified that some of the companies in the BTR family are strictly holding companies and some are operating companies. The operating companies operate as individual companies.

The Supreme Court has held that "common ownership and control does not liberate (two separately incorporated subsidiaries within the same corporate family) from the impact of the antitrust laws ... especially ... where (they) hold themselves out as competitors." *Keifer-Stewart Co. v. Joseph E. Seagrams and Sons, Inc.,* 340 U.S. 211, 215, 71 S.Ct. 259, 261 (1951). The Ninth Circuit has held that "to conspire within the meaning of the Sherman Act, corporate entities within a single organization must be sufficiently independent of each other for the concerted action to raise antitrust concerns ... to determine whether corporate entities are separate enough to be capable of a conspiracy, a Court must examine the particular facts of the case before it ... if the intra-enterprise entities hold themselves out as competitors, the rule that they can not avoid Sherman Act liability by hiding behind a common ownership and control is "especially applicable." *Las Vegas Sun, Inc. v. Summa Corp.,* 610 F.2d 614, 617 (9th Cir. 1979). The District Court gave an instruction along the lines of *Las Vegas Sun, Inc.* The jury made a factual determination against S.I. on this issue.

A Motion for JNOV focuses on the sufficiency of the evidence. The standard for granting a JNOV is the same as for a directed verdict. *Fountila v. Carter,* 571 F.2d

487, 489-90 (9th Cir. 1978). The Court considers "all of the evidence in the light most favorable to the non-moving party and draw(s) all reasonable inferences in favor of that party." *Twin City Fire Ins. v. Philadelphia Life Ins. Co.,* 795 F.2d 1417, 1423 (9th Cir. 1986). The Court properly denied S.I.'s Motions for JNOV and a Directed Verdict.

TESTIMONY OF McQUILLAN EXPERT

The District Court's evidentiary rulings will be upheld on appeal unless the Court abused its discretion, *United States v. Merrill,* 746 F.2d 458, 465 (9th Cir. 1984), *cert. denied,* 469 U.S. 1165, 105 S.Ct. 926 (1985), or committed "manifest error." *United States v. Marabelles,* 724 F.2d 1374, 1381 (9th Cir. 1984). There is abuse of discretion if the lower Court decision is clearly erroneous or is based on incorrect legal standards. *Fjelstad v. American Honda Motor Co.,* 762 F.2d 1334, 1337 (9th Cir. 1985). McQuillan elected to prove damages by showing a "loss of business value." The method of proving "loss of business value" was addressed by the Ninth Circuit in *Simpson v. Union Oil Company of California,* 411 F.2d 897 (9th Cir. 1969) as follows:

> "The issues should have been, what was the value of the business, what money did appellant have invested in it, what was its net income after deducting a fair return on capital and a fair compensation to appellant for his work, what were the prospects of continual renewals of the lease, and finally, if illegal restraints were removed, what were the prospects of additional profits from the business as it became better established. These are the factors that a willing buyer would consider in determining fair market value of the business . . ." 411 F.2d at 910.

James H. West, McQuillan's expert, testified as follows: He is a C.P.A., having been certified in 1952. He estimates that he has testified in Court as an expert on at least thirty occasions. He has experience in valuations of businesses since the early 1960's. This was in connection with valuing businesses being acquired or sold by clients, or on matters involving estate taxes in valuation of the business and estate plan, and after death valuations. He has also participated im matters involving disputes between parties on business-type valuations. He performed a valuation of Sorboturf Enterprises (McQuillan's business) as of the date of termination which was August 1, 1983. He explained that he considered sales for the period of existence of the business and made a forecast of sales for a future period. As he explained, in the case of a business that has a short history but has a growing trend in terms of its sales volume, it is usually necessary to utilize a forecast method to determine what the longer-term earnings would be in that, in evaluation, the buyer is essentially buying an income, buying a share of earnings. It is thus necessary to forecast the possible earnings in the future. He also considered expenses and costs, both past and the future. He determined a value for the athletic and equestrian distributorships. He then reached a total value for the business and reduced it to a present value. In valuing the business as of August 1, 1983, he did not consider information available after that date. He correctly stated that the valuation has to be based upon data that is available at the time of termination. S.I. and Spectrum argue that his method of valuation was inconsistent with the manner in which "loss of business value" must be proven and was without foundation and therefore speculative. The testimony of West had been admitted subject to a Motion to Strike. The Court denied the Motion to Strike.

Mr. West's testimony was not inconsistent with the formula set forth by the Ninth Circuit in *Simpson, supra.* Most of the objections of S.I. and Spectrum go to the weight of the testimony. The Court did not abuse its discretion or commit manifest error in admitting the testimony of Mr. West and denying the Motion to Strike.

MOTION IN LIMINE

The trial court granted a Motion in Limine by McQuillan and as a result S.I. and Spectrum were not permitted to introduce evidence of events occurring after August 1, 1983, as they related to the antitrust, RICO, and damage claims.

This ruling is appealed only by S.I., who maintains that post-termination evidence was relevant to show a lack of monopoly power, bears directly on the issue of specific intent to monopolize, and can also demonstrate the absence of injury in fact.

Evidentiary rulings are reviewed for abuse of discretion. The authorities cited by S.I. do not stand for the proposition that post-termination activity must always be admitted. The relevant time-period for demonstrated monopoly power is the period in which S.I. and Spectrum were engaging in the acts complained of by McQuillan, i.e. from the time she went into business until she was forced to close. The same is true of evidence of a declining marketshare in the relevant market and inability to exclude competitors. Evidence of the existence or non-existence of these elements after the termination date may be admissible depending on the circumstances of each case. It is important to note that the kind of damages which the plaintiff is claiming may effect whether or not such post-termination evidence is admitted. S.I. cites *Greyhound Computer Corporation v. IBM Corp.,* 559 F.2d 488, 496, n. 18 (9th Cir. 1977) in support of admissibility of post-termination activity. In that case the plaintiff was suing for loss of business and future profits. Future profits would be affected by post-termination activity. McQuillan sued for the "loss of business value." The only material evidence relates to the value of her business at the time that she was terminated by the defendants.

S.I. also contends that the Court's ruling denied them the opportunity to prove that there was no "threat of continuing activity" as required by RICO. S.I. cites *Sedima v. Imrex, Inc.,* 473 U.S. 479, 105 S.Ct. 3275 (1985) as authority. In *Sedima* the Court said that there must be at least two acts and some evidence of a threat of continuing activity in order to find a pattern of racketeering activity. This language does not mean that post-termination activity is necessarily admissible in every case.

The trial court did not abuse its discretion in granting the Motion in Limine.

SHERMAN ACT—SECTION 2

(THE ATTEMPT TO MONOPOLIZE CLAIM)

The jury found against S.I. and Spectrum on the violation of Section 2 of the Sherman Act—monopolizing, attempting to monopolize, and conspiring to monopolize. The verdict form did not break down each of the claims, therefore, if the evidence is adequate to sustain any of the three theories, the verdict must be sustained. The Court instructed the jury that the plaintiff claimed that the defendants violated the Federal antitrust laws by monopolizing or attempting to monopolize the athletic shoe market insert, the polymer athletic shoe insert submarket, or the Sorbothane athletic shoe insert market. The jury was instructed that in order to prove the claim of attempted monopoly, the plaintiff must prove each of the following elements by a preponderance of the evidence:

1. That the defendants had a specific intent to achieve monopoly power in the relevant market;

2. That the defendants engaged in exclusionary or restricted conduct in furtherance of its specific intent;

3. That there was a dangerous probability that defendants could sooner or later achieve its goal of monopoly power in the relevant market;

4. That the defendants' conduct occurred in or affected interstate commerce; and,

5. That the plaintiff was injured in the business or property by the defendants exclusionary or restrictive conduct.

Spectrum claims that the District Court erred in not directing a verdict or entering JNOV on the Sherman Section 2 claims because the evidence was legally insufficient to sustain the verdict. On the "attempt to monopolize" claim specifically, Spectrum argues that the record contains no evidence that Spectrum intended to destroy competition or that they committed any anti-competitive conduct directed towards that purpose.

Spectrum also contends that the Court erred in not directing a verdict or granting JNOV on the monopolization claims because there was no evidence that they had monopoly power, committed any predatory acts, or that any antitrust injury resulted from their conduct.

The Ninth Circuit, in a series of cases beginning with *Lessig v. Tidewater Oil Company,* 327 F.2d 459 (9th Cir.), *cert. denied,* 377 U.S. 993 (1964), has held that sufficiently unfair or predatory conduct alone may satisfy both the specific intent and the dangerous probability elements of the offense, without any proof of relevant market or the defendant's marketpower. 327 F.2d at 474-75. Some of the opinions, including *Lessig,* dispensed with dangerous probability of success as an element of the offense since it may be inferred from proof of specific intent, which in turn may be inferred from conduct. In *Lessig,* Tidewater entered into a service station lease and dealer contract with Lessig and cancelled it later. The theory of Lessig's case was that Tidewater violated the antitrust laws by fixing the prices at which its dealers resold gasoline and by imposing upon its dealers a system of exclusive dealing and tieing arrangements in the purchase of petroleum products, tires, batteries, and automotive accessories which were sold or sponsored by Tidewater. The trial court withdrew from the jury the charge that Tidewater attempted to monopolize in violation of Section 2 of the Sherman Act. In reversing the trial court the court said:

> "The essence of monopoly is power to control prices and exclude competition and what we have said demonstrates that there was evidence that Tidewater possessed the specific intent to acquire and exercise such power with respect to a part of commerce.
>
> Tidewater argues that attempt to monopolize is established only if there is proof of 'dangerous probability of success, i.e., that if unchecked, monopolization will result'; that this requires an evaluation of Tidewater's power in the relevant

market; that the evidence on this issue was inadequate, and such evidence as there was indicated a lack of any possibility that Tidewater could monopolize the sale of petroleum products or tires, batteries, and automotive accessories. (TBA)

We reject the premise that probability of actual monopolization is an essential element of proof of attempt to monopolize. Of course, such a probability may be relevant circumstantial evidence of intent, but the specific intent itself is the only evidence of dangerous probabilty the statute requires—perhaps on the not unreasonable assumption that the actor is better able than others to judge the practical possibility of achieving his illegal objective.

When the charge is attempt (or conspiracy) to monopolize, rather than monopolization, the relevant market is 'not an issue.' (Citations omitted) Section 2 prohibits attempts to monopolize 'any part' of commerce, and a dominant position in the business of distributing petroleum products and TBA was not necessarily prerequisite to ability to attempt to monopolize an appreciable segment of interstate sales in such products. If the jury found that Tidewater intended to fix the price at which 2,700 independent service station operators resold gasoline and to exclude other suppliers of petroleum products and sponsored TBA items from competing for the patronage of those operators, and took steps to accomplish that purpose, it could properly conclude that Tidewater attempted to monopolize a part of interstate commerce in violation of Section 2 of the Sherman Act." *Id.*

Later cases in the Ninth Circuit have followed *Lessig* and refined its language. In *California Computer Products, Inc. v. International Business Machines, Corp.*, 613 F.2d 727, 737 (9th Cir. 1979), the court said that evidence of marketpower is not an "independent" element of an attempt claim, citing *Hallmark Industry v. Reynolds Metals Co.*, 499 F.2d 8, 12, n.3 (9th Cir. 1973). In *Blair Foods, Inc. v. Ranchers Cotton Oil*, 610 F.2d 665, 669-70 (9th Cir. 1980) the court recognized that while evidence of marketpower is not vital, it may be relevant to suggest the existence of specific intent. It stated: "The real issue in this type of case is one of specific intent to monopolize, and we find nothing in *Lessig* which excludes consideration of marketpower as one of the circumstances to be considered in determining whether such intent exists."

We are satisfied that if evidence of unfair or predatory conduct is presented, it may satisfy both the specific intent and dangerous probability elements of the offense, without any proof of relevant market or the defendant's marketpower. If there is not sufficient evidence of unfair or predatory conduct, then the plaintiff will be required to show proof of relevant market or the defendant's marketpower. In *Gough v. Rossmoor Corp.*, 585 F.2d 381 (9th Cir. 1978), *cert. denied*, 440 U.S. 936, 99 S.Ct. 1280, 59 L.Ed.2d 494 (1979), an action claiming attempt to monopolize was brought against a retirement community newspaper that refused to accept carpet advertisements from dealers outside the retirement community. Over the plaintiff's insistence that proof of relevant market was unnecessary in their attempt claim, the Ninth Circuit held that "in the absence of proof of relevant market and marketpower, the plaintiff must prove either predatory conduct or a per se violation of Section 1 to prove an attempt to monopolize. . . .". 585 F.2d at 390.

The District Court instructed the jury that "if the plaintiff has shown that the defendant engaged in predatory conduct, you may infer from that evidence the specific intent and the dangerous probability element of the offense without any proof of relevant market or the defendant's marketing power." There was no objection to this instruction.

The record shows that Spectrum, acting through Jr., engaged in the following conduct:

When McQuillan became interested in Sorbothane she spent a day at H-K. At this time Jr. was Vice President of Marketing for H-K. Jr. informed her that they, H-K, had not previously considered equestrian uses for Sorbothane. At this time McQuillan presented her ideas to Jr. and other H-K personnel concerning the making of horseshoe pads or equestrian products from Sorbothane. She was also introduced to Sr. on that trip.

Jr. left H-K and decided to become a distributor for Sorbothane. Up to this time he had been with H-K and was aware of McQuillan's efforts to develop an equestrian product. Jr., as Vice President of Marketing at H-K, had been involved in establishing the regional distributor concept and the selection of the individual distributors. There is evidence that Jr. was an enthusiastic enforcer of H-K's price fixing agreements. He boasted to Heinsohn that he had his own method of policing his retailers—he would slow down their shipments if they sold below a suggested retail list price. Jr. confided to Heinsohn that he wanted to be the national Sorbothane distributor from the beginning. He and Sr. were concerned that they would be criticized for violating BTR's anti-nepotism policy if Jr. were immediately given a national distributorship.

In January 1982 there was a meeting in Jr.'s office involving Sr., Jr., Heinsohn and John Burne. Burne, through his company IEM, marketed Sorbothane in England. He was interested in becoming the national Sorbothane medical distributor in the United States over the objections of Heinsohn, who felt the distributors had been promised the medical market. IEM was appointed national medical distributor of Sorbothane products. In order to have effective control of resale prices, it would be important to have only one person to deal with on athletic products. The result of a January 1982 meeting was an agreement that Jr. would be H-K's new national athletic distributor. In the meantime they had the problem of getting rid of the regional distributors. Jr. attempted to buy McQuillan's business and told her that if she did not agree to sell to him, she would be "looking for work." This was shortly after McQuillan was told that she would have to sell her athletic distributorship to Jr. in order to keep the equestrian distributorship rights. Sorbo, Inc., at Jr.'s direction, placed a hold on one of McQuillan's shipments of products. After her termination, Sr. gave Jr. McQuillan's customer list without consulting with her.

There is sufficient evidence from which the jury could conclude that the S.I. Group and Spectrum Group engaged in unfair or predatory conduct and thus inferred that they had the specific intent and the dangerous probability of success and, therefore, McQuillan did not have to prove relevant market or the defendant's marketing power.

The District Court should grant a Motion for Directed Verdict only if, considering all the evidence and all reasonable inferences that can be drawn from the evidence in a light most favorable to the non-moving party, reasonable men could not arrive at a verdict in favor of the non-mover. Applying this standard, the trial court was correct in refusing to direct a verdict in defendants favor. There is sufficient evidence in the record to sustain the attempt to monopolize claim.

PROOF OF ANTITRUST INJURY TO ESTABLISH SECTION 2 CLAIM

S.I. and Spectrum complain that the jury instructions did not require McQuillan to prove an antitrust injury to establish the Section 2 claim. They also argue that the Court should have granted their Motion for JNOV because the plaintiff offered no evidence to prove that their conduct negatively effected competition. Horizontal market division agreements (Section 1 claim) and attempts to monopolize (Section 2 claim) are treated as per se violations of the Sherman Act. Injury to competition is presumed to follow from the conduct proscribed by these Sections. *United States v. Topco, supra; Walker v. U-Haul Co. of Mississippi*, 747 F.2d 1011 (5th Cir. 1984). The jury was properly instructed on the antitrust violations and there was sufficient evidence in the record to show that McQuillan was injured as a result of the defendants' conduct.

THE ALTER EGO INSTRUCTION

The jury found that H-K was the agent or alter ego of BTR, Inc. S.I. argues that the Court improperly instructed the jury regarding alter ego because it failed to properly explain that the absence of the corporate form causing the inequitable result must:

1. amount to bad faith;

2. be the product of the acts or omissions of the entity against whom liability is sought—here BTR; and,

3. proximately harm or prove to be unjust to McQuillan.

Orloff v. Allman, 819 F.2d 904 (9th Cir. 1987). S.I. also argues that the party against whom the alter ego doctrine is invoked must have been an actor in the course of conduct constituting the "abuse of the corporate privilege".

The jury instructions given by the Court were consistent with the cases cited by S.I. in support of its arguments.

The jury was instructed that a corporation is a separate legal entity. The jury was further instructed that the corporate form can be disregarded where:

> [T]here is such a unity of interest and ownership that the separate personalities of the parent corporation and the subsidiary no longer exist; and . . . an inequitable result would follow if the acts are treated as those of the subsidiary corporation alone.

The jury was specifically told to consider:

> One, whether the parent corporation is the principal stockholder of the subsidiary corporation; two, whether the parent corporation uses the subsidiary corporation as its marketing or distributing arm; three, whether the officers and directors of the two corporations are the same; four, whether the parent corporation holds the other corporation out to the public as a mere division or agent; five, whether the parent corporation has sufficient involvement with the day-to-day operation of the subsidiary corporation; six, whether the corporations have conducted separate board meetings and maintained separate minutes of board meetings; and whether an inequitable result will occur if the conduct is not attributable to both defendants.

Finally, the jury was cautioned:

> However, it is not sufficient in this regard for the plaintiff to show merely that the defendant BTR, Inc., owns all the stock in the defendant Sorbothane, Inc., and Hamilton Kent Manufacturing Company, or that the officers or directors of Sorbothane, Inc., and Hamilton Kent Manufacturing Company are the same as those of the defendant BTR. Factors which may be relevant in showing the domination or control include proof that there was a commingling of assets, that there was representations to the plaintiff that BTR, Inc. was liable for the debts of the defendants Sorbothane, Inc., and Hamilton Kent Manufacturing Company; that the defendant Sorbothane Inc., and Hamilton Kent Manufacturing Company used the same employees and facilities as the defendant BTR, Inc.; and that the defendant Sorbothane, Inc., and Hamilton Kent Manufacturing Company were mere shells or conduits for business which was fed directly to BTR, Inc.
>
> Each of these factors must be balanced and weighed by you to see if, in the totality of the evidence, the preponderance proves any lack of independent existence or control by the defendant Sorbothane, Inc., and Hamilton Kent Manufacturing.

These jury instructions were consistent with *Orloff, supra,* which states:

> The California alter ego doctrine . . . applies where:
>
> > (1) such a unity of interest and ownership exists that the personalities of the corporation and individual are no longer separate, and

> (2) an inequitable result will follow if the acts [giving rise to liability] are treated as those of the corporation alone.

819 F.2d at 908-09, citing *RRX Industries, Inc. v. Lab-Con, Inc.*, 772 F.2d 543, 545 (9th Cir. 1985) and *Automotriz Del Golfo De California, S.A. De C.V. v. Resnick*, 47 Cal.2d 792, 797, 306 P.2d 1, 4 (1957); *see also, Firstmark Capital Corp. v. Hempel Financial Corp.*, 859 F.2d 92, 94 (9th Cir. 1988).

S.I. argues that BTR must have been guilty of "wrongdoing" for the alter ego doctrine to apply. In *Firstmark*, this Court stated

> "A California Court of Appeal stated the [alter ego liability] rule thus, 'The fraud or inequity sought to be eliminated must be that of the party against whom the alter ego doctrine is invoked, and "such party must have been an actor in the course of conduct constituting the 'abuse of the corporate privilege' . . .." ' *American Home Insurance Co. v. Travelers Indemnity Co.*, 122 Cal.App.3d 951, [966], 175 Cal.Rptr. 826, 834 (1981) (citations omitted)."

Firstmark Capital Corp. v. Hempel Financial Corp., *supra*, 859 F.2d at 94.

The jury instructions here were consistent with *Firstmark*. BTR, through Cahill, was an actor in the course of conduct constituting the abuse of the corporate privilege. *Firstmark* does not suggest that BTR had to have an evil motive or be independently liable for the wrongdoing. Indeed, alter ego liability is unnecessary if a party is independently liable.

S.I. contends that BTR merely engaged in the "normal supervisory actions" of a parent corporation. The jury, properly instructed on the relevant factors, resolved this factual issue against BTR and there was substantial evidence to support their conclusion.

ATTORNEYS FEES

The parties agree that the standard of review is abuse of discretion or clear error of law. What constitutes an appropriate award of attorneys fees and any enhancement thereof for payment delay or risk of non-payment are matters within the trial court's discretion.

The trial court denied McQuillan's request for fee enhancement based on delay and risk of non-payment and also rejected a portion of the alleged lodestar. McQuillan appeals only from the denial of enhancement. McQuillan sought enhancements totalling $574,042.00 for the delay in payment and for the risk of non-payment.

McQuillan argues that *Missouri v. Jenkins by Agyei*, ______ U.S. _____, 109 S.Ct. 2463, 105 L.Ed.2d 229 (1989) holds that reasonable attorneys fees, in cases involving contingent fee agreements, *must* include compensation for delay in payment and may include enhancement for the risk of non-payment. This is an incorrect statement of the holding in that case and counsel conceded as much in oral argument. The Court held that an enhancement for delay in payment is "an appropriate factor in the determination of what constitutes a reasonable attorney's fee . . ." 109 S.Ct. at 2469. It did not hold that it was mandatory.

The District Court pointed out that the Court in *Pennsylvania v. Delaware Valley Citizens' Council*, 478 U.S. 546, 565, 106 S.Ct. 3088, 3098, 92 L.Ed.2d 439 (1986) noted the "strong presumption" that the lodestar amount represents a reasonable fee, and that enhancements are to be given only in "rare" or "exceptional" circumstances. As pointed out by S.I. and

Spectrum, the trial court gave a "de facto" enhancement by utilizing the "average" hourly rate advanced by McQuillan in support of the fee application. This "average" was in fact a weighted mean calculated by dividing the total billed by the total hours. This adopted a higher billing rate set at current rates which is one of the common methods of enhancement for delay. *Jenkins,* 109 S.Ct. at 2469.

The Court explained its reasoning in denying enhancement and its decision is affirmed. There was no abuse of discretion.

THE DAMAGE AWARD

The jury returned the same damage award, $1,743,000.00, against all defendants on each Count on which they were found liable. Spectrum and Jr. argue that they were not found liable on some of the claims and certain claims were not even asserted against them, therefore, the Court erred in not granting a new trial due to the inconsistent damage awards. S.I. puts forth the same argument adding that there was obvious jury confusion and misunderstanding, thereby requiring a new trial.

The Seventh Amendment right to a jury trial requires validation of verdicts if at all possible. *Pierce v. Southern Pacific Transportation Company,* 823 F.2d 1366, 1370 (9th Cir. 1987). The Court has the duty to reconcile the jury's special verdict responses on any reasonable theory consistent with the evidence. *Pierce, supra,* at 1370, *Ortiz v. Bank of America National Trust and Savings,* 852 F.2d 383 (9th Cir. 1988), *In Re Hawaii Federal Asbestos Cases,* 871 F.2d 891, 894 (9th Cir. 1989), citing *Gallick v. Baltimore & O. R.R.,* 83 S.Ct. 659, 666-67, 372 U.S. 108, 119-22 (1963). The verdict against

S.I. Group on the Sherman Act Section 1 claim is supported by the evidence as has been set forth hereinbefore. The verdict against S.I. Group and Spectrum Group on the attempt to monopolize claim is also supported by the evidence. The Court need not address the arguments that the damages awarded on the other verdicts are not supported by the evidence.

OTHER ISSUES RAISED BY S.I. GROUP AND SPECTRUM GROUP

S.I. Group and Spectrum Group raise many other issues relating to the pendent state claims and the RICO claims. In view of the foregoing, it is not necessary for the Court to address any of those issues.

AFFIRMED.

JUDGMENT OF THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA

(Filed August 10, 1988;
Entered August 12, 1988)

Case No. 84-1585-E(CM)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SHIRLEY McQUILLAN and LARRY McQUILLAN, individually and dba SORBOTURF ENTERPRISES,
Plaintiffs,

vs.

SORBOTHANE, INC. (aka SORBO, INC.), HAMILTON-KENT MANUFACTURING COMPANY, INC., BTR, INC., SPECTRUM SPORTS, INC., KENNETH M. LEIGHTON and KENNETH B. LEIGHTON, JR.,
Defendants.

JUDGMENT

This action came on regularly for trial before the Court and a jury, the Honorable William B. Enright, District Judge, presiding, and the Court having instructed the jury to find a special verdict, and the jury having found such verdict,

IT IS ORDERED, ADJUDGED AND DECREED that:

1. Judgment shall enter for plaintiffs SHIRLEY and LARRY McQUILLAN, individually and dba SORBOTURF ENTERPRISES, and against defendants BTR, INC., HAMILTON-KENT MANUFACTURING COMPANY, INC., SORBOTHANE, INC. (aka SORBO, INC.) and KENNETH M. LEIGHTON on the claims for fraud, breach of an oral contract, bad faith denial of the existence of an oral contract, violation of section 17200 of the California Business and Professions Code—unfair competition, interference with prospective business advantage, conversion, violation of section 1 of the Sherman Act, Title 15 U.S. Code, violation of section 2 of the Sherman Act, Title 15 U.S. Code, violation of section 16600 or 16700 of the California Business and Professions Code—Cartwright Act, and violation of section 1962(a), (b), (c) and (d), Title 18 U.S. Code—the Racketeering Act;

2. Judgment shall enter for the plaintiffs SHIRLEY and LARRY McQUILLLAN, individually and dba SORBOTURF ENTERPRISES, and against defendants SPECTRUM SPORTS, INC. and KENNETH B. LEIGHTON on the claims for violation of section 17200 of the California Business and Professions Code—unfair competition, interference with prospective business advantage, violation of section 2 of the Sherman Act, Title 15 U.S. Code, and violation of section 1962(b), (c) and (d), Title 18 U.S. Code—the Racketeering Act; and

3. Judgment shall enter for defendants SPECTRUM SPORTS, INC. and KENNETH B. LEIGHTON and against plaintiffs SHIRLEY and LARRY McQUILLAN, individually and dba SORBOTURF ENTERPRISES, on the claims for fraud, violation of section 1 of the Sherman Act, Title 15 U.S. Code, violation of section 16600 or 16700 of the

California Business and Professions Code—the Cartwright Act, and violation of section 1962(a), Title 18 U.S. Code—the Racketeering Act;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiffs SHIRLEY and LARRY McQUILLAN, individually and dba SORBOTURF ENTERPRISES, have and recover from defendants BTR, INC., HAMILTON-KENT MANUFACTURING COMPANY, INC., SORBOTHANE, INC. (aka SORBO, INC.), SPECTRUM SPORTS, INC., KENNETH M. LEIGHTON and KENNETH B. LEIGHTON, jointly and severally, the sum of One Million Seven Hundred and Forty-Three Thousand Dollars ($1,743,000), said sum to be trebled to the sum of Five Million Two Hundred Twenty-Nine Thousand Dollars ($5,229,000), together with ________ Dollars ($—0—), as prejudgment interest, together with ________ Dollars ($912,032.50) as attorneys' fees, together with ________ Dollars ($32,828.83) as all costs of suit herein, together with interest on all such sums at a rate of 7.95 percent (% 7.95) per annum from the date hereof.

DATED: 8/9, 1988

/s/ William B. Enright
United States District Judge

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AMENDING MEMORANDUM DECISION AND DENYING PETITION FOR REHEARING

(Filed April 1, 1991)

No. 89-55326
89-55329
89-55332
(Consolidated)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SHIRLEY McQUILLAN, *et al.*,
Plaintiffs/Appellees/
Cross-Appellants,

vs.

SORBOTHANE, INC., *et al.*,
Defendants/Appellants/
Cross-Appellees.

ORDER

BEFORE: TANG and O'SCANNLAIN, *Circuit Judges*, and MARQUEZ, *District Judge**

The panel has voted to amend its July 3, 1990 Memorandum Decison as follows:

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* Honorable Alfredo C. Marquez, United States District Judge for the District of Arizona, sitting by designation.

At page 22, the final sentence of the first full paragraph reading: "There was no objection to this instruction." shall be deleted.

With the Memorandum Decision so amended, the panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, 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 rehearing en banc is rejected.

IT IS SO ORDERED.