No. 84-510

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ASPEN SKIING COMPANY,
Petitioner,

v.

ASPEN HIGHLANDS SKIING CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF FOR PETITIONER

EDWARD BENNETT WILLIAMS
HAROLD UNGAR
(Counsel of Record)
RICHARD M. COOPER
MARK S. LEVINSTEIN
MANLEY W. ROBERTS

WILLIAMS & CONNOLLY
839 17th Street, N.W.
(202) 331-5000
Washington, D.C. 20006

Attorneys for Petitioner

Of Counsel:

DAVID G. PALMER
WILLIAM W. MAYWHORT
Denver, Colorado

March 19, 1985

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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Respondent, Aspen Highlands Skiing Corporation ("Highlands"), in its brief, has raised several issues that are irrelevant, has made a number of factual assertions that need correction, and has made several legal assertions that warrant response.

I. HIGHLANDS' IRRELEVANT NEW ISSUES.

A. Aspen Skiing Co.'s Acquisitions.

Highlands refers to Aspen Skiing Co.'s ("Ski Co.'s") development of multi-mountain capacity as having occurred through two acquisitions—of the Buttermilk operation in 1963-64 (Tr. 158) and of the Snowmass operation in 1967 (Ex. 36(c), Tr. 180).

Resp. B. 4-5, 26-27.[1] In both cases, Ski Co. itself developed the destination skier facilities, and thus did not merely acquire established operations. Moreover, the acquisitions approximately twenty years ago, and ten years before the events in issue, as defined by Highlands (Tr. 206), are irrelevant to the present antitrust claim.

First, acquisitions are not in general unlawful, *e.g.*, *United States* v. *Columbia Steel Co.,* 334 U.S. 495 (1948); and here it was not shown, or even contended, that Ski Co.'s acquisitions were unlawful.

Second, at the times of the acquisitions, the acquired operations were not viable independent entities competing against, or having the potential to compete against, Ski Co. At the time of the acquisition of Buttermilk, Ski Co. had only Aspen Mountain, which was (and is) for expert skiers. Tr. 1155, 1175-77, 2062-63. Buttermilk was operated for beginners by the head of Ski Co.'s ski school, Tr. 204-05; and so it did not compete with Aspen Mountain, Tr. 1546-47. Moreover, in the words of Highlands' president, Buttermilk "wasn't doing too well" at the time, Tr. 157; and it had never functioned independently, Tr. 158, 1544-45. Snowmass, the other acquired operation, had, at its own request, been developed and operated by Ski Co. from the very beginning. Tr. 158, 1475-76. Thus, the Snowmass operation, too, had never had the capacity to be an independent competitor.

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[1] "Resp. B" stands for Brief for Respondent. "Pet. B." stands for Brief for Petitioner. "J.A." stands for the Joint Appendix filed in this Court. "Tr." stands for the transcript of proceedings in the trial court. "Pet. App." stands for the appendix to the Petition for Certiorari.

Third, the transformation of the Aspen submarket from a market for local skiers to a destination market, attracting skiers from all over North America and elsewhere, did not occur until after Ski Co.'s two acquisitions. Tr. 156-57, 1176, 1503-04. Thus, contrary to Highlands' unsupported assertion, Resp. B. 42-43 n.69, Ski Co. did not acquire *any* destination skiing operations, but took the risks and made the investments to develop three destination skiing mountains on its own.[2]

B. Highlands' "Innovations".

Highlands refers to its "innovations" and improvements. Resp. B. 3-4, 37-38, 44. It does not deny, however, that it never made the one innovation and improvement that it now contends is necessary for success—namely, development of multi-mountain capacity. Nor does it deny that, during its 23 years in the business, it had full opportunity to develop such capacity, but did not have the foresight or tolerance for risk to do so.

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[2] Highlands mentions a comment by a director of Ski Co., in connection with a suggested purchase of Highlands, that "what we want to control is skiing in Aspen." Resp. B. 4, citing J.A. 23-24. The conversation took place "in the early 60's," *id.*, and therefore has no bearing on Ski Co.'s actions or intent fifteen to twenty years later. Moreover, the price offered for Highlands—book value less depreciation (Tr. 160)—hardly reflected an expectation of monopoly profits.

Highlands also refers to Ski Co.'s subsequent acquisition policy, Resp. B. 26, but that policy related to acquisitions outside the Aspen submarket. There is no evidence that, between the early 1960's and the present, Ski Co. made any attempt to purchase Highlands or any other actual or potential skiing operation in the Aspen area or in any other area where it had a substantial market position.

C. Ski Co.'s Other Area Joint Ticket Participations.

Highlands notes that Ski Co. participated in joint ticket arrangements in two skiing areas other than Aspen. Resp. B. 1 n.1, 8 & n.9, 9, 25, 30. The inference to be drawn is that Ski Co. found it advantageous to participate in such arrangements elsewhere, but not in Aspen. A firm that engages in a joint venture in one or two markets does not thereby incur a legal duty to engage in a joint venture in a third market, where economic circumstances are different. The free enterprise system leaves such matters to voluntary choice, rather than to rules of law or decisions by courts or juries. The record does not show definitively why Ski Co. participated in joint ventures elsewhere but not in Aspen. Highlands speculates that the decisive factor was presence of monopoly power in Aspen but not elsewhere. A much more likely explanation than monopoly power (as reflected in submarket share) is that Ski Co.'s Aspen facilities were able to compete on their own for destination skiers, and that its facilities elsewhere were not. *See* Tr. 400-01.

D. Ski Co.'s Allegedly Excessive Revenue Sharing Demands.

Highlands complains that during negotiations over the division of joint ticket revenues for the 1977-78 and 1978-79 seasons, Ski Co. demanded percentage shares that Highlands considered too high. Resp. B. 22, 29-30.[3] Outside a true bottleneck situation, there

[3] Highlands agreed to the percentage division proposed by Ski Co. for 1977-78, but rejected the division proposed for 1978-79. In fact, the 15% Highlands share agreed to in advance for 1977-78 exceeded Highlands' actual 1976-77 share, which was 13.43%. Ex. 5, Tr. 170. Highlands' share of joint ticket usage had been declining since 1974-75. *Id.*

is nothing improper in the owner of a valuable asset negotiating for as large a share of available revenues as can be obtained for allowing another party to benefit from the use of the asset. The author of a best-selling book may demand as high a price as may be gotten when selling the movie rights; a firm holding a valuable trade secret may seek the maximum possible price for products made by use of it. Contrary to Highlands' assertion at Resp. B. 48, seeking a large share of joint venture revenues is in no way predatory. *Trace X Chemical, Inc.* v. *Canadian Industries, Ltd.*, 1984-2 Trade Cas. (CCH) ¶ 66,089, at 66,076 (8th Cir. 1984). The earning of large revenues promotes entry and competition. *See* Pet. B. 46; *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 294 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

E. Ski Co.'s Alleged Advertising Improprieties.

Highlands complains about isolated elements in Ski Co.'s advertising of its own three mountains, principally on the extraordinary ground that Ski Co. failed to spend its own money to advertise Highlands. Resp. B. 9-10, 22, 31. Of course, Ski Co. had no duty to do so; and its failure to do so was not an antitrust violation. The record contains no evidence that Ski Co.'s advertising was false or deceptive,[4] that it disparaged

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[4] Highlands cites three isolated aspects of Ski Co.'s advertising as allegedly deceptive. Resp. B. 9-10.

Highlands' exhibit of the airport poster (Ex. 60, Tr. 182) shows that the words "only" and "all," which had been appropriate when the poster referred to all four skiing mountains, were deleted when it was changed to refer to Ski Co.'s three mountains.

Highlands in any way, or that it misled consumers or induced them not to patronize Highlands.[5]

Even if, contrary to the record, some advertising by Ski Co. had been found to be false under standards derived from the common law,[6] or § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a) (1982),[7] or § 5 of the

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The relevant text then read: "Three Mountains. On One Lift Ticket." The revised poster was in no way deceptive.

Highlands complains that Exhibits 66 and 67 (Tr. 182) "equat[e] the word 'Aspen' with Ski Co." Resp. B. 9. These brochures certainly associate Ski Co.'s facilities with the town of Aspen, but there is no statement or suggestion that Ski Co.'s facilities are the only ones in the area. The brochures simply do not mention Highlands, and there was no obligation that they mention it. Nor is it deceptive for a firm to associate itself with the place where it conducts its business.

In Ex. 103, J.A. 184, it does not appear that the names "Aspen Mountain," "Buttermilk," or "Snowmass" are intended to refer to specific mountains shown in the photograph, or that readers of the advertisement would care whether they did or not. The fact that the mountain on which Highlands operates appears in a photograph used in the advertisement does not impose on Ski Co. an obligation to advertise Highlands.

[5] Although Highlands asserts that newcomers to Aspen were misled and return visitors were confused by Ski Co.'s advertising, Resp. B. 10, it cites no evidence because there is none, that the advertising had such effects.

[6] See, e.g., Penthouse Int'l Ltd. v. Playboy Enterprises, Inc., 663 F.2d 371, 391 (2nd Cir. 1981) (confusion of reasonable readers).

[7] Toro Corp. v. Textron, Inc., 499 F. Supp. 241, 251, 253-54 (D. Del. 1980) (proof of, *inter alia,* actual consumer reliance); McNielab, Inc. v. American Home Products Corp., 501 F. Supp. 517, 524-25 (S.D.N.Y. 1980) ("evidence usually in the form of market research or consumer surveys showing how the statements are perceived by those who are exposed to them"); Skil Corp. v. Rockwell Int'l Corp., 375 F. Supp. 777, 782-83 (N.D. Ill. 1974).

Federal Trade Commission Act, 15 U.S.C. § 45 (1982) (which does not authorize an award of damages), there would still be no antitrust violation. On the facts of this case, the influence of any allegedly false or deceptive advertising would have been *de minimis,* and certainly not material support for a damage award of $2.5 million before trebling. *See* generally 3 P. Areeda & D. Turner, Antitrust Law [hereinafter cited as "Areeda & Turner"] ¶ 738a at 278-79 (1978);[8] *Berkey Photo, Inc.* v. *Eastman Kodak Co., supra,* 603 F.2d at 288 n.41; *see also Associated Radio Service Co.* v. *Page Airways, Inc.,* 624 F.2d 1342, 1354-56 (5th Cir. 1980), *cert. denied,* 450 U.S. 1030 (1981). Simi-

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[8] Highlands quotes the opening two sentences of the discussion of misrepresentations in Areeda & Turner, ¶ 738a. Resp. B. 31 n.49. Highlands omits their conclusion: "There is no redeeming virtue in deception, but there is a social cost in litigation over it. To determine the impropriety of a representation implicates the usual tort issues with respect to non-disclosure (When is there a duty to speak?), the distinction between 'fact' and 'opinion,' the knowledge or due care of the speaker, the actual degree of reliance by those allegedly deceived and the 'reasonableness' of any such reliance. [Citation.] That particular buyers might have been deceived is not itself of § 2 concern. . . . The key problem here is the difficulty of assessing the connection between any improper representations and the speaker's monopoly power. Because the likelihood of a significant impact upon the opportunities of rivals is so small in most observed instances—and because the prevalence of arguably improper utterance is so great—the courts would be wise to regard misrepresentations as presumptively *de minimis* for § 2 purposes. The presumption could be overcome by cumulative proof that the representations were clearly false, clearly material, clearly likely to induce reasonable reliance, made to buyers without knowledge of the subject matter, continued for prolonged periods, and not readily susceptible of neutralization or other offset by rivals." The record in this case does not come close to satisfying *any* of the requirements for overcoming the presumption.

larly, as the Court noted in *Jefferson Parish Hospital District No. 2* v. *Hyde,* 104 S. Ct. 1551, 1560 (1984), even *per se* rules are applicable only where there is a "substantial potential for impact on competition," not where such impact would be *de minimis.* Moreover, ["the Sherman] Act does not purport to afford remedies for all torts committed by or against persons engaged in interstate commerce." *Hunt* v. *Crumboch,* 325 U.S. 821, 826 (1945). *Cf. Copperweld Corp.* v. *Independence Tube Corp.,* 104 S. Ct. 2731, 2745 (1984), explaining that eliminating the intra-enterprise conspiracy doctrine "will . . . not cripple antitrust enforcement," but "will simply eliminate treble damages from private state tort suits masquerading as antitrust actions."

F. The Comparison of Ski Co.'s Own Lift Tickets With the Joint Ticket.

Highlands argues that Ski Co.'s market share was not the result of a superior product. Resp. B. 27-28. Highlands compares Ski Co.'s lift tickets with the joint ticket, which included access to Ski Co.'s facilities. The relevant comparison, however, is between Ski Co.'s facilities (and the lift tickets for access to them) and Highlands' facilities (and the lift tickets for access to them). The relative attractiveness of the parties' facilities to skiers is demonstrated by Highlands' unwillingness to compete straight out against Ski Co. and its demand for association with Ski Co.

G. Ski Co.'s Alleged Discrimination Against Highlands.

Highlands asserts that Ski Co. sold tickets to tour operators but not to it. Resp. B. 7, 22, 30-31. Highlands and tour operators are not comparable. Other than Highlands, no firm that operated skiing facilities (and thus competed with Ski Co. in such operation) sought to buy tickets from Ski Co. Highlands did not seek to perform the economic function of a tour operator: combining lift tickets with lodging and transportation, and marketing the package to individual skiers throughout North America. Had Ski Co. continued to participate in issuing joint tickets or sold its own tickets to Highlands, Highlands would have re-sold the tickets to tour operators, and would not itself have become one.[9]

II. FACTUAL CORRECTIONS.

A. As to the Nature of Ski Co.'s Refusal to Cooperate with Highlands.

Highlands asserts: "Ski Co. repeatedly refused . . . to deal with [Highlands'] customers." Resp. B. 22;

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[9] Highlands asserts that it "wanted to purchase Ski Co. lift tickets at wholesale and resell them to consumers in a retail package." Resp. B. 42 n.68. There is no evidence for that assertion. Highlands also refers to Ski Co.'s refusal "to sell its own tickets to Highlands at their *full retail price.*" Resp. B. 49 (emphasis added). Highlands would not have been entitled to any wholesale discount from Ski Co. because it had no intention, or capacity, to perform any wholesale or other substantial economic function with respect to Ski Co.'s tickets. Ski Co. certainly did not need to have its tickets sold through Highlands' ticket windows, nor was Highlands interested in selling them in that manner.

Ski Co.'s rejection of Highlands' Adventure Pack coupons, though part of a strategy of competition rather than cooperation with Highlands, was not discriminatory toward Highlands. Ski Co. did not accept any coupons. Tr. 1659-60.

see also *id.* 23. That statement is unsupported by the record, and is incorrect. Ski Co. was willing to sell tickets to every customer of Highlands who wanted to buy them. *See* Pet. B. 29-30. Highlands argues that Ski Co.'s refusal to sell tickets to Highlands and its refusal to honor Highlands' Adventure Pack coupons involved a "willingness to sacrifice volume and profits in order to eliminate its remaining competitor . . . ." Resp. B. 32. That argument, too, is factually incorrect. Even in the short-term period covered by the evidence in this case, Ski Co.'s number of annual skier visits generally *increased* (J.A. 183): there is no evidence of any sacrifice of volume or profits in any time period.

Highlands asserts: "Thus, a seller such as Ski Co. can utilize a refusal to deal as a device to restrict output or to discipline customers and competitors. 'Moreover, he has a weapon with which to extend his control over the market.'" Resp. B. 23 (citation omitted). There has never been a suggestion, and there is no evidence, that Ski Co. refused to cooperate with Highlands in order to restrict output or to discipline customers or any competitor, or that its conduct had any such effect. There is no evidence that Ski Co. intended that its "output" decrease or that it did decrease. There is no evidence that Ski Co. intended to "discipline," *i.e.,* to punish or penalize in order to induce a change in conduct, or that it did "discipline" anyone. There is no evidence that Ski Co. sought to gain patronage by use of any "weapon" other than the attractiveness of its skiing facilities and its own marketing skills. Finally, it is striking that Highlands complains of not being able to "turn to another source of supply" of lift tickets, Resp. B. 23: Highlands was a *producer* of skiing services and a *seller* of its own lift tickets.

Highlands contends that, as one of the initiators of multi-day, multi-mountain tickets, it was a "financing risk-taker." Resp. B. 40. On the contrary, the shift from selling single-mountain tickets each day to selling multi-day, multi-mountain tickets at or before the beginning of the skier's vacation (see Resp. B. 2-3) involved no risk whatever, but rather created a profitable float, from which Highlands benefited. Ski Co.'s withdrawal from the joint ticket did not deprive Highlands of the reward for any risk it bad taken, or the benefit of any business practice it had invented.[10]

B. As to the Availability of a Marketplace Remedy.

Highlands suggests that the marketplace was dissatisfied with Ski Co.'s withdrawal from the joint ticket because there was substantial effective demand for the joint ticket. Resp. B. 30 n.48. "Effective demand," as an economic concept is not, however, a matter of subjective preferences, but rather of market behavior. Effective market demand for a product no longer offered will be reflected in (1) reduced demand for products offered as substitutes, and (2) substantial effective efforts by the market to bring about restoration of the product formerly offered. The record here contains no evidence of such effective demand for the joint ticket—by tour operators, or by skiers. As Highlands acknowledges, "skiers could simply shun an area that denied them [what] they wanted." Resp. B. 25. There is no evidence from market behavior that skiers

[10] The idea of a joint ticket was brought to Aspen by Friedl Pfeiffer, who headed the Ski Co. ski school and was involved with Buttermilk. J.A. 21.

shunned Aspen or Ski Co. due to the absence of the joint ticket. Highlands' real complaint is that skiers found Ski Co.'s three-area ticket an adequate substitute for the joint ticket. *See also* Pet. B 20-21. In sum, the market did not express a need for any remedy.

Highlands argues that combinations of daily tickets with or without limited multi-day tickets (*e.g.*, for three days or some other number less than six) were an inadequate marketplace remedy because daily tickets were "used mainly by less vigorous skiers tagging along after multi-area ticket holders." Resp. B. 39 n.61. There is no evidence to support that speculation: the record contains no quantitative analysis of the usage of daily tickets.

Moreover, Highlands' own evidence was that a daily ticket to its facilities could provide a full variety of skiing. Tr. 151, 155-56. If Highlands' problem was that Ski Co. had more skiing terrain of each type than Highlands did and thereby could satisfy a skier's demand for varied terrain within a particular skill level, then Highlands is complaining about a capacity that Ski Co. had achieved but Highlands had not. A firm's refusal to share its capacity with a horizontal competitor is not an antitrust violation.

Even apart from Highlands' claim that its facilities were as good and as varied as Ski Co.'s, Ski Co.'s refusal to continue the joint ticket did not "den[y] Highlands the ability to market a reasonable substitute," Resp. B. 39, and did not prevent or restrain Highlands from offering its own tickets in competition on the merits, *id.* 46. Highlands had full opportunity to offer the market its own tickets as a remedy for whatever deficiencies the market might perceive in Ski Co.'s performance.

Highlands argues that "[t]he competitive consequences of a monopolist's refusal to deal can not be remedied through marketplace discipline. Rejected customers cannot simply turn to another source of supply." Resp. B. 23. That argument is correct in some applications, *e.g.*, an electric power utility. It is incorrect, however, as applied to the facts of this case. The jury found that Ski Co. had monopoly power (not that it had a monopoly), and that it had such power in a submarket (which was part of a larger market). J.A. 187-88.[11] Even in a two-firm market, inadequate performance by one firm, even one with monopoly power, can be disciplined by superior competitive performance by the other firm. If Ski Co.'s performance failed to satisfy skiers, they could turn to Highlands. Moreover, the discipline is strengthened where, as here, the monopoly power is only in a submarket patronized predominantly by transients. During any period of time longer than a single skiing vacation, customers dissatisfied with Ski Co. could turn to any of numerous other skiing mountains with which it competes in the North American market found by the jury. *See also Heath* v. *Aspen Skiing Co.,* 325 F. Supp. 223, 231-32 (D. Colo. 1971).

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[11] Highlands takes pains to argue that the Aspen submarket was not "purely competitive." Resp. B. 22-25. Of course not: no two-firm market is perfectly competitive, and the jury found that Ski Co. had monopoly power in that submarket. Highlands, too, had market power: it did not face a horizontal demand curve. The mere existence of an oligopolistic market or monopoly power is not a violation of § 2. Pet. B. 7 & n.6. Moreover, Highlands has not shown that Ski Co.'s conduct was different from the conduct that would be pursued by a firm with much smaller market share but the same facilities Ski Co. had.

C. As to Highlands' Free Ride.

In response to the free rider argument made at Pet. B. 25-26, Highlands contends that certain arrangements between itself and Ski Co. for joint promotional activities were structured to avoid free rider problems. Resp. B. 5-6 n.5. That is true. But the structure of those activities did not eliminate or reduce the real and quite different free rider problem we described.

Highlands contends that the figures on its advertising and promotional expenses presented in Pet. B. 26-27 n.28 fail to reflect Highlands' contributions to the promotional efforts of Aspen Reservations, Inc. ("ARI"), which was supported jointly by Highlands and Ski Co. Resp. B. 36 n.57. Highlands' comment reinforces the point made in n.28, the relevance of the figures cited there, and the irrelevance of Highlands' adjusted figures. The point is that during the latter years of the joint ticket (1973-74 to 1977-78), Highlands' *own independent* promotional expenditures *for its own facilities* were reduced. The fact that Highlands shifted its advertising expenditures from independent competitive efforts to cooperative efforts through ARI (presumably to promote Aspen in general and the joint ticket) further supports our argument that the joint ticket substantially depressed competition *between the firms.*

We argued that Highlands' Adventure Pack depended on a free ride on Ski Co.'s good will. Pet. B. 27-28. Highlands takes that as an argument that Ski Co.'s facilities were superior to Highlands'. Resp. B. 37. Although Highlands' expert acknowledged the superiority of Ski Co.'s facilities, *e.g.*, Tr. 1153-55, 1342, our argument does not depend on any finding of superiority, or on any comparison between Ski Co.'s facilities and Highlands'. It depends merely on the indisputable fact that Ski Co.'s facilities had *some* good will, *some* attraction to skiers, from which Highlands sought to benefit.

D. As to Ski Co.'s Refund Policy.

Highlands asserts that "most skiers" were unaware of Ski Co.'s refund policy. Resp. B. 11. There is no evidence for that assertion—from surveys of skiers or otherwise. Highlands did find two witnesses to testify that they, individually, were unaware of the policy. But they do not speak for the hundreds of thousands of skiers whose state of knowledge is not reflected in the record. Highlands notes that Ski Co. "would explain its refund policy only if asked by the skier." Resp. B. 11 n.13. Highlands does not contend that this practice was different from the custom of businesses generally, or from the custom of skiing operations, or from its own practice. Indeed, Highlands does not describe its own refund policy at all, or mention whether it informed skiers of it. In fact, even after adjustments for differences in numbers of skiers served, Highlands made far fewer refunds than did Ski Co. J.A. 160 (in 1977-78, Highlands refunded $800 of joint ticket purchases; Ski Co. refunded $110,000).[12]

[12] Highlands cites J.A. 123-24 for the proposition that "Ski Co. often sent skiers across town to the tour operator who sold them the ticket to secure a proper fund." Resp. B. 12 n.14. In fact, the testimony was that skiers "were told . . . that they may be able

III. THE LEGAL ASSERTIONS WARRANTING REPLY.

A. The Duty to Cooperate Issue Was Raised at Trial.

In opposing Ski Co.'s contention that the evidence is not sufficient to support the verdict, Highlands argues that the issue of non-existence of a duty to cooperate was not preserved in the trial court. Resp. B. 14-18. This point was fully briefed to and considered by the court of appeals, which decided it correctly. *See* Pet. App. 13a-15a. The insufficiency of the evidence was raised in Ski Co.'s motion for directed verdict at the close of Highlands' case in chief. Citing relevant authorities, counsel for Ski Co. argued that there cannot be a duty to cooperate. Tr. 1452 ("Now, we also think, Judge, that there cannot be a requirement of cooperation between competitors . . ."); J.A. 134. In the context, this argument could be understood only as asserting (1) that Highlands' evidence was sufficient to go to the jury only if it is the law under § 2 that competitors may be required to cooperate, (2) that that is not the law, and (3) that, therefore, Ski Co. is entitled to a directed verdict. Counsel also argued, with respect to conduct alleged to have violated both § 1 and § 2 (*see* Tr. 2251), that there was no adverse effect on competition, and thus, by necessary implication, that the evidence was insufficient to support the § 2 claim. Tr. 1455. Counsel

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to receive a larger refund from [the tour operator] because . . . [Ski Co.] was deducting a service charge which was comparable to the commission that [Ski Co. had] paid [the tour operator]." J.A. 123. Thus, Ski Co. was not sending skiers across town, but, rather, was willing to give refunds at its own offices but also told skiers they might be able to get a larger refund from the tour operator. Ski Co. was willing to make refunds on the spot or by mail, so that a skier seeking a refund did not have to lose any skiing time. *See* J.A. 159.

renewed these arguments at the close of all the evidence. J.A. 180. Counsel argued that Highlands had "proved our case," and, by necessary implication, that it had failed to present sufficient evidence to prove its own case. Highlands' contention that counsel's argument about duty to compete related not to the issue of conduct but rather to the issues of market definition and monopoly power, Resp. B. 16-17 n.18, makes no sense. The cases cited by counsel—*Telex Corp.* v. *IBM*, 510 F.2d 894 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975), and *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, *supra*—are jointly noteworthy for their discussions of the conduct element.[13]

B. The Invalidity of Court-Ordered Joint Marketing Applies to The Damage Remedy as Well as to The Injunction.

Highlands suggests that Ski Co.'s objections to the "court-ordered scheme of mandatory joint marketing"

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[13] Highlands' citation, Resp. B. 18 n.21, of United States v. Falstaff Brewing Corp., 410 U.S. 526, 575 (1973) (Rehnquist, J., dissenting), is inapt because the opinion deals with the transformation of a plaintiff's case from one theory at trial to another introduced for the first time on appeal. Justice Rehnquist's concern was that the *plaintiff* was being given an opportunity to try its case a second time with a new theory, for which no evidence had been introduced at the first trial. 410 U.S. at 573-74, 575. No such situation is present in the instant case, and no possible unfairness to Highlands is involved. Here, the question is whether, after the plaintiff had fully presented its case in chief, the *defendant* adequately presented its legal position that, as a matter of law, it had no duty to cooperate and therefore was entitled to a directed verdict. We submit that that position was, in express terms, presented to the trial court, as the court of appeals found. Moreover, Highlands certainly cannot complain that it had more evidence of non-cooperation that it did not offer because it was not clearly apprised of Ski Co.'s legal position.

apply only to the injunction issued below, and not to the award of treble damages. Resp. B. 1 & n.1, 44. In fact, the objections apply to both. If treble damages can be awarded for a mere refusal to enter into a horizontal joint marketing scheme, then (a) the law would mandate participation in such a scheme, and (b) an injunction to enforce the law would generally be an available remedy, as it was here. The expiration of the injunction in this case will not remove the precedential effect of the decision below. Highlands represents that it will not seek an extension of the injunction when it expires. Resp. B. 1 n.1. Presumably, Highlands is relying on the threat of treble damage action to induce Ski Co. to maintain into the indefinite future the joint ticket, on which Highlands claims its prosperity depends.

C. Highlands' Proposed Test to Distinguish Competitive From Exclusionary Conduct Is Inapplicable Here.

Highlands proposes that conduct be deemed exclusionary "if . . . the exercise of monopoly power has the effect in the short run of disadvantaging competitive firms, perhaps even driving them out of the market, in an effort to gain larger profits in the long run." Resp. B. 20. The test is inapplicable here because Ski Co.'s withdrawal from the joint ticket and its refusal to cooperate with Highlands were not exercises of monopoly power, but could be engaged in successfully by any firm with sufficiently attractive facilities. Moreover, Ski Co.'s conduct did not "disadvantage" Highlands. Highlands was put in the position of having to compete on the merits in all aspects of its business, but that is not a "disadvantage" from which the antitrust laws provide protection.

D. The Requirement of Substantial Exclusionary Conduct As An Element of Monopolization Is Not Impermissibly Unclear.

We argue that monopolization in violation of § 2 involves substantial exclusionary conduct. Pet. B. 18-19. Highlands professes confusion as to the source of the term "substantial" in this context. Resp. B. 45 n.72. The term is used in furtherance of the maxim, *de minimis non curat lex,* and is reflected in Areeda & Turner's limitation of exclusionary conduct to conduct that appears "capable of making a *significant* contribution to creating or maintaining monopoly power." Areeda & Turner, ¶ 626c at 79 (emphasis added), *quoted in* Pet. B. 18-19, Resp. B. 19-20 n.25. *See also* pp. 7-8, *supra.*

E. Ski Co. Has Not Taken The Limited View Of The Essential Facilities Doctrine That Highlands Attributes To It.

Contrary to Highlands' assertion at Resp. B. 42, we do not argue that the essential facilities doctrine is limited to producer goods. We referred to "an input (producer *or wholesale* good or service). . . ." Pet. B. 36 (emphasis added).

Contrary to Highlands' argument at Resp. B. 39-40 n.62, moreover, under our view of the essential facilities doctrine a railroad excluded from access to the terminal involved in *United States* v. *Terminal R.R. Ass'n,* 224 U.S. 383 (1912), would have been entitled to recover. Access to the terminal was an essential input for operation of a railroad in the St. Louis area and was controlled by a vertically integrated group of competitors. By contrast, access to Ski Co.'s facilities was not an essential input for operation of Highlands' facilities in Aspen, and those facilities were not controlled by a vertically integrated firm.

CONCLUSION

For the foregoing reasons, together with those set forth in Pet. B.,[14] the Court should reverse the judgment below.

Respectfully submitted,

EDWARD BENNETT WILLIAMS
HAROLD UNGAR
(Counsel of Record)
RICHARD M. COOPER
MARK S. LEVINSTEIN
MANLEY W. ROBERTS

WILLIAMS & CONNOLLY
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000

Attorneys for Petitioner

Of Counsel:

DAVID G. PALMER
WILLIAM W. MAYWHORT

Denver, Colorado

DATED: March 19, 1985

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[14] A typographical error appears in Pet. B. 44, fifth line from the bottom: the reference to "J.A. 146" should read "J.A. 46."