

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF KENTUCKY  
LOUISVILLE DIVISION

SHAMROCK MARKETING, INC. ,

PLAINTIFF

V.

BRIDGESTONE BANDAG, LLC,

DEFENDANT.

CIVIL ACTION NO. 3:10-CV-74-H

**BRIDGESTONE BANDAG, LLC'S FIRST AMENDED ANSWER**

Defendant, Bridgestone Bandag, LLC ("Bandag"), by counsel, hereby answers Plaintiff's Complaint:

**PARTIES**

1. Bandag lacks information sufficient to form a belief in the truth of the allegations in paragraph 1 of the complaint and therefore denies the same.

2. The allegations in paragraph 2 of the complaint are admitted.

**JURISDICTION AND VENUE**

3. The allegations in paragraph 3 of the complaint are admitted.

4. The allegations in paragraph 4 of the complaint are admitted.

**FACTUAL ALLEGATIONS**

5. Bandag admits that it has 259 franchises in the United States and that the "franchising of a proprietary process for the retreading of tires" is part of the franchising relationship. All other allegations contained in paragraph 5 are denied.

6. The allegations in paragraphs 6-16 of the complaint are admitted.

7. Bandag admits that envelopes in the “precured” process are generally designed to be reusable, and that it is possible to reuse certain envelopes to retread more than 200 tires. All other allegations contained in paragraph 17 are denied.

8. The terms and conditions of each of the franchise agreements address the supply of precured tread rubber. Generally, Bandag agreed to supply, and the franchisees agreed to purchase, all of the franchisees’ requirements of precured tread rubber, from Bandag. All other allegations contained in paragraph 18 are denied.

9. The franchise agreements authorized Bandag to specify that franchisees must purchase their requirements of curing envelopes, as well as other materials and equipment. All other allegations contained in paragraph 19 are denied.

10. Some, but not all, of Bandag’s franchisees purchased envelopes from suppliers other than Bandag prior to December 4, 2007. All other allegations contained in paragraph 20 are denied.

11. The allegations in paragraph 21 of the complaint are admitted.

12. On December 4, 2007, Bandag instituted a price increase on “precured” tread rubber. All other allegations contained in paragraph 22 are denied.

13. The allegations in paragraph 23 of the complaint are admitted.

14. The Q-Fund automatically accrued credits in the name of Bandag franchisees in proportion to the pounds of tread rubber purchased from Bandag, but were not required to participate in the program by redeeming any or all of the credits accrued under the fund for any product. The franchisees voluntarily decided whether and how to apply any or all of the credits accrued. All other allegations contained in paragraph 24 are denied.

15. Under the terms of the Q-Fund, a Q-Fund account is created for each franchisee and it is credited with \$0.05 per pound of “precured” tread rubber purchased by that franchisee from Bandag. All other allegations in paragraph 25 of the complaint are admitted.

16. The “credit” is not available in cash and may be utilized by the election of franchisee only as to whether the credits are used and which of the scheduled products are purchased by fund credits. The terms of the Q-Fund provide for a “sunset” on the use of credits. All other allegations contained in paragraph 26 are denied.

17. The allegations in paragraphs 27-31 of the complaint are denied.

18. Bandag lacks information sufficient to form a belief in the truth of the allegations in paragraph 32 of the complaint and therefore denies the same.

19. Bandag lacks information sufficient to form a belief in the truth of the allegations in paragraph 33 of the complaint and therefore denies the same.

20. The allegations in paragraphs 34-35 of the complaint are denied.

### **COUNT ONE**

21. Bandag incorporates its responses to paragraphs 1-35 in response to paragraph 36 of the complaint.

22. Paragraphs 37-45 of the complaint pertain solely to Count One, which has been dismissed by the Court and to which no response is necessary.

### **COUNT TWO**

23. Bandag incorporates its responses to paragraphs 1-45 in response to paragraph 46 of the complaint.

24. The allegations in paragraphs 47-51 of the complaint are denied.

**COUNT THREE**

25. Bandag incorporates its responses to paragraphs 1-51 in response to paragraph 52 of the complaint.

26. The allegations in paragraphs 53-55 of the complaint are denied.

**COUNT FOUR**

27. Bandag incorporates its responses to paragraphs 1-55 in response to paragraph 56 of the complaint.

28. Paragraphs 57-61 of the complaint pertain solely to Count Four, which has been dismissed by the Court and to which no response is necessary.

**FIRST AFFIRMATIVE DEFENSE**

29. Counts II and III fail to state a claim upon which relief can be granted.

**SECOND AFFIRMATIVE DEFENSE**

30. Plaintiff lacks standing to bring a claim under the antitrust laws.

**THIRD AFFIRMATIVE DEFENSE**

31. Plaintiff lacks standing to bring a claim based upon the franchise agreements between Bandag and its franchisees.

**FOURTH AFFIRMATIVE DEFENSE**

32. The pro-competitive benefits of Bandag's Q-Fund program enhance the ability of Bandag and its franchisees to compete effectively in the market for the sale of replacement tires. These benefits outweigh any alleged anti-competitive effects. As a result, Counts II and III must be dismissed.

**FIFTH AFFIRMATIVE DEFENSE**

33. The Q-Fund program works hand-in-hand with the Franchise Agreement to maintain and improve the uniformity and quality of retreaded tires made by the franchisees and sold under the Bandag name. The Q-Fund program does not impose an unreasonable restraint on competition. As a result, Counts II and III must be dismissed.

**SIXTH AFFIRMATIVE DEFENSE**

34. Counts II and III of the complaint must be dismissed because a tying claim brought under the Sherman Act cannot be predicated upon the purchase and sale of goods by a franchisee under a franchise agreement.

35. Bandag reserves the right to assert any additional defenses available to it or that may become available to it as the discovery proceeds in this action.

WHEREFORE, Bandag demands the following relief:

1. Plaintiff's Complaint be dismissed, in its entirety, with prejudice;
2. Recovery of Bandag's costs and expenses incurred herein, including, but not limited to, attorneys fees;

3. Any and all other relief to which Bandag is entitled.

*/s/ Philip W. Collier*

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 4<sup>th</sup> day of April, 2011, a true and correct copy of the foregoing First Amended Answer was filed with the Western District of Kentucky CM/ECF system, which will send electronic notice of filing to:

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*/s/ Philip W. Collier*

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*Philip W Collier*