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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

SHAMROCK MARKETING, INC. ,

PLAINTIFF

V.

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

BRIDGESTONE BANDAG, LLC,

DEFENDANT.

BRIDGESTONE BANDAG, LLC'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS

Plaintiff's antitrust tying claims fail because the complaint does not – and cannot – allege the essential element that Bridgestone Bandag, LLC ("Bandag") "actually coerced" its franchisees to buy Q-Fund-approved curing envelopes and accessories ("Q-Fund Products") by "conditioning" the sale of tread rubber upon the purchase of Q-Fund Products. Pleading "economic" coercion is insufficient and requires dismissal. *Downs v. Insight Communications Company, L.P.*, 2010 U.S. Dist. LEXIS 54577 *13 n.1 (W.D. Ky. June 3, 2010). Similarly, the complaint does not allege any "antitrust injury," only an alleged decline in sales by a single competitor. The critical lack of coercion and standing allegations is fatal to all four counts, requiring the dismissal of the complaint in its entirety.

Even if Shamrock Marketing, Inc. ("Shamrock") had alleged that Bandag *refused* to sell precured tread rubber unless its franchisees purchased Q-Fund Products – which it didn't – these allegations would not support a *plausible* tying claim. Where a franchise agreement requires franchisees to "agree to purchase" specified equipment or materials, courts have consistently dismissed single-brand tying claims, because this is an exercise of contract power, not "market power." Since Bandag was expressly authorized to *require* franchisees to buy envelopes and

accessories from Bandag, there is no antitrust violation when it merely incentivizes franchisees to use program credits to buy Q-Fund Products on an approved list. As a result, Shamrock fails to shoe-horn Bandag's franchise into *Kodak's* narrow "lock-in" exception to the rule that a single brand cannot form a relevant market, requiring dismissal of Counts I and IV.

Shamrock's lack of antitrust standing is addressed initially, since standing is a threshold matter. Thereafter, this memorandum explains why the complaint should be dismissed for failure to plead essential elements of a tying claim, as well as for failing to plead a plausible claim based upon an alleged single-brand market.

I. SHAMROCK LACKS STANDING – THERE IS NO "ANTITRUST INJURY" AND THE ALLEGED DAMAGES DO NOT ARISE FROM ANTICOMPETITIVE CONDUCT.

Shamrock's complaint does not allege an "antitrust injury," because it does not allege injury to *competition* in any capacity. "A complaint alleging only that an individual competitor is injured, but not the market, does not establish an antitrust injury." *Midwest Agency Services, Inc. v. JP Morgan Chase Bank*, 2010 U.S. Dist. LEXIS 22457 *10 (E.D. Ky. 2010). The failure to plead such an injury requires dismissal. Indeed, Shamrock's Memorandum does not even mention "antitrust injury," arguing simplistically that all it has to allege to satisfy standing is that it is a "competitor in the market for the tied product" and that it has sustained a "loss of profits on sales of curing envelopes and accessories." (Shamrock Mem. at 11, 13.)

Shamrock's complaint alleges vaguely that the Q-Fund has "the anticompetitive effect" of "excluding [competing sellers] from selling their 'curing envelopes' and other 'Q-Fund'-designated 'accessories' to Bandag franchisees." (Compl. ¶ 30.) In *Midwest Agency Services*, the court dismissed similarly vague allegations for lack of antitrust injury where a single competitor alleged that its sales of insurance declined as a result of Chase Bank's "tying" its financing services to an "approved list" of insurance products which excluded the plaintiff's

product. The court reasoned that "[a]lthough Midwest does allege that the Defendants' conduct decreased competition within the market, it does not allege facts that demonstrate that competition was actually diminished." Because Midwest did not allege how many competitors comprised the market, the number of providers on the approved list, or how the sales of other market participants had been injured by Chase, "it is impossible to tell the extent to which competition may have been affected." *Id.* at **10-11.

Shamrock fails to allege facts demonstrating that Bandag's Q-Fund Program reduced competition in the supposed *market* for "curing envelopes and other accessories." There are no allegations concerning the structure, scope, number of participants or reach of such a market, much less that the Q-Fund program reduced competition in "envelopes and other accessories." Plaintiff alleges only a decline in *its* sales to Bandag franchisees. This is not antitrust injury.

Further, Shamrock's complaint fails to allege facts demonstrating that its alleged loss of profits was a result of *anticompetitive* behavior. Shamrock alleges only that its sales would not have declined "but for" the Q-Fund program created for the benefit of its franchisees.[1] The complaint does not allege that Bandag's creation of the Q-Fund was not authorized by the franchise agreement or unlawful. There is no allegation that the Q-Fund was created to harm competition – only that it had that "effect." Indeed, the text of the Q-Fund documents and publicly available records demonstrates that the Q-Fund was implemented to standardize the Bandag Process and help franchisees absorb the first price increase in nearly three years.

The Sixth Circuit has routinely dismissed antitrust complaints for failing to allege antitrust injury when "each of the defendants had taken an action that it was lawfully entitled to

[1] In addressing the second requirement for antitrust standing, Shamrock completely neglects the *Southhaven* factors. These factors, as set forth in Bandag's memorandum in support of its motion to dismiss, are effectively the same test used by this Court in *U.S. v. Solinger*, 457 F. Supp. 2d 743, 759 (W.D. Ky. 2006) to analyze antitrust standing. In fact, Shamrock's alleged injuries are similar – and even more remote – than the plaintiff in *Solinger* who was not "permitted to join the cartel." Plaintiff's neglect of the *Southhaven* factors is understandable; an analysis of all five factors illustrates that Shamrock does not have antitrust standing.

take, independent of the alleged antitrust violation, which was the actual, indisputable, and sole cause, of the plaintiff's injury." *In Re Cardizem CD Antitrust Litig.*, 332 F.3d 896, 914 (6th Cir. 2003) (citations omitted). A competitor which alleges lost sales as the result of exclusion from an approved supplier list does not suffer an antitrust injury and lacks antitrust standing. *CTUnify, Inc., v. Nortel Networks, Inc.*, 115 Fed. Appx. 831, 836 (6th Cir. 2004) ("CTUnify's injuries flow from the fact that it was not chosen to be a preferred vendor and not from any alleged tying arrangement between Nortel and Global Knowledge."); *see also Midwest Agency Services, Inc.,* 2010 U.S. Dist. LEXIS 22457 *11 ("Midwest's alleged injury flows from its exclusion from the Approved List, not from the alleged tying arrangement itself.").

Here, as in *CTUnify* and *Midwest Agency*, the injury suffered is unique to the supplier that was not included on the approved list. Absent some injury to competition as a whole, there is no antitrust standing and the complaint should be dismissed.

II. THE TYING CLAIMS LACK ESSENTIAL ELEMENTS – REQUIRING DISMISSAL AS A MATTER OF LAW

Plaintiff seems to argue that the "plausibility standard" established by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) should be limited to horizontal price fixing cases, and not applied to tying arrangement cases. (Shamrock Mem. at 11.) *Iqbal* shows that this narrow interpretation is plainly wrong. *Ashcroft v. Iqbal*, 556 U.S.__, 129 S. Ct. 1937 (2009). It is belied as well by the many tying cases that have been dismissed for failure to allege plausible facts of an unlawful tying arrangement.[2]

Plaintiff hangs its hat on *Kodak*,[3] but careful analysis shows that this case does not save

[2] *See* e.g. *Schlotzsky's Ltd. v. Sterling Purchasing and Nat'l Distrib. Co. Inc.*, 520 F.3d 393 (5th Cir. 2008); *Bansavich d/b/a Lori's Mobil v. McLane Co., Inc.*, 2008 U.S. Dist. LEXIS 25817 (D. Conn. 2008); *Trane U.S. Inc. v. Meehan*, 563 F. Supp. 2d 743, 756 (N.D. Ohio 2008); *Sheridan v. Marathon Petroleum Co., LLC*, 530 F.3d 590 (7th Cir. 2008).

[3] *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992).

Plaintiff's claims from dismissal. In fact, Plaintiff's complaint fails to allege actual coercion in the form of a "conditional" sale, an essential predicate to a tie under *Kodak* and other controlling Supreme Court precedent. Moreover, *Kodak's* "lock-in" analysis was applied to a market structure far different from that found in the present case. Instead, *Queen City Pizza*[4] lays out the principles that apply directly to the franchise context of this case. A review of these leading authorities reveals that the complaint lacks essential coercion allegations and proposes an implausible single-brand market requiring dismissal under *Twombly*.

A. There is no "tie" because Bandag does not condition the sale of tread rubber on the purchase of "envelopes" or other "accessories."

1. The complaint fails to allege a "conditioned" sale.

Plaintiff's lead case, *Kodak*, defines a "tying arrangement" as "an agreement by a party to sell one product *but only on the condition* that the buyer also purchase a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." *Kodak*, 504 U.S. at 461. The Court in *Kodak* noted specifically that "Kodak would sell parts to third parties *only if they agreed not to buy service from ISOs*." *Id.* at 463. All four counts of the complaint must be dismissed because Plaintiff has not, and cannot, allege that Bandag conditions its sale of the supposed tying product, tread rubber, on the purchase of curing "envelopes" and "accessories."

Shamrock's complaint *does not allege* that Bandag threatened to withhold the sale of pre-cured tread rubber to its franchisees unless the franchisees purchased Q-Fund Products. To the contrary, Bandag is *contractually bound* to sell tread rubber to its franchisees regardless of whether or not franchisees choose to take advantage of the Q-Fund incentive program. The Franchise Agreement states unequivocally: "We will sell to you, and you agree to purchase from

[4] *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430 (3d Cir. 1997).

us, your entire requirements of Materials." (Franchise Agreement at § 7.6.) The absence of a *condition requiring purchase of another product* is fatal to Plaintiff's antitrust claims.

The U.S. District Court for the Eastern District of Kentucky recently determined that where, as here, a customer is free to purchase other products, there can be no tie. *See Midwest Agency Services, Inc.*, *supra*. In *Midwest Agency*, the Plaintiff alleged that the defendant unlawfully tied its purchase of automobile chattel paper to the sale of "gap" insurance by one of its approved vendors. The court reasoned: "[Plaintiff] admits that car buyers may or may not choose to purchase gap insurance. . . . Thus, by definition, a tie cannot exist because a 'tied product' is not being forced upon the buyer." *Id.* at *15-16. The court accordingly dismissed the complaint under Fed. R. Civ. P. 12(b)(6).

As explained in Bandag's motion and accompanying exhibits, the Q-Fund program is voluntary: franchisees may choose what products to purchase and whether or not to participate. Bandag franchisees have been and are free to purchase curing envelopes from anyone. Although Plaintiff claims to have "spell(ed) out with more than sufficient detail how Bandag's 'Q-Fund' has "operated" to "economically" coerce franchisees into buying the tied products" (Shamrock Mem. at 24), it fails to cite a single authority in its entire section on coercion. Further, Plaintiff's allegations of economic coercion are plainly implausible when compared with the actual terms of the Q-Fund program.

2. The complaint fails to plead "actual" coercion.

Kodak requires allegations of "actual" coercion to plead and sustain a tying claim. As subsequent decisions have emphasized, "[w]ithout actual coercion, there is no restraint of trade and no Sherman Act claim." *Downs v. Insight Communications Company, L.P.*, 2010 U.S. Dist. LEXIS 54577 *11 (W.D. Ky. June 3, 2010). Because it cannot allege "actual" coercion,

Shamrock seeks to cure this fatal pleading defect by alleging "economic" coercion and "coercive effect." (Compl. ¶¶ 28-30.)

Three recently-decided district court cases are instructive. First in *In Re: Time Warner Inc. Set-Top Cable Television Box Antitrust Litigation*, 2010 U.S. Dist. LEXIS 22369 (S.D.N.Y. March 5, 2010), the court dismissed similar tying claims for lack of "actual" coercion. The plaintiffs − cable customers who wanted to purchase an alternative to cable TV control boxes known as a CableCARD − argued that efforts by cable television companies to economically coerce subscribers to purchase their "set top boxes" in connection with the sale of premium cable services amounted to the "tying" of the box to the cable services. In rejecting this argument, the *Time Warner* court reasoned:

> Actual coercion "is an indispensable element of a tying violation." . . . "[W]here the buyer is free to take either product by itself there is no tying problem even though the seller may also offer the two items as a unit at a single price." *N. Pac. Ry*., 356 U.S. at 6 n.4 . . . . Plaintiffs do not allege that CableCARDs were unavailable to consumers. Instead, they complain that Time Warner has minimized the use of CableCARDs by "inhibit[ing] and thwart[ing] the effectiveness of CableCARD technology." . . . . [A]ccepting the allegations of the Amended Complaint as true, CableCARDs were nonetheless available to those customers who chose not to lease a cable box. Time Warner's promotion of cable boxes over the alternative CableCARD technology may have persuaded most customers to choose to lease a cable box, but the option was available to all customers . . . . Vigorous and aggressive salesmanship is insufficient to make a claim of coercion.

Id. at *18-20.

Second, this court's decision in *Downs v. Insight*, *supra*, echoes the rationale of *Time Warner*, flatly rejecting the same "economic" coercion theory Shamrock advances in this case:

> [Plaintiffs argue] that a coercive scheme may be found even if the tying arrangement leaves the consumer with some choice, or even if the coercion is not 100% effective in meeting the defendants' anticompetitive goal . . . . In *Eastman Kodak*, the defendant required buyers of its replacement parts either to purchase repair services from Kodak or to promise to service their own machines; this prevented Kodak's clients from hiring third-party repairmen. 504 U.S. at 458. The result was to condition the availability of one product on an agreement not to buy a second product from a third-party. Actual coercion

> was therefore present. Here, however, there is no adequate allegation of conditioning, because CableCARDs provide an alternative to Insight customers who have no use for two-way communications.

2010 U.S. Dist. LEXIS 22369 *13 n.1.

Third, the court's dismissal of tying claims in *Warren General Hospital v. Amgen Inc.*, 2010 U.S. Dist. LEXIS 56220 (D.N.J. June 7, 2010) closely parallels the facts here. Warren General sued Amgen on the premise that it tied discounts and rebates on Amgen's market-dominant WBGCF drugs to purchases of Aranesp, an RBGCF medication.[5] Aransep's only competitor product was the medication Procrit. Warren General asserted that Amgen offered substantial rebates to buyers of Aransep based on the volume of combined purchases of WBGCF and RBGCF drugs. Warren General claimed that these rebates were calibrated to an amount that would coerce purchasers to buy enough of the bundled products to exceed Medicare reimbursement levels. The Complaint alleged that the rebate and pricing scheme forced purchasers to buy less Procrit and more Aranesp in order to attain these rebates. The court rejected the economic coercion allegations as insufficient and dismissed the suit:

> The Complaint alleges, in other words, that Amgen conditioned the availability of rebates and discounts on one product, the WBCGF drugs, on a buyer's purchase of another, Amgen's RBCGF drug . . . . The Complaint neither expressly charges nor inferentially alleges that Amgen will not sell WBCGF unless a buyer also purchases Aranesp. Amgen, rather, has created a pricing and discount scheme that a buyer may take advantage of if it buys both Amgen products. This arrangement does not present a tying problem. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984) ("Where the buyer is free to take either product by itself there is no tying problem even though the seller may also offer the two items as a unit at a single price.").

Id. at *21-22.

In this case, the Franchise Agreement and the Q-Fund program documents demonstrate that Bandag franchisees were not deprived of their ability to choose. First, Q-Fund is a

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[5] These chemotherapy medications include White Blood Cell Growth Factor ("WBCGF") and Red Blood Cell Growth Factor ("RBCGF").

franchisee benefit program. Enrollment is automatic, but not "mandatory." Whether a franchisee chooses to take advantage of Q-Fund credits is a matter of choice. In fact, Bandag franchisees can take no action if they so choose and ignore any Q-Fund credits they receive. The complaint concedes that franchisees continue to purchase envelopes and accessories from Shamrock and other companies.[6] As with *Time-Warner*, *Downs* and *Warren General*, because Shamrock fails to allege "actual coercion," its tying claims should be dismissed.

B. *Kodak's* "lock-in" theory is inapplicable to this case.

In their response, Plaintiff admits that their market definition relies solely on the "lock-in" theory enunciated in *Kodak* to define a single brand market. But Plaintiff ignores the many important factual distinctions that make the *Kodak* market analysis of little use in the present case.

First, the structure of the market in *Kodak* was entirely different than in the present case. In *Kodak,* the plaintiff defined the tying product market as the "aftermarket" for Kodak parts. The Supreme Court explained that these products are "unique parts" manufactured *by Kodak itself* or *made to Kodak's order* by other manufacturers.[7] Copier owners and repairmen were not compelled to purchase the parts from Kodak because of a franchise agreement. Rather, the reason that these "unique parts" for Kodak's copy machines had to be purchased from Kodak was that they not available from any other source. In this narrow factual scenario, the Court found that a single-brand market could be alleged – no other parts could be substituted for the unique Kodak parts that fit the Kodak copiers.

In contrast, the alleged tying product in this case is pre-cured tread rubber, a commodity product made by several manufacturers. Unlike the situation in *Kodak,* Bandag is not the only

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[6] *See* Compl. ¶¶ 33-34.

[7] 504 U.S. at 464.

source of the product. Unlike the situation in *Kodak,* the reason non-Bandag tread rubber cannot be substituted is the franchise contract. In exchange for participation in its franchise system and use of its proprietary process and patented equipment, Bandag requires its franchisees to purchase tread rubber exclusively from Bandag. As recognized in *Queen City Pizza* and every circuit court to consider the issue, this type of requirements contract does not create a separate relevant market for tying arrangement analysis.[8]

Second, in *Kodak* the Supreme Court was troubled by the possible existence of "information and switching costs" that would insulate parts and service sales in the aftermarket from demand in the primary equipment market.[9] The Court found that, for service market price to affect equipment demand, consumers would have to obtain information about "lifecycle costs," and that such information might be difficult to acquire. In *Kodak*, there was no suggestion that such information was readily available to customers or even existed. In addition, the Court was concerned that customers who had purchased a Kodak copier might be deterred by the high unit cost from switching to another brand with lower servicing costs.

The situation with Bandag and its franchisees (as well as with other franchise systems) is much different. Before Bandag can add a company to its franchise system, it is required by law to provide the prospective franchisee with a Uniform Franchise Disclosure Document.[10] This document clearly discloses the franchisee's obligation to buy tread rubber *only* from Bandag. It also discloses the franchisor's contractual right to designate specific suppliers or even to require that materials be purchased only from Bandag. It specifically discloses the franchisee investment required to establish a successful franchise. This is exactly the type of "lifecycle" information

[8] 124 F.3d at 438. *See also* cases cited at Bandag Mem. in Supp. of Mot. to Dismiss at 21.

[9] 504 U.S. at 473-74.

[10] *See* Bandag Mem. in Supp. of Mot. to Dismiss, Ex. 4.

that the Court found lacking in *Kodak.* In contrast to *Kodak*, where the high service costs were allegedly sprung, post-purchase, on the unsuspecting copier buyer, Bandag's prospective franchisees enter the relationship with their eyes open and disclosures in hand. As the Third Circuit recognized in *Queen City Pizza,* a franchise contract "lock-in" is not a "lock-in" as defined by *Kodak.*

Third, the *Kodak* case involved product parts and service "aftermarkets." The present case involves the "premarket," *i.e.,* the market for inputs in the manufacturing process. Most circuits have declined to extend *Kodak* beyond the aftermarket scenario.[11] *See* ABA Section of Antitrust Law, *Antitrust Law Developments* at 588-593 (6th ed. 2007). The Plaintiff cites no authority which would support doing so here.

C. **Under *Queen City Pizza*, the alleged Single Brand Market is implausible in the franchise context.**

Plaintiff's alleges that Bandag "monopolizes" the sale of tread rubber to its franchisees. Its entire single brand market theory is premised on a narrow exception, created by *Kodak*, to the rule that single brand product markets do not constitute a plausible market definition for antitrust purposes. *Cf. Tarrant Service Agency Inc. v. American Standard, Inc.*, 12 F.3d 609, 614 (6th Cir. 1993 ("[m]onopolization of a single brand is not an antitrust violation"). But *Kodak* has been effectively narrowed to its facts and *Queen City Pizza* (and its progeny) is the more appropriate guidepost in determining the plausibility of Plaintiff's single brand market in the franchise context.[12] As discussed below, when analyzed under the rubric of *Queen City Pizza*, Plaintiff's tying and monopolization claims premised on a single brand market fail.

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[11] *See e.g. Lee v. The Life Insurance Co. of North America*, 23 F. 3d 14 (1st Cir. 1994) (refusing to extend *Kodak* in the college healthcare market); *Maris Dist. Co. v. Anheuser-Busch Companies, Inc.*, 302 F.3d 1207 (11th Cir. 2002) (refusing to extend *Kodak* to the distributor-manufacture market); and *Schlotzky's, Ltd. v. Sterling Purchasing and National Dist. Co.*, 520 F.3d 393 (5th Cir. 2008) (refusing to extend *Kodak* to the franchise market).

[12] *See generally* IIB Areeda and Hovenkamp, *Antitrust Law* at ¶ 519b (2007) "Post-Contract Power in Franchise Tying Claims"; *Antitrust Law Developments*, *supra*, at 238-240.

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In *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430 (3d Cir. 1997),[13] the Third Circuit rejected the plaintiffs' argument that a *Kodak*-type "lock-in" analysis should be applied to the franchise context. Instead, it returned to basic antitrust principles in recognizing that "the test for a relevant market is not commodities reasonably interchangeable by a particular plaintiff, but commodities reasonably interchangeable by consumers for the same purposes." *Id*. at 438. Thus, in contrast to *Kodak*, the pizza ingredients were not unique – they were readily available from other suppliers. In further contrast to *Kodak*, the franchisees were informed by a detailed franchise agreement that Domino's retained significant control over their sources of supply. Based on these distinctions, the Third Circuit rejected plaintiffs' proposed relevant market limited to products approved by Domino's for its franchisees. Since the Domino's pizza brand ingredients were "reasonably interchangeable" with other ingredients, the relevant product market was much larger. Domino's market power was diluted accordingly and Queen City Pizza's tying and monopolization claims failed.

Here, as in *Queen City Pizza*, a single brand does not create a plausible relevant market in the franchise context for antitrust purposes, and Plaintiff's allegations in Counts 1 and 4 should be dismissed.

D. *Burda v. Wendy's* does not control here.

Plaintiff seeks to distinguish *Queen City Pizza* (and its progeny) by relying exclusively on *Kodak's* lock-in theory based on an alleged "change of policy" by Bandag.[14] In *Kodak*, the defendant changed its policy regarding service and parts in the aftermarket *after* the plaintiffs already purchased the Kodak product. Here, Plaintiff claims that the implementation of the Q-

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[13] For a more detailed and thorough discussion of *Queen City Pizza*, see Bandag's memorandum in support of its motion to dismiss, Sections III(c)(6-7).

[14] The Sixth Circuit requires that a *Kodak* "lock-in" claim be supported by specific factual allegations in the complaint that the defendant improperly changed or concealed its rules from its customers. *Michigan Division - Monument Builders of North America v. Michigan Cemetery Ass'n*, 524 F.3d 726, 737 (6th Cir. 2008).

Fund is a similar change in policy.

Plaintiff relies heavily on a recent federal District Court's decision in *Burda v. Wendy's International, Inc.*, 659 F. Supp. 2d 928 (S.D. Ohio 2009), a still-pending case that apparently applied *Kodak's* "lock-in" theory in a franchise context, due to a "change in policy." Plaintiff, however, neglects to consider the many important differences between *Burda* and this case.

In *Burda*, the plaintiff, a Wendy's franchisee, alleged that Wendy's made significant changes in its relationship with its franchisees *after* they entered into the franchise agreements. Specifically, after Burda purchased his franchise, Wendy's named an exclusive supplier of buns for all Midwest franchisees and allegedly threatened to pull Burda's franchise if he purchased buns elsewhere. Wendy's also installed its own affiliate, Willow Run Foods, as the exclusive distributor for all other food supplies in Burda's region and implemented a 4-cent-per-case surcharge on any food supplies franchisees ordered from sources besides Willow. The court determined that these actions went beyond Wendy's rights under the franchise agreement and disclosures, and could not have been foreseen by the franchisees. Consequently, these changes were sufficient to meet the "change of policy' requirement" to establish a single brand market under *Kodak*. *Id*. at 936.

The present circumstances are much different. ***First***, this case is not brought by a franchisee claiming it was threatened with the loss of its franchise or misled as to supply guidelines, but by a supplier disappointed that its products were not included on the Q-Fund list.[15] ***Second***, Bandag's implementation of the Q-Fund program was fully consistent with the disclosures received by franchisees prior to joining the franchise system. Bandag is expressly authorized to require franchisees to purchase additional materials and equipment from Bandag.

[15] *Cf. Midwest Agency Services, Inc. v. JP Morgan Chase Bank, supra*.

(*See* Franchise Disclosure Document at 13 ("Section 8. Restrictions on Sources of Products and Services").) In light of the franchise agreement and disclosure, franchisees were in a position to assess the "potential costs and economic risks" from the start. *See Queen City Pizza* at 440. ***Third***, while Bandag would be authorized by ¶¶ 5.2 and 7.6 of the Franchise Agreement to *require* its franchisees to purchase envelopes and accessories from Bandag, the Q-Fund program does not go so far. The program is voluntary, and franchisees may elect to apply their credits to any Q-Fund products they choose, or none at all. There is no counterpart to Wendy's exclusive bun and food supply programs – Shamrock does not allege that Bandag ever threatened to terminate a franchise because of Q-Fund, and Bandag franchisees remain free to purchase the envelopes Shamrock imports and distributes, even today. ***Fourth***, instead of imposing penalties, the Q-Fund program provides incentives to franchisees to purchase tested, quality products, while mitigating the tread rubber price increases phased in starting in 2007. Because of these factual distinctions, *Burda* provides little guidance here.

In addition, *Burda* tries to swim against the tide of authority, led by *Queen City Pizza,* holding that the *Kodak* "lock-in" theory does not extend beyond aftermarkets of unique products to voluntary requirements contracts created in the context of franchise systems.[16] Not only is the case not final and not binding, it is a distinguishable outlier that does not salvage Plaintiff's flawed theory of antitrust liability.

E. <u>Plaintiff has failed to adequately define a relevant tied product market for "accessories."</u>

Product markets identified with catch-all descriptors such as "accessories" are void for vagueness. The purpose of antitrust law is to avoid the unlawful exercise of market power resulting in anticompetitive effects in a relevant market. No useful antitrust analysis can be

[16] IIB Areeda and Hovenkamp, *Antitrust Law* at ¶ 519b.

performed when the alleged tied market consists of disparate products such as those approved for the Q-Fund. The essential test for determining a relevant market is interchangeability of use: "products that are reasonably interchangeable in use generally compete with each other and thus are part of the same market." *Antitrust Law Developments* at 228. The Q-Fund list includes pencils, paint, rasps and glue; items which plainly are not reasonably interchangeable and which cannot substitute for each other. Obviously, many of them are in different product markets upon which the Q-Fund program has no impact Moreover, since Plaintiff does not even sell some of these products, it cannot demonstrate standing. Accordingly, Plaintiff's proposed product market, as defined in Counts 1-4 to include generic accessories, is fatally defective and all tying and monopolization claims relating to a purported market for "accessories" should be dismissed.[17]

CONCLUSION

For the reasons set forth above and in Bandag's opening memorandum, Plaintiff's antitrust claims fail as a matter of law and the Complaint should be dismissed in its entirety.

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[17] Plaintiff's Complaint also fails to establish two distinct products used in the alleged tying arrangement. Tread rubber and envelopes are not two distinct products, but instead, components of one unified product – retread tires. There is no separate demand for curing envelopes outside of manufacturers of pre-cure retreads; the consumers (generally fleet users) – purchase a retreaded tire which incorporates tread rubber and envelopes into the retreading process. They do not separately purchase tread rubber or envelopes.

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of June, 2010, a true and correct copy of the foregoing reply memorandum was filed with the Western District of Kentucky CM/ECF system, which will send electronic notice of filing to:

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I further certify that the reply memorandum has been filed under seal with the Clerk of Court, and that a true and copy of same was provided by e-mail to counsel of record as listed above.

/s/ O. Scott Barber

Oliver H. (Scott) Barber, III