IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LE PAGE'S INCORPORATED, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	CIVIL ACTION No. 97-3983
	)	
3M (MINNESOTA MINING AND MANUFACTURING COMPANY),	)	
	)	
	)	
Defendant.	)	

MEMORANDUM

Padova, J. March , 2000

This matter arises on Defendant's Motion for Judgment as a Matter of Law, and Motion for a New Trial. For the reasons that follow, the Court will grant in part and deny in part Defendant's Motion for Judgment as a Matter of Law. The Court further will deny Defendant's Motion for a New Trial.

I. BACKGROUND

Plaintiffs Le Page's Incorporated and Le Page's Management Company ("Le Page's") brought this action against Defendant Minnesota Mining and Manufacturing Company ("3M"), alleging that 3M engaged in unlawful restraint of trade in violation of Section 1 of the Sherman Antitrust Act ("Sherman Act"), 15 U.S.C. §1; anti-competitive exclusive dealing in violation of Section 3 of the Clayton Antitrust Act, 15 U.S.C. §14; and unlawful maintenance of a monopoly and attempted maintenance of a monopoly in violation of Section 2 of the Sherman Act, 15 U.S.C. §2.

On September 17, 1999, Defendant filed a Motion for Judgment as a Matter of Law at the close of Plaintiffs' case. Defendant renewed this Motion at the close of its case. At the conclusion of a two month trial, the Court submitted all four counts to the jury.

On October 13, 1999, the jury returned a verdict in favor of Le Page's and against 3M on Count I (unlawful maintenance of monopoly power) and Count II (unlawful attempted maintenance of monopoly power), in the amount of $22, 828, 899.00. The jury found in favor of Defendant on Count III (exclusive dealing) and Count IV (restraint of trade). Defendant 3M now moves for judgment as a matter of law, or in the alternative for a new trial, on Counts I and II.

II. STANDARD

Rule 50(b) of the Federal Rules of Civil Procedure provides in relevant part:

> If, for any reason, the Court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the Court is considered to have submitted the action to the jury subject to the Court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after the entry of judgment and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the Court may:
> (1) if a verdict was returned:
> (A) allow judgment to stand,
> (B) order a new trial, or
> (C) direct entry of judgment as a matter of law.

Fed. R. Civ. P. 50(b)(1).

III. MOTION FOR JUDGMENT AS A MATTER OF LAW

Defendant moves for entry of judgment in its favor as a matter of law on Counts I and II. "[J]udgment as a matter of law should be granted sparingly." Walter v. Holiday Inns, Inc., 985 F.2d 1232, 1238 (3d Cir.1993). A motion for judgment as a matter of law "should be granted only if, viewing the evidence in the light most favorable to the nonmovant and giving it the advantage of every fair and reasonable inference, there is insufficient evidence from which a jury could reasonably find liability." Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1166 (3d Cir.1993)(citing Wittekamp v. Gulf & Western Inc., 991 F.2d 1137, 1141 (3d Cir.1993)). Although a scintilla of evidence is not enough to sustain a verdict of liability, Walter, 985 F.2d at 1238, the question is "

'whether there is evidence upon which a jury could properly find a verdict for [the prevailing] party.'" Lightning Lube, Inc., 4 F.3d at 1166 (quoting Patzig v. O'Neil, 577 F.2d 841, 846 (3d Cir.1978)).

A. COUNT II

In Count II, Plaintiff proceeded under a unique "attempted maintenance of monopoly power" theory. The Court submitted the following charge to the jury:

> Count 2 is the unlawful attempt to maintain monopoly power. And Le Page's alleges that it was injured by 3M's unlawful attempt to maintain its monopoly.
>
> And to win on its attempted monopolization, Le Page's must prove each of the following elements by a preponderance of the evidence.
>
> First, that 3M engaged in predatory or exclusionary conduct.
>
> Secondly, that 3M had a specific intent to maintain monopoly power in a relevant market.
>
> Thirdly, that there was a dangerous probability that 3M would achieve its goal of maintaining monopoly power in the relevant market.
>
> And fourthly, that Le Page's was injured in its business or properly by 3M's predatory or exclusionary conduct.

Trial Transcript ("Tr.") Vol. No. 34 at 140-141. Defendant argues that the Sherman Act does not provide a cause of action for "attempt to maintain a monopoly." The Court agrees.

Section 2 of the Sherman Act 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 the several States, or with foreign nations, shall be deemed guilty of a felony.

15 U.S.C. §2 (1994). As construed by the courts, Section 2 encompasses two causes of action: monopolization and attempted monopolization. The offense of monopolization under Section 2 has two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power. . . " Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 481 (1992)(internal citations and quotations omitted). On the other hand, the offense of

attempted monopolization requires that the defendant "(1) had engaged in predatory conduct or anti-competitive conduct with (2) specific intent to monopolize and with (3) a dangerous probability of achieving monopoly power." Ideal Dairy Farms, Inc. v. John Labatt, Ltd., 90 F.3d 737, 750 (3d Cir. 1996).

The Court declines to create a new third cause of action: attempted maintenance of monopoly power. First, the Court has found no case law, nor has Plaintiff cited any case which supports an "attempted maintenance of monopoly power" claim. Furthermore, the Court does not discern any support in the legislative history of the Sherman Act for creating such a cause of action. Moreover, the Court finds "an attempted maintenance of monopoly power" inherently illogical. Any "attempt claim" rests on the underlying theory that the defendant has failed to achieve its goal, which in this case is maintenance of monopoly power. But, if the defendant has failed to achieve its goal of maintaining monopoly power, then it follows that the defendant lacks monopoly power. Lacking any monopoly power to maintain, the defendant cannot be held liable for "attempted maintenance of monopoly power."

Thus, this "attempted maintenance" concept in fact presents a standard attempted monopolization claim. The attempted monopolization cause of action readily embodies this scenario by requiring proof that there was a dangerous probability that the defendant would eventually succeed in achieving monopoly power. See Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 454 (1993). This language, thus, recognizes that the defendant does not have monopoly power, but would eventually achieve monopoly power if it continued to engage in predatory conduct.

Because neither the statutory language nor the case law support an "attempted maintenance of monopoly power" claim, the Court declines to create such a cause of action. The Court, therefore, will enter judgment in favor of Defendant on Count II.

B. COUNT I

In Count I, Plaintiff brought a monopolization claim under Section 2 of the Sherman Act, 15 U.S.C. §2. The Court instructed the jury as follows:

> . . . Count I in this case is unlawful maintenance of monopoly power.
> Le Page's alleges that it was injured by 3M's unlawful monopolization in the United States market for invisible and transparent tape for home and office use. To win on their claim of monopolization, Le Page's must prove each of the following elements by a preponderance of the evidence.
> First, that 3M had monopoly power in the relevant market.
> Secondly, that 3M willfully maintained that power through predatory or exclusionary conduct. . .
> And thirdly, that Le Page's was injured in its business or property because of 3M's restrictive or exclusionary conduct.

Tr. Vol. No. 34 at 131-132. The jury verdict form then asked the jurors to answer the following three questions related to Count I:

> (1) Do you find that Le Page's has proven, by a preponderance of the evidence, that the relevant market is invisible and transparent tape for home and office use in the United States?;
> (2) Do you find that Le Page's has proven, by a preponderance of the evidence, that 3M unlawfully maintained monopoly power as defined under the instructions for Count I?; and
> (3) Do you find that Le Page's has proven, as a matter of fact and with a fair degree of certainty, that 3M's unlawful maintenance of monopoly power injured Le Page's business or property as defined in these instructions?

The jury answered each question in the affirmative.

1. Relevant Market

Defendant first argues that Plaintiff failed to prove that the relevant geographic market is the United States because Plaintiff failed to present evidence of entry barriers. To the contrary, the Court finds that Plaintiff introduced sufficient evidence from which the jury could properly find that the relevant market is the United States. First, Plaintiff's economic expert, Mr. Kenneth Baseman, opined that the United States is a separate market for tape sales than the rest of the world. Tr. Vol. 21 at 61.

Similarly, Defendant's economic expert found the relevant market defined by Mr. Baseman was " . . . reasonable." Tr. Vol. 32 at 71-72. Moreover, the evidence produced at trial showed that new entrants in the tape market have been negligible. Tr. Vol. 27 at 124-25; PX 365, 366. Furthermore, Plaintiff introduced evidence that distributors' inventory and "just in time" delivery requirements make it infeasible for them to utilize foreign manufacturers. Tr. Vol. 17 at 11; Tr. Vol. 20 at 124. The record thus supports a reasonable conclusion that the relevant geographic market for invisible and transparent tape is the United States.

2. Exclusionary Conduct

Defendant advances several arguments directed at the second element of Count II, namely whether 3M willfully maintained its monopoly power through predatory or exclusionary conduct. The Court instructed the jury as follows:

> [P]redatory or exclusionary conduct is conduct that has the effect of preventing or excluding competition, or frustrating or impairing the efforts of other firms to compete for customers within the relevant market. It is not necessary that such conduct be unlawful in and of itself, apart from its effect in maintaining 3M's monopoly power. You should consider the following factors in determining whether 3M's conduct was predatory or exclusionary: its effect on its competitors, such as Le Page's, its impact on consumers, and whether it has impaired competition in an unnecessarily restrictive way. You may also consider that behavior that might otherwise not be of concern to the antitrust laws, or that might be viewed as pro-competitive, [can] take on an exclusionary connotation when practiced by a firm with monopoly power. Thus, exclusionary conduct and predatory conduct comprehends, at the most, behavior that not only, one, tends to impair the opportunity of its rivals, but also, number two, either does not further competition on the merits, or does so in an unnecessarily restrictive way. If 3M has been attempting to exclude rivals on some basis other than efficiency, you may characterize that behavior as predatory.
>
> However, you may not find that a company willfully maintained monopoly power, if that company has maintained that power, solely through the exercise of superior foresight or skill in industry, or because of economy of technological efficiencies, or because of size, or because of changes in customer and consumer preferences, or simply because the market is so limited that it is impossible to efficiently produce the product, except by a plan large enough to supply the whole demand.

> The acts or practices that result in the maintenance of monopoly power must represent something other than the conduct of business that is part of the normal competitive process, or even extraordinary commercial success. They must represent conduct that has made it very difficult or impossible for competitors to engage in fair competition.

Tr. Vol. 34 at 138-39. Viewing the evidence and inferences drawn therefrom in the light most favorable to Plaintiff, the Court finds that the jury's verdict that Defendant willfully maintained monopoly power through predatory or exclusionary conduct was supported by sufficient evidence adduced at trial.

a. Economic Coercion

First, Defendant submits that Le Page's was required under SmithKline Corp. v. Eli Lilly & Co., 575 F.2d 1056 (3d Cir. 1978)("SmithKline"), but failed to prove, that (1) Scotch tape is a monopoly product, and (2) that 3M's bundled rebate program effectively required 3M's customers to forego purchasing Le Page's private label tape if they wished to obtain rebates on 3M's monopoly product.

Tying cases under Section 1 of the Sherman Act require proof of monopoly power in the first product and economic coercion. See e.g. Marts v. Xerox, Inc., 77 F.3d 1109, 1113 (8th Cir. 1996). This action, however, has not proceeded under a tying theory. Rather, this case presents a unique bundled rebate program that the jury found had an anti-competitive effect.

Moreover, Plaintiff introduced evidence that Scotch is a monopoly product, and that 3M's bundled rebate programs caused distributors to displace Le Page's entirely, or in some cases, drastically reduce purchases from Le Page's. Tr. Vol. 30 at 105-106; Vol. 27 at 30. Under 3M's rebate programs, 3M set overall growth targets for unrelated product lines. In the distributors' view, 3M set these targets in a manner which forced the distributor to either drop any non-Scotch products, or lose the maximum rebate. PX 24 at 3M 48136. Thus, in order to qualify for the maximum rebate

under the EGF/PGF programs, the record shows that most customers diverted private label business to 3M at 3M's suggestion. Tr. Vol. 28 at 74-75; PX23, 28, 32, 34, 715. Similarly, under the newer Brand Mix rebate program, 3M set higher rebates for tape sales which produced a shift from private label tape to branded tape. Tr. Vol. 31 at 79. PX 393 at 534906.

Furthermore, Plaintiff introduced evidence of customized rebate programs that similarly caused distributors to forego purchasing from Le Page's if they wished to obtain rebates on 3M's products. Specifically, the trial record establishes that 3M offered Kmart a customized growth rebate and Market Development Funds payment. In order to reach the $15 million sales target and qualify for the $1 million rebate, however, Kmart had to increase its consumer stationary purchases by $5.5 million. Kmart substantially achieved this "growth" by dropping Le Page's and another private label manufacturer, Tesa. PX 51 at 3M 102175, PX 121 at 156838. Likewise, 3M customized a program with Staples that provided for an extra 1% bonus rebate on Scotch tape sales "if Le Page's business is given to 3M." PX 98 at 3M 149794. Finally, 3M provided a similar discount on Scotch tape to Venture Stores "based on the contingency of Venture dropping private label." PX 712 at 3M 450738. Thus, the jury could have reasonably concluded that 3M's customers were forced to forego purchasing Le Page's private label tape in order to obtain the rebates on Scotch tape.

b. Efficiency

Second, Defendant contends that Plaintiff was required, but failed to prove that Le Page's approaches 3M's level of efficiency as a competitor. 3M reads SmithKline as imposing an equivalent efficiency standard. The Court disagrees with this construction, and finds that under the law of this Circuit, a plaintiff does not need to establish equal or equivalent efficiency to succeed under Section 2 of the Sherman Act. Rather, "[i]f a firm has been attempting to exclude rivals on some basis other

than efficiency, it is fair to characterize its behavior as predatory." Aspen Skiing Company v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 (1985)(internal quotation and citation omitted).

Following Aspen and its progeny, the Court thus instructed the jury as follows: "if 3M has been attempting to exclude rivals on some basisother than efficiency, you may characterize its behavior as predatory." Tr. Vol. 34 at 138: 19-21. Accordingly, the jury properly distinguished between 3M's technological and economical efficiencies, and 3M's other exclusionary conduct.

c. Injury to Competition

Third, Defendant argues that Plaintiff failed to show that 3M's rebate programs injured competition. Nevertheless, "a finding of no anti-competitive market effect would not suffice to dispose of [plaintiff's] claim under section 2 of the Sherman Act." Angelico v. Lehigh Valley Hosp., Inc., 184 F.3d 268, 276 n. 5 (3d Cir. 1999)(citing Mahone v. Addicks Util. Dist., 836 F.2d 921, 939 (5th Cir.1988)("[P]roving an injury to competition is not an element of a monopolization-based antitrust claim.")). Accordingly, this argument does not state a basis for judgment as a matter of law. Rather, as one of several factors to consider in determining whether 3M's conduct was predatory, the jury was properly instructed to evaluate "whether [3M's conduct] impaired competition in an unnecessarily restrictive way." Tr. Vol. 34 at 138: 8-9.

Moreover, the trial record supports a finding that 3M's conduct did impair competition in an unnecessarily restrictive way. As discussed supra, Plaintiff introduced evidence that the growth targets of 3M's rebate programs caused distributors to displace competitors. The record fully supports the jury's verdict on this element.

d. Recoupment

Defendant claims that under SmithKline Corp. v. Eli Lilly & Co., 427 F.Supp. 1089 (E.D. Pa. 1976), aff'd, 575 F.2d 1056 (3d Cir. 1978), Advo, Inc. v. Philadelphia Newspapers, Inc., 51 F.3d

1191 (3d Cir. 1995), and Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993), Plaintiff was required to prove that if Le Page's was eliminated, 3M would be able to recoup the revenues and profits it sacrificed through its rebate program without attracting new entrants into the market which would check its pricing behavior. The Court does not find this argument persuasive.

First, the Court does not construe these cases as imposing a separate "recoupment" element in Section 2 cases. Rather, the definition of monopoly power includes a recoupment component. The Court explained to the jury that "monopoly power is. . . the power to control prices or exclude competition in a relevant market." Tr. Vol. 34 at 132: 18-19. The Court instructed:

> The power to control prices is the power of a company to establish appreciably higher prices for its equivalent goods, without a substantial loss of business to its competitor. That's the power to control prices.
>
> The power to exclude competition means the power of a company to dominate a market by eliminating existing competition from that market, or by preventing new competition from entering that market.
>
> . . .
>
> The existence of monopoly power may also be shown by evidence that 3M has the power to raise prices appreciably without substantially losing business to competitors. . .

Tr. Vol. 34 at 132:22-133:4, 135: 8-10. Thus, under this definition, by finding that 3M possessed monopoly power, the jury implicitly determined that 3M enjoyed the power to control prices or exclude competition in the invisible and transparent tape market.

Moreover, 3M's recoupment argument rests on the assumption that "a wave of new entrants who will drive prices down to competitive levels," Advo, Inc., 51 F.3d at 1203, will enter the market. As discussed supra Plaintiff, however, introduced substantial evidence at trial that significant entry

barriers prevent competitors from entering the invisible and transparent tape market in the United States. Thus, this case presents a situation in which a monopolist remains unchecked in the market.

Finally, Plaintiff presented evidence that 3M succeeded in eliminating the availability of the lower priced, private label tape at Hooks drug stores. PX130. The jury could reasonably infer that 3M's planned elimination of the lower priced private label tape, as well as the lower priced Highland brand, would channel consumer selection to the higher priced Scotch brand and lead to higher profits for 3M. Indeed, Defendant concedes that "3M could later recoup the profits it has forsaken on Scotch tape and private label tape by selling more higher priced Scotch tape. . . if there would be no competition by others in the private label tape segment when 3M abandoned that part of the market to sell only higher-priced Scotch tape." Def. Mem. at 30.

e. Other Proof

Finally, Defendant contends that because the jury did not find for Le Page's under Section 1 of the Sherman Act or Section 3 of the Clayton Act, the evidence surrounding exclusive dealing cannot be used to support the jury verdict on Count I. As the law of the case makes clear, conduct that does not violate Section 1 may still be "sufficient to establish the offense of monopolization under §2 of the Sherman Act." Le Page's Inc. v. 3M, No. Civ-97-3983, 1997 WL 734005, at *9 (E.D. Pa. Nov. 14, 1997); accord United States v. Microsoft Corp., No. Civ-A-98-1233 (TPJ), 1998 WL 614485, at *23 (D. D.C. Sept. 14, 1998)(holding that "a monopolist's conduct that does not give rise to the level of a §1 violation may nevertheless violate §2 if it 'impair[s] competition in an unnecessarily restrictive way.'" Accordingly, the Court rejects this argument.

3. Injury in Fact and Antitrust Injury

Defendant contends that Plaintiff failed to prove that Le Page's suffered injury in fact and antitrust injury. The Court charged the jury that to establish injury, "Le Page's must have offered

evidence that established as a matter of fact and with a fair degree of certainty that 3M's alleged illegal conduct was a material cause of Le Page's injury." Tr. Vol. 34 at 155: 6-8. Evidence that a plaintiff lost customers and that this loss was a result of the defendants' antitrust violations is sufficient to prove injury and causation under Section 2 of the Sherman Act. Callahan v. A.E.V., Inc., 182 F.3d 237, 253 (3d Cir. 1999). Plaintiff introduced substantial evidence that the anti-competitive effects of 3M's rebate programs caused Le Page's losses. Tr. Vol. 17 at 24-25, 46; Vol. 2 at 72, 95, Vol. 17 at 46.; Vol. 5 at 167-68. Moreover, the record amply reflects that 3M's rebate programs did not benefit the ultimate consumer. Tr. Vol. 15 at 13-14, 148-149; PX 76 at 3M 126048; PX 26 at 3M 048169. Accordingly, the jury could reasonably find injury and causation under Section 2 of the Sherman Act.

4. Amount of Damages

Finally, 3M argues that the jury's damage calculation was too speculative to uphold the award, and challenges the damages model of Plaintiff's expert, Mr. Terry Musika. The Court, however, concludes that there is no basis for rejecting the jury award. The Court specifically instructed the jury that it could only award damages to Le Page's for "injuries caused by a violation of the antitrust laws." Tr. Vol. 34 at 157: 9-10. The Court clearly charged the jury to disregard losses not caused by 3M:

> [Y]ou may not calculate damages based only on speculation or guessing. . . [Y]ou may not award damages for injuries or losses caused by other factors.

Tr. Vol. 34 at 157:7-11. The record further demonstrates that Mr. Musika's assumptions were grounded in the past performances of Scotch, Highland and Le Page's tapes, as well as 3M's own internal projections of future growth. Tr. Vol. 19 at 74:9-18, 81:10-19, 86-89, 124:18-25. Accordingly, this argument does not provide a basis for judgment as a matter of law.

In accordance with the foregoing, the Court will grant Defendant's Motion for Judgment as a Matter of Law on Count II, but deny the Motion with respect to Count I.

IV. MOTION FOR A NEW TRIAL

In the alternative, Defendant moves for a new trial, pursuant to Rule 59 of the Federal Rules of Civil Procedure. "A new trial is appropriate only when the verdict is contrary to the great weight of the evidence or errors at trial produce a result inconsistent with substantial justice." Sandrow v. United States, 832 F.Supp. 918, 918 (E.D.Pa.1993) (citing Roebuck v. Drexel Univ., 852 F.2d 715, 735-36 (3d Cir.1988)). When the basis of the motion for a new trial is an alleged error involving a matter within the sound discretion of the trial court, such as the court's evidentiary rulings or points of charge to the jury, the trial court has wide latitude in ruling on the motion. Griffiths v. CIGNA Corp., 857 F.Supp. 399, 410 (E.D.Pa.1994) (citing Link v. Mercedes-Benz of North America, Inc., 788 F.2d 918, 921-22 (3d Cir.1986); Lind v. Schenley Indus., Inc., 278 F.2d 79, 90 (3d Cir.), cert. denied, 364 U.S. 835 (1960); Lightning Lube v. Witco Corp., 802 F.Supp. 1180, 1185 (D.N.J. 1992), aff'd, 4 F.3d 1153 (3d Cir.1993)), aff'd without opinion, 60 F.3d 814 (3d Cir.1995).

The trial court's discretion to grant a new trial, however, is more limited when the asserted ground is that the verdict is against the weight of the evidence. In that instance, the motion should be granted only where permitting the verdict to stand would result in a miscarriage of justice. Sandrow, 832 F.Supp. at 918 (citing Klein v. Hollins, 992 F.2d 1285, 1290 (3d Cir.1993)); Griffiths, 857 F.Supp. at 411 (citing Williamson v. Conrail, 926 F.2d 1344, 1353 (3d Cir.1991)). In reviewing a motion for a new trial, the Court must " 'view all the evidence and inferences reasonably drawn therefrom in the light most favorable to the party with the verdict.' " Marino v. Ballestas, 749 F.2d 162, 167 (3d Cir.1984) (citation omitted).

A. POINTS OF CHARGE

Defendant challenges eight points in the jury instructions. First, Defendant argues that the "conduct element" of the jury charge was "too general" in that it does not reveal which of its actions violated the antitrust laws. Section 2 of the Sherman Act does not require individualized or truncated transgressions, such as tying, leveraging, or predatory pricing, so long as the overall conduct is exclusionary or predatory. The Court adequately defined exclusionary or predatory conduct in the instructions. Tr. Vol. 34 at 137:21-139:11. Accordingly, this argument is rejected.

Second, 3M complains that the instructions failed to sufficiently define Plaintiff's theory of the case. See Tr. Vol. 34 at 123:15-125:13. Similarly, 3M claims that the jury was not adequately charged on its own theory of the case. See Tr. Vol. 34 at 125:14-126:11. To the extent that Defendant challenges the Court's view of the law of the case, this argument has been fully discussed and rejected. See supra §III.B. To the extent that 3M disagrees with the manner in which the Court framed the factual approach of each side, the Court is under no obligation to restate the parties' factual theory in the charge to the jury. The Court, therefore, rejects these two grounds.

Fourth, 3M challenges the "Scalia charge," Tr. Vol. 34 at 138: 10-14, on the ground that this charge vested too much discretion in the jury to determine for itself what conduct was exclusionary. In reviewing a claim of error in the charge to the jury, the Court evaluates the instructions as a whole. Malley-Duff & Associates, Inc. v. Crown Life Ins., 734 F.2d 133, 147 (3d Cir. 1984). Indeed, the Court charged the jury to consider the entire charge as a whole:

> [Y]ou should not single out any instruction[], but instead you should consider my instructions as a whole, including the instructions that I gave you at the beginning of this case when you retire to deliberate in the jury room.

Tr. Vol. 34 at 114:9-13. Furthermore, the Court charged that no one instruction surpassed any other instruction in terms of its importance:

> Now, you are instructed that the Court does not intend to stress the relative importance of any question of fact or law, either by the number of instructions given upon a particular proposition or by the order in which the instructions were given.

Tr. Vol. 34 at 164-65. The Court fully defined the term "predatory or exclusionary conduct" for the jury. Tr. Vol. 34 137:21-139:11. Accordingly, the Court dismisses this ground for relief.

Next, Defendant objects to the verdict form language stating "use in the United States," arguing that this language implied that the relevant criterion was the area in which the tape was used. The Court adequately instructed the jury on this aspect of the case:

> Question No. 1 on your verdict form deals with relevant market. There are two aspects that you must consider in defining relevant market. The fist is the relevant product market. The second is the relevant geographic market. Now, Le Page's bases its case entirely on the relevant market being invisible and transparent home and office tape in the United States. You must determine whether Le Page's has proved by a preponderance of the evidence that the relevant market is invisible and transparent tape for home and office use in the United States in order for Le Page's to proceed on any of its claims.
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> . . .
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> . . .
>
> There is no big problem with respect to what the product market, the relevant product market, is in this case, because the parties agree that the relevant product market is transparent and invisible tape for home and office use, which includes by agreement of the parties acetate, cellophane and polypropylene tape, and you should use this definition of relevant product market throughout these instructions.
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> . . .
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> . . .
>
> The second aspect of relevant market, however, is in significant contest in this case, and the second part of relevant market is the relevant geographic market. Now, this aspect of relevant market is the geographic area is which the products compete. Le Page's contends that the relevant geographic market is the United States. Now, the relevant geographic market is the area in which, (1) a potential tape customer may rationally look for the goods it seeks and also the area in which (2) other businesses effectively compete with 3M for the distribution of the relevant product.

> Consequently, the geographic market is not comprised of the region in which the seller attempts to sell its product, but rather is comprised of the area where its customers would look to buy such products, and in this case when we use the term "customers," customers refers to the retailers and distributors of tape, not the ultimate consumer.
>
> Real quickly, for you again, that part. We're talking about relevant geographic market. And the relevant geographic market is the area in which a potential tape customer-- now, of course, you know we're talking about the distributors like Kmart, etc.-- a potential tape customer may rationally look for the goods it seeks, and the area in which other businesses effectively compete with 3M for the distribution of the relevant product.
>
> Now, you may consider where customers -- and when we use the word customers, we're talking about the distributors like Kmart, Staples -- you may consider where customers, as a practical matter, can and do buy the product. That is, whether customers residing in one area buy from the same sources as customers residing in another area, or if they buy from local sources rather than more distant sources, because they find it more convenient or practical to do so.
>
> In this regard, you may consider whether an increase in price charged by suppliers in one location would cause a substantial number of purchasers to turn to more remote sources of supply. And if so, the locations are and would be part of the same geographic market.

Tr. Vol. 34 at 128-130. This extensive instruction properly instructed the jury that the relevant criterion was the area in which distributors rationally looked for tape, and in which other businesses effectively compete with 3M for the distribution of the tape. Accordingly, this argument is rejected.

Sixth, Defendant submits that the Court erred in refusing Defendant's Proposed Instruction No. 9 which stated that "a high share of sales in a relevant market may be achieved through traditional means of competition and is not itself determinative that there is monopoly power within that market." Defendant further argues that the definition of monopoly power failed to consider potential future competitors and the strength of customers. The Court's charge amply covered the definition of monopoly power:

Monopoly power is defined as the power to control prices or exclude competition in a relevant market. Therefore, you must determine whether 3M could control prices or exclude competition in the relevant market.

The power to control prices is the power of a company to establish appreciably higher prices for its equivalent goods, without a substantial loss of business to its competitor. That's the power to control prices. The power to exclude competition means the power of a company to dominate a market by eliminating existing competition from that market, or by preventing new competition from entering the market.

In making these determinations, you may consider the following factors in determining whether 3M had monopoly power in the market: the size of 3M's market share, the number, size and strength of competing firms, the freedom of entry into the field, pricing trends and practices in the industry, the ability of consumers to substitute comparable goods or services from outside the market, and consumer demand.

Now, you have head evidence about 3M's market share. You may infer whether or not monopoly power exists from 3M's share of the relevant market. Market share is a firm's share of total industry sales, shipments and products, capacities or reserves, expressed as a percentage of the whole. And there's been evidence on market share in the United Sates.

Now, there are a variety of ways to measure market share, but whatever measure you use must be reasonably and consistently applied.

You have heard evidence regarding 3M's market share after June 11, 1993. If you determine that 3M's share of the relevant market is less than 50 percent, that market share, less than 50 percent, by itself does not permit you to infer that 3M has monopoly power. If you determine that 3M's share of the relevant market is 80 percent or higher, well, that is strong evidence of the existence of monopoly power. And if you determine that 3M's market share is somewhere between 50 percent and 80 percent, then you may infer the existence of monopoly power from that share. And the inference is stronger, the higher 3M's market share is within that 50 to 80 percent range.

You may also consider the trend in 3M's market share. A declining market share may indicate the absence of monopoly power, though it does not foreclose such a finding, while an increasing market share may indicate the opposite.

And another factor is the number and size of 3M's competitors. If these are few, weak, or have small or decreasing market shares so that they do not offer substantial competition to 3M in the relevant market, then this may tend to indicate that 3M has monopoly power in that market. If, on the other hand, if those

> competitors are numerous, and vigorous, or have large or increasing shares of that market, this may be evidence that 3M does not have monopoly power.
>
> And you may also consider the history of entry and exit from that market by other companies. Entry of companies into the market may indicate that 3M lacks monopoly power. On the other hand, departure of companies from the market, or the failure of companies to enter the market may indicate that 3M has monopoly power.
>
> These are all circumstances for your consideration. The existence of monopoly power also may be shown by evidence that 3M has the power to raise prices appreciably, without substantially losing business to competitors, or by evidence that 3M has profit margins that were extraordinarily high, or maintained high rates of return over a long period of time.

Tr. Vol. 34 at 132:18-135:13. Accordingly, the Court rules against Defendant on this point.

In addition, Defendant argues that the Court erred in refusing to give Proposed Instruction No. 30 (Mitigation). This proposed instruction, however, was not supported by the evidence. Accordingly, the absence of this instruction does not provide grounds for relief.

Finally, 3M submits that the Court erred in refusing a variety of its Proposed Instructions[1]: (1) Proposed Instruction Nos. 2 and 7 (Purpose of Antitrust Laws); (2) Proposed Instruction No. 12 (Antitrust Injury); (3) Proposed Instruction No. 13 (Lost Profits); (4) Proposed Instruction No. 22 (Unlawful Monopolization), and (5) Proposed Instruction No. 25 (Injury to Competition). The Court adequately covered all of these areas of the law in its charge to the jury. See Tr. Vol. 34 at 122-23 (Purpose of the Antitrust Laws); 153-54 (Antitrust Injury); 155-57 (Damages); 139-40 (Unlawful Monopolization), and 137-38 (Injury to Competition). Accordingly, the Court rejects this argument.

The Court has considered the aforementioned alleged instruction errors, and all other objections raised in Defendant's Motion for A New Trial, and concludes that none of these grounds support a new trial under Rule 59 of the Federal Rules of Civil Procedure.

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[1]All citations are to Defendant's Proposed Jury Instructions, filed July 23, 1999. (Docket #186).

B. EVIDENTIARY ISSUES

Defendant raises three evidentiary issues. Specifically, 3M contends that (1) the Court improperly allowed hearsay testimony from Jim Kowieski concerning 3M's "upfront payments" at Kmart; (2) the Court improperly excluded evidence of the Kodak Growth Incentive Plan, and the Ponder & Best Rebate Program; and (3) the Court improperly excluded DX 1667, a glossy original catalog promoting Ross products, as evidence of a comparative restraint imposed on 3M by potential competitors. The Court has reviewed the three challenged rulings, and upholds the Court's decision. Even assuming these evidentiary rulings were erroneous, the Court finds that these three rulings did not produce "a result inconsistent with substantial justice." Sandrow, 832 F.Supp. at 918.

Finally, Defendant argues that the verdict is against the weight of the evidence. Viewing all the evidence and inferences reasonably drawn therefrom in the light most favorable to Plaintiff, the Court cannot conclude that the jury's verdict in this action results in a miscarriage of justice. Accordingly, the Court will deny Defendant's Motion for a New Trial.[2]

An appropriate Order follows.

[2]Because the Court has reached the merits of Defendant's argument, the Court expresses no opinion on whether Defendant has waived any of the various grounds asserted in support of its Motion for Judgment as a Matter of Law, and Motion for A New Trial.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LE PAGE'S INCORPORATED, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	CIVIL ACTION No. 97-3983
	)	
3M (MINNESOTA MINING AND MANUFACTURING COMPANY),	)	
	)	
	)	
Defendant.	)	

ORDER

AND NOW, this day of March, 2000, upon consideration of Defendant's Motion for Judgment As A Matter of Law, and Motion for A New Trial, and the briefing thereon, **IT IS HEREBY ORDERED** that

1. Defendant's Motion for Judgment As A Matter of Law (docket # 343) is **GRANTED** as to Count II and **DENIED** in all other respects;

2. The parties submit a proposed Judgment within ten (10) days of the date of this Order; and

3. Defendant's Motion for A New Trial (docket #345) is **DENIED**.

BY THE COURT:

_____

John R. Padova