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

LEPAGE’S INCORPORATED and LEPAGE'S MANAGEMENT COMPANY,	:	CIVIL ACTION
Plaintiffs	:	
v.	:	
3M (MINNESOTA MINING AND MANUFACTURING COMPANY),	:	
Defendant	:	No. 97-3983

M E M O R A N D U M

Padova, J. May , 1999

LePage’s Incorporated and LePage's Management Company (“LePage’s”) brought this action against Minnesota Mining and Manufacturing Company (“3M”), alleging that 3M engaged and is engaging in a number of anticompetitive practices in violation of antitrust laws. 3M has filed a Motion for Summary Judgment. For reasons that follow, the Motion will be denied.

I. LEPAGE'S STATEMENT OF CLAIMS:[1]

The following is taken from LePage's Statement of Claims:

For over sixty years, 3M has enjoyed a monopoly in the market for invisible and transparent tape for home and office use in the United States. Until recently, there were three major suppliers in the market: 3M, LePage's, and Tesa Tuck, Inc. ("Tesa"). After this lawsuit was filed, Tesa withdrew from the market, leaving only 3M and LePage's. 3M has a market share of over 90%, making it a monopolist, which 3M concedes for purposes of this Motion.

For decades, LePage's has marketed its own brand of tape and other products, including its well-known children's glue. 3M has marketed its premium Scotch brand tape and a second tier tape, Highland brand, as well as a host of other products that LePage's does not make. Starting in the early 1980's, LePage's developed private label tape programs. LePage's private label tapes sold at prices well below the price of 3M's Scotch tape, and LePage's private label tape business began to erode 3M's monopoly. From

[1]The Court directed LePage's to file a Statement of Claims in response to 3M's repeated representations that it could not understand the nature of LePage's antitrust claims against it. 3M's Motion for Summary Judgment is directed primarily to LePage's Statement of Claims and its supporting evidence, and the information in this section is taken from LePage's Statement of Claims. Before LePage's filed its Statement of Claims, the claims in the Amended Complaint were set out in this Court's Opinion on Defendant's Motion to Dismiss. See LePage's Inc. v. 3M, No. 97-3983, 1997 WL 734005 (E.D. Pa. Nov. 14, 1997). LePage's later filed a Second Amended Complaint naming an additional Plaintiff, LePage's Management Company. The claims in the Second Amended Complaint are not materially different from those in the Amended Complaint.

1982 to 1992, LePage's tape business had a compound annual growth rate of 11.8%, its sales increased from $12 million to $37.2 million, and its market share grew to nearly 12%. 3M's market share declined, but it maintained its monopoly. Until 1992, 3M did not attempt to compete in the private label segment of the market.

Office “superstore” chains such as Office Depot, Office Max, and Staples, which developed in the 1980's and 90's, were in a position to use private label tape that would compete with 3M's Scotch tape, and they did so. 3M perceived LePage's own brand, and especially LePage's private label brands, as a threat to 3M's monopoly and to the high profits that Scotch tape generated.

Faced with this threat, 3M set out to protect the dominance in the market of Scotch tape by crippling its competitors and limiting the ability of consumers to buy tape other than Scotch tape. It did this in three ways: (1) by creating “bundled rebate” programs which discouraged competition on the merits; (2) by offering its customers direct financial incentives for exclusivity; and (3) by stifling the growth of private label and second tier brand sales of transparent tape. LePage's contends that, to a large extent, 3M has succeeded.

In response, 3M asserts that the practices of which LePage's complains were not only lawful, they were procompetitive.

II. LEGAL STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" if there is sufficient evidence with which a reasonable jury could find for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). A factual dispute is "material" if it might affect the outcome of the case. Id.

A party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant's initial Celotex burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." Id. at 325, 106 S. Ct. at 2554. After the moving party has met its initial burden, “the adverse party’s response . . . must set forth specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e). That is, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. at 322, 106 S. Ct. at 2552. Under Rule 56, the Court must view the evidence presented on the motion in the light most favorable to the opposing party. Anderson v. Liberty Lobby, Inc., 477 U.S. at 255, 106 S. Ct. at 2513 ("The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [the non-movant's] favor."). "[I]f the opponent [of summary judgment] has exceeded the 'mere scintilla' [of evidence] threshold and has offered a genuine issue of material fact, then the court cannot credit the movant's version of events against the opponent, even if the quantity of the movant's evidence far outweighs that of its opponent." Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358, 1363 (3d Cir. 1992).

III. DISCUSSION

LePage's alleges unlawful restraint of trade in violation of § 1 of the Sherman Antitrust Act ("Sherman Act"), 15 U.S.C.A. § 1 (West 1997); anticompetitive exclusive dealing in violation of § 3 of the Clayton Antitrust Act ("Clayton Act"), 15 U.S.C.A. § 14 (West 1997); and monopolization and attempted monopolization in violation of § 2 of the Sherman Act, 15 U.S.C.A. § 2 (West 1997).[2]

Section 1 of the Sherman Act is entitled, "Trusts, etc., in restraint of trade illegal," and it provides in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C.A. § 1. In order to present a valid claim under § 1, plaintiffs must allege that "(1) the defendants contracted, combined or conspired among each other, (2) the combination or conspiracy produced anti-competitive effects within the relevant product and geographic markets; (3) the objects of the conduct pursuant to that contract or conspiracy were illegal; and (4) the plaintiffs were injured as a proximate result of that conspiracy." Ideal Dairy Farms, Inc. v. John Labatt, Ltd., 90 F.3d 737, 748 n.5 (3d Cir. 1996) (citation omitted). LePage's alleges that, "[b]ecause the 3M conduct at issue in this case involved [unlawful] agreements between 3M and office supply retailers and wholesalers concerning the terms and

[2] Plaintiff is authorized to bring this suit by Section 4 of the Clayton Act, which provides: ". . . [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 14 U.S.C.A. § 14 (West 1997).

conditions under which 3M products were sold, 3M is . . . liable to LePage's under Section 1.”[3] (Pl.'s St. Claims at 51.)

Section 3 of the Clayton Act is entitled “Sale, etc., on agreement not to use goods of competitor,” and it provides:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States . . . or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

15 U.S.C.A. § 14. LePage's alleges that “[t]he cash payments, bundled rebates and other incentives that 3M provided to retailers and wholesalers in order to exclude LePage's and Tesa from critical distribution channels also violated Section 3.”[4]

Section 2 of the Sherman Act is entitled, "Monopolizing trade a felony,” and it provides in pertinent part: “Every person

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[3]It is not always clear which conduct LePage's claims violates which section of the antitrust statutes; however, if the evidence it presents with respect to any alleged conduct satisfies the summary judgment standard with respect to any section at issue in this case, the claim under that section will go forward.

[4]As this Court stated in writing on the Motion to Dismiss in this case, § 3 of the Clayton Act applies to a narrower range of transactions than does § 1 of the Sherman Act. Section 3 includes goods or commodities but not real property, advertising, or services. However, both require agreements or understandings between the defendant and others, and for purposes of this Motion, the differences between § 1 and § 3 are not material.

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.A. § 2. Plaintiff alleges both monopolization and attempted monopolization on the part of 3M.

The offense of monopolization under § 2 of the Sherman Act has two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of superior product, business acumen, or historical accident." Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 481, 112 S. Ct. 2072, 2089 (1992) (internal quotation and citation omitted). Monopoly power is the ability to "control prices or exclude competition." United States v. E.I. duPont de Nemours & Co., 351 U.S. 377, 391 76 S. Ct. 994, 1005 (1956). The United States Court of Appeals for the Third Circuit ("Third Circuit") examines these two factors conjunctively. See Borough of Lansdale v. Philadelphia Elec. Co., 692 F.2d 307, 311 (3d Cir. 1982) (defining monopoly power as the power to control prices and exclude competition). The plaintiff in an antitrust case must allege that it suffered antitrust injury, that is, the type of injury the antitrust laws were intended to prevent, as a result of that which makes the defendant's acts unlawful. See Houser v. Fox Theaters Management Corp., 845 F.2d 1225, 1233 (3d Cir. 1988)

The offense of attempted monopolization under § 2 of the Sherman Act requires that the defendant “(1) had engaged in predatory conduct or anticompetitive 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 at 750.

LePage's claims that 3M, in violation of § 2 of the Sherman Act,

> willfully and unlawfully set out to maintain and strengthen its transparent tape monopoly. . . . 3M did so with full knowledge that the transparent tape market in the United States is characterized by no effective foreign competition, high barriers to entry, and by a principal competitor (LePage's) that, while capable of competing with 3M tape against tape, could not hope to counter the anticompetitive plan 3M put in place. . . . 3M executives have conceded that at all times the company's goals were to ensure that it sold more of the higher priced Scotch brand tape to its retail and wholesale customers, that those customers maximized their margins by keeping tape prices to consumers high, and that less private label tape finds its way on to store shelves.

(Pl.'s St. Claims at 50.)

It should be noted that, for purposes of this Motion, 3M concedes the following: (1) that the relevant market for purposes of this Motion is as LePage's has defined it: the United States market for invisible and transparent tape for home and office use; (2) that 3M has a monopoly in the market as defined; (3) that 3M's intention was and is to exclude competition. However, 3M contends that there was nothing unlawful about its acting on its intention because there was no injury to competition and because LePage's suffered no antitrust injury. More specifically, 3M contends (1) that its bundled rebates are legitimate, procompetitive programs that do not offend any antitrust principles, (2) that it has no exclusive dealing agreements, (3) that its efforts to replace private label and second tier tape with Scotch tape are entirely appropriate, (4) that LePage's cannot demonstrate that 3M's conduct injured competition, and (5) that LePage's cannot demonstrate that it was injured by any allegedly anticompetitive aspect of 3M's conduct. These arguments will be considered in turn.

1. Bundled Rebates

LePage's claims that 3M devised anticompetitive rebate programs to encourage customers to buy more of its products and to drop LePage's as a supplier. Under one of the rebate programs, the Executive Growth Fund (EGF), 3M set different and individualized growth targets for customers to meet in various unrelated business lines and tied the highest percentage rebate to the attainment of the growth targets in each and every one of the lines. (Pl. St. Claims Ex. 48, 54.) One of the business lines was the Consumer Stationery Division, which included such 3M products as Scotch tape and repositionable notes (“Post-Its”), in which 3M has a 95% market share.[5] (Pl.'s St. Claims Ex. 34.) The rebates for different products and product lines were thus

[5]As evidence for this figure, LePage's cites to a report on 3M's Commercial Office Supply Division. The Court assumes that the figure applies to repositionable notes in general. (Pl.'s St. Claims Ex. 34.)

tied together in a bundled rebate program. The growth targets in the EGF programs were set by 3M at aggressive levels that some customers perceived as requiring them to drop competitors and replace their products with 3M products in order to get the maximum rebates. For example, CVS considered 3M's 24% growth target for the Consumer Stationery Division an “aggressive stretch” which was based on their eliminating LePage's private label tape and switching to 3M tape. (Pl.'s St. Claims Ex. 22.) LePage's offers evidence that 3M set the targets for transparent tape and some other products with that goal in mind, and that, at times, 3M explicitly proposed that the customers replace another supplier with 3M to meet growth targets. (Pl.'s St. Claims Ex. 61.) Customers attached great importance to earning the maximum possible rebates from 3M and considered that a “penalty” was imposed on them if they failed to meet each of the growth targets.[6] (Pl.'s St. Claims Ex. 21.)

LePage's also offers evidence that 3M structured rebate payments in the EGF program so that, while they resulted in lower prices to its customers, they did not result in lower prices to consumers. The rebates were paid at the end of the year rather than the beginning, so that they would be used as profit enhancements and to promote products and sales rather than to

[6]Other rebate programs were designed to shift customers from 3M's own second tier or private label products to its more profitable primary branded products. For example, the Brand Enhancement program offered purchasers of Scotch tape rebates on purchases of “Post-Its.” (Pl.'s St. Claims Ex. 34.)

lower prices. (Pl.'s St. Claims Ex. 64, Harstad Tr. 81-82; Ex. 36, Powell Tr. 88-89.) LePage's produces evidence that it was not the only competitor 3M sought to eliminate through bundled rebates; competitors in other product lines were targeted also, and the EGF program, because of its structure, could target a number of competitors in different product lines at the same time. (Pl.'s St. Claims at 26 n.1 & references cited therein.)

LePage's contends that 3M's bundled rebate programs are anticompetitive and unlawful under SmithKline Corp. v. Eli Lilly & Co., 575 F.2d 1056 (3d Cir. 1978). In SmithKline, in the market for cephalosporins, a type of antibiotic carried by virtually every hospital in the country, the defendant Eli Lilly & Co. ("Lilly") linked two antibiotics for which it had monopolies, Keflin and Keflex, with Kefzol, an antibiotic for which it faced competition from SmithKline's Ancef. Lilly devised a Revised Cephalosporin Savings Plan ("CSP") in which it offered rebates on volume sales of the bundle of the three cephalosporins, although it did not condition the purchase of any of them on the purchase of any others.

> The result was to sell all three products on a non-competitive basis in what would have otherwise been a competitive market for Ancef and Kefzol. The effect of the Revised CSP was to force SmithKline to pay rebates on one product, Ancef, equal to rebates paid by Lilly on volume sales of three products. On the basis of expert testimony, the [district] court found SmithKline's prospects for continuing in the cephalosporin market under these conditions to be poor.

SmithKline, 575 F.2d at 1065. The court found this use of "bundled rebates," to be anticompetitive and an "act of willful acquisition and maintenance of monopoly power" in violation of § 2 of the Sherman Act. Id. LePage's argues that this case is like SmithKline in 3M's bundling of products and product lines in its rebate programs.

3M contends that its programs do not offend any antitrust principles for several reasons. First, 3M argues that its bundled rebate programs are not anticompetitive because there are legitimate business justifications for them and they were not just intended to eliminate competition. See Trace X Chemical, Inc. v. Canadian Industries, Ltd., 738 F.2d 261, 266 (8th Cir. 1984). 3M proffers several such justifications in its Memorandum in Support of its Motion for Summary Judgment. (Def.'s Mem. at 44-48.) LePage's argues that the reasons 3M offers are largely pretextual, and offers evidence that 3M's reasons conflict with deposition testimony, and that they find little support in the contemporaneous record. (Pl.'s Opp'n. at 53-56.) The existence of a legitimate business reason is ordinarily a question of fact, Sicor Limited v. Cetus Corp., 51 F.3d 848, 855 n.8 (9th Cir. 1995), and in this case there is a genuine issue of material fact as to 3M's reasons for offering bundled rebates.

In addition, 3M argues that its rebate programs are not anticompetitive because they are all reducible to net price, and that LePage's could have competed at that price. In Orth. Diagnostic Systems, Inc. v. Abbott Laboratories, Inc., 920 F. Supp. 455 (S.D.N.Y. 1996), the court found that discount pricing of bundled products was lawful where the plaintiff's business remained profitable despite the defendant's program, and where the plaintiff could have cut its profits substantially more than it did while still remaining profitable. Id. at 462. 3M points to evidence suggesting that LePage's could have competed with 3M and still made a profit, but that it chose not to.

3M points to the case of Fay's Drug, where 3M's rebate was equal to 18% of Fay's total business with 3M, LePage's salesman stated, “there was no way we [could] afford an additional 18% and we would just as soon walk away from the business.” “I knew what we were willing to accept as a reasonable profitability out of the account, and it would have ate into the profits too much.”[7] (Def.'s Ex. 24 at 166, 469.) With respect to the Kmart contract, LePage's president testified that LePage's would not, in order to compete with 3M, reduce its margin below 10%, which included its “out-of-pocket costs plus our overhead.” (Def.'s Ex. 19 at 413-14.)

Accepting 3M's position that, if LePage's could have offered its customers a discount equal to the maximum rebate offered by 3M for bundled products while still making a profit, 3M's bundled rebate programs could not be characterized as anticompetitive,

[7]It is not clear that LePage's could have met 3M's total discount by reducing the price of its private label tape by 18%. It appears that 3M was offering an 18% discount on the total volume of all products 3M sole to Fay's Drug, not just transparent tape. The total dollar amount of 3M's sales may have resulted in a dollar amount rebate higher than 18% of LePage's sales to Fay's Drug.

there nevertheless is conflicting evidence as to whether LePage's could have made a profit and stayed in business in those circumstances. In contrast to 3M's evidence is the evidence of LePage's expert, Kenneth C. Baseman, regarding Kmart. LePage's had done business with Kmart for many years and, the year before Kmart switched to 3M, Kmart had designated LePage's its “vendor of the year.” Mr. Baseman, stated in his report that, with respect to Kmart, the “tax” on LePage's private label operations from 3M's rebate programs was 12.6%, whereas LePage's net income percentage was around 8%, so that “LePage's could not likely sustain a business on the prices it would have to offer to compensate K-mart for foregoing 3M's rebates.” (Baseman Rept. at 24.) Taking this evidence in the light most favorable to LePage's, there is a genuine issue of material fact as to whether and to what extent 3M's rebate programs unlawfully undercut LePage's ability to compete under SmithKline.[8]

3M argues that, because its bundled rebate programs are reducible to pricing, they fall under Brook Group, Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 113 S. Ct. 2578 (1993), which held that “a plaintiff seeking to establish competitive injury from a rival's low prices must prove that the prices

[8]The assumption here is that LePage's approaches 3M's level of efficiency as a competitor. In SmithKline Corp. v. Eli Lilly & Co., 427 F. Supp. 1089, 1128 (E.D. Pa. 1976), the district court stated that “the foul is committed here by reason of the package scheme's interrelationship with the significant barriers to entry [into the market] which permits Lilly to maximize its dominance and simultaneously drive a slightly less efficient competitor from the market.” 427 F. Supp. at 1128.

complained of are below an appropriate measure of its rival's costs." Brooke Group, 509 U.S. at 222, 113 S. Ct. at 2587; see also Atlantic Richfield Co. v. USA Petroleum ("ARCO"), 495 U.S. 328, 339, 110 S. Ct. 1884, 1891-92 (1990) ("[I]n the context of pricing practices, only predatory pricing has the requisite anticompetitive effect."). As in its Motion to Dismiss, 3M here takes the position that SmithKline has been overruled, or at least limited, by Brooke Group and ARCO which, it maintains, teach us that complaints based upon a rival's lowering the effective price of a product cannot give rise to a Sherman § 2 claim unless the rival lowers its price to one which is below an appropriate measure of its cost. As this Court noted in writing on the Motion to Dismiss, the instant case can be distinguished from Brooke Group, in which the claims were predatory pricing or primary-line price discrimination or both. Brooke Group, 509 U.S. at 221, 113 S. Ct. at 2587. This case concerns neither predatory pricing nor primary-line price discrimination, but a structured system of bundled rebates. LePage's withdrew its claim of predatory pricing early in the case, and Brooke Group does not indicate that the requirement it states has wider application.[9]

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[9]In addition, none of the companies in Brooke Group was a monopolist. Id. at 213, 113 S. Ct. at 2582-83. The defendant in that case never controlled more than 12% of the market at any time relevant to the dispute. A monopolist such as 3M may be held to a different standard in evaluating anticompetitive conduct. See Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 488, 112 S. Ct. 2072, 2093 (1992) (Scalia, J., dissenting) (stating that "[w]here a defendant maintains

This Court believes that the Third Circuit's opinion in SmithKline is still good law, and that the following statement by the district court in that case applies here:

> [A] monopolist does not receive immunity merely because it has priced the product in issue above its average cost. For that immunity is lost when it uses a pricing scheme linking the monopolistic products . . . with another competitive product . . . to deter [the competitor] from entering or effectively competing in the [relevant] market. If Lilly can win today with such an anticompetitive plan, then in tomorrow's game, after the demise of its only real competitor (SmithKline), the defendant can then charge a very high price for its products unimpeded by the possibility that some new company might enter the field as a competitor . . . . Given Lilly's tactics, the consumer will not receive any benefits from the elimination of competitive pricing through the demise of SmithKline.

427 F. Supp. at 1128.

3M also argues that, in Advo v. PNI, 51 F.3d 1191, 1195 (3d Cir. 1995), the Third Circuit limited SmithKline to circumstances in which discounts are tied to specific items. The court stated:

> [Defendant's] discounts, based on the total amount of dollars spent by a customer, offend no antitrust principles. Such "total quantity" discounts distinguish this case from SmithKline Corp. v. Eli Lilly & Co., where we found that discounts tied to the purchase of specific items might amount to unlawful leveraging of monopoly power.

Advo, 51 F.3d at 1203 (citation and footnote omitted). In Advo, the court was distinguishing the case before it, which concerned

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substantial market power, his activities are examined through a special lens: Behavior that might otherwise not be of concern to the antitrust laws -- or that might even be viewed as procompetitive -- can take on exclusionary connotations when practiced by a monopolist.")

“total quantity” discounts, from SmithKline, which dealt in linked products. While the Advo court used the language “specific items,” this Court is not convinced that the Third Circuit meant to rule out the application of SmithKline to discounts linked to groups of products that include specific items in which the defendant has monopoly power, especially where that monopoly power plays a significant role in the balance of factors. The bundled rebate programs in SmithKline and the instant case both contrast with total quantity discounts and both could have the same anticompetitive effect, depending on the structure of the programs and the role of the defendant's monopoly power in them. LePage's claim of anticompetitive systems of bundled rebates will proceed ahead under § 2 of the Sherman Act.

2. “Exclusivity”

LePage's claims that, in addition to bundled rebates, 3M offered customers cash payments for switching from competitors to 3M. 3M does not contest that it intended to be the exclusive supplier for certain customers, but it claims that LePage's has not produced any evidence of the necessary meeting of minds, of an agreement whereby a customer was precluded from buying from suppliers other than 3M.

Another district court in this Circuit has stated the requirements for recovery for exclusive dealing under § 3 of the Clayton Act as follows:

> . . . [R]ecovery under Section 3 requires that two separate conditions both be met: First, an "exclusive dealing" arrangement must exist between a buyer and one seller. Second, the probable effect of the exclusion must be to substantially lessen competition in the market.
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> To pass the first hurdle under the Act, an agreement need not actually be one whereby the buyer expressly agrees to deal only with a particular seller. Section 3 of the Act also encompasses "requirements contracts" where the buyer voluntarily agrees to purchase all of its requirements from a single seller, resulting in the practical exclusion of competing sellers. However, an exclusive dealing arrangement, in whatever form it takes, requires that there be a "meeting of the minds;" the buyer must actually agree to limit its purchases to one seller. The agreement may be either expressly stated in a contract or inferred from the circumstances. On the other hand, the Act, of course, does not prohibit a buyer from making a unilateral decision to deal exclusively with a single supplier. The primary inquiry is whether or not the buyer has committed itself, either expressly or by an implied agreement, to limit its purchases to one seller in exchange for some benefit.

Barr Laboratories, Inc. v. Abbott Laboratories, No. 87-4764 (AET), 1989 WL 60320 at *4 (D.N.J. June 1, 1989).

In considering whether LePage's has presented evidence of the requirements as described in Barr Laboratories, the first question is whether the purchasing arrangements 3M made with any of LePage's former customers can be considered "exclusive dealing."

There are several different patters of exclusive dealing. One is a refusal to deal, in which a monopolist refuses to sell its products to customers who buy a competing product. See Minnesota Mining and Manufacturing Company v. Appleton Papers Inc., 35 F. Supp. 2d 1138, 1144 (D. Minn 1999) (summary judgment denied where there was evidence Appleton refused to sell paper product to customers who bought competing product). In the instant case, there is no refusal to deal. Another is a requirements contract, whereby the customer agrees to buy all it needs of a particular product from one vendor, "resulting in the practical exclusion of competing sellers." See Barr Laboratories, 1989 WL 60320 at *4 (summary judgment denied where contracts which on their face offered only volume discounts might be shown to be classic requirements contracts). In the instant case, there is no explicit requirements contract; however, "[t]he agreement may be either expressly stated in a contract or inferred from the circumstances." Id. at *4. If 3M sets the target growth rate in the line of products that includes transparent tape so high that, in order to meet it, a customer must drop any competitor and buy tape only from 3M, and the customer agrees to 3M's suggestion that it drop the only significant competitor, an inference of a requirements contract might be drawn.

LePage's has produced some evidence that 3M intended to pay for exclusivity. Staples, formerly a major customer of LePage's, dropped LePage's and substituted 3M's Highland tape for LePage's own brand. A 3M confidential document entitled "Competitive Offers" states, "Provide extra 1% bonus rebate on Scotch if LePage business is given to 3M. 1% of $4,000,000 = $40,000." (Pl.'s Opp'n Ex. 54.) If 3M and LePage's were the only real players in the field at that time, and if 3M offered the 1% bonus, then a decision by Staples to replace LePage's with 3M for a cash incentive could be interpreted as an exclusive dealing arrangement. On the other hand, 3M presented testimony from its own officers and from a Staples buyer that there was no exclusive dealing agreement between them. (Graves Decl.; Harstad Decl.; Stephens Decl.)

The question is whether Staples' decision to replace LePage's with 3M represented a meeting of the minds, arguably cemented by a 1% bonus to Staples specifically for switching suppliers, or whether it was a unilateral decision by Staples. 3M argues that the document produced from its files listing the 1% bonus offer to Staples is "an undated orphan whose author has never been identified," and that there is no evidence that the idea was ever adopted by 3M. (3M's Reply Br. at 16.) While the "orphan" document from 3M's files, standing alone, would not be enough to support the inference of an agreement, it can be put together with other evidence: 3M has admitted it intended to take over LePage's business and become a sole source supplier to certain customers such as Kmart and Staples; in a 3M internal memorandum following a planning meeting with Kmart personnel, Dave Wegscheid of Kmart commented that 3M was "asking Kmart to eliminate three other suppliers" (Pl.'s Opp'n Ex. 51.); and 3M did displace LePage's with respect to Kmart and Staples. In the face of this evidence, the Court cannot say there is no genuine issue of material fact as to a requirements contract.

As to the second requirement of <u>Barr</u>, whether the probable effect of the exclusion is to lessen competition substantially in the relevant market, LePage's has raised a genuine issue of material fact regarding a substantial lessening of competition in producing evidence of the decline of its business in a market where it is the only remaining competitor against a monopolist.

3M contends that LePage's evidence is equally consistent with an innocent interpretation of the facts, and therefore summary judgment must be granted under Matsushita Electric Industrial Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348 (1986). In Matsushita, the Supreme Court considered "the standard district courts must apply in deciding whether to grant summary judgment in an antitrust conspiracy case." [10] Id. at 576, 106 S. Ct. at 1350-51. In that case, American manufacturers of television sets alleged that their Japanese competitors had illegally conspired to drive the American manufacturers from the American market by fixing low prices for the television sets the Japanese manufacturers sold in the United States. The Matsushita court stated that

> antitrust law limits the range of permissible inferences from ambiguous evidence in a [Sherman Act] § 1 case. Thus, in Monsanto Co. v. Spray-Rite Service Corp., we held that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. To survive a motion for summary judgment

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[10] Matsushita seemed to raise the possibility that there might be a special summary judgment standard for antitrust cases in general, or predatory pricing cases in particular. However, the Supreme Court later made clear in Eastman Kodak Co. v. Image Technical Serv's., Ind., 504 U.S. 451, 468-69, 112 S. Ct. 2072, 2083 (1992), that there was no special standard. See also Advo v. Philadelphia Newspapers, Inc., 51 F.3d 1191, 1195 (3d Cir. 1995).

> or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence that tends to exclude the possibility that the alleged conspirators acted independently. Respondents in this case, in other words, must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents.

Matsushita, 475 U.S. at 588, 106 S. Ct. at 1356-67 (internal citations and quotations omitted). In Matsushita, the conspiracy did not make economic sense for the Japanese manufacturers because it would likely have generated losses for them without corresponding gains. 475 U.S. at 595, 106 S. Ct. at 1360. There was, in fact, no evidence that would have supported the theory of conspiracy rather than of innocent conduct. The Court further stated:

> It follows from . . . settled principles that if the factual context renders respondents' claim implausible -- if the claim is one that simply makes no economic sense -- respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary. Cities Service is instructive. The issue in that case was whether proof of the defendant's refusal to deal with the plaintiff supported an inference that the defendant willingly had joined an illegal boycott. Economic factors strongly suggested that the defendant had no motive to join the alleged conspiracy. . . . [T]he refusal to deal had to be evaluated in its factual context. Since the defendant lacked any rational motive to join the alleged boycott, and since its refusal to deal was consistent with the defendant's independent interest, the refusal to deal could not by itself support a finding of antitrust liability.

Id. at 587, 106 S. Ct. at 588 (citing First Nat. Bank of Ariz. v. Cities Service Co., 391 U.S. at 253, 88 S. Ct. at 1575 (1968).

In this case, unlike Matsushita or Cities Service, the alleged conspiracy does make economic sense for 3M and the factual context does not make LePage's claim implausible. In addition, the Court cannot say that LePage's evidence, as summarized above, is equally consistent with the position that the customers that 3M won from LePage's acted independently in deciding to switch, nor can it say that there is no genuine issue of material fact as to exclusive dealing. The claim of exclusive dealing will go forward under § 3 of the Clayton Act and § 1 of the Sherman Act.

3. Private Label and Low-Priced Market Segment

LePage's claims that, while 3M tried to capture LePage's private label business, 3M was never interested in developing that business, which occupied the low-priced end of the market along with LePage's own brand and 3M's Highland tape. Instead, LePage's asserts, 3M's ultimate goal was to drive LePage's out of business by taking over its customers and then to limit sale of its low-cost tapes, including private label tape, in favor of 3M's more profitable Scotch tape.

3M counters that there is nothing wrong with its wanting to discourage the use of private label tape in favor of Scotch tape. It admits that it promotes Scotch tape first, then its second-tier tape, Highland tape, and finally, its private label tape. Because there was a persistent, though relatively small demand for private label home and office tape, 3M entered that segment of the market. At the same time, 3M continues its strategy of trying to persuade customers “that they are better off with

Scotch brand tape than Highland, better off with 3M's Highland brand than with LePage's brand, and better off with either 3M brand than with private label." (Def.'s Mem. at 30.) 3M maintains that it has no duty to encourage private label sales, or to promote them over branded tape, and furthermore, that it cannot dictate its customers' strategies. (Id.) Finally, 3M argues that its entry into the private label market enhances competition, as does its ongoing attempt to get customers to convert from private label tape. (Id.)

If the actions LePage's describes were undertaken by a non-monopolist, they would probably be, as 3M contends, procompetitive. However, 3M's position as a monopolist may affect the evaluation of its conduct and that conduct's effect on the competitive process. See Eastman Kodak, 504 U.S. at 468-69, 112 S. Ct. at 2083) (Scalia, J., dissenting)

LePage's has presented evidence that, after 3M won a private label customer from LePage's, the customer's sales of private label tape went down while sales of 3M's branded tapes went up, in accord with 3M's plan. 3M persuaded the customer to limit its offerings of private label tape and display more Scotch tape. (Pl.'s St. Claims Ex. 103.) If 3M, as a monopolist, succeeds in limiting the availability of low cost tape in favor of the higher priced Scotch tape once it gets the private label business from LePage's former customers by unlawful bundled rebates or exclusive dealing, then the consumer and the competitive process may suffer, and a scenario similar to the one the district court feared in SmithKline might be played out in this case:[11]

> If [3M] can win today with such an anticompetitive plan, then in tomorrow's game, after the demise of its only real competitor ([LePage's]), the defendant can then charge a very high price for its products unimpeded by the possibility that some new company might enter the field as a competitor . . . . Given [3M's] tactics, the consumer will not receive any benefits from the elimination of competitive pricing through the demise of [LePage's].

426 F. Supp. at 1128.

There is a genuine issue of material fact as to whether 3M is using its monopoly power and competing on a basis other than price or efficiency to capture more of the private label segment of the market, and thus more of the transparent tape market. If, however, 3M is gaining its advantage through lawful means only, then an attempt by 3M to promote aggressively its higher priced brand over its lower-priced tape is not unlawful. The burden of proving that the 3M's actions are unlawful is, of course, LePage's, and it will have the opportunity to do so.

4. Injury to Competition

As the Third Circuit has stated, “It is axiomatic that the antitrust laws were enacted for the protection of competition,

[11]Some of 3M's customers were concerned that, if 3M's monopoly grew stronger, it would raise prices. Eckerd Drug Company, in discussing 3M's entry into the private label market, wondered whether, if it captured a monopoly position, it would use that position to drive up the prices. (Pl.'s Opp'n Ex. 86.) Woolworth noted that 3M had always been a high priced supplier and feared that 3M would raise prices further if it obtained all of Woolworth's business. (Pl.'s St. Claims Ex. 85)

not competitors." Tunis Brothers Co., Inc. v. Ford Motor Co., 952 F.2d 715, 737 (3d Cir. 1991) (internal quotations and citations omitted). 3M argues that LePage's cannot demonstrate that any of the alleged conduct has adversely affected competition because it has not adversely affected the price, quality or quantity of tape. It quotes Tunis Brothers, a case brought under § 1 of the Sherman Act, in which the court stated:

> The Sherman Act was designed to prohibit significant restraints of trade rather than to proscribe all unseemly business practices; and the plaintiffs must have demonstrated some harm to the competitive landscape from [the challenged action]. An antitrust plaintiff must prove that challenged conduct affected the prices, quantity or quality of goods or services.

715 F.2d at 728 (internal citations and quotations omitted).

3M asserts that, "here we are, after six years of supposedly anticompetitive conduct. LePage's is still in business, it still has most of the U.S. private label tape sales, prices have gone down, quality and quantity have gone up, and the only 'injury' has been to LePage's." (Def.'s Mem. at 71.) LePage's has produced some evidence that some sole source arrangements between 3M and LePage's former customers affect the quantity of low-cost tape available to consumers and that, if it is driven out of business, the arrangements are likely to affect the quantity of low-priced tape available to consumers. The Court cannot rule out a genuine issue of material fact as to the present or probable negative effects of 3M's challenged conduct on the price and quantity of tape.

LePage's claims that the effects of 3M's bundled rebates and exclusive dealing on its business is nothing short of devastating. That does not, in itself, show injury to competition. However, LePage's has raised genuine issues of material fact as to whether its position as the only real competitor in the market has been weakened, 3M's monopoly position has been strengthened, and competition in the market has thus been significantly weakened or threatened by conduct of 3M that is unlawful under the antitrust laws, e.g., unlawful bundled rebates or exclusive dealing or both. Such competition on the part of a monopolist is always inimical to antitrust interests.

5. Antitrust Injury to LePage's

3M maintains that, in order to prevail, LePage's must show not only that it was injured, but that its injury was attributable to an anticompetitive aspect of 3M's conduct. It reasserts that there can be no antitrust injury if LePage's cannot show that 3M's pricing was below an appropriate measure of 3M's cost, a position this Court has already rejected. If LePage's can show that it lost customers directly because of 3M's unlawful bundled rebate offers or unlawful exclusive dealing agreements, and that there is a resulting decline in and danger to competition in the market, then it can show an antitrust injury attributable to 3M's anticompetitive conduct. 3M also attacks the measures of damages LePage's uses. It may be that the LePage's measures of damages need refining, or that 3M can show at trial what it claims in support of this Motion, that some of LePage's measures of damages do not make sense, but those are not reasons to grant summary judgment in favor of 3M.

III. CONCLUSION

For reasons stated in the foregoing, 3M's Motion for Summary Judgment will be denied and LePage's case will proceed to trial.

An appropriate Order follows.

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

LEPAGE'S INCORPORATED, Plaintiff	:	CIVIL ACTION
v.	:	
3M (MINNESOTA MINING AND MANUFACTURING COMPANY), Defendant	:	No. 97-3983

O R D E R

AND NOW, this day of May, 1999, upon consideration of Defendant's Motion for Summary Judgment (Doc. No. 144), Plaintiff's Response (Doc. No. 155), Defendant's Reply (Doc. No. 159), the submissions thereto, and following oral argument on the Motion, **IT IS HEREBY ORDERED** that the Motion is **DENIED**.

BY THE COURT:

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JOHN R. PADOVA, J.