IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

MARSHALL DIVISION

PSKS, INC., ET AL.	§	
Vs.	§	CIVIL ACTION NO. 2:03-CV-107
LEEGIN CREATIVE LEATHER PRODUCTS, INC.	§	

ORDER

The defendant's motion for new trial (#108) and renewed motion for judgment as a matter of law (#109) are denied.

In the motion for new trial, the defendant contends that the court erred when it excluded the testimony of its economic expert. Despite the defendant's arguments, the court remains persuaded that its analysis of this case and, in particular, the rationale underlying the court's exclusion of Dr. Elzinga's testimony, is correct under current law. Nearly a century ago, *Dr. Miles* prescribed vertical minimum price fixing agreements unlawful under Section 1. *Dr. Miles Medical Co. v. John D. Park & Co.*, 220 U.S. 373 (1911). Whether the per se classification of such agreements is wise is not for this court to decide. A dealer terminated for discounting under the circumstances presented here suffers antitrust injury as a matter of law. *Pace Electronics, Inc. v. Canon Computer Systems, Inc.*, 213 F.3d 118, 124 (3d Cir. 2000). The defendant's arguments that the court should have further defined antitrust injury or that a defense existed because the plaintiff could not prove injury to

competition are indirect challenges to the per se classification of the violation. In addition, the court is not persuaded that the jury should have been instructed under *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1361-1367 (5th Cir. 1980) that it could find an exception to the per se rule under the facts of this case. The court has canvassed the arguments made in the defendant's motion for new trial and is persuaded that the motion should be denied.

The court has also considered the arguments made in the defendant's renewed motion for judgment as a matter of law. To evaluate the motion for judgment as a matter of law, the court must keep in mind that the jury in this case found a violation of Section 1 on sufficient evidence. That said, the defendant's primary challenge is to the evidence supporting the damages verdict. The defendant contends that the plaintiff's damage model and supporting proof were impermissibly speculative. The court disagrees.

In an antitrust case, once the fact of damages has been proven, a plaintiff enjoys a somewhat relaxed burden of proof regarding the amount of damages. *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946). This is because it is not possible to compute future damages with mathematical precision and the wrongdoer should bear the burden of any uncertainty created by the illegal activity. *Story Parchment Company v. Paterson Parchment Paper Company*, 282 U.S. 555 (1931); *Lehrman v. Gulf Oil Corporation*, 464 F.2d 26, 46 (5th Cir. 1972)("the courts are to take a charitable view of the difficulties of proving damages in a case when a treble-damage plaintiff must try to prove what would have accrued to him in the absence of the defendant's anticompetitive practice."). In a distributor termination case, the defendant's decision to cut off the source of supply forces an aggrieved plaintiff who seeks compensation for lost profits, in effect, to prove sales that he never had a chance to make. *Pierce v. Ramsey Winch Co.*, 753 F.2d 416, 435 (5th Cir. 1985).

Although the standard is lenient, it is not without limits: the plaintiff must not resort to guesswork or speculation. Instead, a plaintiff must provide a just and reasonable estimate of the damage based on relevant data. *Eleven Line, Inc. v. North Texas State Soccer Ass'n*, 213 F.3d 198, 206-07 (5th Cir. 2000).

Here, there is no substantial question that the plaintiff proved the fact of damages resulting from the termination of its supply. The defendant touts the Brighton brand as an attractive, unique product, made so at least in part by the company's pricing policies. The value of such a brand to a distributor is evident. Even when undertaken pursuant to the *Colgate* doctrine, one intended effect of suspending shipments to a dealer is to cause adverse economic consequences--to persuade, as the case may be, the discounter to reconsider its position. So it was in this case. The plaintiff proved the fact of damages.

As to the amount of damages, the court has reviewed the evidence under the prevailing standards and concludes that the jury could have credited or rejected the factual underpinnings of Mr. Davis's testimony, including the projected damages term and the benchmark average used to compute the subsequent annual losses. The average sales in particular were based on actual, not theoretical, numbers. Mitigation was also for the jury. The defendant's able lawyers subjected the plaintiff's principal and its expert witness to vigorous cross-examination on the merits of the damages issues in this case. The jury was properly instructed on the measure of damages, and it is significant that the jury did not award the entire amount sought by the plaintiff. Under the prevailing standards for antitrust damages, this award is supported by sufficient evidence. The court has reviewed the balance of the renewed motion for judgment as a matter of law and concludes that the motion should be denied.

So **ORDERED** and **SIGNED** this 17th day of August, 2004.

T. John Ward

T. JOHN WARD
UNITED STATES DISTRICT JUDGE