IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

TUNICA WEB ADVERTISING, INC. AND CHERRY L. GRAZIOSI **PLAINTIFFS**

V. **CIVIL ACTION NO. 2:03CV234-P-D**

TUNICA CASINO OPERATORS ASSOCIATION, INC., ET AL. **DEFENDANTS**

MOTION (AND SUPPORTING MEMORANDUM)
FOR DETERMINATION AND FINDING PURSUANT TO FRCP RULE 54(B)
OR IN THE ALTERNATIVE FOR INTERLOCUTORY APPEAL

COME NOW the Plaintiffs in the above-referenced matter and move the Court pursuant to Rule 54(b) of the Federal Rules of Civil Procedure ("FRCP") to amend its December 21, 2005 Order dismissing the claims of Plaintiff Cherry Graziosi and Plaintiff Tunica Web Advertising, Inc. to include therein an additional paragraph stating: "This Court determines that there is no just reason for delay and it directs the Clerk to enter judgment based on this order."Alternatively, the Plaintiffs move the Court for an order certifying the Court's December 21, 2005 Order for interlocutory appeal. In support of the motion, the Plaintiffs respectfully urge as follows:

1. On or about December 21, 2005, the Court entered an order that provided as follows:

IT IS ORDERED AND ADJUDGED THAT:

(1) The Casino Defendants' Motion for Summary Judgment is hereby GRANTED; therefore,

(2) All of Plaintiff Cherry Graziosi's claims against the casino defendants a(re) DISMISSED WITH PREJUDICE for lack of standing;

(3) All of Plaintiff Tunica Web Advertising, Inc.'s claims against the remaining defendants are DISMISSED WITH PREJUDICE; and

(4) The defendants' counterclaims remain.

The Court's dismissal of Tunica Web Advertising Inc.'s claims is based in substantial part upon a legal finding that a horizontal boycott is not *per se* illegal under Section 1 of the Sherman Act unless one of the conspirators participating in the boycott is a competitor of the plaintiff/victim. As a result of the Court's earlier denial of the Plaintiffs' motion for partial summary judgment and the order detailed above, some of the claims asserted in this action (namely, all of the Plaintiffs' claims) have been dismissed, while others (namely, the copyright counterclaims by some of the Defendants) remain pending for further adjudication by the Court.

2. Fed. R. Civ. P. 54(b) provides in pertinent part as follows:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action . . . .

The Court's December 21, 2005 Order does not make the express determination or finding contemplated by Federal Rule of Civil Procedure 54(b).

3. There is no just reason for delay of the Court's entry of a final judgment as to the claims dismissed in its December 21 Order. The amendment as requested above will allow an appeal from the foregoing order while other unrelated claims remain in this cause.

4. Alternatively, Plaintiffs move the Court to certify its December 21, 2005 Order for Interlocutory Appeal. 12 U.S.C. § 1292(b) provides as follows:

> When a district judge, in making in a civil action not otherwise appealable under this section, shall be of the opinion that such order involves a controlling issue of law as to which there is substantial ground for difference of opinion and that an

> immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

Because the Court's December 21, 2005 Order involves a controlling issue of antitrust law as to which there is substantial ground for a difference of opinion and because an immediate appeal may materially advance the ultimate termination of this matter, the Court should certify its rulings for interlocutory appeal pursuant to § 1292(b).

5. The Court's dismissal of the Plaintiffs' claims presents a controlling question of law. In its Memorandum Opinion the Court acknowledges the Fifth Circuit Court of Appeal's understanding that "the horizontal agreement need not be between competitors of the victim" in order to be actionable as a *per se* antitrust violation. *Spectator's Communication Network, Inc. v. Colonial Country Club*, 253 F.3d 215, 223 (5th Cir. 2001). The Fifth Circuit in that 2001 case quoted the United States Supreme Court's own definition of the meaning of "horizontal agreements" or "horizontal restraints" for such purposes as set forth in *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988): "a restraint is horizontal *not* because it has horizontal *effects*, but because it is the product of a horizontal *agreement*." *Spectator's Communication*, at 224, quoting *Sharp Electronics*, at 730 n. 4 (emphasis added). The Fifth Circuit in that case also relied in that context on *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998), in which the Supreme Court characterized the scope of the *per se* rule as follows: "precedent limits the *per se* rule in the boycott context to cases involving horizontal agreements *among direct competitors*." *Id.* at 135 (emphasis added). The Fifth Circuit conformed to the Supreme Court's definition of horizontal agreements when it defined "horizontal conspiracy" in *Spectator's Communication*: "(I)n order to bring its boycott claim within the *per se* rule, Spectators' must point to a horizontal conspiracy, *in other words, a conspiracy between competitors*, rather than a vertical conspiracy

between firms at different levels of distribution." *Id.* at 223 (emphasis added). The Supreme Court and the Fifth Circuit are both clear in their statements that for purposes of determining the scope of *per se* liability for boycotts, the adjective "horizontal" in "horizontal conspiracy" modifies the noun "conspiracy", and refers to the commercial relationships between two or more *of the conspirators* (and *not* to the commercial relationships between any conspirator(s) and the plaintiff as a victim or target of the conspirators' agreement).[1]

6. Notwithstanding those precedents, this Court granted summary judgment against Tunica Web Advertising, Inc. based substantially on its conclusion that "the defendants' alleged behavior cannot be a horizontal boycott because no one who made the alleged agreement to not do business with tunica.com was a competitor of the plaintiff." Memorandum Opinion, pgs. 15-16. That conclusion was based on an understanding that "at least one competitor of the victim must partake in the agreement for the boycott to be horizontal - hence the word 'horizontal,' since to be horizontal means to be on the same level of competition as the victim." *Id.* at 15. The Court's conclusion presents a controlling issue of law as to which there is substantial ground for a difference of opinion, in its interpretation of the cases' references to "horizontal" as a reference to the relationship between the victim and one or more of the conspirators, rather than to the relationship between or among two or more conspirators.

7. Moreover, an immediate appeal will materially advance the ultimate termination of this matter. The Fifth Circuit Court of Appeal's resolution of the Defendants' liability *vel non*

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[1]Nothing about Justice Black's analysis as the author of the Supreme Court's opinion in *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), is inconsistent with the definition of *per se* illegal boycott agreements set forth by Justice Breyer on behalf of the Court in *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998), in reliance in part on the *Klor's* decision. It is true that under the **facts** presented in *Klor's*, both the plaintiff and one of the defendants (though not the other defendants) were both appliance retailers. 359 U.S. at 207. But at no point in the *Klor's* opinion was that fact treated as either necessary or sufficient to a determination of whether or not the defendants' boycott agreement was *per se* illegal.

will avoid the potential for two separate trials involving the parties. The Court's concern regarding such an eventuality prompted it to rule against the Plaintiffs' earlier request for a separate trial of the Defendants' counterclaims. An immediate appeal of the December 21, 2005 Order will serve the Court's interest in disposing of all viable claims asserted in this matter in one proceeding, thereby materially advancing its ultimate resolution.

8. To the extent that the Court's December 21, 2005 Order and Memorandum Opinion, though it did not dispose of all claims by all parties in this proceeding, may nevertheless be regarded as appealable as of right, the Plaintiffs hereby notice an appeal from that Order.

FOR THE FOREGOING REASONS, the Plaintiffs respectfully request that the Court enter an order certifying that there is no just reason for delay pursuant to FRCP Rule 54(b), or in the alternative certify for interlocutory appeal pursuant to 12 U.S.C. § 1292(b) its December 21, 2005 Order and Memorandum Opinion granting the Defendants' motion for summary judgment.

This the 19th day of January, 2006.

Respectfully submitted,
TUNICA WEB ADVERTISING, INC. and
CHERRY L. GRAZIOSI

By: s/ J. Brad Pigott
J. Brad Pigott (Mississippi Bar No. 4350)

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CERTIFICATE OF SERVICE

I, J. Brad Pigott, do hereby certify that I have this day caused a true and correct copy of the foregoing *Motion For Determination and Finding Pursuant to Fed. R. Civ. P. 54(b) or In the Alternative For Interlocutory Appeal* to be filed with the Clerk of the Court via the ECF system which sent notification of same to the following counsel of record in the above-referenced matter:

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THIS the 19th of January, 2006.

s/Brad Pigott
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