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10/23/2007

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

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

VS. **CIVIL ACTION NO. 2:03CV234-P-A**

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

MEMORANDUM BRIEF OF DEFENDANTS BARDEN MISSISSIPPI GAMING, LLC, BL DEVELOPMENT CORPORATION, SHERATON TUNICA CORPORATION, BALLY'S OLYMPIA LIMITED PARTNERSHIP, TUNICA PARTNERS II, L.P., BOYD TUNICA, INC. AND ROBINSON PROPERTY GROUP LIMITED PARTNERSHIP IN SUPPORT OF THEIR RENEWED MOTION FOR SUMMARY JUDGMENT

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ORAL ARGUMENT REQUESTED

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INTRODUCTION

The Casino Defendants[1] (also referred to as "Casinos" or "Defendants") submit this Memorandum Brief in support of their Renewed Motion for Summary Judgment. Defendants are entitled to judgment as a matter of law on Plaintiff Tunica Web Advertising, Inc.'s ("TWA") federal and state antitrust claims. TWA's antitrust claims fail because:

- TWA cannot produce any admissible evidence to show concerted action by the Defendants.
- TWA cannot establish an unreasonable restraint on trade by the Defendants for the following reasons:
    - TWA contends that the relevant market for its antitrust claims is internet advertising of Tunica County, Mississippi, as a travel destination to the exclusion of all other forms of advertising, including print, broadcast, outdoor, and direct mail. TWA has totally failed to meet its burden of proving that any such relevant market exists, thereby requiring the dismissal of its antitrust claims.
    - TWA has failed to provide any evidence that the Casino Defendants' have market power within the relevant market or that their independent decisions to refuse to lease TWA's domain name or to advertise on TWA's website have had a substantial adverse effect upon competition in the relevant market. There are multiple media sources available to advertise Tunica as a travel destination, including print, broadcast, outdoor, and direct mail.
    - After TWA began operating its own web site, TWA made a variety of different offers to different Casino Defendants asking them to purchase advertising on TWA's website. Their separate rejections of TWA's different proposals cannot support a Sherman Section One claim.
    - TWA's offer was not worth the price TWA was asking. Refusal to purchase a product for more than it is worth does not violate the antitrust laws.

[1] The reference to Casino Defendants throughout includes Barden Mississippi Gaming, LLC (d/b/a "Fitzgerald's Casino and Hotel"), BL Development Corp. (d/b/a "Grand Casino Tunica"), Robinson Property Group, Ltd. Partnership (d/b/a "Horseshoe Casino & Hotel"), Tunica Partners II L.P. (d/b/a "Harrah's Tunica Mardi Gras Casino"), Bally's Olympia Limited Partnership (d/b/a "Bally's Saloon & Gambling Hall"), HWCC-Tunica, Inc. (d/b/a "Hollywood Casino Tunica"), Boyd Tunica, Inc. (d/b/a "Sam's Town Hotel & Gambling Hall"), and Sheraton Tunica Corporation (d/b/a "Sheraton Casino & Hotel"). However, this motion is being filed by all of these entities with the exception of Hollywood Casino Tunica, which is filing a separate Renewed Motion for Summary Judgment incorporating arguments unique to Hollywood Casino Tunica.

- TWA has failed to establish it has suffered an antitrust injury proximately caused by Casino Defendants.

- Because TWA's federal antitrust claim fails, its state antitrust claim must also fail. The Mississippi federal courts have expressly ruled that the two claims are analytically identical.

For the reasons explained below, there is no genuine issue of material fact in dispute, and Defendants are entitled to judgment as a matter of law on TWA's claims.

I. RELEVANT UNDISPUTED FACTS

A. The Parties

Plaintiff Tunica Web Advertising, Inc., a Maryland corporation, formed in August of 2000 with its principal place of business in Maryland, is an internet-related business that owns the URL address or domain name, tunica.com. Plaintiff Cherry L. Graziosi is an incorporator, officer, and the sole shareholder of TWA, which is her first and only internet-related company. Graziosi is what some people in the internet community refer to as a "cyber-squatter." She owns several domain names that include the names of areas or activities in which she had no prior legitimate interest, including Tunica. Since TWA's inception and for several years before then, Ms. Graziosi has lived in Maryland. She has held clerical or administrative positions for several different non-internet-related companies in the Washington, DC-Maryland area while owning TWA.

The Casino Defendants own and operate eight casino properties located in Tunica County, Mississippi. Each Casino Defendant has at all times relevant to the facts of this case owned and operated its own respective website developed at a substantial capital cost with their websites being used for internal purposes and by the general public which is able to obtain information over the internet about the casino's gaming and other license-related activities and

accommodation services. The Casino Defendants also offer hotel, restaurant, entertainment, and other vacation and leisure-related activities, such as golf, tennis, and spas.

Tunica County Casino Operators Association, a non-profit Mississippi corporation located in Tunica County, is a trade association formed by the local area casinos to discuss and address matters of mutual interest such as public law enforcement, public transportation, and other public infrastructure-related concerns and the activities of Defendant Tunica County Tourism Commission, a local public body.

Tunica County Tourism Commission, created by the State Legislature to supervise and promote tourism within Tunica County, oversees the activities of the Tunica Convention & Visitors Bureau. Like most local public convention and visitor bureaus, the TCTC operates a website, www.tunicamiss.org, that provides travel-related information about gaming and other leisure-related activities and accommodations in Tunica County.

B. Procedural History and Remaining Claims

The First Amended Complaint in this action was filed by TWA and as well as its owner, Cherry Graziosi, against nine casinos operating in Tunica, Mississippi (the Casino Defendants and Circus Circus Mississippi, Inc. (d/b/a "Gold Strike Casino Resort")), the TCOA, and the TCTC, asserting claims for violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and the Mississippi Antitrust Act, Miss. Code § 75-21-1, et seq. (1972) as well as claims for intentional or tortious interference with business relations and punitive damages. This Court subsequently dismissed Plaintiffs' claims against the TCTC in its Orders dated November 24, 2004 and December 20, 2005, for which Plaintiffs did not seek appellate review. *See* November 24, 2004 Order (attached hereto as Exhibit "A"); December 19, 2005 Order (attached hereto as Exhibit "B"). Furthermore, Plaintiffs settled their claims against the TCOA, and Defendant Gold Strike Casino Resort, and the claims against those Defendants were dismissed as well. *See* November

23, 2005 Order (attached hereto as Exhibit "C"); December 5, 2005, Agreed Final Judgment of Dismissal with Prejudice (attached hereto as Exhibit "D").

With regard to Plaintiffs' claims against the remaining eight Casino Defendants, this Court granted the Casino Defendants' Motion for Summary Judgment on all of Plaintiffs' claims on December 19, 2005. *See* December 19, 2005 Order (attached hereto as Exhibit "E"). In the accompanying Opinion, this Court held that Plaintiff Graziosi did not have standing individually to pursue the claims she had asserted in this action. *See* December 19, 2005 Memorandum Opinion (attached hereto as Exhibit "F"). Plaintiff Graziosi did not challenge this ruling on appeal. *See Tunica Web Advertising, Inc., et al v. Tunica Casino Operators Association, Inc., et al*, 496 F.3d 403, 408 n.9 (5th Cir. 2007). Thus, there are no claims of Plaintiff Graziosi remaining in this litigation.

With regard to TWA's claims against the remaining eight Casino Defendants, TWA appealed this Court's dismissal of its federal and state antitrust claims but did not challenge this Court's dismissal of TWA's claims for interference with business relations and for punitive damages. Upon review, the Fifth Circuit reversed this Court's ruling dismissing TWA's antitrust claims and has remanded for further consideration by this Court. Specifically, the Fifth Circuit remand (1) for the district court to consider the Casino Defendants' admissibility objections and determine whether the admissible evidence is sufficient to establish concerted action (*Tunica Web*, 496 F.3d at 411; and to consider the factors set forth by the United States Supreme Court in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Company*, 472 U.S. 284 (1985) to determine whether the *per se* rule or rule of reason should be applied in this case (*Tunica Web*, 496 F.3d at 414-415). The Fifth Circuit also noted that the Casino Defendants are

free to reurge on remand their additional argument that TWA cannot establish an antitrust injury. *Id.* at 415 N. 17.

TWA contends that the relevant market in this action is internet or online advertising for Tunica as a travel destination. TWA alleges that the Casino Defendants engaged in a group boycott and refusal to do business with TWA, initially by refusing to lease TWA's domain name in May of 2001 and later by refusing to advertise on TWA's website. However, this Court previously held and the Fifth Circuit agreed that "the casinos' initial decision to reject TWA's $2,500 per-casino-per-month proposal was not an unreasonable restraint on trade. Given the joint nature of TWA's initial proposal, which invited the casinos to respond together as a single entity, the casinos' decision to reject that proposal is not concerted action subject to section 1." *Tunica Web*, 496 F.3d at 410. Thus, the only claims remaining in this litigation are TWA's federal and state antitrust claims against the eight Casino Defendants arising out of the Casino Defendants refusal to deal with TWA and "tunica.com" after May 30, 2001.

The Casino Defendants deny all claims and contend that the relevant market for Plaintiffs' antitrust claims consists of all media advertising related to the travel destination industry as well as all media advertising related to Tunica as a travel destination. The Casino Defendants separately and independently deny all liability for a variety of reasons. As shown below, the Casino Defendants, all of whom had their own casino-related websites that were already linked to the TCTC's website, had (and still have) separate, independent, legitimate business reasons for declining to do business with TWA.[2]

[2] Harrah's has been unable to identify any employee who ever communicated with Plaintiffs or made a decision not to do business with Plaintiffs nor has Harrah's located any evidence that an affirmative decision to not do business with Plaintiffs was ever made.

C. The Undisputed, Material Facts Disclosed In Discovery

1. History of tunica.com

Formed in August of 2000, TWA purchased the URL address or domain name "tunica.com" in October of 2000 for $20,000 from a Canadian corporation. TWA initially generated business income with its domain name by leasing its URL address. In November, 2000, TWA leased its domain name on an exclusive basis to Gold Strike Casino Resort for 90 days at $3,000.00 per month. *See* Graziosi Dep. at 474-475 & Ex. 51 (relevant portions of Cherry Graziosi's deposition labeled as Exhibit "G"). Gold Strike then leased the domain name on a month-to-month basis until April 30, 2001. *Id.* at 490-491 & Ex. 73. Throughout this period, TWA did not own or operate a website. Anyone who typed www.tunica.com into the web browser of a personal computer would be sent directly to the home page of Gold Strike's website where information about Gold Strike's gaming activities and hotel and restaurant accommodations were displayed.

When the exclusive lease between TWA and Gold Strike ended, TWA had still not developed its own website. *See* Graziosi Dep. at 432-433. Beginning May 1, 2001, a visitor to www.tunica.com would be greeted by a message that said "error" or "under construction" or "coming soon." In early May of 2001, TWA, through Graziosi, approached the TCTC with a proposal about leasing TWA's domain name, tunica.com, for placement on the TCTC's website. *See* Graziosi Dep. 575-577. The TCTC promotes and markets Tunica as a travel destination through all forms of media advertising, including print (newspaper, magazine, brochures, etc.), broadcast (television and radio), outdoor, and the internet. These activities are largely funded by hotel and restaurant taxes that the TCTC levies on each hotel and restaurant located in Tunica County - not simply those owned by the Casino Defendants. From time to time, various casinos will make voluntary contributions to the TCTC to support certain targeted promotions.

On May 14, 2001, Graziosi appeared before the TCTC and offered a joint proposal for each casino in Tunica to pay a monthly charge to have the domain name tunica.com direct its internet traffic to the TCTC's website. Graziosi Dep. at 575-578. The TCTC, at the suggestion of Ms. Karen Sock, then General Manager of the Grand Casino and a member of the TCTC, referred the matter to the members of the TCOA for their review and response. *Id.* at 578; *see* May 14, 2001 Minutes of TCTC (labeled as Exhibit "H"); May 15, 2001 Letter from Hank Thomas to "Members"(labeled as Exhibit "I").

After the May 14, 2001 meeting, Graziosi immediately wrote Karen Sock. *See* Graziosi Dep. at 581-586 & Ex. 9. Attached to her letter, Graziosi included this specific proposal:

PROPOSAL

WWW.TUNICA.COM

- $2,500 per casino per month (no increase in fee for a multi-year contract).
- Direct name to the Tunica Tourism's website. Tunica Web Advertising, Inc. would have access to statistics for www.tunica.com
- All casinos in Tunica would have a collective first right of refusal to purchase the name.

(Graziosi Dep. at Ex. 9). In sum, TWA was proposing that its domain name, www.tunica.com, be directed to the TCTC's website, with the Casino Defendants paying an annual lease fee totaling $300,000.00 for this arrangement and also having the right of first refusal to the domain name. In her letter, Graziosi expressly stated that she believed TWA's proposal would benefit the casinos and the entire Tunica community. Graziosi Dep. at Ex. 9.

At Ms. Sock's request, the TCOA called a meeting of its members for May 30, 2001, to consider and discuss, among other things, TWA's proposal. Most, but not all, of the members attended. At the meeting, Webster Franklin, Executive Director of the TCTC, addressed the current and future plans for the TCTC's website. Clyde Callicott, the then Marketing Director

for Gold Strike, discussed Gold Strike's prior experience in leasing TWA's domain name. Not one of the Casino Defendants present accepted TWA's proposal.[3]

2. History of the Marketing Activities of the Casino Defendants

In addition to the financial and information-support related contributions the Casino Defendants make to the TCTC to market Tunica as a travel destination, the Casino Defendants have promoted and marketed their own individual properties through a variety of different forms of media advertising such as print, broadcast, outdoor, direct mail, and internet. The types of media advertising used by the Casino Defendants differ from casino to casino, with internet-related advertising being a smaller portion of their respective marketing budgets and some casinos allocating nothing for internet advertising. *See* Moss Rep. at 3 (Kim Moss May 18, 2005 Expert Report labeled as Exhibit "K"). As already mentioned, each Casino Defendant has its own website that the public may access for information, and their websites are also linked to the TCTC's website. Some Casino Defendants, such as Bally's, Sheraton, the Grand, and Gold Strike, have had at different times internet advertising-related contracts with websites such as www.gomemphis.com or www.aol.com.

3. TWA's Post-May 2001 Efforts to Market "tunica.com"

After May of 2001, TWA changed its business model. Rather than leasing its domain name, TWA hired a website developer to create its website, www.tunica.com, and it contracted with a webserver to host its website. Although its owner has appeared always to have access to adequate capital, TWA has never developed a business or marketing plan for its website. Graziosi has done the bulk of the work collecting any information for TWA's website while

[3] Notes of that meeting, taken by Patsy Brown, an administrative assistant at the Grand Casino state that "The consensus of the group attending was not to utilize the site." Notes from May 30, 2001 TCOA Special Meeting; *see* Brown Aff. at ¶ 4 (Patsy Brown Affidavit labeled as Exhibit "H,"). Ms. Brown has since explained that the word "consensus" is her term and was never used by anyone at the meeting. *See* Brown Aff. at 8-9.

remaining employed full-time with her daytime employers in the Washington, DC-Maryland area.

Since July 6, 2001, TWA has operated its website www.tunica.com. TWA's website has focused at times on gaming and other entertainment or leisure-related activities in Tunica County, Mississippi. TWA's income from its website has come from advertising or from commissions received from online bookings for hotels located in Tunica County or elsewhere. Graziosi has obtained most of the content for TWA's website by copying what appeared on the TCTC website or the websites of the Casino Defendants.

Once its website became operational, TWA has made different proposals to some, but not all, of the Casino Defendants about placing advertising on TWA's website. *See* Graziosi Dep. at 599-600. TWA admits that these proposals differed from its May 2001 proposal and that these proposals in fact differed from casino to casino. *Id.*

Gold Strike Casino and Resort entered into a contract with TWA related to the booking of bus tours after TWA's website became operational. *See* Graziosi Dep. at 634-635 & Ex. 82. This contract, signed in October of 2001, granted TWA exclusive rights to book bus tours on specified terms with Gold Strike on a commission basis. *Id.* at 635-637 & Ex. 82. In connection with this contract, the only advertising done by TWA to solicit tour bus bookings was done on TWA's website. *Id.* Visitors to the website who were interested in bus tours to the Tunica area filled out information on TWA's website, with the information then being sent by TWA for booking with Gold Strike. *Id.* at 632-633, 638-639, 643-644. After their contract became effective, TWA issued press releases in November of 2001, published on TWA's website, which boasted that "Tunica.com and Gold Strike Casino Resort are working together to provide accommodations to organized bus tours via Tunica.com." *Id.* at 192-194 & Ex. 25. Remarkably,

after TWA issued its press release, TWA never sent Gold Strike a single bus tour referral. In fact, TWA never invoiced Gold Strike for any tour bus bookings under their contract.

As explained in Exhibit "M",[4] those remaining Casino Defendants who were in fact approached by TWA about advertising on its website had individual, legitimate business reasons for declining to do business. If there is a common thread in these decisions, it is that each of the casinos was unwilling to pay TWA to advertise on a website that (1) was grossly inferior to their own websites and to the website of the TCTC, which was linked to their own sites, and that (2) did nothing more than copy information from the websites of the Casino Defendants (or the TCTC's website) and repackage that information on its own separate site. At times, since July 6, 2001, TWA has leased its domain name to an offshore online gaming facility, shut its website down completely, or used the website for other purposes such as the display of photographs by professional artists or photographs of its owner, Ms. Graziosi, with different public figures or celebrities. Copies of sample pages from TWA's website are attached hereto as Exhibit "N."

In late August or early September of 2002, TWA entered into discussions with Clyde Callicott who in August of 2001 had left Gold Strike to become the Marketing Director at the Grand Casino, and Memphis-area radio personality Rudi Schiffer, about forming a new company that would market the website www.tunica.com. *See* Graziosi Dep. at 204-209 & Ex. 29-30. Their plan was to develop the tunica.com website into an additional marketing medium for the Casino Defendants. *Id.*

Their discussions called for Rudi Schiffer to "acquire" tunica.com and serve as the front man for the company in dealing with the Tunica community and the Casino Defendants. *Id.* at

[4] Pursuant to Rule 1006 of the Federal Rules of Evidence, the Casino Defendants submit as Exhibit "M" herewith a summary of the deposition testimony of various employees of the Casino Defendants outlining in detail the specific legitimate business reasons each Casino Defendant had for choosing not to do business with TWA.

Ex. 29; Callicott Dep. at 219-21 & Ex. 57. TWA would be a "silent" partner, retaining a 10% interest any profits obtained from the sale of advertising on the website. Graziosi Dep. at 251; Callicott Dep. at 210. Clyde Callicott, due to his obvious conflicts of interest arising from his position as the Marketing Director of the Grand, would also be a "silent" partner and serve as an insider within the Tunica gaming community. *See* Graziosi Dep. at Ex. 29; Callicott Dep. at 205-06, 236.

Mr. Callicott developed a business plan for tunica.com which he sent to TWA and Schiffer. *See* Graziosi Dep. at 209 & Ex. 30; Callicott Dep. at 205-206 and Ex. 56. Mr. Callicott testified that this business plan was based on "totally incorrect" and "inaccurate" projections and was destined from the outset to fail. *See* Callicott Dep. at 218-219, 409-418. Utilizing this business plan, Mr. Schiffer then went to the Casino Defendants and attempted to sell advertising on the site to each of the Casino Defendants. *See* Graziosi Dep. at 212-215. Both Ms. Graziosi and Mr. Callicott testified that Mr. Schiffer was uncomfortable with the technology and understood virtually nothing about internet websites. *See* Graziosi Dep. at 212-213; Callicott Dep. at 237. Meanwhile, TWA attempted to sell "half" of the website in October of 2002 to an offshore, on-line casino known as "Casino on Net." Graziosi Dep. at 218-220 & Ex. 33. This sale never materialized, and Schiffer's marketing efforts related to tunica.com continued with the Casino Defendants.

None of the Casino Defendants were interested in paying to advertise on the "all new Tunica.com" website. *Id.* at 254-255 & Ex. 38. Schiffer e-mailed TWA on November 28, 2002 and reported as follows:

> Cherry,
>
> have not made any headway with sales effort . . . seemed we missed the budget cycle by casinos and nobody wants to spend on another site and they seem to be pretty satisfied with their own websites. that ends my effort and sorry we

> couldn't get it together, I think it had great promise but I couldn't convince the folks who had the budgets to expand them for tunica.com

(*Id.*) It is undisputed that none of the Casino Defendants had any knowledge that TWA or Graziosi had any interest in the "all new Tunica.com." TWA, Schiffer, and Callicott abandoned their discussions in late November of 2002. *Id.* at 222 & Exs. 35, 39.

It is undisputed that TWA never made another joint proposal to the TCTC and the Casino Defendants once TWA began operating its website. It is also undisputed that neither the TCTC nor the TCOA has since met and discussed the TWA.

II. THE STANDARD OF REVIEW

A party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the 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." *Home Health Care Affiliates of Miss., Inc., v. North Am. Indem. N.V.*, 299 F. Supp. 2d 645, 651 (N.D. Miss. 2004). The movant has the initial burden of showing the absence of a genuine issue of material fact. *Id.* The moving party is not required to introduce evidence that negates the non-moving party's allegations, but merely must establish an absence of evidence supporting an essential element of the plaintiff's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

The burden then shifts to the non-movant to go beyond the pleadings and "by . . . interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial," and is not discharged by mere allegations or denials. *Id.* To this end, the "opposing party must present more than a metaphysical doubt about the material facts in order to preclude the grant of summary judgment." *Hobbs v. The Stroh Brewery Co.*, 189 F. Supp. 2d 559, 565 (S.D. Miss. 2001). The non-moving party must produce "specific proof demonstrating

a triable issue of fact as to each of the elements required for establishment of the claim or claims asserted." *Id.* The evidence proffered by the non-movant must be admissible and of such a nature that a "fair-minded jury" would be satisfied that the non-movant is entitled to a verdict in its favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1996); *Conti Commodity Serv., Inc. v. Ragan*, 63 F.3d 438, 441 (5th Cir. 1995). If the non-movant fails to meet her burden, summary judgment should be entered. *Fields v. South Houston*, 922 F.2d 1183, 1187 (5th Cir. 1991).

To survive summary judgment in a suit where the plaintiffs allege a combination or conspiracy in restraint of trade under the Sherman Antitrust Act, 15 U.S.C. § 1, as Plaintiffs do here, they must present evidence that is not merely consistent with conspiracy but "tends to exclude the possibility of independent action." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984). While it is true that when evaluating a motion for summary judgment, the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the non-moving party, substantive antitrust law expressly limits the range of permissible inferences which may be drawn from ambiguous evidence related to a Sherman Section One claim. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 585, 587-88 (1986). "[C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.* at 588. Thus, summary judgment is proper if it is as reasonable to infer from the evidence permissible activity as it is to infer conspiracy. In addition, if a claim is economically senseless, the antitrust plaintiff must come forward with more persuasive evidence to support its claim than otherwise would be necessary. *Id.* at 587.

III. TWA'S SHERMAN SECTION ONE CLAIM FAILS AS A MATTER OF LAW

In order to state a claim under Section 1 of the Sherman Antitrust Act, TWA must show that the Defendants (1) engaged in a conspiracy (2) that restrained trade (3) in a particular market. *Tunica Web*, 496 F.3d at 409. "A necessary ingredient of any section 1 conspiracy is a showing of concerted action on the part of the defendants." *Id.*. "Only after an agreement is established will a court consider whether the agreement constituted an unreasonable restraint on trade." *AD/SAT v. Associated Press*, 181 F.3d 216, 232 (2nd Cir. 1999).

A. TWA Cannot Establish A Conspiracy By The Casino Defendants Because The Only Evidence Offered By Plaintiffs To Show Concerted Action By The Casino Defendants Is Inadmissible Hearsay.

The basis of Graziosi's conspiracy allegations rests fundamentally on e-mails and communications between her and Clyde Callicott, at times an employee for four casinos over the course of the period that the allegations arose, including Gold Strike (1998-July 2001), Grand Casino Tunica (2001-2002), Sheraton and Bally's (2002- Jan. 2003). In 2003 Callicott was fired by Sheraton and Bally's.

There is a series of correspondence between Graziosi and Callicott, primarily via e-mail, that the plaintiff is seeking to use as evidence of an agreement to boycott the website tunica.com. This electronic correspondence must be analyzed for admissibility under the following two exceptions to the hearsay rule: (1) Whether it is admissible under F.R.E. 801(d)(2)(D) as a statement of a party's agent concerning a matter within the agent's course and scope of employment or (2) Whether it is admissible under FRE 801(d)(2)(E) as a statement by a coconspirator of a party during the course of and in furtherance of the conspiracy.

1. The Disputed E-Mails

The e-mail correspondence can be broken down into three distinct groups:

a. The Gold Strike E-mails:

In an e-mail dated April 9, 2001 Graziosi contacted Callicott regarding the website tunica.com. (Exhibit 28 to Callicott Dep.). In response to this e-mail Callicott, on April 17, 2001, informed Graziosi that his boss Scott Ribeiro, with whom Graziosi had been negotiating, was instructing him to stay away from the project. (Exhibit 37 to Callicott Dep.). At this point Graziosi was on notice that the decision for Gold Strike to use tunica.com was no longer Callicott's call.

On June 5, 2001, following the meeting where the boycott agreement was allegedly made, Graziosi again attempted to negotiate with Callicott. In response Callicott sent Graziosi an e-mail in which he states that based on the TCOA meeting "his hands are tied." (Exhibit 162 to Callicott Dep.). This e-mail was followed by correspondence relating to other publicity opportunities. All of the e-mails sent and received by Callicott were to or from Ccallicott@mrgmail.com, his company e-mail account with Gold Strike.

b. Grand Casino E-Mails

On August 30, 2002, more than a year after any previous communication, Graziosi contacted Callicott again regarding the sale of tunica.com, this time on E-bay. Callicott responded from his Grand Casino e-mail account callicottc@grandcasinos.com on the same day. (Exhibit 54 to Callicott Dep.). This e-mail is the only e-mail sent from this account. Callicott informs Graziosi that he doesn't have the same pull at the Grand as he did at Gold Strike, and he solicits or suggests a potential "franchise" project and a desire to put her in touch with Rudi Shiffer for a "project." *Id.* Following this e-mail, all correspondence between Callicott and Graziosi is to or from his personal e-mail at c_callicott@msn.com.

c. Personal E-mails and Communication

From early August 2002 to late November 2003 Graziosi, Shiffer and Callicott communicate via multiple e-mails and telephone conversations. (Collective Exhibit ___ - ***Exhibits 29, 31-33, 35-36, 41*** to Callicott Dep.). The subject of their communication is primarily a partnership or arrangement between themselves whereby Shiffer will publicly promote the website to the casinos and Callicott and Graziosi would act as silent partners. Callicott was intentionally hiding his involvement because, as he stated in a telephone conversation with Graziosi, "once they know I'm connected, bam, I'm in trouble". (Exhibit _____ (see exhibit 36 on previous MSJ).

2. The E-Mails Are Not Excepted From the Hearsay Rule Under Rule 801(d)(2)(D).

Under Rule 801(d)(2)(D), an otherwise inadmissible hearsay statement may be admitted if it is offered against a party and is a statement by the party's agent or servant concerning a matter within the scope of the agency or employment and made during the existence of the relationship.

In *Staheli v. University of Mississippi*, 854 F.2d 121 (5th Cir.1988), the Fifth Circuit refused to admit the statement of a fellow teacher regarding hiring practices of the University, as that colleague's position had nothing to do with the decision regarding the plaintiff's tenure and that his statements were not made in his employment capacity. In *Cook v. Miss. Dept. of Human Services*, the Fifth Circuit recognized that to be considered an agent under Rule 801(d)(2)(D) a person need not be an actual decision maker but "must at least have been involved in or participated in the process leading to the challenged employment decision" to establish a relevant agency relationship. 108 Fed. Appx. 852, 855 (5th Cir. 2004)(citing *Hill v. Spiegel, Inc*. 708 F.2d 233, 237 (6th Cir.1983); *Yates v. Rexton*, 267 F. 3d 793, 802 (8th Cir. 2001)). In that case the

court refused to admit a statement by a senator regarding employment practices of the MDHS as he was not in a decision making position.

In *Corley v. Burger King Corp.* the Fifth Circuit did admit a statement as a non-hearsay admission by a party opponent when a manager of a Burger King stated he was on his way to work to repair the drink machine. 56 F.3d 709 (5th Cir. 1995). The statement was used to establish Burger King's vicarious liability in the case, and the court held that his statements were within the scope of his employment. The manager of the Burger King admitted he was acting in his official capacity at the time of the wreck. This can be distinguished from the facts here in that Callicott actually informs Graziosi of his lack of control.

Merely being an employee and making statements is not sufficient to be considered non-hearsay. As the *Staheli* court noted where the declarant had no control over the decision his statements cannot be imputed to the principal. *Staheli,* at ____.

a. The Gold Strike E-Mails Are Not Admissible.

The plaintiff has settled its claims against Gold Strike and as of December 5, 2005, it is no longer a "party" to this action. However, irrespective of its status as a non-party, Callicott's e-mails while he was an employee of Gold Strike do not establish the required characteristics that could allow it to be admitted.

It is clear that in the April 17, 2001 e-mail Callicott informed Graziosi that the website decision was no longer his call and yet she continued to pressure him for business. (Exhibit ___). This led to the June 6, 2001 e-mail from his Gold Strike Casino account where he informs Graziosi that his hands have officially been tied. Graziosi was on notice that Callicott was not in a position to do business with her regarding the site, and that this was outside the agency relationship.

b. At the Grand Casino, Callicott Was Not Acting as an Agent for Any of the Casino Defendants

A corporate defendant's participation in the conspiracy for purposes of Rule 801(d)(2)(D) may be established by proof of an employee's acts taken during the course and scope of her employment. *Paul F. Newton & Co. v. Tex. Commerce Bank,* 630 F.2d 1111, 1121 (5th Cir 1980).

In his only e-mail from the Grand Casino account, Callicott informs Graziosi that he does not have the same leverage he had at Gold Strike, again putting her on notice that he was not in a position to make decisions about the website. In fact Callicott's position at the Grand was to oversee player development and special events. (Exhibit _____ Callicott Depo p. 188-189). The Grand employed a separate advertising team to handle advertising and web ventures. *Id.* Not only was Callicott's contact with Graziosi outside the scope of his employment at the Grand, but she was put on notice that his contact was not on behalf of the Casino. Callicott's potential agency relationship could only exist with regard to the Casinos he worked for and at some point even that relationship was terminated because of his personal partnership with Graziosi. The nature of their relationship now shifts to a partnership. Callicott establishes a personal interest in marketing the website and its successful sale. Callicott takes on a role as a business partner with Graziosi and is no longer acting as a liaison between her and the Casino network. As a result, any comments made by him should be excluded as hearsay since no agency relationship existed.

c. All Remaining E-Mails Were Authored While Callicott Was an Agent for Graziosi, Not Any of the Casino Defendants

Clearly, Callicott's agency relationship with the casinos was evenutally replaced by his agency relationship with Graziosi herself. The Plaintiff cannot possibly argue that she should be permitted to use statements Callicott made as her partner under F.R.E. 801(d)(2)(D).

In *United States v. Summers*, the Fifth Circuit held that certain recorded conversations between a defendant and a witness for the government were not admissible under this exception as they were made after the witness had started working for the prosecution, thereby terminating the existing agency relationship. 598 F. 2d 450, 457 (5th Cir. 1979). Summers was a city council member found guilty of bribery under the Hobbs Act. Included in evidence used against him at trial were tape recordings of telephone conversations between a co-conspirator and James McCrory, an agent of the defendant and informant for the FBI. *Id.* The government introduced the evidence at trial under the 801(d)(2)(D) exception as a statement by an agent concerning a matter within the scope of his agency. *Id.* On appeal the court held that because the recordings were made after McCrory had commenced working with the FBI, any agency relationship which might have existed between Summers and McCrory was terminated. The court went on to state that the government would have to prove the agency relationship was in existence at the time the statements were made. *Id.* at 458. The court specifically held that "McCrory could not be working for both the FBI and Summers at the same time" *Id.* at 459.

This principal is clearly controlling here. The e-mails and communication between Graziosi and Callicott following the August 30, 2002 e-mail from Callicott to Graziosi are all written from his personal e-mail account and are for the purpose of advancing a personal business partnership with Graziosi and Rudi Shiffer. (Exhibit ____ - Exhibit 28 previous MSJ). In this e-mail Callicott first introduces the idea of franchising the website for his, Graziosi and Shiffer's personal gain. This e-mail is in no way connected to his position with the casinos. The e-mails between Graziosi, Shiffer and Callicott from this point on were with regards to their personal business relationship. He also put together a business plan for the arrangement. Exhibit ____ ((Callicott Depo. 205) However, in a taped phone conversation, which is also inadmissible

under the same principle, Callicott expressed the need for his anonymity, "I can't get involved because once they know I'm connected, bam, I'm in trouble." Exhibit ___ (Exhibit 36). This clearly evidences Callicott's transferred loyalty to the joint venture he had with Graziosi. Following the ruling in *Summers*, once Callicott took on the role of business partner with Graziosi, any agency relationship he could have possibly had with the Casino Defendants was terminated. Based on this, all communication between Graziosi, Shiffer and Callicott after the August 30th e-mail fails to fall within the 801(d)(2)(D) non-hearsay rule.

The e-mails Callicott sent from his personal e-mail account are not written in his capacity as an employee of his casino employers. It is during this line of communication that Callicott revealed the most information about the casinos approach to and rejection of the website. However, his statements were not made on behalf of the casinos but in his role as her business partner. They were made in no way for the purpose of advancing the casinos' agenda, but simply informing his business partner of where they stood with regards to their joint attempts to market the website through Shiffer. Additionally, their conversation and e-mails involved the potential sale to a third party individual or sale on E-bay. It is clear from these e-mails that the purpose of the communication between Callicott and Graziosi is to make some sort of joint personal profit from this website. They discussed marketing to individual buyers as well, not necessarily casinos. (Exhibit ___; see e-mails 8-11 discussing potential buyers and E-bay sale).

3. The E-Mails Are Not Excepted From the Hearsay Rule Under Rule 801(d)(2)(E)

Fed.R.Evid. 801(d)(2)(E) excludes from the definition of " hearsay" a statement that "is offered against a party and is ... a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy."

A statement may not be offered against the Casino Defendants unless it is first proved that (1) a conspiracy existed and (2) that the defendant was a member of the conspiracy. *United States v. Bourjaily*, 483 U.S. 171, 174, 97 L. Ed. 2d 144, 107 S. Ct. 2775 (1987).[5] Rule 801(d)(2)(E) requires that the *declarant* be a member of the conspiracy at the time the statement was made. *United States v. Summers*, 598 F.2d 450 (5th Cir. 1979).

Before admitting evidence under Rule 801(d)(2)(E), the proponent must "establish by a preponderance of the evidence that the declarant and the defendant were involved in a conspiracy and that the statements were made during and in furtherance of the conspiracy." *United States v. Broussard*, 80 F.3d 1025, 1038 (5th Cir. 1996); see also *Bourjaily*, 483 U.S. at 175-76. In *Paul F. Newton & Co. v. Texas Commerce Bank*, 630 F.2d 1111, 1121 (5th Cir. 1980), the Fifth Circuit recognized a clear standard for determining the admissibility of evidence under this rule. "To remove a statement made by a coconspirator from the application of the hearsay rule the party seeking to introduce the statement must established by a preponderance of the evidence, that (1) a conspiracy existed, (2) the declarant and the party against whom the statement is offered were members of the conspiracy, and (3) the declarant made the statement during the course and in furtherance of the conspiracy." *Id.* at 1120 (quoting *United States v. James*, 590 F.2d 575, 578 (5th Cir.) (en banc).

In *Newton* the court states that determination of a conspiracy is fact specific and that the district court should make the initial determination based on the declarants' relationship to the alleged co-conspirators. *Id.* at 1121. In *Viazis v. American Association of Orthodontists* (AAO), Viazis, a dentist, brought an action against the AAO and others for violation of the Sherman Act.

[5] In 1997, the advisory committee to the Federal Rules of Evidence codified in rule 801(d)(2) this holding.

314 F.3d 758, 760 (5th Cir. 2002). He claimed that the defendants conspired to prevent the marketing of orthodontic brackets that he had patented. The trial court granted defendant's motion for summary judgment and Viazis appealed arguing among other things that the court erred by excluding a note written by one of the defendants, as it fell within the 801(d)(2)(E) exception. The Fifth Circuit rejected this argument and held that outside of the note no conspiracy was established. *Id.* at 767. To establish a conspiracy, required Viazis to show that the declarant and defendants had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Id.* at 763.

Applying this standard to the facts of the instant case, it is clear that Callicott, even if he was an agent of the Casino Defendants was in no way an active participant in any decision of any agreement, even if he was aware of such an agreement. Additionally in *United States v. Richards*, the court recognized that the out-of-court statement in itself may be considered in determining the existence of the conspiracy, but in itself is insufficient to support its own admission. 204 F.3d 177, 202 (5th Cir. 2000). Graziosi, cannot use these statements alone to establish a conspiracy.

Graziosi has not contended that Callicott himself was a member of any alleged conspiracy as indeed she cannot. The e-mails clearly demonstrate that for most of the key time periods, Callicott worked with and for Graziosi to attempt to establish a joint venture to exploit the Casinos. Graziosi clearly befriended and relied on Callicott for information and access to the Casinos. At no time do the e-mails reflect that Callicott had any authority to control or even have input into the decisions of the Casino defendants to use Graziosi's website. Thus, having failed to establish that Calicott was a "co-conspirator", or that his hearsay statements were made "in furtherance of" any alleged conspiracy, the subject e-mails must be excluded.

B. TWA Has Failed To Show An Unreasonable Restraint On Trade.

Assuming that TWA were able to show a concerted action by the Casino Defendants, TWA must then establish that the Casino Defendants' actions constituted an unreasonable restraint on trade. Whether the Casino Defendants' actions violated Section 1 of the Sherman Act depends on whether it is found to be an *unreasonable* restraint. *Northwest Wholesale*, 472 U.S. at 289. As the Fifth Circuit explained:

> To determine whether an agreement is an unlawful restraint on trade, we generally apply "rule of reason," which requires us to consider whether the particular agreement at issue in fact operates as an unreasonable restraint on competition. Under the rule of reason, an agreement will be found unlawful only if the plaintiff shows that it actually had an adverse effect on competition. Some types of agreements can be considered *per se* violations of section 1, meaning that the law does not require to provide the usual proof that the agreement at issue is actually anticompetitive in the particular case.

Tunica Web, 496 F.3d at 411-412.

While the Fifth Circuit determined that the Casinos' alleged agreement not to do business with TWA was horizontal because the Casinos are competitors of one another, the Court made it clear that that determination "does not necessarily mean that the agreement is *per se* unlawful." *Tunica Web*, 496 F.3d at 414 (citing *Northwest Wholesale Stationers*, 472 U.S. at 295; *Paladin Assoc., Inc. v. Montana Power Co.*, 328 F.3d 1145, 1155 (9th Cir. 2003); *Diaz v. Farley*, 215 F.3d 1175, 1182 (10th Cir. 2000)). Rather, the Firth Circuit remanded this case for this Court to consider whether the rule of reason or the *per se* rule should be applied to Plaintiff's claims in light the United States Supreme Court's opinion in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Company*, 472 U.S. 284 (1985).

1. The Rule of Reason Applies to TWA's Sherman Section One Claim.

In *Northwest Wholesale Stationers*, the United States Supreme Court discussed the type of cases in which the *per se* rule has been applied to group boycotts:

> Cases to which this Court has applied the *per se* approach have generally involved joint efforts by a firm or firms to disadvantage competitors by "either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle." In these cases, the boycott often cut off access to a supply, facility, or market necessary to enable the boycotted firm to compete, and frequently the boycotting firms possessed a dominant position in the relevant market. In addition, the practices were generally not justified by plausible arguments that they were intended to enhance overall efficiency and make markets more competitive. Under such circumstances the likelihood of anticompetitive effects is clear and the possibility of countervailing procompetitive effects is remote.

472 U.S. at 294 (1985)(internal citations omitted).

"[T]here is a presumption in favor of [the] rule of reason standard." *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 726, 108 S.Ct. 1515, 99 L.Ed.2d 808 (1988). "A plaintiff seeking application of the *per se* rule must present a threshold case that the challenged activity falls into a category likely to have predominantly anticompetitive effects." *Northwest Wholesale Stationers,* 472 U.S. at 298. The Supreme Court has recently reiterated that "[t]o justify a *per se* prohibition a restraint must have manifestly anticompetitive effects and lack any redeeming virtue." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2007 WL 1835892, at *7 (Jun. 28, 2007). As discussed herein, this case does not fall within that class of cases for which the court "can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason" and, therefore, does not qualify for *per se* treatment. *See Leegin Creative Leather Prods.*, 127 S.Ct. at 2713 (2007).

a. The Alleged Group Boycott Did Not Involve Joint Efforts To Disadvantage A Competitor By Denying Or Persuading Or Coercing Suppliers To Deny Relationships The Competitors Need In The Competitive Struggle.

As the *Northwest Wholesale* Court explained, generally cases to which the *per se* rule has been applied "involved joint efforts 'to disadvantage competitors by either directly denying or persuading or coercing suppliers to deny relationships the competitors need in the competitive

struggle.'" This Court previously held and the Fifth Circuit agreed that "the Casinos were simply prospective customers of [TWA], nothing more." *Tunica Web*, 496 F.3d at 415 n.17. Not being a competitor of TWA, even if the Casino Defendants refused to do business with TWA, the Casinos alleged boycott in no way involved a competitor of TWA. While the fact that the Casinos are not competitors of TWA does not in and of itself prevent this case from being evaluated as a *per se* violation, it does make it far less likely that the alleged boycott is the type for which *per se* treatment should apply.

In *Adaptive Power Solutions, LLC v. Hughes Missile Systems Company,* the Plaintiff asserted a Section 1 claim against two companies who it allegedly participated in a concerted refusal to buy its product. 141 F.3d 947 (9th Cir. 1998). Defendants were the only two firms that manufactured advanced medium range air missiles ("AMRAAMs") for sale to the Department of Defense. The Plaintiff, Adaptive Power Solutions, LLC , ("APS") manufactured an internal power supply system known as the "A3" for the AMRAAM missile. APS was a successor to Sigmapower, Inc., which had supplied A3s to one of the Defendants prior to APS's acquisition of Sigmapower. The other Defendant purchased its A3s from a company called Oeco Corporation. When APS acquired Sigmapower, it raised its asking price for the A3s. As a result the Defendant who had been purchasing A3s from APS's predecessor refused to purchase from APS and convinced the other defendant manufacturer of AMRAAMs not to buy A3s from APS either. When APS could not sell its A3s to either Defendant (the only firms who manufactured AMRAAMs), APS exited the A3 business. *Id.* at 948-949.

APS argued that the defendants refusal to by A3s from APS was *per se* illegal because (1) it cut off ASP's access to the market for the sale of A3s, (2) the defendants were the only manufacturers of AMRAAMs so, not only are they the dominant market, they are the only

market for the sale of A3s, and (3) the defendants failed to state a plausible argument that their conspiracy enhanced competition. *Id.* at 950. Relying on the Supreme Court's opinion in *Northwest Wholesale*, the Ninth Circuit held that APS's argument "overlooks the description of a group boycott as one which 'disadvantages competitors'" noting that "the *per se* approach has generally been limited to cases in which firms with market power boycott suppliers or customers *in order to discourage them from doing business with a competitor*." *Id.* (quoting *Northwest Wholesale Stationers*, 471 U. S. at 294; *Indiana Fed'n of Dentists*, 476 U.S. at 458)(emphasis is orginal). The Ninth Circuit concluded that the defendants' conspiracy did not trigger the *per se* rule of a group boycott and the rule of reason was properly applied. *Id.* at 950.

In *APS*, the defendants were the only parties that would need the product that APS manufactured, yet they refused to purchase it. Even so, the Ninth Circuit held that case did not warrant application of the *per se* rule. Here, however, even though the Casinos may have been TWA's ideal consumer, there were other consumers available to purchase its product. **[insert cite]** Much like the situation in *APS,* assuming the Casinos did agree with one another not to do business with TWA, this refusal does not constitute a *per se* violation of the antitrust laws.

The Supreme Court recently re-emphasized its general reluctance to apply the *per se* rule unless "the courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason." *Leegin Creative Leather Prods,* 127 S. Ct. 2705, 2007 WL 1835892, at *7. Considering the purpose of the antitrust laws is to promote competition, the fact that this case does not involve efforts to disadvantage a competitor weighs in favor of applying the rule of reason rather than the *per se* rule.

b. The Alleged Boycott Did Not Cut Off Access To A Supply Facility Or Market Necessary To Enable The Plaintiff To Compete.

In *Northwest Wholesale Stationers*, the U.S. Supreme Court explained that one type of group boycott case to which the *per se* rule has been applied are cases in which the boycott cuts off access to a supply, facility, or market necessary to enable the boycotted firm to compete, citing to *Silver v. New York Stock Exchange,* 373 U.S. 341, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963) and *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656, 81 S.Ct. 365, 5 L.Ed.2d 358 (1961).[6]

In *Silver v. New York Stock Exchange*, Harold Silver, a securities broker-dealer, and his brokerage firm (collectively "Silver"), both of which were not members of the New York Stock Exchange ("NYSE"), filed an action against the NYSE alleging violation of Section 1 of the Sherman Act. 364 U.S. 341 (1963). Silver obtained direct private telephone wire connections with a number of securities firms, some of which were members of the NYSE, and arranged for private wires to several member firms of the NYSE, as well as a number of nonmember firms. *Id.* at 343. Pursuant to NYSE Rules, the member firms applied for approval of the wire connections with Silver. The NYSE granted 'temporary approval' for these wire connections, as well as for a direct teletype connection to a member firm in New York City and for stock ticker service to be furnished to Silver directly from the floor of the NYSE. Approximately six months later, the NYSE decided to disapprove private wire applications and its members were notified

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[6] The language of *Northwest Wholesale Stationers* indicates that this type of case likewise involves a competitor:

> Cases to which this Court has applied the *per se* approach have generally involved joint efforts by a firm or firms to disadvantage competitors by "either directly denying or persuading or coercing suppliers or customers to deny relationship, the competitors need in the competitive struggle." ***In these cases***, the boycott often cut off access to a supply, facility, or market necessary to enable the boycotted firm to compete . . . .

472 U.S. at 294.

and instructed to discontinue the wires with Silver. The member firms notified Silver that the wire connections would be disconnected and the NYSE notified Silver of discontinuance of the stock ticker service. *Id.* at 344.

Silver claimed that the volume of his business dropped substantially after removal of the wire connections. *Id.* at 344-345. Silver filed an action against the NYSE alleging, *inter alia*, that the NYSE conspired with its member firms to deprive petitioners of their private wire connections and stock ticker service in violation of Sections 1 and 2 of the Sherman Act. *Id.* The Supreme Court held:

> The concerted action of the [NYSE] and its members here was, in simple terms, a group boycott depriving [Silver] of a valuable business service which they needed in order to compete effectively as broker-dealers in the over-the-counter securities market. Unlike listed securities, there is no central trading place for securities traded over the counter. The market is established by traders in the numerous firms all over the country through a process of constant communication to one another of the latest offers to buy and sell. The private wire connection, which allows communication to occur with a flip of a switch, is an essential part of this process. Without the instantaneously available market information provided by private wire connections, an over-the-counter dealer is hampered substantially in his crucial endeavor-to buy, whether it be for customers or on his own account, at the lowest quoted price and sell at the highest quoted price. Without membership in the network of simultaneous communication, the over-the-counter dealer loses a significant volume of trading with other members of the network which would come to him as a result of his easy accessibility.
>
> These important business advantages were taken away from petitioners by the group action of the [NYSE] and its members. Such 'concerted refusals by traders to deal with other traders…have long been held to be in the forbidden category,' of restraints which 'because of their inherent nature or effect…injuriously restrained trade'.

Silver, 373 U.S. at 348 (internal citations omitted).

In *Radiant Burners, Inc. v. Peoples Gas Light & Coke Company*, the other case cited by the *Northwest Wholesale Stationers* Court as an example of cases involving a competitor being cut off from an essential element necessary to compete, Radiant Burners, Inc., a manufacturer of ceramic gas burners, brought an antitrust action against the American Gas Association ("AGA")

which consisted of two public utilities engaged in the distribution of gas, two pipeline companies engaged in transporting natural gas and six other manufacturers of gas burners. 364 U.S. 656 (1961). The complaint alleged that the

> [AGA] operates testing laboratories wherein it purports to determine the safety, utility and durability of gas burners. It has adopted a 'seal of approval' which it affixes on such gas burners as it determines have passed its tests. Its tests are not based on 'objective standards,' but are influenced by respondents, some of whom are in competition with [Radiant Burners], and thus its determinations can be made 'arbitrarily and capriciously.' [Radiant Burners] has twice submitted its Radiant Burner to AGA for approval but it has not been approved, although it is safer and more efficient than, and just as durable as, gas burners which AGA has approved. '(B)ecause AGA and its Utility members, including Peoples and Northern, effectuate the plan and purpose of the unlawful combination and conspiracy alleged herein by…refusing to provide gas for use in the plaintiff's Radiant Burner(s)…which are not approved by AGA,' [Radiant Burners'] gas burners have been effectively excluded from the market, as its potential customers will not buy gas burners for which they cannot obtain gas, and in consequence petitioner has suffered and is suffering the loss of substantial profits.

Radiant Burners, 364 U.S. at 366-367. Radiant Burners did not allege public injury to competition and, thus, the AGA moved to dismiss for failure to state a claim upon which relief can be granted. *Id.* at 658-659. The Court of Appeals affirmed, holding that a *per se* violation was not established by the facts alleged. *Id.* The U.S. Supreme Court held:

> It is obvious that [Radiant Burners] cannot sell its gas burners, whatever may be their virtues, if, because of the alleged conspiracy, the purchasers cannot buy gas in those burners. The conspirational refusal "to provide gas for use in the plaintiff's Radiant Burner(s) (because they) are not approved by AGA" therefore falls within one of the "classes of restraints which from their 'nature of character' (are) unduly restrictive, and hence forbidden by both the common law and the statute.

Id. at 659-660.

Unlike the situation in *Silver* and *Radiant Burners*, the Casino Defendants, who were merely potential customers of TWA, did not cut off TWA's access to an essential element necessary for TWA to compete. In *Silver*, the Plaintiff was cut off from the wire connections it needed to transmit information and in *Radiant Burners*, the Plaintiff was cut off from the gas that

its burners needed to operate. TWA was not cut off from any such essential facility or supply in this case.

In fact, even after the Casinos individually declined to do business with TWA, TWA continued to operate within the relevant market by _____. **[cite Graziosi depo.]** This further shows that the Casinos did not cut off TWA from an essential facility it needed in order to compete.

c. The Casino Defendants Do Not Possess A Dominant Position In The Relevant Market.

The U.S. Supreme Court in *Northwest Wholesale Stationers* also noted that group boycott cases to which the *per se* rule has been applied also frequently involve "boycotting firms [which] possess[] a dominant portion in the relevant market." *Northwest Wholesale Stationers,* 472 U.S. at 294 (citing *Silver,* 364 U.S. _____, *Associated Press v. United States,* 326 U.S. 1 (1945); *Fashion Originators' Guild of America, Inc. v. FTC,* 312 U.S. 457 (1941)).[7]

TWA alleges that the relevant market in this case is "online advertising for Tunica as a travel destination." Compl. ¶ ____; Tajirian Rep. at _____. As this Court previously found and Fifth Circuit agreed, the

> TWA and the casinos are not in competition with each other. TWA operates a website. The casinos own and operate casinos, hotels, and other leisure-related activities. They simply do not compete for the same customer base. Although the casinos own and operate their own websites, they have never leased websites nor sold internet advertising.

Tunica Web, 496 F.3d at 415 n.17. Since the Casino Defendants are not in the same relevant market as Plaintiff, they cannot possess a dominant position in that market.

[7] Again, the *Northwest Wholesale Stationers* reference to "these cases" indicates it was referring to cases which involved a competitor of the boycotted firm. *See* footnote 5, *supra*.

d. The Casino Defendants' Actions Were Justified By Plausible Arguments That Were Intended To Enhance The Overall Efficiency And Make Markets More Competitive.

The Casino Defendants set forth in their initial Motion for Summary Judgment numerous plausible, procompetitive reasons why they chose not to do business with the Plaintiff. *See* Exhibit "M".

The rule of reason applies whenever "the economic impact of certain practices is not immediately obvious." *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 459 (1986); s*ee Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Painting Co.*, 472 U.S. 284, 296 (1985) (rule of reason analysis applied to horizontal boycott); a*ccord, Goss v. Memorial Hospital System*, 789 F.2d 353, 354-56 (5th Cir. 1986). TWA does not give any plausible explanation in economic terms why the Casino Defendants are allegedly boycotting its website. The facts bear close scrutiny by this Court particularly because each Casino Defendant already had a fully operational website to which the general public has access and their respective websites were already linked to a website that offered information about Tunica as a travel destination. Under these circumstances, the refusal of the Casino Defendants to do business with TWA does not imply an "anticompetitive state of mind" that would justify *per se* treatment. *See Goss*, 789 F.2d at 355.

2. Applying the Rule of Reason, TWA's Antitrust Claims Fail As a Matter of Law.

a. TWA's Antitrust Claims Should Be Dismissed For Failure To Define A Relevant Product Market Or A Relevant Geographic Market.

To prevail on its antitrust claim, TWA must provide sufficient evidence to establish the relevant geographic and product markets. *E.g., Hornsby Oil Co. v. Champion Spark Plug Co.*, 714 F.2d 1384, 1390-94 & n.8 (5th Cir. 1983). Expert economic testimony is necessary to support a relevant market determination. *E.g., American Key Corp. v. Cole Nat'l Corp.*, 762

F.2d 1569, 1579 (11th Cir. 1985). The relevant product market consists of products which have "reasonable interchangeability for the purposes for which they were produced – price, use and qualities considered." *Hornsby Oil Co.,* 714 F.2d at 1393.

The parameters of the relevant product market are defined by the presence of available substitutes for the product in question, or cross-elasticity of demand, and the ability of other competitors or new entrants to enter the market, or cross-elasticity of supply. *Id.* The relevant geographic market consists of the "area of effective competition" in which the relevant product and its substitutes are traded. *Id.* In making this determination, the court must consider both economic and physical barriers to enter. *Id.* at 1394.

TWA contends that the "general marketplace involved [in this matter] is that of advertising for Tunica as a travel destination. In this market there are two distinct submarkets: online advertising, and traditional media. The relevant submarket for analyzing tunica.com is online advertising for Tunica as a travel destination." (Memo from A. Tajirian to B. Pigott (undated)(labeled as Exhibit "N")). Mr. Tajirian, TWA's expert, has provided no economic evidence in support of this alleged product "submarket," but rather simply describes in the most general of terms how some, but certainly not all, websites operate.

A review of the relevant case law demonstrates Mr. Tajirian's definition of a relevant market fails as a matter of law. For example, in *America Online, Inc. v. Greatdeals.net*, the court considered whether AOL's attempts to block spam e-mail from its subscribers constituted an antitrust violation. 49 F. Supp. 2d 851, 857-58 (E.D. Va. 1999). There, the antitrust counterclaimant asserted that the relevant market was e-mail advertising and that AOL controlled a distinct sub-market based on internet subscribers who are accessed through AOL facilities. The court disagreed:

> [T]here are reasonable substitutes for advertising through AOL. Thus, it must reject [the] proposed relevant market. First, the Court rejects [counterclaimant] attempt to restrict the market to e-mail advertising. There are numerous substitutes for e-mail advertising..., some of which are less expensive, including use of the World Wide Web, direct mail, billboards, television, newspapers, radio, and leaflets, to name a few. Even if the Court restricted the market to e-mail advertising, interchangeable substitutes include other paid e-mail subscription services … or free e-mail services …. The Court will not restrict the market to AOL subscribers because it is improper to define a market simply by identifying a group of consumers who have purchased a given product.

Id. at 858 (citation omitted).

As the *AOL* court aptly observed, the internet "is not a place or location; it is infinite. . . . [Counterclaimants] ignore the fact that they have multiple means of advertising their computer equipment to the Internet-accessing public." *Id.* Accordingly, where the "relevant market proposed by the plaintiff is not even alleged to encompass all interchangeable substitute products, the market is legally (rather than factually) insufficient and a motion to dismiss is appropriate." *Id.* at 858-859.[8]

TWA has the burden of producing competent economic evidence to support its proffered market definition. *See Dimitt Agri Indus. v. CPC Int'l Incl*, 679 F.2d 516, 525 (5th Cir. 1982). TWA's inability to allege or prove a relevant market based on the record evidence and the economic realities related to the marketing decisions made by participants in the travel destination industry in accordance with established case law should result in a dismissal of its federal and state antitrust claims.

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[8]*See Smith v. Network Solutions, Inc.*, 135 F. Supp. 2d 1159, 1167-70 (N.D. Ala. 2001) (expired internet domain names was not relevant market in antitrust action against registrar which had failed to timely delete names from registry; the relevant market was all domain names generally); *Midwest Radio Co., Inc. v. Forum Publishing Co.*, 942 F.2d 1294, 1297 (8th Cir. 1991) (antitrust defendant did not control monopoly on mass media advertising market even though defendant published the only general circulation newspaper, operated two radio stations and one television station in relevant geographic market where billboards, weekly newspapers, magazines, and direct mail were competitors in mass media advertising market).

b. TWA Has Failed to Show There Has Been An Adverse Effect On Competition In the Relevant Market.

To prove an antitrust violation under the rule of reason, an antitrust plaintiff:

> must show the defendant's conduct adversely affected competition. That is, the rule of reason requires plaintiffs to show that the defendants' actions amounted to a conspiracy against the market -- a concerted attempt to reduce output and drive up prices or otherwise reduce consumer welfare. Under the rule of reason, the antitrust laws protect competition, not particular competitors. In addition, the absence of procedural safeguards in the process of making business decisions can in no sense determine the antitrust analysis . . . .
>
> Accordingly, a showing that the defendants harmed the plaintiffs is not enough to prove a violation of section 1 under the rule of reason. It is a natural part of a competitive market that products, firms and --sometimes-- entire sectors of the economy fail. A plaintiff does not have a claim under the rule of reason simply because others refuse to promote, approve, or buy its products.

Consolidated Metal Prod., Inc. v. American Petroleum Inst., 846 F.2d 284, 292-93 (5th Cir. 1988). As demonstrated below, TWA cannot meet this burden.

TWA has the burden of proving that the Casino Defendants have market power in the relevant market and that the alleged restraint has (or is likely to have) a substantial adverse anticompetitive effect upon competition within the relevant market. *E.g., Northwest Power Products v. Omark Indus.*, 576 F.2d 83, 90 (5th Cir. 1978). Unless TWA comes forward with such evidence, the Casino Defendants are not required to prove that their conduct serves a legitimate business purpose. As shown in Exhibit "M" and the discussion at pages 26-31, *infra*, the Casino Defendants and the TCOA had legitimate business reasons for acting as they did, and TWA has not produced any evidence of collective action on their part. Nonetheless, TWA has not offered any evidence of the Casino Defendants' market power or a shred of evidence that suggests that there has been an adverse anticompetitive effect upon competition within the relevant market, much less a substantial adverse effect. TWA's only expert witness has failed to address these essential elements of TWA's Sherman Section One claim, directly or indirectly.

As this Court aptly noted, "it was more important that plaintiff proffer expert testimony that tends to show that the defendants' behavior was an unreasonable restraint on trade, or was anticompetitive, in the relevant market (whether advertising as a whole of Tunica County as a travel destination or specifically internet advertising.)" *See* December 19, 2005 Memorandum Opinion at 17. Thus, this Court has previously held, and the Fifth Circuit has not disagreed, that "[t]he expert's testimony as to this is too sparse to create a genuine issue of material fact as to whether there was an unreasonable restraint on trade." *Id.* Accordingly, TWA's federal antitrust claim must be dismissed as a matter of law.

c. TWA's Claim Of A Concerted Refusal To Deal Based On TWA's Offers Made After The May 2001 Meeting Are Not Actionable Because The Defendants Were Being Offered Different Terms.

In the present case, the evidence shows that TWA, at different times after the May 2001 joint proposal, approached some, but not all, of the Casino Defendants individually, extending them separate offers with their own terms and conditions. Graziosi admits that these proposals varied from casino to casino. Graziosi Dep. at 601. For a concerted refusal to deal to be actionable under the Sherman Act, the party or parties refusing to deal with the plaintiff must, "do so by rejecting the same terms and conditions afforded to and tendered by other parties." *Ramco Int'l, Inc. v. Travex Corp.*, 531 F. Supp. 796, 800 (S.D. Fla. 1982); s*ee Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 539 (1954) (noting that plaintiff failed to prove necessary concerted action where defendant motion picture producers refused to deal with plaintiff only after plaintiff approached each defendant separately).

Any refusals by the Casino Defendants to deal with TWA were thus based on individual rejections of separate offers with different terms and conditions. Accordingly, under *Ramco International, and Theatre Enterprises*, TWA's claim for prohibited joint refusal to deal is not actionable.

d. The Casino Defendants' Refusal To Purchase A Product Or Service For A Price Which Is More Than It Is Worth Cannot Give Rise To An Antitrust Violation.

The Southern District of Mississippi has stated unequivocally that, "a refusal to buy a product for more than it is worth simply cannot be a violation of the antitrust laws." *AT&T Co. v. Delta Comms. Corp.*, 408 F. Supp. 1075, 1101 (S.D. Miss. 1976). In *AT&T*, the court granted the defendants' motion for summary judgment where the plaintiff was incapable of affirmatively showing that its product, rejected by defendants, was actually worth buying. *AT&T*, 408 F. Supp. at 1101. In other words:

> Where the concert asserted is predicated on a failure to buy a service worth money for a moneysworth price, the plaintiff has the burden of demonstrating that his product has some value above the price paid or offered. In the case at bar the undisputed material facts show that *the service Delta was attempting to sell was not worth buying*.

Id. (emphasis added); s*ee also Natrona Serv. Inc. v. Continental Oil Co.*, 435 F. Supp. 99, 111 (D. Wyo. 1977)("[T]he plaintiffs have the burden of demonstrating that their product has some value above the price paid or offered. A refusal to buy a product for more than one thinks it is worth is not a violation of the anti-trust laws"); *Custom Auto Body, Inc. v. Aetna Cas. & Surety Co.*, C.A. No. 78-0301, 1983 WL 1873 at * 13 (D.R.I. Aug. 3, 1983) ("A purchaser's refusal to deal with a seller because his price is too high, for example, is not an illegal boycott under the Sherman Act. Rather, this is simply the result of the proper functioning of the marketplace wherein purchasers decide whether or not to buy based on the price and quality of goods").

Furthermore, in reviewing the appropriateness of summary judgment in an anti-trust case, the United States Supreme Court recognized that, "it would not have been evidence of conspiracy if [defendants] refused to deal with [plaintiff] *because the price at which he proposed to sell oil was in excess of that at which oil could be obtained from others*." *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 279 (1968) (emphasis added); *cf. Chick's Auto Body v.*

State Farm Mut. Auto. Ins. Co., 401 A.2d 722, 730 (N.J. Super. 1979) ("An unlawful boycott will not result from a buyer's refusal to pay a higher price for goods or services where it can buy them at a lower price").

In the present case, the product offered by TWA was, from the Defendants' perspective, simply not worth buying. TWA's offer required each Casino Defendant to pay $2,500 per month for leasing the domain name tunica.com which would do nothing more than direct traffic to the TCTC's website. (*See* Graziosi Dep. at Ex. 9.) This offer cost at least ten times more than the average online cost. (*See* Moss Rep. at 7 (Kim Moss's Expert Report labeled as Exhibit "O")).

TWA has produced no evidence whatsoever that proves that Plaintiffs' proposal was worth $2,500 per month per casino. Consequently, TWA is incapable of meeting its burden under *AT&T* and *Natrona*, *supra*, of demonstrating that the advertising space offered to Defendants in this case possessed some actual value over and above the price at which it was offered and subsequently rejected. This test is notably subjective, based on what the Casino Defendants think the product or service is worth. As shown in Exhibit "M," many employees of the Casino Defendants have testified that what TWA was requesting the Casino Defendants to pay was simply more than what it was worth. Moreover, each of the Casino Defendants could obtain the "product" offered by TWA from other sellers at a lower price or at no cost at all. Ultimately, each individual Defendant acted in accordance with a properly functioning marketplace and decided not to buy something based on price and quality. Such a refusal constitutes a reasonable business decision and plainly cannot be categorized as an unlawful boycott.

C. Plaintiff Has Failed To Show Any Antitrust Injury.

Antitrust injury in an essential element of proof of every Section 1 claim. *Atlantic Richfield Co. v. U.S.A. Petroleum Co.*, 495 U.S. 328, 343, 346 110 S. Ct. 1884, 1894-1895, 109

L.Ed. 2d. 333 (1990); *Anago, Inc. v. Tecnol Med. Prods., Inc.*, 976 F.2d 248, 249 (5th Cir. 1992). Antitrust injury has been defined by the Supreme Court as an injury "of the type that antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Cargill, Inc. v. Monfort of Col., Inc.*, 479 U.S. 104, 109, 107 S. Ct. 484, 489, 93 L.Ed. 2d 427 (1986) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S. Ct. 690, 697, 50 L.Ed. 2d 701 (1977)). As set forth by the Supreme Court in *Brunswick*, "the injury should reflect the anti-competitive effect either of the violation or of the anti-competitive acts made possible by the violation." *Brunswick*, 429 U.S. at 49, 97 S. Ct. at 697. This is a very heavy burden for the plaintiff, as this circuit has narrowly interpreted the meaning of antitrust injury, excluding from its reach the threat of decreased competition. *Anago, Inc.*, 976 F.2d at 249 (*citing Phototron Corp. v. Eastman Kodak Co.*, 842 F.2d 95, 100 (5th Cir.) *cert. denied* 486 U.S. 1023, 108 S. Ct. 1996, 100 L.Ed. 2d 228 (1988)).

To prevail on its antitrust claim, TWA has the burden of showing that antitrust injury resulted from the defendants' alleged actions by producing evidence that "defendants (1) engaged in a conspiracy (2) that produced some anti-competitive effect (3) in the relevant market." *Johnson v. Hospital Corp. of Am.*, 95 F.3d 383, 392 (5th Cir. 1996). To show such antitrust injury, a plaintiff "must prove more than injury causally linked to an illegal presence in the market." *Anago, Inc.*, 976 F.2d at 250 (citing *Brunswick*, 429 U.S. at 49, 97 S. Ct. at 697); *see Cargill, Inc.*, 479 U.S. at 109-110, 110 S. Ct. at 1889 ("injury, although causally related to an antitrust violation, nevertheless will not qualify as 'antitrust injury' unless it is attributable to an anti-competitive aspect of the practice under scrutiny"). To prove antitrust injury, a plaintiff must show more than mere injury to itself. *Green v. State Bar of Tex.*, 27 F.3d 1083, 1087 (5th Cir. 1984). To prove antitrust injury, the plaintiff must demonstrate that the defendants' actions

unreasonably restrained competition. *Green*, 27 F.3d at 1087. As set forth by the Supreme Court and cited an infinite number of times throughout antitrust jurisprudence, the antitrust laws were enacted for "the protection of competition, not competitors." *Brown Shoe Co. v. United States*, 370 U.S. 294, 320, 825 S. Ct. 1502, 1521, 8 L.Ed. 2d 510 (1962). This is one of the most basic tenets of antitrust law and, unfortunately for TWA, is where TWA's claim falls woefully short of the mark.

In this case, TWA complains that it solicited a business relationship with each of the casinos in the Tunica area through which the casinos would pay for advertising on TWA's website or would otherwise pay TWA for the use of its website. The plaintiff's business model, which was vague and ever changing, initially called for the casinos as a group to pay $2,500.00 per month per casino to TWA to have TWA link its website directly to the website of the Tunica Convention and Visitor's Bureau. Later versions of plaintiff's business model included requesting that the casinos simply pay for some form of advertising on TWA's website. While TWA contends that it lost profits when the casinos rejected its invitations to enter into a business relationship, TWA has failed to offer any proof that the actions of the defendants caused any injury to competition, as opposed simply to injury to TWA. In fact, it is unclear as to what group of competitors or to what realm of competition TWA even alleges an injury. It appears that TWA's whole argument as to antitrust injury is that TWA itself was harmed by the defendants' actions, but there are no allegations, and certainly no proof, of any injury to competition itself.

In the seminal antitrust decision of *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, the Supreme Court "severely limited the availability of private plaintiffs to utilize the antitrust laws as a sword by requiring antitrust plaintiffs to prove injury to overall competition, not just injury to the plaintiff itself." *Southern Volkswagen, Inc. v. Centrix Fin., LLC*, 357 F.Supp.2d 837, 848,

fn 5 (D.Md. 2005)(citing *Brunswick*, 429 U.S. at 488). The mere conclusionary statement that antitrust injury, in the form of the exclusion of the plaintiff from a business relationship with the defendants, resulted and will continue to result in injury and harm to the plaintiff, is not sufficient. *Southern Volkswagen, Inc.*, 357 F.Supp.2d at 48 fn 5. Furthermore, the plaintiff cannot meet the requirement showing antitrust injury by making broad allegations of harm to the "market" as an abstract entity. *Atlantic Richfield Co.*, 495 U.S. 328, 339 fn 8, 110 S. Ct. 1884, 1892 fn 8. "Although all antitrust violations, under both the *per se* rule and the rule-of-reason analysis, 'distort' the market, not every loss stemming from a violation counts as antitrust injury." *Id.*

The plaintiff seems to imply that if an antitrust violation is deemed to fall under the *per se* category, no antitrust injury need be shown. Nothing could be further from the truth. The U.S. Supreme Court has made it clear that a plaintiff who has alleged a *per se* violation must still prove antitrust injury to prevail on its claim. *Atlantic Richfield Co.*, 495 U.S. at 341, 110 S. Ct. at 1893. "The per se rule is a method of determining whether Section 1 of the Sherman Act has been violated, but it does not indicate whether a private plaintiff has suffered any antitrust injury and thus whether he may recover damages under Section 4 of the Clayton Act." *Id.* at 342, 1893. The *per se* and rule-of-reason analyses are simply two methods of determining whether the anti-competitive effects of a certain action outweigh its pro-competitive effects. *Id.* The *per se* rule, as compared to the rule-of-reason, simply sets forth a presumption of unreasonableness under certain circumstances. *Id.* However, the purpose of the antitrust injury requirement is entirely different. *Id.* The antitrust injury requirement ensures that the injury claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place. *Id.* This relates back to that basic tenet that antitrust laws were designed to protect competition and

not merely individual competitors. To be entitled to relief, the plaintiff must be able to show that the defendants' actions harmed competition, and not merely injured the plaintiff. The requirement that harm to competition be shown to support a Section 1 claim is at least as great under the per se rule as under the rule-of-reason. *Id.* at 383, 1894. "Indeed, insofar as the per se rule permits the prohibition of efficient practice in the name of simplicity, the need for the antitrust injury requirement is underscored." *Id.* "Pro-competitive or efficiency-enhancing aspects of practices that nominally violate the antitrust laws may cause serious harm to individuals, but this kind of harm is the essence of competition and should play no role in the definition of antitrust damages." *Id.* (quoting Page, The Scope of Liability for Antitrust Violations, 37 Stan.L.Rev. 1445, 1460 (1985)). Thus, "proof of a per se violation and of antitrust injury are distinct matters that must be shown independently." *Id.* (quoting P. Areeda & H. Hovenkamp, Antitrust Law para. 334.2c, p. 330 (1989 supp.)).

The Fifth Circuit provided a relevant analysis in *Kiepfer v. Beller*. 944 F.2d 1213 (5th Cir. 1991). Dr. Kiepfer was a physician who specialized in nuclear medicine, which allowed him to perform certain tests or scans of heart patients using radioactive isotopes. *Kiepfer*, 944 F.2d at 1216. He was hired as a consulting physician by Cardiovacsular Associates, a professional association owned by Dr. Eades and Dr. Beller in San Antonio, Texas. *Id.* When Dr. Kiepfer testified against another member of the medical profession as an expert witness for the plaintiff in a medical malpractice action, Drs. Eades and Beller terminated Dr. Kiepfer from his position. *Id.* After terminating Kiepfer, Drs. Eades and Beller engaged in a campaign to persuade other doctors in the area to stop referring cases to Dr. Kiepfer, a campaign which was apparently successful. *Id.* Dr. Kiepfer subsequently filed suit against Dr. Eades, Dr. Beller and others, asserting, among other things, an antitrust violation.

In analyzing the merits of Dr. Kiepfer's antitrust claim, the Fifth Circuit focused on the plaintiff's failure to show antitrust injury. Dr. Kiepfer's antitrust claim arose out of his contention that the defendants conspired to restrain trade by putting him out of business. *Kiepfer*, 944 F.2d at 1221. The Court, noting the limited scope of the antitrust laws, found that the Sherman Act "does not purport to afford remedies to all torts committed by or against persons engaged in interstate commerce." *Id.* (citing *Larry R. George Sales Co. v. Cool Attic Corp.*, 587 F.2d 266, 272 (5th Cir. 1979)). To prevail on an antitrust claim, the plaintiff must show that the defendants' actions unreasonably restrained competition, not merely that the defendants' actions injured the plaintiff. *Kiepfer*, 944 F.2d at 1221. Accordingly, it was incumbent upon Dr. Kiepfer to show that the alleged conspiracy resulted in some anti-competitive effect in the relevant market. *Id.* In reversing the jury's verdict in favor of the plaintiff on the antitrust claim, the Court noted that Dr. Kiepfer had failed to make the required showing. Dr. Kiepfer offered no evidence that his departure from the practice of nuclear medicine caused any difficulty for either patients or other doctors in the San Antonio area. *Id.* Furthermore, there was no evidence in the record that the market for consulting services in nuclear medicine was harmed in any way by the loss of one practitioner. *Id.* The Court found that in the absence of any evidence of anti-competitive effect to any market, the jury could not properly have found that the defendants' actions violated the Sherman Act. *Id.*

Similarly, in our case, the fact that the Casino Defendants' rejection of the plaintiff's overtures to engage in a business relationship with TWA may have had some effect upon the hoped-for profits of the plaintiff's business venture is insufficient to prove any anti-competitive effect to the relevant market. TWA has failed to show the requisite harm to competition and accordingly, its claims must fail. As set forth by the Ninth Circuit in *Mutual Fund Investors, Inc.*

v. Putnam Management Co., a refusal to deal does not present a viable antitrust claim unless the plaintiff can provide evidence that the "effect on competition in the marketplace is substantially adverse." *Mutual Fund Investors, Inc. v. Putnam Mgmt Co.*, 553 F.2d 620, 627 (9th Cir. 1977) (citing *United States v. Arnold Schwinn & Co.*, 388 U.S. 365, 375, 87 S. Ct. 1856, 1863, 18 L.Ed. 2d 1249 (1967)). Injury to a single individual or entity does not equal injury to competition. *See Green*, 27 F.3d at 1087 (Fifth Circuit found that the plaintiff's claim that the defendants' conspiracy had forced him out of business failed as a matter of law since the plaintiff had demonstrated "no unreasonable restraint of competition in a relevant market"); *Cascade Cabinet Co. v. Western Cabinet and Millwork, Inc.*, 710 F.2d 1366, 1372 (9th Cir. 1983); *Mutual Fund Investors, Inc.*, 553 F.2d at 627.

As set forth by the distinguished antitrust scholar Professor Herbert Hovenkamp, "an antitrust policy dominated by efficiency concerns will attempt to distinguish purely private losses from those that coincide in some way with losses to society as a whole." Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice*, at § 16.3 (2d ed. 1999). Simply put, TWA has failed to produce any evidence that the Casino Defendants' actions resulted in any diminution in competition within the relevant market. For this reason, TWA has failed to establish the existence of antitrust injury and this failure constitutes an insurmountable bar to any recovery under any of TWA's antitrust claims. Accordingly, summary judgment must be entered in favor of the Casino defendants on the claims asserted by TWA under federal and state antitrust law.

IV. TWA'S MISSISSIPPI ANTITRUST ACT LIKEWISE FAILS AS A MATTER OF LAW.

Since TWA is unable to establish Sherman Act conspiracy to restrain trade, its conspiracy in restraint of trade claim pursuant to the Mississippi Antitrust Act likewise fails as a matter of

law. "The Mississippi antitrust statutes were enacted shortly after the Sherman Antitrust Act and, like the Sherman Act, the Mississippi statutes proscribe attempts to monopolize a market by unfair competition." *Main Street Publishers, Inc. v. Landmark Comm., Inc.*, 701 F. Supp. 1289, 1291 (N.D. Miss. 1988). Further, federal courts have routinely treated Mississippi and federal antitrust claims as "analytically identical." *Walker v. U-Haul of Miss.*, 734 F. 2d 1068, 1070 n. 5 (5th Cir. 1984); *Hardy Bros. Body Shop, Inc. v. State Farm Mut. Auto. Ins. Co.*, 848 F. Supp. 1276, 1290-91 (S.D. 1994). In fact, dismissal of federal antitrust claims is generally followed by the dismissal of any pendent state antitrust claims. *See Futurevision Cable Sys. of Wiggins, Inc. v. Multivision Cable TV Corp.*, 789 F. Supp. 760, 780 (S.D. Miss. 1992) ("Because the court has determined that Futurevision's complaint charging violations of federal antitrust statutes is to be dismissed at this time, the court further concludes that Futurevision's allegations of state law violations must be dismissed as well."); *Uniroyal, Inc. v. Hoff & Thames, Inc.*, 511 F. Supp. 1060, 1067 (S.D. Miss. 1981) (dismissing pendent state antitrust claims along with federal antitrust claims). Thus, for the very same reasons that TWA's federal antitrust claims fail, TWA's state antitrust claims likewise fail as a matter of law.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, the Casino Defendants respectfully submit that they are entitled to judgment as a matter of law on TWA's federal and state antitrust claims and urge the Court to enter an Order granting their Motion for Summary Judgment and dismissing all of Plaintiff's claims with prejudice.

This the 25th day of October, 2007.

Respectfully submitted,

BL DEVELOPMENT CORPORATION (d/b/a "Grand Casino Tunica"); SHERATON TUNICA CORPORATION (d/b/a "Sheraton Casino & Hotel"); BALLY'S OLYMPIA

LIMITED PARTNERSHIP (d/b/a "Bally's Saloon & Gambling Hall"); TUNICA PARTNERS II L.P. (d/b/a "Harrah's Tunica Mardi Gras Casino"); BOYD TUNICA, INC. (d/b/a "Sam's Town Hotel & Gambling"); and ROBINSON PROPERTY GROUP LIMITED PARTNERSHIP (d/b/a "Horseshoe Casino & Hotel")

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CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2007, I electronically filed the Memorandum Brief of Defendants Barden Mississippi Gaming, LLC, BL Development Corporation, Sheraton Tunica Corporation, Bally's Olympia Limited Partnership, Tunica Partners II, L>P., Boyd Tunica, Inc. and Robinson Property Group Limited Partnership In Support of Their Renewed Motion For Summary Judgment with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

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