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

TUNICA WEB ADVERTISING, INC. **PLAINTIFF**

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

TUNICA CASINO OPERATORS ASSOCIATION, INC., et al. **DEFENDANTS**

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO CASINO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff Tunica Web Advertising, Inc. ("TWA") throughout all relevant times has owned all of the legal rights to the internet domain name "Tunica.com" (and thus the rights to control any internet website reached through the use of that domain name). Cherry Graziosi[1] throughout all such times has been TWA's sole owner.

In April of 2001, Ms. Graziosi resigned her full-time job with plans of devoting most of her time to the development of her vision for Tunica.com to serve as an "all-purpose, one-stop-shopping" interactive travel-destination website, through which potentially millions of interested internet users could learn detailed information about the Tunica casinos, make reservations, buy tickets, and engage in other travel-related transactions and communications.[2]

In a free competitive marketplace, TWA's prospects as the unique owner of "Tunica.com" would have been excellent. First, Tunica County, Mississippi has become

---

[1] Ms. Graziosi grew up principally in Cleveland, Mississippi, where she attended Cleveland High School in the early and middle 1970s. (Exhibit 1, at 13). She ultimately earned a Masters Degree in Journalism and Public Policy from the American University in Washington, D.C., and has lived in the Maryland area during most of her adult life. (*Id.* at 14, 42).

[2] See Exhibit 1, at 22-23, 65, 74-78, 109, 135-36 & 169-73; See also Exhibit 47 (Affidavit of Cherry Graziosi).

what the Defendants in this case call "America's third largest gaming resort destination" (and "The South's Casino Capital").[3] Secondly, a growing *majority* of American travelers "research and plan their travel online."[4] Thirdly, because of the simplicity of its geographic-specific name and the salience of the ".com" phenomenon, internet users interested in going to Tunica as a destination are substantially more likely to type in "tunica.com" *than any other unique domain name on the entire worldwide internet.* (*Ibid.*) Finally, travel-related website owners operating in the free marketplace have developed an especially efficient method of capturing very substantial "pay-per-click" revenue from "advertisers" (such as casinos or hotels) which pay to have their own websites listed on a travel website (such as "Vegas.com") based on the number of digital "click-throughs" by users from the travel website "into" the advertisers' websites.[5]

And yet, from the date of a May 30, 2001 meeting among executives of the Defendant casinos until the date of this Memorandum, each and every one of the Tunica-based casinos has refused to utilize Tunica.com through any paid advertising relationship with TWA of any kind.[6] This case is about why.

---

[3]See Exhibit 9, following Transcript Page 81.

[4]See Exhibit 9, Deposition of TCTC Director Webster Franklin (2005), at 13-14 (and 2002 Report of Internet Consultant), and Exhibit 8, at 326.

[5]See, e.g., Exhibit 9, at Pages 34-37 (regarding "pay-per-click campaign" by the Tunica County Tourism Commission for its website Tunicamiss.org). The Defendants' own "marketing" expert witness in this case has advised travel-related clients of her firm to advertise on internet websites, and to pay those website owners not based on space or time consumed by an "ad" but based on the number of "impressions" resulting to individual internet users of the advertiser's website name, called a "pay-per-impression" compensation basis closely related to the "pay-per-click" basis described also by Mr. Tajirian. (Exhibit 44, at 18, 21, 91-92). The Casinos' marketing expert also agrees that over 80% of internet advertising generally is paid for on either the "pay-per-click" or the "pay-per-impression" transactional basis). (Exhibit 44, at 29-30).

[6]See Exhibit 1, at 305, 375 & 690.

1. What the Fifth Circuit Has Already Decided in this Case

In reversing the District Court's earlier granting of the Defendant Casinos' 2005 summary judgment motion, the Fifth Circuit Court of Appeals has finally decided the following matters in this case (set forth below in the Fifth Circuit's own quoted words), and the Casinos are precluded by the law-of-the-case doctrine from re-litigating any of these matters (despite their best efforts to do so in a number of respects through their "renewed" and now-pending summary judgment motion):

> -"A necessary ingredient of any (Sherman Act) section 1conspiracy is a showing of concerted action on the part of the defendants." (496 F.3d at 409)
>
> -"TWA's evidence - such as Callicott's statements and emails to Graziosi indicating that the casinos had entered into a "gentlemen's agreement" to not deal with "tunica.com" and that Gold Strike (Casino) had to terminate its relationship with "tunica.com" as a result of the casinos' agreement at the May 30, 2001 meeting - is, if credited, direct evidence that the casinos agreed not only to reject TWA's initial proposal, but also to refuse to do business with TWA and "tunica.com" individually." (*Id.* at 410).
>
> -"Although the district court purported to analyze TWA's claims on the assumption that all of the evidence proffered by TWA was true, it did not give meaningful consideration to Callicott's statements (allegedly later confirmed by Duffin) that the casinos had a "gentlemen's agreement" to not deal with TWA, and it failed to explain why that evidence, if credited, does not create a fact issue about whether the casinos engaged in concerted action. We believe that it does." (*Id.* at 410).
>
> -"Moreover, if TWA's evidence of the casinos' actions after the May 30, 2001 TCOA meeting is credited, that evidence likewise creates an issue of fact as to whether the casinos engaged in concerted action. According to another email from Callicott to Graziosi, the casinos met in November

2002 and again decided to refuse to advertise on "tunica.com," in the hopes that the value of the domain name would decrease and the casinos could buy it at a later date. If TWA can establish concerted action by the casinos through this sort of direct evidence, then it is not required to provide circumstantial evidence, such as the details surrounding its later proposals to the casinos, from which a concerted refusal to deal can be inferred." (*Id.* at 410-11).[7]

-"Although, as the district court found, the casinos might well have had a number of valid independent reasons why they might decline to do business with TWA and "tunica.com," those plausible reasons for independent action do not establish that appellees are entitled to summary judgment where the plaintiff has come forward with direct, rather then circumstantial, evidence of concerted action, since direct evidence of agreement necessarily tends to exclude the possibility of independent action." (*Id.* at 411, Note 11).

-Because "TWA submitted evidence that would tend to prove that the casinos did more than simply reject TWA's joint offer" back in May of 2001 for a "$2,500 per-casino-per-month" use of Tunica.com, evidence of "the casinos' initial decision to reject" that initial proposal "does not end" any analysis of whether the casinos' went further than that rejection and agreed together not to utilize tunica.com on any terms. *(Id.* at 410).[8]

-The "casinos' alleged agreement to not do business with TWA is clearly a horizontal agreement, as the casinos are direct competitors of one another." *(Id.* at 412).

---

[7]The Casinos' Brief ignores this specific Fifth Circuit ruling, as the Casinos continue to urge the District Court on remand to dismiss T.W.A.'s allegations of concerted action based entirely on cases which involved *no direct* evidence of an agreement, but were instead based *only on circumstantial* evidence of concerted action. See, e.g., Casinos' Brief at Page 35, citing *Ramco Int'l v. Travex Corp.,* 531 F.Supp. 796 (S.D.Flor. 1982) and *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537 (1954). (See also the circumstantial evidence cases cited on Pages 36 and 37 of the Casinos' Brief.)

[8]The Casinos also defy this specific Fifth Circuit finding, as the Casinos continue to argue (on Pages 36-37 of their Brief) that there is no evidence of any consensus or understanding by them other than a rejection of a single $2,500-per-month proposal from T.W.A. The Fifth Circuit specifically found otherwise.

-"Nothing in (applicable Supreme Court cases) establishes a bright-line rule limiting the application of the *per se* rule to cases in which the victim is a competitor of at least one of the conspirators, and no such rule is justified under the Court's precedents." (*Id.* at 413).

-"(T)he district court erred in finding that the *per se* rule only applies in situations where one of the conspirators is a direct competitor of the victim." (*Id.* at 414).[9]

-"Instead, to determine the applicability of the *per se* rule in this case, the district court should have analyzed the following factors: (1) whether the casinos hold a dominant position in the relevant market; (2) whether the casinos control access to an element necessary to enable TWA to compete; and (3) whether there exist plausible arguments concerning pro-competitive effects." (*Id.* at 414-15, citing U. S. Supreme Court's decision in *Northwest Wholesale Stationers*, 472 U.S. at 294).

-"The (Supreme) Court further stated (in Northwest Wholesale Stationers) that 'a concerted refusal to deal need not necessarily possess all of these traits to merit *per se* treatment.'" (*Id.* at 414, citing *Northwest Wholesale,* 472 U.S. at 295).

-"(A)lthough direct competition with the victim will frequently exist in cases of *per se* unlawful boycotts, nothing in *Northwest Wholesale Stationers* indicates that it is an absolute prerequisite to a finding of *per se* illegality if the agreement in question is marked by ***any*** of the other traits identified in that case." (*Id.* at 414; Emphasis on "**any**" added).

---

[9]Despite this clear holding by the Fifth Circuit in this very case, the Casinos on Pages 25 and 26 of their Brief nevertheless urge this Court to adopt a contrary view they attribute to the Ninth Circuit in its 1998 case of *Adaptive Power Solutions, LLC v. Hughes Missile Systems Co.,* 141 F.3d 947 (9th Cir. 1998). On this as on other points in their Brief and pending Rule 56 Motion, the Casinos act as if the Fifth Circuit had never ruled as it has ruled in this case. The Casinos also defy the same Fifth Circuit ruling in this case when they claim - on Page 30 of their Brief - that because the Tunica Casinos are not direct *competitors* of Tunica.com, that means that they cannot have any effect on the relevant Tunica market in which Tunica.com competes, and that therefore the Casinos "cannot possess a dominant position in that market". Here, the Casinos site no authority - not even from the Ninth Circuit - in support of such a position so at odds both with the Fifth Circuit's mandate in this case and with common sense.

2. What the District Court has Already Decided in this Case

In the course of the first of their *three* summary judgment motions in this case, the Casinos expressly moved - in May of 2004 - for a definitive judicial ruling on the admissibility of a statement emailed to Plaintiff TWA's owner by a marketing director for one of the Defendant Casinos.[10] As the Casinos put it in their Motion:

> "In response to a June 5 (2001) sales solicitation e-mail by Ms. Graziosi, Gold Strike Casino marketing director Clyde Callicott answered as follows, as quoted by Ms. Graziosi:
>
> "I was informed by my VP/GM (based on that discussion held at the TCOA meeting) to terminate the business relationship we have created with the "tunica.com" site. I wish I could do more but my hands have been officially tied by the TCOA on this issue.
>
> "Ms. Graziosi's affidavit quote of the Callicott e-mail is double hearsay testimony that is irrelevant or, if marginally relevant, certainly more prejudicial than probative. The paragraph should be stricken under Rule 56(e) and under Federal Rules of Evidence 104(b)(conditional relevance), 401 (relevance), 403 (prejudice exceeding relevance), 602 (author's personal knowledge of the arguably relevant discussion not shown), 802 (hearsay), and 1002 (the document alone proves its contents).

(See Exhibit 2).

---

[10]See Exhibit 2. It is undisputed in this case that on May 15, 2001, the Grand Casino's General Manager, who also served as President of the Tunica Casino Operators' Association ("TCOA"), had caused a "Dear Members" notice to be sent to all other Tunica casinos' general managers asking them to appear on May 30, 2001 at the Grand Casino for an "emergency TCOA meeting" as to which "the purpose of the meeting will be **to discuss the website tunica.com**". (Exhibit 5, at 26-27)(Emphasis added).

Judge Pepper considered all of those evidentiary arguments opposing the admissibility of the quoted Callicott email to the Plaintiff, and also considered the Plaintiff's arguments that such statements by Callicott were indeed admissible[11], and ruled as follows:

> "Paragraph 9 of the plaintiff's affidavit contains a complete verbatim quote from a June 6 email from Clyde Callicot, the then Marketing Director of Defendant Circus Circus Mississippi, Inc. (d/b/a "Gold Strike Casino Resort") sent to the plaintiff Cherry Graziosi . . . . Considering the arguments of counsel, the court concludes that Paragraph 9 does not run afoul of Federal Rule of Civil Procedure 56(e) or Federal Rules of Evidence 104(b), 401, 403, 602, 802, or 1002. More specifically, the defendants admit on page 2 of the instant motion that the quoted email was written by Callicot and that he was at that time the Marketing Director for Gold Strike. Therefore, the substance of the email is not hearsay since it is both a party admission and a co-conspirator admission under FRE 801(d)(2)(D) and (E). Hence, pursuant to Rule 56(e), the affidavit 'set(s) forth such facts as would be admissible in evidence.'"

(See Exhibit 4).

That evidentiary ruling, by this Court in this case, cannot be again re-litigated by the Casinos over three years later, since that ruling that the Callicot email to the Plaintiff was admissible ***both*** as a party admission ***and*** separately as a co-conspirator admission has become final by virtue of the law-of-the-case doctrine of preclusion.

---

[11]Exhibit 3.

Hensley v. King, 2007 WL 2908854 (N.D.Miss. 2007, Pepper, J.)(trial court's earlier ruling on the admissibility of particular items of evidence "became the law of the case"). Rulings which have become the "law of the case" do not become less preclusive or otherwise lose their finality when a District Court case is re-assigned to a different District Judge. *Harvey* v. *Coldwell Banker Real Estate Corp.*, 2006 WL 3423813 (N.D.Miss., Mills, J.).

It is the law of this case, then, that the substance of the quoted email from Gold Strike Casino's Marketing Director to the Plaintiff was "concerning a matter within the scope of the agency or employment" of the Marketing Director, "made during the existence of the relationship" within the meaning of Rule 801(d)(2)(D) of the Federal Rules of Evidence ("FRE"). Independently of that, the statement has also been judicially determined in this case to be "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy" within the meaning of the separate FRE Rule 801(d)(2)E), which in the case of this email was a summary of *the content of the agreement/conspiracy itself*.[12] Applying either rule of evidence, the statement is

---

[12]This Court's final and preclusive determination that the emailed statement was both a non-hearsay party admission *and* a co-conspirator statement also satisfies (for purposes of the admission of all other co-conspirator statements in this case) the requirement set forth in *United States v. James*, 590 F.2d 575, 578 (5th Cir. 1979)(*en banc*), *cert. denied*, 442 U.S. 917 (1979). *James* requires that before further statements can be admitted as co-conspirator statements under FRE Rule 801(d)(2)(E), the proponent of the statements must first demonstrate to the court *through some non-hearsay statement* that there was a conspiracy, that the maker of the statements participated in the conspiracy, and that the statements were made during the course of and in furtherance of the conspiracy. *Id.* at 578. *See also United States v. Bourjaily*, 483 U.S. 171, 174 (1987). Judge Pepper's rulings about the June 2001 emailed statement by Mr. Callicott to Ms. Graziosi establish all of those things as part of the law of this case with respect to all of the participants in the May 30, 2001 TCOA meeting. Mr. Callicott attended that meeting on behalf of the Gold Strike Casino, and participated in the discussion concerning (and "consensus" not to utilize) Tunica.com. See Exhibit 8 at Pages 348-54. Gold Strike Casino, having paid TWA to settle the claims against it in this case, is no longer formally a "party" to this litigation. But proof that Gold Strike was a co-conspirator would obviously remain relevant at a trial of this case, since the fact that Gold Strike is no longer formally a party/defendant has no effect on the relevance of whether Gold Strike was a co-

admissible in a trial of this case if offered by the Plaintiff, because the statement is to be treated as an admission by a party-opponent and "not hearsay" at all. FRE Rule 801(d).

Indeed, the District Court has determined in this case that when Mr. Callicott, then employed as Marketing Director of one of the Casinos whose executives participated together in a May 30, 2001 "TCOA meeting" (nominally of the Tunica Casino Operators' Association), stated that he was required "to terminate the business relationship we have created with the 'tunica.com' site," and that "the TCOA" had "officially tied" the "hands" of that Casinos' Marketing Manager "on this issue" of maintaining business relationships with the Plaintiff's Tunica.com website, the Marketing Manager was making a statement "concerning a matter within the scope of" his function as Marketing Manager. Any decision about whether or not a casino should have a business relationship with a private website to market itself clearly and obviously is "concerning a matter within the scope of" the Marketing Director's responsibilities. Even if that conclusion were not the law of this case, it would be very difficult in good faith to deny. The Casinos' effort at getting a second "bite" at this "apple" should in any event be rejected as being precluded by the law of the case.

That same emailed statement by that same Casino Marketing Manager, already determined by the District Court in 2004 to be admissible under two different rules of evidence, has also been determined finally by the Fifth Circuit in this case to be, "if credited, **direct evidence that the casinos agreed** not only to reject TWA's initial

---

conspirator of the Casinos which remain parties in this case. *See, e.g., United States v. Delgado*, 401 F.3d 290 (5th Cir. 2005), *United States v. Richards*, 204 F.3d 177 (5th Cir. 2000), and *United States v. Narviz-Guerra*, 148 F.3d 530 (5th Cir. 1998).

proposal, but also **to refuse to do business with TWA and "tunica.com" individually."** 496 F.3d at 410 (emphasis added). The admissibility and relevance (to prove the essential issue of an "agreement" to boycott) already having been judicially and finally determined, whether or not the statement is to be "credited" is of course an issue of credibility for the jury, and not a matter for summary judgment disposition.[13]

As an aside, the Court should know why the Fifth Circuit in deciding the appeal of this case was not apparently aware that the District Court had already determined in 2004 that the emailed statement was admissible: That earlier 2004 evidentiary ruling by the District Court was not within the scope of the December 2005 decision by the District Court to grant summary judgment (which was granted on different grounds from the grounds involved in the 2004 ruling). Because only that later 2005 ruling was appealed to the Fifth Circuit, the original 2004 evidentiary ruling on admissibility was not before, and was understandably not addressed by, the Fifth Circuit in its 2007 opinion in this case.

3. The District Court's Reasoning, in Ruling Admissible Callicott's "Hands Have Been Officially Tied by the TCOA" Email, Applies Equally to Seven other Party Admissions Concerning Matters Within Casino Managers' Job Responsibilities.

The District Court having already ruled that the "hands . . . tied" email is admissible, and the Fifth Circuit having already ruled that such an email (if admissible) is itself "direct evidence" that the casinos agreed "to refuse to do business with TWA and "Tunica.com" individually" (i.e., to boycott the Plaintiff), those determinations alone

---

[13]A jury would have little choice but to "credit" the accuracy of the emailed statement, since Mr. Callicutt as the author of that statement admitted in his 2005 deposition in this case that he personally witnessed what was said in the "TCOA meeting" in May of 2001 and that he admitted that the content of the emailed statement was true." (Exhibit 8, at Pages 364-66, and Exhibit 67 *thereto*).

mean that the Casinos cannot be entitled to summary judgment on the issue of whether or not such an agreement was entered. *Other* statements providing *additional* direct evidence of such an agreement would of course only be *cumulative* of the statement which has already been determined admissible.

But to address the Casinos' remaining arguments in their Brief about the *extent* of such direct evidence in this case, TWA submits that there are at least seven additional party admissions providing cumulative direct evidence that there was indeed such an agreement. Under the same straightforward reasoning applied by the District Court in ruling in 2004 that the "hands . . . tied" email is admissible under *both* FRE Rule 801(d)(2)(D) *and* 801(d)(2)(E), each of the following seven additional statements by Casino agents - concerning the very issue of whether or not the casinos as a group had decided not to do business with Tunica.com - is likewise admissible.

First Additional Admission: "Official Minutes" of the Casinos' May 2001 Meeting

The Casinos actually authorized the preparation of "official minutes for the TCOA meetings," through which all Tunica casino general managers met under the guise of the Tunica Casino Operators' Association.[14] The official TCOA minutes were prepared by an administrative secretary named Patsy Brown (who personally attended the "TCOA meeting" along with the casinos' general managers on May 30, 2001), then were approved by Ms. Brown's employer, and then were circulated among all Casio General Managers who had attended the meeting for comment, after which they

[14]See Exhibit 5 at Pages 26-28.

became the "official TCOA minutes".[15] The "official TCOA minutes" of that meeting frankly stated that "(t)he purpose of this meeting was to discuss the website tunica.com," and ultimately that "(t)he consensus of the group attending **was to not utilize the site**."[16] Casino general managers have indeed admitted in their depositions in this case that *none* of the casino general managers attending the May 30, 2001 TCOA meeting *disagreed* with what the TCOA minutes refer to as a "consensus to not utilize the site".[17] The representation on those TCOA minutes that "a consensus of the group developed in the course of that meeting not to utilize the tunica.com site" has been re-affirmed in further depositions of participants in that meeting as **accurate**, as well as admissions that such a "consensus" was reached as "a result of their free discussion **as business people engaged together in a business decision**" with that result.[18]

Quite obviously, when Ms. Brown attended that meeting and prepared those "official minutes" with those admissions, she had been "authorized by the part(ies) to make a statement concerning the subject" of the content of the meeting, squarely within the meaning of the quoted FRE Rule 801(d)(2)(C). Ms. Brown's own employer and the

---

[15]See Exhibit 5, at Pages 26-27, 108-112.

[16] See Exhibit 6, Deposition of Fitzgerald's General Manager Dominic Mezzetta (at Pages 21-23, and Exhibit 7 thereof, also marked as "Exhibit 7" to Cantor Deposition)(Emphasis added). Persons whose names were recorded on those minutes as being present for the meeting included casino general managers or other casino executives representing the Grand Casino, Bally's Casino, Sheraton Casino, Horseshoe Casino, Sam's Town Casino, Harrah's Casino, Fitzgerald's Casino and Gold Strike Casino. (Exhibit 7, Deposition of TCTC President Webster Franklin (2004), at 65-68).

[17]See Exhibit 6, at Page 21.

[18]See Exhibit 4, at Page 38 (emphasis added).

other Casinos' General Managers can also said to have "manifested an adoption or belief in its truth" by not ordering changes in it upon the circulation to them of the "official minutes" pursuant to the TCOA's standard procedure, within the meaning of the separate FRE Rule 801(d)(2)(B).

Moreover, the statements of Casino General Managers at the TCOA meeting ultimately summarized by Ms. Brown were quite obviously statements by the Casinos' agents "concerning a matter within the scope of the agency or employment, made during the existence of the relationship," within the equally clear meaning of FRE Rule 801(d)(2)(D)(and within the interpretation of that Rule previously applied in this case by Judge Pepper with respect to the Casinos' Marketing Managers). In constituting what the "official minutes" acknowledge was "a consensus to not utilize" Tunica.com, the minutes also record a statement by co-conspirators "during the course and in furtherance of the conspiracy" within the meaning of the quoted FRE Rule 801(d)(2)(E)(as also applied to the same Casinos' statements during the same meeting by Judge Pepper's earlier ruling described above). Clearly, the "official minutes" under *each and all* of those four different "party admission" rules are admissible as non-hearsay in a trial of this case.

Second Additional Admission: "No Use for Us to be Involved" with Tunica.com

Mr. Callicott, the same Gold Strike Casino Marketing Manager whose statements about the same May 30, 2001 meeting (attended by him with the Casinos' General Managers) have been found by Judge Pepper to be admissible under both FRE Rule 801(d)(2)(D) *and* FRE 801(d)(2)(E), has testified under oath in his deposition

in this case that in the course of that same meeting, Fitzgerald's Casino General Manager Dominic Mezzetta said to the group of gathered casino general managers "that there's **no use for us to be involved as properties separately** in this," and that "dealing with tunica.com was not the right thing to do."[19] The other casino general managers in attendance "**agreed with the position** taken by Mr. Mezzetta" to that effect.[20]

Those statements by Mr. Mezzetta, conveyed from the personal knowledge and direct observation of Mr. Cullicott, are themselves admissible as non-hearsay party admissions by virtue of the same reasoning already applied by Judge Pepper with respect to Mr. Callicott's statements: the decision about whether or not Fitzgerald Casino would do business with Tunica.com (or urge "us" as the group of casinos not to do so) clearly was "concerning a matter within the scope of the agency or employment" of Mr. Mezzeta as Fitzgerald Casino's General Manager, "made during the existence of the relationship" within the clear meaning of FRE Rule 801(d)(2)(D). Moreover, the statement also reflected a "statement by a coconspirator of a party during the course and in furtherance of the conspiracy" jointly to boycott Tunica.com, within the clear meaning of FRE Rule 801(d)(2)(E).

Third Additional Admission: "No Longer in Our Hands" Based on Casino General Managers' May 30 Meeting

The same Mr. Callicott has testified in his sworn deposition in this case (and therefore is expected to testify at a trial of this case) that Randy Roberts, who at the

---

[19]Exhibit 8, at Page 358 (emphasis added).

[20]Exhibit 8, at 359-360(emphasis added).

time was the General Manager of the Gold Strike Casino (which Mr. Callicott then served as Marketing Manager), stated to Mr. Callicott shortly after the May 30, 2001 meeting of the other casino general managers "what his understanding was of what the general managers had decided or discussed" at the May 30 meeting.[21] Specifically, General Manager Roberts told Marketing Manager Callicott that "as a result of the meeting" and "based on that discussion," "Gold Strike was to wrap up whatever relationship it had with tunica.com or with Ms. Graziosi's company. . .because it was no longer in our hands."[22] Otherwise put: the Gold Strike General Manager was aware that the joint decision-making by the casino general managers at the May 30 meeting required Gold Strike to take action to stop dealings with TWA, and therefore Gold Strike was going to comply with that joint agreement.

This statement directly by Gold Strike General Manager Randy Roberts is a further example of admissible non-hearsay about the content of the boycott agreement, for exactly the same reasons which have caused Judge Pepper to rule that Gold Strike Marketing Director Clyde Callicott's email to TWA - saying essentially the same thing - was admissible on two independent grounds. First, the decision about whether or not Gold Strike Casino would cease doing business with Tunica.com was clearly "concerning a matter within the scope of the agency or employment" of Mr. Roberts as Gold Strike's General Manager, "made during the existence of (his) relationship" with Gold Strike within the clear meaning of FRE Rule 801(d)(2)(D). Moreover, the

---

[21]See Exhibit 8, at Pages 366-68.

[22]See Exhibit 8, at Pages 367-68.

statement also reflected a "statement by a coconspirator of a party during the course and in furtherance of the conspiracy" jointly to boycott Tunica.com, within the clear meaning of FRE Rule 801(d)(2)(E).

Fourth Additional Admission: "If One of Us Doesn't Do Business with Her, then None of Us Should Do Business With Her. Let's All Agree to That" (Horseshow Casino General Manager)

Yet another Casino General Manager admitted the content of the agreement reached among the Casinos beginning on May 30, 2001, under circumstances which make the statement a non-hearsay party admission for exactly the reasons applied by Judge Pepper in ruling admissible the statements of Mr. Callicott himself while he was Gold Strike's General Manager.[23]

During late June or early July of 2001, Mr. Callicott stated to Ms. Graziosi that at the May 30, 2001 meeting Robert McQueen, who was present and participating in the meeting as the then-General Manager of Horseshoe Casino, had said to those in attendance that **"I'm not interested in doing business with her. Let's all agree not to do business with her. And that way the site would be worthless."**[24] Otherwise stated, Mr. McQueen was said by Mr. Callicott to have stated that "**if one of us doesn't want to do business with her, then none of us should do business with her. Let's all agree to that.**" [25] As Mr. Callicott put it, a "gentlemen's agreement" resulted under

---

[23]This further statement made by Mr. Callicott to Ms. Graziosi was definitely made while he was still Marketing Director at the Gold Strike Casino, and indeed was made to Ms. Graziosi in Mr. Callicott's office at that same Casino. (See Exhibit 47, Affidavit of Chery Graziosi, at Paragraph 11).

[24]See Exhibit 1, at 98, 102, 218-19 (emphasis added).

[25]See Exhibit 1, at 97-99 (emphasis added).

which none of the casinos would utilize or do business with Tunica.com in any respect or on any terms.[26]

Those statements by General Manager McQueen, and the conveyance of them by Marketing Director Callicott, are admissible as non-hearsay party admissions by virtue of the same reasoning already applied by Judge Pepper with respect to Mr. Callicott's own statements a few weeks before to Ms. Graziosi on the same topic: the decision about whether or not Horseshoe Casino would do business with Tunica.com (or urge the other casinos not to do so) clearly was "concerning a matter within the scope of the agency or employment" of Mr. McQueen as Horseshoe Casino's General Manager, "made during the existence of the relationship" within the clear meaning of FRE Rule 801(d)(2)(D). Likewise, and as Judge Pepper has already more specifically ruled, the same issue as to the Gold Strike Casino was "concerning a mater within the scope of the agency or employment" of Mr. Callicott as that Casino's then-existing Marketing Manager.

Moreover, both the statement by Mr. McQueen and the conveyance of that statement by Mr. Callicott represented statements "by a coconspirator of a party during the course and in furtherance of the conspiracy" jointly to boycott Tunica.com, within the clear meaning of FRE Rule 801(d)(2)(E).

Fifth Additional Admission: Grand Casino Marketing Director: "The Feeling is If Nobody Does Business (with Tunica.com), the Site Would Be Worthless."

During the same July 2001 time period, Ms. Graziosi communicated in Tunica,

---

[26]See Exhibit 1, at 97-99, 102-03.

Mississippi with Eileen Duffin, then serving as Grand Casino's Marketing Director, and relayed to her Ms. Graziosi's belief and understanding by that time of the same "gentlemen's agreement that took place at the TCOA meeting" a few weeks before.[27] Ms. Duffin then communicated an awareness of the "gentlemen's agreement" of which Ms. Graziosi was talking, as Ms. Duffin told Ms. Graziosi: "you know, the feeling is that if nobody does business with you, the site would be worthless."[28]

The Fifth Circuit opinion in this case pointed in part to this statement by Ms. Duffin as amounting to evidence that the substance of Mr. Callicott's oral and emailed admissions had allegedly been "later confirmed by Duffin". 496 F.3d at 410.

Ms. Duffin's statement directly to Ms. Graziosi is yet another example of admissible non-hearsay about the content of the boycott agreement, for exactly the same reasons which has caused Judge Pepper to rule that Gold Strike Marketing Director Clyde Callicott's email to TWA was admissible on two independent grounds. First, the issue of whether or not the Grand Casino was to pay Tunica.com to market through its website was an issue "concerning a matter within the scope of the agency or employment" of Ms. Duffin as a marketing executive at the Grand Casino in Tunica, and her statement was clearly "made during the existence of (her) the relationship" with Grand Casino within the clear meaning of FRE Rule 801(d)(2)(D).

Sixth and Seventh Additional Admissions:

On November 19, 2002, Mr. Callicott, then the Marketing Director at both the

---

[27] See Exhibit 1, at 102-03 & 146.

[28] *Ibid.*

Defendant Sheraton Casino and the Defendant Bally's Casino,[29] first emailed Ms. Graziosi with the following news about a re-affirmation by the casinos of their earlier boycott "vote" as to Tunica.com:

> "The meeting went well . . . however it's (sic) looks like the Tunica casino (the TCOA) is turning their backs on Rudi thanks to a special meeting held last week backed by Dominic from Fitzgeralds. They apparently held a meeting last Tuesday to discuss this . . in a similar fashion as they did when you where (sic) involved. **They voted to stray** (sic) **away from the site** so it could evently (sic) be sold and bought at a later date by them."[30]

Later that same day, Sheraton/Bally's Marketing Director Callicott communicated a further email to Ms. Graziosi which included the following language:

> "Dominic (just as he did with the last TCOA meeting) **asked for a majority vote from each property to see if they would ban advertising on this site** . . his arguement (sic) is that (although valuable) it is not for one individual to profit from. He beleaves (sic) that the state should own the site. With such a strong opponnent (sic), no property will cross that line individual (sic) to advertise with this project."[31]

These emails by Casino Marketing Director Callicott to an owner of Tunica.com,

---

[29]See Exhibit 8, at 412-13 & 403-04, and Exhibits 64 and 65 thereto.

[30]See Exhibit 8, at 392-97, 403 & Exhibit 64 thereto. (Emphasis added). The Casino executives meeting as the TCOA had indeed held a meeting one week before that date, on November 12, 2002. (Exhibit 5, at 129-31 & Exhibit 4 thereto). The casinos represented at that meeting, according to the minutes thereof, included Grand Casino, Hollywood Casino, Sheraton Casino, Harrahs Casino, Horseshow Casino, Fitzgerald Casino, Sam's Town Casino, and Gold Strike Casino. (*Ibid.)*

[31]See Exhibit 8, at 397-404, and Exhibit 65 thereto. (Emphasis added).

an enterprise still hoping to some day do marketing business with the Tunica casinos through some mutually beneficial means, are clearly admissible non-hearsay admissions for exactly the same principal reason - namely FRE Rule 801(d)(2)(D) - that Mr. Callicott's June 2001 email to Ms. Graziosi about the same topic was ruled to be admissible non-hearsay by Judge Pepper in this case in 2004: First, those further emails by Callicott in November of 2002 were made "during the *existence of (his) relationship*" as Marketing Director of two of the Defendant Casinos (at least one of which was represented at the subject TCOA meeting).[32] Secondly and finally, the marketing topic of the November 2002 emails was "concerning a matter within the scope of the agency or employment," for exactly the same reasons that Judge Pepper found with respect to the matter involved in the June 2001 email. The matter of whether or not the Tunica casinos for which Mr. Callicott was then the Marketing Director were (or were not) going to do marketing business with Tunica.com concerned a subject matter clearly "within the scope of the agency or employment" of a Casino Marketing

---

[32]See Exhibit 8, at 403-04 & 412-13. This fact alone distinguishes this case easily from the very different facts in *United States v. Summers*, 598 F.2d 450 (5th Cir. 1979), relied on by the Casinos on Pages 19 and 20 of their Brief. At the time of the purported statement by the declarant McCrory in that case, Mr. McCrory had specifically *terminated* his prior agent relationship with the defendant. He simply was not in fact an agent of the defendant at the time of the statement, so the most basic requirement of FRE Rule 801(d)(2)(D) did not apply. *Id.* at 457-8. In contrast, during November of 2002 Mr. Callicott was not only continuing to serve full-time as Marketing Director of two of the Casino Defendants, but he also regarded the prospect of the Casinos' using Tunica.com as a "one-stop shopping" private sector website as a positive prospect which was *in the best interests of the casinos*. See Exhibit 8 at Page 428. The Casinos' attempted analogy, between Mr. Callicott's continuing service as Marekting Director of two of the Casinos while also communicating to Ms. Graziosi the facts about why the Casinos were voting to "ban advertising" on Tunica.com (on the one hand), and Mr. McCrory actually ending his employment with his earlier principal and beginning undercover work for the FBI in taping conversations with his former principal (on the other hand), does not aid their cause.

Director.[33] This was as true in November of 2002, when Mr. Callicott was Marketing Director of not one but two of the Defendant Casinos, as it was in June of 2001 when he was Marketing Director of Gold Strike Casino (as to which Judge Pepper has already ruled in this case).

Mr. Callicott has testified by deposition in this case that when he composed and sent those two emails to Ms. Graziosi in November of 2002, he was not engaged in simply forwarding or conveying the content of any particular statements ("hearsay" or otherwise) made to him by others.[34] Instead, he has testified that he was conveying to Ms. Graziosi through those emails **his own conclusions about what had happened regarding the casino marketing issues** he addressed in the emails, undeniably communicated during the "existence" of his tenure as Marketing Director at both Bally's Casino and Sheraton Casino.[35]

Contrary to what the Casinos suggest in their current Brief, admission as a non-hearsay party admission under FRE Rule 801(d)(2)(D) does ***not*** require ***any*** of the following: (a) that the speaker have been *authorized* by his or her principal *to make* the

---

[33]In clear contrast, it could <u>not</u> be said of the accounting professor involved in *Staheli v. University of Mississippi*, 854 F.2d 21 (5th Cir. 1988), on which the Casinos rely in their Brief, that his job concerned whether or not the University should have provided tenure to the geology professor who was the plaintiff in that case. The two professors worked in entirely separate departments, and neither had anything to do with tenure for the other. That an admission by the accounting professor was not an admission by the University as to the denial of tenure to the geology professor was therefore clear under FRE Rule 801(d)(2)(D), and is easily distinguishable from the facts in this case. Even more obviously distinguishable are the facts in the case of *Cook v. Miss. Dept. of Human Services*, 108 Fed.Appx. 852 (5th Cir. 2004), on which the Casinos in their Brief also rely: the declarant there was a State Senator, whose Legislative Branch job was totally separate from the Executive Branch decision of the Department of Human Services as to whether or not to fire the DHS employee who was the plaintiff in that case. Id. at 855 (Senator's statement of his "belief" was not an admission by DHS under FRE Rule 801(d)(2)(D)).

[34]See Exhibit 8, at 398-401.

[35]See Exhibit 8, at 400.

communication or similar communications,[36] or (b) that the statement advantages or *serves the interests* of the principal,[37] or (c) that the making of the statement itself was *within the scope of the agency,*[38] or (d) that the speaker have been an actual *decision-maker* with respect to the action or decision the statement is describing,[39] or (e) that the speaker otherwise have "*firsthand knowledge*" of the matter being described, or (f) that there be any "guarantee of trustworthiness" of any kind. As the Official Advisory

---

[36]This is where the scope of FRE Rule 801(d)(2)(D) is much broader than the older provision of FRE Rule 801(d)(2)(C), which *does* require "a statement by a person *authorized* by the party to make a statement concerning the subject" of the statement itself. (Emphasis added). *See, e.g., Nekolny v. Painter*, 653 F.2d 1164, 1171 (7th Cir. 1982), cer. denied 455 U.S. 1021 (1982). The facts relied on by the Casinos in their Brief, such as their point that the November 2002 emails by Mr. Callicott were sent from his *personal* computer rather than his *office* computer, simply *do not matter* for purposes of a proper FRE Rule 801(d)(2)(D) analysis. The Casinos' arguments in their Brief would have some force if the only ground advanced for admissibility were the specific-authority provision of FRE Rule 801(d)(2)(*C*). But that is not among the rules of evidence on which Judge Pepper relied, and it is not among the rules of evidence on which TWA relies here for the admissibility of these Casino admissions.

[37]*See, e.g., United States v. Lauersen,* 348 F.3d 329, 340 (2d Cir. 2003)(admitting as admission by clinic its nurse's statement to patient that other clinic employees had destroyed patient's files to conceal from government, since general matter of custody of patient files was within scope of nurse's job even if making statement was not and even if making of statement incriminated clinic/principal), and *Larch v. Mansfield Municipal Elec. Dept.*, 272 F.3d 63, 72-73 (1st Cir. 2001), and *White v. Honeywell, Inc.*, 141 F.3d 1270, 1276 (8th Cir. 1998)(supervisor's racial slur against employee admissible against employer under FRE Rule 801(d)(2)(D)). *Corley v. Burger King Corp.*, 56 F.3d 709 (5th Cir. 1995), cited by the Casinos in their Brief, demonstrates the same point: the Burger King manager's admission at the scene of the accident that he "was headed to the store when the wreck happened", while hardly helping Burger King's interests, was an admission by Burger King because the statement concerned a general matter within the manger's job responsibilities. *Id.* at 710.

[38]If the *content* of the "*matter*" addressed by the statement is within the scope of the agency, the *making* of the statement need *not* have been made "within the scope" of the agency. *See, e.g., Hoptowit v. Ray*, 682 F.2d 1237, 1262 (9th Cir. 1982). The Fifth Circuit in the *Stahili* case, on which the Casinos rely in their Brief, explained that the modern FRE Rule 801(d)(2)(D) was intended to allow a "somewhat broader" scope of admissibility than any rule limiting party admissions to statements made "in the scope of employment," since - leading up to the broadening of admissibility - "(d)issatisfaction with (the) loss of valuable and helpful evidence (had) been increasing." *Stahili, supra*, at 127.

[39]*See, e.g., United States v. Portsmouth Paving Corp.*, 694 F.2d 312, 321 (4th Cir. 1982)(secretary's statements about what boss said on car radio admitted under FRE Rule 801(d)(2)(D), though secretary clearly did not have decision-making authority over decision reported by her to 3rd party). *See also Cook v. Miss. Dept. of Human Services,* 108 Fed.Appx. 852 (5th Cir. 2004): "To be considered an 'agent' under Rule 801(d)(2)(D), a person need not have been an actual decision-maker in the hiring process." *Id.* at 855 (case relied on by Casinos).

Committee explained in their Official Note to FRE Rule 801:

> Admissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule. . . . No guarantee of trustworthiness is required in the case of an admission. The freedom which admissions have enjoyed from techynical demands of searching for an assurance of truthworthiness in some against-interest circumstance, and from the restrictive influences of the opinion rule and the rule requiring firsthand knowledge, when taken with the apparently prevalent satisfaction with the results, calls for general treatment of this avenue to admissibility.[40]

4. All Eight of the Same Casino Manager Admissions are Independently Admissible as Non-Hearsay Statements of the Content of the Boycott Agreement Itself (and thus as "Verbal Acts" of Legal Significance Apart from the Truth of What They Assert)

Even if *none* of the eight statements described above were admissible as non-hearsay party admissions (or co-conspirator statements) for the reasons described under FRE Rule 801(d)(2), each would nevertheless be admissible for a non-hearsay *purpose* at a trial of this case, which after all hinges on whether or not an agreement not to deal with Tunica.com was entered by the Casinos in the first place.

That further ground for admissibility begins with the definition of hearsay itself, as a statement "offered in evidence to prove *the truth of the matter asserted*." FRE Rule 801(c)(emphasis added). The original Advisory Committee Note accompanying the formal adoption by the United States Supreme Court of FRE Rule 801(c) explained the kinds of statements which are *not* offered to prove "the truth of the matter asserted," and which are *not* hearsay: "If the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the

---

[40]See Exhibit 45 and 46.

statement is not hearsay. . . . The effect is to exclude from hearsay the entire category of 'verbal acts' and 'verbal parts of an act,' in which the statement itself affects the legal rights of the parties or is a circumstance bearing on conduct affecting their rights."[41]

Whether or not the making and content of a particular "statement itself affects the legal rights of the parties" depends, of course, on how the content of the offered statement compares with the elements of the alleged legal violation. If a plaintiff's ability to prove a particular legal right (such as an entitlement to enforce a particular contract with particular content) or a particular legal liability (such as a fraudulent statement or the making of an illegal agreement with a particular content) rises or falls on whether or not *a particular statement was made*, evidence that the statement *was made* is admitted for the direct legal significance thereof, and not for the truth of what the statement asserts. This "verbal acts" doctrine of non-hearsay admissibility applies where "legal consequences flow from the fact that the words were said." *United States v. Pungitore*, 965 F.Supp. 666, 673 n. 1 (E.D.Pa. 1997). Examples are:

-(1) In a case alleging that a defendant had sold illegal narcotics, testimony that the defendant had made an out-of-court statement offering to sell narcotics was admitted as non-hearsay, since it was offered to prove "that it had been made" and not the truth of any matter asserted in the statement. *United States v. Roach*, 164 F.3d 403, 410 (8th Cir. 1998).

-(2) In a case alleging that defendants had made fraudulent statements over the telephone as part of a wire fraud scheme, the content of telephone calls by

---

[41] 56 F.R.D. 183, 293-95. See the fourth and fifth pages of Exhibit 46 hereto for those pages from the Advisory Committee's Note.

the defendants posing as police officers and trying to obtain credit card numbers of victims was admissible as non -hearsay, since the content of the statements constituted the fraudulent scheme itself. *United States v. Saavedra*, 684 F.2d 1293 (9th Cir. 1982).

-(3) In a case alleging that a defendant had refused to sell the plaintiff a residence for discriminatory reasons, the defendant housing salesman's out-of-court statements declining to sell the plaintiff a house were admissible as non-hearsay. *Yarborough v. City of Warren*, 383 F.Supp. 676 (E.D.Mich. 1974).

-(4) In a case alleging that a defendant had threatened the life of a federal judge at a sentencing hearing, the defendant's statements were admissible as non-hearsay, since the content of them "contain(ed) the operative words of (the) criminal action." *Unites States v. Jones*, 663 F.2d 567, 571 (5th Cir. 1981).

-(5) In a case alleging that defendants had engaged in illegal gambling transactions, statements attributed to them constituting the offer and acceptance of bets were admissible, since they "constitute verbal acts and can be considered part of the offense in question." *United States v. Boyd*, 566 F.2d 929, 937 (5th Cir. 1978).

In this boycott case alleging that the Defendant Casinos beginning on May 30, 2001 communicated to one another (and explicitly re-affirmed in November of 2002) an understanding and agreement "to not utilize" Tunica.com, statements acknowledging the content of what they in fact said to one another, and the content of their resulting understanding, have direct legal significance in proving that such an agreement did in fact take place. "A conspiracy is an agreement or understanding, express or implied,

between the conspirators. The usual way in which people reach agreements or understandings is by the use of words, oral or written. Indeed, it is difficult to conceive of a conspiracy formed or carried forward without the use of any words." *United States v. Calaway*, 524 F.2d 609, 613 (9th Cir. 1975), *cert. denied* 424 U.S. 967 (1976)(admitting as "verbal acts" out-of-court statements by defendants placing and accepting bets in gambling prosecution).

The eight quoted statements by Casino Managers in this case describe *the content of the Casinos' understanding itself* with respect to dealings with Tunica.com, and are therefore admissible, not in order to prove the truth of what the statements assert, but to prove that the understanding "to not utilize" Tunica.com was reached in the first place:

> (1) In describing the content and effect of "that discussion held at the TCOA meeting" as having "officially tied" his "hands" as Gold Strike's Marketing Manager to the effect of requiring him "to terminate the business relationship we have created with the 'tunica.com' site," Mr. Callicott in his original emailed statement to Ms. Graziosi *is describing the content of the inter-casino understanding itself*. Because such a content of such an inter-casino agreement itself has legal consequences under the Sherman Antitrust Act, that statement is admissible as a "verbal act" in itself.
>
> (2) In bluntly stating on the "official TCOA minutes" of the Casinos' May 30, 2001 meeting that "the purpose of (the) meeting was to discuss the website tunica.com," and that "(t)he consensus of the group attending was to not utilize the site," the TCOA minutes described the content of the Casinos' understanding itself, and are likewise admissible as a non-hearsay "verbal act".
>
> (3) When Fitzgerald's Casino General Manager Dominic Mezzetta is quoted by Mr. Callicott as having said to the other Casinos' general managers at the same TCOA meeting "that there's no use for us to be involved as properties separately in this" and that "dealing with tunica.com was not the right thing to

do," and when Mr. Callicott reports that the other casino general mangers in attendance "agreed with the position taken by Mr. Mezzetta" to that effect, those reported statements further document the content of the casinos' understanding itself, and are likewise admissible as "verbal acts".

(4) When Mr. Callicott attributes to Gold Strike Casino General Manager Randy Roberts statements reflecting an "understanding" of "what the general managers had decided or discussed" at the May 30 TCOA meeting, and that according to Mr. Roberts "as a result of the meeting" Gold Strike was to terminate any prior business relationship with tunica.com "because it was no longer in our hands," such statements further describe the content of the casinos' understanding itself, and are likewise admissible as "verbal acts".

(5) When Mr. Callicott further reports to Ms. Graziosi the statements of Horseshoe Casino General Manager Robert McQueen to the effect that "(l)et's all agree not to do business with (Ms. Graziosi). And that way the site would be worthless," and otherwise the statement that "if one of us doesn't want to do business with her, then none of us should do business with her - (l)et's all agree to that," he again is describing statements which make up and prove the content of the casinos' understanding itself, and thus they are admissible as further "verbal acts".

(6) When Grand Casino Marketing Director Eileen Duffin in July of 2001 acknowledges directly to Ms. Graziosi her understanding of a "gentlemen's agreement" having been reached by the casinos not to utilize Tunica.com at all, and describes the rationale of such an agreement through saying that "the feeling is that if nobody does business with you, the site wold be worthless," Ms. Duffin is likewise describing the content of the agreement itself.

(7) When Mr. Callicott, then Sheraton/Bally's Marketing Director, states in an email to Ms. Graziosi in November of 2002 that the casino general managers "held a meeting last Tuesday" and that they "voted to stray (sic) away from the site so it could evently (sic) be sold and bought at a later date by them," he was clearly conveying the content of a renewed and re-affirmed understanding (and, indeed, an inter-casino "vote"), making that content itself admissible as a further "verbal act" of a re-stated agreement.

(8) When Mr. Callicott later that November, 2002 day also emailed to Ms. Graziosi the words that "Dominic (just as he did with the last TCOA meeting) asked for a majority vote from each property to see if they would ban advertising on this site," and that "(w)ith such a strong opponent (sic), no property will cross that line individual (sic) to advertise with this project," he again set forth the content of the agreement by the Defendants, making the emailed statement itself admissible for the non-hearsay purpose of proving the terms of the agreement itself.

5. The Casinos Must Eliminate Any Jury Issue On All Three of the Factually Complex "*Per Se*" Factors to Win Summary Judgment on Whether or Not their Boycott Was a *Per Se* Sherman Act Violation

The Fifth Circuit's opinion in this case establishes that this is a horizontal "group boycott"[42] case, and that upon admission of any of the statements of "direct evidence" of a boycott agreement, the fact-finder at the trial court level will also need to analyze, in order to determine whether or not the agreement is a *per se* violation of the Sherman Act (as being *per se* unreasonable), three questions: "(1) whether the casinos hold a dominant position in the relevant market; (2) whether the casinos control access to an element necessary to enable TWA to compete, and (3) whether there exist plausible arguments concerning pro-competitive effects." 496 F.3d at 414-15, citing U. S.

---

[42]For a narrow statutory purpose, of interpreting the scope of the term "boycott" only for the purpose of determining the continuing liability of the insurance industry for "any agreement to boycott, coerce, or intimidate" notwithstanding the antitrust immunity otherwise provided specifically for that industry by the *McCarran-Ferguson Act,* 15 U.S.C. § 1013(b), the Supreme Court in l993 noted with approval two dictionary definitions of the term "boycott": first, "to withhold, wholly *or in part*, social or business intercourse from, as an expression of disapproval or means of coercion," from *Webster's New International Dictionary* 321 (2d ed. 1950)(emphasis original to opinion), and secondly, "to combine in refusing to hold relations of any kind, social or commercial, public or private, with (a neighbor), on account of political or other differences, so as to punish him for the position he has taken up, or coerce him into abandoning it." from 2 *Oxford English Dictionary* 468 (2d ed. 1989). *Hartford Fire Insur. Co. v. California,* 509 U.S. 764, 801 (1993). In an earlier case, the Supreme Court had cited Judge Bork's antitrust treatise for its definition of "boycotts" as "agreements among competitors to refuse to deal". *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 734 (1988), citing R. Bork, *The Antitrust Paradox* (1978), at 330.

Supreme Court's decision in *Northwest Wholesale Stationer, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985).[43] If a jury were to find that *either* of the first two matters can be answered in the affirmative, *or* that the final matter can be answered in the negative, the Casinos' boycott agreement is unlawful *per se*, and there is no further need for any other questions to be decided as to liability under the Sherman Antitrust

---

[43]The plaintiff office supply retailer in *Northwest Wholesale* had been removed, not from selling or buying in any particular market, but only from membership in a wholesale buying cooperative. As members of that cooperative, other small office supply retailers had managed to pool their buying power in order to achieve lower average wholesale prices for themselves (and thus to compete more effectively in retail price competition with larger retailers who already enjoyed their own built-in economies of scale and resulting buying power). *Id.* at 286-87. The Court acknowledged that an expulsion of the plaintiff retailer from that cooperative was "susceptible of being characterized as a concerted refusal to deal." *Id.* at 286.

The Supreme Court also acknowledged that it had "long held that certain concerted refusals to deal or group boycotts are so likely to restrict competition without any offsetting efficiency gains that they should be condemned as *per se* violations of § 1 of the Sherman Act," that "'(g)roup boycotts' are often listed among the classes of economic activity that merit *per se* invalidation under § 1," and that "(t)he *per se* rule is a valid and useful tool of antitrust policy and enforcement." *Id.* at 290, 293 & 298.

But for reasons specific to buying cooperatives themselves, the Court determined that such cooperatives (and their membership rules) **on their face** would tend to make retail markets more competitive rather than less competitive. *Id.* at 295. The Court therefore found that a plaintiff, challenging as a group boycott an expulsion from such a **facially pro-competitive** buying cooperative, would have to create a triable jury issue **as to either of two facts** in order for such a challenge **to still be treated as a matter of law as *per se* unreasonable** (and not subject to the more complex "rule of reason" analysis): "When the plaintiff challenges expulsion from a joint buying cooperative, some showing must be made that the cooperative possesses market power **or** unique access to a business element necessary for effective competition." *Id.* at 298 (emphasis added). Even in the case of facially pro-competitive buying cooperatives, then, a group boycott case is **still** governed by the *per se* rule of liability if the plaintiff can demonstrate **either** that the cooperative "possesses market power" **or** that the cooperative controls "unique access to a business element necessary for effective competition." *Ibid.* What the analysis of buying cooperatives in *Northwest Wholesale* did **not** change is the long-standing rule that group boycotts, being presumptively anti-competitive, are presumptively governed by the *per se* unreasonable standard of liability (and not by a "rule of reason" standard). This is evident in the re-affirmation of the *per se* rule in the more recent Supreme Court case of *F.T.C. v. Superior Court Trial Lawyers, supra,* which itself cites the principal historic cases setting forth the *per se* rule of liability. As the Fifth Circuit noted about the Supreme Court's analysis in *Northwest Wholesale*, it remained true after that decision that "the touchstone of *per se* illegality is that the customers **or** suppliers of the plaintiff **had, as a group, agreed** or been forced **to cease doing business with the plaintiff**." *Consolidated Metal Products, Inc. v. American Petroleum Institute*, 846 F.2d 284, 291 (5th Cir. 1988)(emphasis added). When the Supreme Court more recently noted in *Leegin Creative Leather Products v. PSKS, Inc.*, 127 S.Ct. 2705 (2007), that to justify a *per se* prohibition a practice must "lack . . . any redeeming virtue," the Court was simply citing the *Northwest Wholesale Stationers* case for that quoted language, and did not expand or change the rule announced in that case as it would pertain to horizontal boycotts. *Id.* at 2713.

Act. *Ibid.*[44]

The Casino Defendants boldly claim through their summary judgment motion that there can be no admissible evidence from which any reasonable juror can find for the Plaintiff as to any of these three elements. But to read the Fifth Circuit's definition of those three elements is to realize the factual complexity inherent in any examination of any of those elements. And to read the Casinos' conclusory claims in their Brief is to be even more certain that no such complex economic issue in this case can be taken from a jury consistent with the Seventh Amendment right of the Plaintiff to a jury trial on issues of fact.[45]

---

[44] In ruling that an agreement among court-appointed attorneys in the District of Columbia to withhold their legal services from the appointment system for indigent criminal defendants was a horizontal boycott agreement and thus a *per se* Sherman Act violation, the United States Supreme Court in *Federal Trade Commission v. Superior Court Trial Lawyers Association*, 493 U.S. 411 (1990), noted that the doctrine traditionally finding horizontal boycott agreements to be *per se* illegal was based on "a longstanding judgment that the prohibited practices by their nature have 'a substantial potential for impact on competition.'" *Id.* at 433, quoting *Jefferson Parish Hospital Dist. No. 2 v. Hyde,* 466 U.S. 2, 16 (1984). The Court noted that in its *Jefferson Parish* decision it had explained that "(t)he rationale for *per se* rules in part is to avoid a burdensome inquiry into actual market conditions in situations where the likelihood of anticompetitive conduct is so great as to render unjustified the costs of determining whether the particular case at bar involves anticompetitive results." *Id.* at 433, Note 15. The Supreme Court in Superior Court Trial Lawyers explained as follows:

> The *per se* rules in antitrust law serve purposes analogous to *per se* restrictions upon, for example, stunt flying in congested areas or speeding. . . . Perhaps most violations of such rules actually cause no harm. No doubt many experienced drivers and pilots can operate much more safely, even at prohibited speeds, than the average citizen. . . . Yet the laws may nonetheless be enforced against these skilled persons without proof that their conduct was actually harmful or dangerous. In part, the justification for these *per se* rules is rooted in administrative convenience. They are also supported, however, by the observation that every speeder and every stunt pilot poses some threat to the community. . . . So it is with boycotts ***and*** price fixing. Every such horizontal arrangement among competitors poses some threat to the free market.

F.T.C. v. Superior Court Trial Lawyers Assn., *supra*, at 433-34 (bold emphasis added).

[45] The Casinos' own antitrust expert witness, University of Mississippi Economics Professor William Shughart, has admitted under oath in this case, based on his own analysis of the same three elements, that if a fact-finder were to find that the casinos got together "and agree(d) with each other that none of them (was) going to utilize a particular private sector internet website," then the casinos thereby violated Section 1 of the Sherman Antitrust Act. (See Exhibit 48, at Pages 52-54.) As Professor Shughart, a former Federal Trade Commission official, put it: "The Sherman Act declares that to be illegal." (*Id.* at Page 54.) Indeed it does. And yet the Casinos through their Third Motion for Summary Judgment in this case continue to defy their own antitrust expert's opinion and argue otherwise.

6. Whether the Tunica Casinos "hold a dominant position" in the Tunica Marketplace is a Jury Issue.

The parties in this case agree that any inquiry into the geographic "market" for analytical purposes in this case must focus on the market of Tunica County, Mississippi. Tunica is the one location which proclaims itself both "The South's Casino Capital" and "America's third largest gaming resort destination,"[46] with a casino-based identity as a travel destination differentiated by the Defendants themselves from all other travel destinations. To take the Defendants' own marketing representations at their word, only Las Vegas, Nevada and Atlantic City, New Jersey rival Tunica as top-three national gambling destinations, making Tunica unique within the central and southern states of the United States as a distinct kind of destination to the millions of travelers apparently interested n centering their travel around casino gambling. Official data collected by the Mississippi Gaming Commission document *over twenty million patron visits annually* to the locations of the Tunica-based casinos who are Defendants in this case.[47]

Obviously, the casinos have no interest in paying any advertising medium to attract travelers to any geographic destination *other* than Tunica County. The Plaintiffs, for their part, having the unique name "Tunica.com," are obviously linked uniquely to Tunica, and could not conduct their website business effectively with respect to any

---

[46]See Exhibit 9 (final page).

[47]See Exhibit 13: "Mississippi Gaming Commission - Public Information - Quarterly Survey Information," published by MGC at www.mgc.state.ms.us. Data officially collected for the "North River Region" all reflect activity reported to the MGC specifically by the Tunica-based casinos.

other geographic location.[48]

William Shughart, engaged by the casinos as an expert witness as to the relevant market, first defined the "relevant product market in this matter comprises, as a first approximation, all advertising media available *for marketing Tunica County, Mississippi*.[49] Alex Tajirian, the Plaintiffs' expert economist,[50] agrees that with the Defendants' own focus and success in differentiating Tunica as a distinctive and high-visibility travel destination, Tunica County, Mississippi is the appropriate geographic focus for analyzing the casinos' conduct in their own market.[51] As all of the parties to this case have routinely represented to the traveling public, Tunica is indeed a unique and prominent travel destination.

The Casinos cannot credibly pretend that they do not collectively enjoy "market power" in that Tunica marketplace. The casinos employ a remarkably high 76.1 percent majority *of the total number of persons employed* - in the entire private and public

---

[48]Exhibit 1, at 172 & 307.

[49]Exhibit 48 (including Exhibit 1 thereto, at Page 7 thereof).

[50]Alex Tajirian, engaged by the Plaintiffs as an expert witness in this case, earned a Masters Degree in Economics from the University of California at Berkeley. See Exhibit 11 (at Page 3: Plaintiff TWA's Response to Interrogatory No. 3). He has taught undergraduate and graduate finance courses within the Graduate School of Business, and courses in Business Policy and Strategy within the Worldwide Programs School at that University. He is also the President and Chief Executive Officer of DomainMart, Inc., which sponsors the internet website known as DomainMart.com. He and his firm conduct appraisals and other valuations of the value of internet websites and domain names, and provide numerous hosting and promotional services for internet website owners and operators. He has also served as a consultant to numerous international financial institutions. *Ibid.* **Judge Pepper has already ruled in this case that Mr. Tajirian's opinions and analyses are admissible at a trial of this case**. *T.W.A. v. Barden Mississippi Gaming*, 2007 WL 2768914 (N.D.Miss.).

[51]See Plaintiff's Exhibit 43 hereto, at Page 2 thereof.

sectors - in Tunica County, Mississippi.[52] Over 90% of hotel rooms waiting in Tunica for travelers are owned by the casinos, who also sponsor a substantial majority of the entertainment events in Tunica.[53] The Tunica casinos report to the Mississippi Gaming Commission their expenditure of *over thirty million dollars* annually on "advertising" alone.[54] Based on his years of experience and in his best professional judgment as marketing director (or otherwise as a marketing executive) at five of the nine Tunica casinos, Mr. Callicott, then the Marketing Director at both Bally's Casino and Sheraton Casino, believed in September of 2002 that fully two-thirds of the advertising revenue available to the Tunica.com ownership in a freely competitive market would come from the Tunica casinos.[55] The casinos cannot, and have not in their Brief, denied their substantial market power in Tunica.[56]

7. Whether the Tunica Casinos "control access to an element necessary to enable TWA to compete" in the Tunica Marketplace is a Jury Issue.

The Casinos on Pages 27-30 of their Brief offer essentially *no evidence*, and only vague and unsupported conclusions, in their attempt to meet their burden as a Rule 56 movant of proving that there is likewise no admissible evidence that their boycott conspiracy has deprived Tunica.com of any element necessary to enable it to

---

[52]Exhibit 24 reports employment data for the County collected as of 2002 by the United States Census Bureau, publicly available at www.census.gov/epcd/cbp/map/02data/28/143.txt Casino employment totaled 13, 274, while *all other* employment totaled 4,149 persons.

[53]Exhibit 5, at 24-25.

[54]Exhibit 13, at 2-17.

[55]See Exhibit 8, at Page 423.

[56]See also Exhibit 1, at 173, 310, 319, 673 & 694.

compete effectively in the Tunica market. Nor do they demonstrate why TWA would have no proof that such a deprivation did occur.

But there is ample admissible evidence that the casinos themselves possess "unique access to a business element necessary for effective competition" in the relevant Tunica advertising market. *Northwest Wholesale Stationers*, *supra*, at 298. Under the undisputed circumstances of substantial market power documented above, the casinos cannot deny their access to, indeed their control of, the predominant advertising revenue potential offered in the Tunica market.[57] As of the May 30, 2001 date of their joint decision "to not utilize Tunica.com," they have indeed stopped all advertising revenue from going directly (or, to the casinos' knowledge, indirectly) from any Tunica casino to TWA.[58] The casinos have also asserted control over the Plaintiffs' ability to allow users of Tunica.com to "link" to the casinos' own websites, and indeed have threatened the Plaintiffs with litigation if the Plaintiffs even **use the casinos' names** in order to inform internet users what might be available to them within the Tunica marketplace.[59] Seven of the eight Casino Defendants have even gone so far as to file legally groundless trademark counterclaims in this action, purporting to

---

[57]See Exhibit 13.

[58]See Exhibit 1, at 305, 375 & 690. The Plaintiffs have resorted to nominal monthly income from commission-splitting contracts with generic non-Tunica travel-related sites, which pay the Plaintiffs essentially to shift traffic Tunica.com receives onto those generic national travel websites. Exhibit 14, at 4-5.

[59]See, e.g., Exhibit 1, at 228 & Exhibit 22 thereto. As the Plaintiffs' Expert Economist has determined, "(w)ithout the ability to provide links to the casino sites, and without an otherwise free and open market of information about such casinos and related attractions, an informational website like Tunica.com could not be effective in competition." (Exhibit 43, at 2). **This analysis has already been ruled admissible at any trial of this case**. *T.W.A. v. Barden Mississippi Gaming,* 2007 WL 2768914 (N.D.Miss. 2007).

have the legal ability to stop a public media outlet such as an internet website from even mentioning their names.

The *Casinos' own expert* witness in this case concedes that access by an owner of Tunica.com to use on such a website of the names of the Defendant Tunica Casinos would be a practical necessity for Tunica.com to be effective in offering Tunica-related information on its website, and thus to be effective in competition in the Tunica marketplace.[60]

Clearly, the casinos have, or claim to have, control over things necessary to the commercially effective operation of any website called Tunica.com.[61]

8. Whether the Tunica Casinos' Boycott Agreement On Its Face Enhances Competition (Even if the Casinos Made that Claim) would be a Jury Issue.

Even if they could meet both of the threshold tests described above for *per se* Sherman Act liability, the casinos cannot meet the third threshold test under *Northwest Wholesale*, as they cannot demonstrate why (and indeed, do not claim that) a boycott of advertising relationships with "Tunica.com," (the most recognizable and salient internet domain name linked expressly to their market[62]) would on its face have been intended by them *to increase competition in the relevant advertising market.*

---

[60]Exhibit 48, at Pages 93-98 & 101-104

[61]The casinos also effectively control the ability of a website owner like Tunica.com to be able to offer to prospective Tunica visitors hotel reservations through the website itself, as the casino hotels would have to be a necessary part of any such reservation transaction. Exhibit 1 at 654.

[62]The simplicity of the name "Tunica" and the relative market familiarity and salience of the ".com" term made the "Tunica.com" domain name "much easier to remember than other local site names" for internet users not yet familiar with the names of particular casinos or other Tunica attractions. (Exhibit 5, Deposition of Former Casino Marketing Director Clyde Callicutt, at 420; and Exhibit 6, at 59-60).

As the Fifth Circuit in remanding this case recognized, the Supreme Court developed this third test in *Northwest Wholesale* in order to protect from *per se* liability joint practices which were *admitted* to have been engaged in by the defendant firms, but which the defendants successfully defended by advancing facially "plausible arguments that they were *intended to enhance overall efficiency and make markets more competitive*." 472 U.S. at 294 (emphasis added). The joint conduct involved in *Northwest Wholesale* was a buying cooperative joined in by about 100 small office supply retailers. *Id.* at 286. The defendant retailers readily admitted that they had engaged in such joint conduct. But they argued that the purpose and the effect of the joint buying cooperative was to enhance their competition against larger retailers through the economies of scale that their collective buying power offered to them through their joint buying cooperative. *Id.* at 295-96. On its face, the buying cooperative was demonstrated to enhance overall competition, making *per se* Sherman Act liability inappropriate (and shifting the proper analysis to a "rule of reason" analysis). *Id.* at 297.

No such arguments are offered in this case by the Casinos, and indeed none could be proven. On Page 31 of their Brief, the only page on which they even address this "third test" under *Northwest Wholesale*, the Casinos do not even submit any "plausible arguments" as to why their joint agreement to boycott Tunica.com has enhanced the reality of competition in the relevant Tunica marketplace. While they have offered multiple alternative reasons why they may have found a refusal to utilize Tunica.com as in their own purported individual business interests (as if that were a *Sherman Act* defense to *agreeing* to the refusal, which of course it is not), they have

offered no evidence from which the Court could infer that their boycott agreement on its face was likely to increase *competition* in the whole of the relevant advertising market.

Totally unlike the office supply retailers who admitted to - but then defended the market purposes of - their joint buying cooperative in *Northwest Wholesale*, the Casinos in this case cannot "get to second base" by defending their boycott agreement's competitive effects because they adamantly do not "get to first base" by admitting in the first place that they acted jointly to boycott Tunica.com. Indeed, in their discovery responses in this case they have **denied** that they acted together so as to increase competition as contemplated by *Northwest Wholesale*. Each casino was asked to admit or deny the following statement, pursuant to FRCP Rule 36 (which, of course, authorizes requests for admissions as to "the application of law to fact"):

> "You did not participate in an agreement with one or more of the other casino Defendants with regard to Tunica.com with a purpose of causing the relevant market to be more competitive. (The phrase 'more competitive" as used herein has the same meaning as it had when used by the United States Supreme Court in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284 (1985))."

As evidenced by each of the Casinos' responses to that Request No. 8, each Casino bound themselves to the position that no such agreement with any such purpose of enhancing competition was ever participated in by them.[63] They cannot (and do not) claim otherwise now, for purposes of having their boycott of Tunica.com treated as if it facially looked like an attempt to enhance competition in the relevant advertising

---

[63]See Exhibits 15 through 23. The Casinos were also asked through Request No. 7 within each such Request for Admissions whether they took the position that they had been a part of an agreement regarding Tunica.com "with a purpose of enhancing overall efficiency of the relevant market" within the specific meaning of the *Northwest Wholesale* decision, and each casino responded with similar admissions that they had *not* entered any such agreement for any such purpose. *Ibid.*

market.

9. Even if there were No Jury Issue about Whether Any of the above "Three Factors" Existed to Render the Casinos' Boycott of Tunica.com a *Per Se* Sherman Act Violation, Whether the Boycott has Injured Relevant Competition in Tunica would Still Present a Jury Issue under Sherman Act "Rule of Reason" Analysis.

Even if this were a case to be analyzed under the Sherman Act's more factually complex "rule of reason" analysis, that would make this case even *less* suitable for summary judgment than a case of "*per se*" liability would be. As a first step in administering a "rule of reason" analysis, a jury would have to decide which relevant product market (or "submarket") should be inquired into.

(A) Relevant Product Submarket

In finding the most distinctive product market of relevance to a proper analysis of the Tunica casinos' conduct in this case, any search must reflect "the ad hoc, fact-specific core embedded in any determination of relevant market." *C. E. Services, Inc. v. Control Data Corp.*, 759 F.2d 1241, 1245 (5th Cir. 1985). Properly defining a product market begins with the inherently general considerations of "reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Heatransfer Corp., supra*, at 980. Within any broad product market category, "well-defined submarkets may exist which, in themselves constitute product markets for antitrust purposes." *Id.* at 980, citing *United States v. E. I. duPont de Nemours & Co.*, 353 U.S. 586, 593-95 (1956). "The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar

characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Id.* at 980, quoting *Brown Show Co. v. United States*, 370 U.S. 294, 325 (1962). The Fifth Circuit in *Heatransfer Corp.*, which involved air conditioners sold for or with automobiles, upheld a fact determination that the relevant product market in that case was not the air conditioning industry, or even air conditioners made for automobiles, but was specifically the market of air-conditioners made for Volkswagen, Porsche and Audi automobiles, "because of the distinct engineering problems associated with the Volkswagen imports" and the other then-related automobile brands. *Id.* at 980.[64]

The Plaintiff's expert in the present case, who has already been ruled by Judge Pepper to be a proper expert witness to testify regarding both the valuation and the operation of internet websites for commercial purposes, has offered through one of his written reports in this case a detailed explanation as to why, in the relevant context of Tunica as a travel destination, internet uses by potential visitors to Tunica are so materially different from uses by potential visitors in response to traditional mass media advertising (i.e., television, radio, print media, etc.), that online advertising for Tunica-related information and reservations itself has distinct uses, characteristics, suppliers

---

[64]The casinos rely in their Brief on *America Online, Inc. v. Greatdeals.net,* 49 F.Supp.2d 851 (E.D.Va. 1999), in which the counterclaimant alleging a *Sherman Act* monopolization by AOL had alleged a relevant market made up only of unsolicited email "advertising" to internet subscribers *using a particular company, namely AOL*. The Court rightly found that not to be a separable market, since AOL itself was one of over 4,000 companies providing dial-up access to the internet, and the claimant did not include as a part of the same market other comparable advertising uses *within the internet itself*. *Id.* at 858. The casinos also cite the monopolization case of *Smith v. Network Solutions, Inc.*, 135 F.Supp. 1159 (N.D.Ala. 2001), which rejected the universe of "expired domain names" as a market separate from non-expired domains because there was no proof that there was *any difference* in interchangeability between expired and non-expired domain names. *Id.* at 1169. The Plaintiff here makes no claims of those kinds concerning the relevant market.

and price schemes, not readily interchangeable with or substitutable by traditional mass media advertising to potential visitors.[65] While specific internet uses are initiated and designed by the potential visitor to the destination, traditional "in-your-face" mass media advertising communications are initiated and designed entirely by the advertiser.[66] Online searches by potential visitors, entirely unlike passive exposure to television or radio commercials or printed advertisements, can get directly to the potential visitor in a single transaction an almost unlimited amount of detailed information through which to compare among Tunica-based casinos, casino-related restaurants, entertainments events, or other details about alternatives within Tunica as a destination.[67] While most traditional advertising media can efficiently be directed only at one or a few geographic markets, internet uses are not limited by geography, and thus internet-related advertising can reach prospective visitors to the destination without regard to geographic limits.[68]

Because of the unique fit between internet searches and travel planning, an actual majority of Americans now research and plan their travel through internet searches.[69] The dollars collectively spent for online advertising doubled in only two

---

[65]See Exhibit 43. The District Court in this case has already ruled that the Plaintiff's Expert's analysis of these issues is admissible at a trial of this case. *T.W.A.* v. *Barden Mississippi Gaming*, 2007 WL 2768914 (N.D.Miss. 2007).

[66]*Id.* at Page 1.

[67]*Id.* at Page 2.

[68]*Id.* at Page 1.

[69]See Exhibit 6a, at Page 3.

years, from $6 billion in 2002 to $12.3 billion in 2004.[70] While the increased demand for online advertising has predictably "pushed the cost to an advertiser higher" in recent years, it is the professional opinion of the Plaintiffs' internet and economics expert that "this has not resulted in substitution to traditional media for such advertising."[71] "Thus, there is no evidence that advertisers are gravitating to traditional media as a substitute, and therefore the cross elasticity of demand between the two submarkets is very small." (*Ibid.)*

The uniqueness of the "pay-per-click" pricing scheme which has developed as "the dominant distribution venue for online advertising" is related to the apparent absence of a cross-elasticity of demand between online advertising and traditional mass media ads.[72] An advertiser paying a website operator a certain number of cents for each "click" - communicated indirectly to the advertising casino or other travel supplier as a result of a use (or "click") by an internet user via the travel website - is enabled to pay exactly for (and only for) the precise number of inquiries the advertiser is getting from prospective visitors inquiring about their casino. *(Ibid.)* The advertiser, then, "gets what they pay for" in a way which is not true of - and cannot be easily compared or "interchanged" with - pricing schemes for traditional mass media advertising. (*Ibid.*) "Advertising" through an internet website - paying "per click" for individual clicks or "links" from the paid website onto the advertiser's website or content - is indeed an entirely different kind of phenomenon from paying for space in a print

---

[70]See Exhibit 43, at Page 1.

[71]*Id.* at Page 2.

[72]*Id.* at Pages 1-2.

medium or for time on a broadcasting medium.

The increasingly "technical and specialized" expertise required to offer online advertising opportunities has also become an entirely different enterprise, with substantially different vendors and suppliers, separate from most traditional advertising agencies having very different expertise in mass media advertising.[73] There is now a definite "lack of overlap between the distributors providing the two types of services" to potential advertisers. (*Ibid.*) The Defendant Tunica County Tourism Commission realized this when it engaged an entirely different kind of firm to manage its taxpayer-funded website "Tunicamiss.org", from the traditional advertising agency which serves it for all other forms of advertising.[74] Like advertising agencies generally with expertise in mass media advertising, "the Commission's ad agency did not regard themselves as having expertise in the market of Internet marketing for Tunica."[75]

---

[73] *Id.* at Page 1.

[74] Exhibit 9, at Pages 14-17.

[75] Exhibit 9, at Page 17. See also Plaintiffs' Exhibit 43 hereto, at Pg. 2. As the Plaintiffs' expert witness has concluded in analyzing the broader anti-competitive consequences on the relevant market of the casinos' collective boycott activity aimed at Tunica.com, the "Tunica casinos have been able to 'free ride' on the Tunica Commission's website without having to pay for advertising." *Ibid.* A mandatory, State-imposed tax on Tunica hotel and restaurant sales funds the TCTC's annual budget, including its payments to maintain that local government agency's own Tunicamiss.org website with its links directly to the individual private casinos' websites. (Exhibit 9, at 34-40). Through those governmental payments to the TCTC's internet consulting company, payments are in turn made to private internet search engine websites on a "pay-per-click" basis. (*Ibid.*) Once the governmental payments fund the "click" traffic onto the TCTC's website, clicks can then be made directly into the casinos' individual websites, all at no expense to any casino. The TCTC internet consultant reported at the end of 2002 that "(f)or every $1 spent by the Tunica (Commission) on Internet marketing with (the consultant) the past 12 months, they received $144 in visitor receipts," with the estimated "receipts" apparently being received at the casinos. (Exhibit 9(a), at Page 1 of "Tunica: 2003 Web Site Economic Impact Survey"). The TCTC's website received over 1.5 million "visits" from internet users inquiring about Tunica during 2004 alone. (Exhibit 9, Exhibit 1 thereto, at Page 3). The TCTC's internet consultant advised the TCTC Director in late 2002 that because the Plaintiffs' website name had ".com" in it, Tunica.com "would outrank the traffic on TunicaMiss.org" if Tunica.com were able to have content comparable with Tunicamiss.org, the TCTC's website, which then received over 1.5 million visits annually. (Exhibit 9, at 59-61, and Exhibit 4 thereto).

(B) Effects on Competition

The Tunica Casinos' boycott of Tunica.com conforms to the Casinos' virtual ***elimination of price competition*** between or among themselves, as the dominant advertising forces in the Tunica destination marketplace, for paid internet advertising (and in particular for paid "clicks" from private-sector internet websites to content or sites controlled by individual casinos). When asked in interrogatories in this case to identify, for instance, *any* payment any such casino had *ever* made "to any owner or operator of *any* internet website the site name (or 'domain name') of which includes the name or term "Tunica", the interrogatory responses by each of the casinos reveal that, since the day on May 30, 2001 when the casinos' boycott of Tunica.com was launched (with the resulting termination of Gold Strike Casinos' prior advertising relationship with Tunica.com), the casinos have enjoyed ***a total absence of price competition among themselves*** for paid internet traffic from private-sector websites focusing explicitly on Tunica as a destination, as they have apparently made no payments at all.[76] When separately asked in an interrogatory to identify any payments made "for any advertising or other promotional content to be placed, included, or maintained on any internet website," the casinos similarly revealed no website as to which any of them has competed with any other casino for paid internet advertising.[77]

---

[76]The reference to "paid" refers, of course, to payments by the private casinos, and does not include payments funded by Tunica County taxpayers through the TCTC as a governmental entity, as separately described in Footnote 74 above. See Responses to Interrogatory No. 3 within Plaintiffs' Second Set of Interrogatories, Exhibits 25 through 33.

[77]See Responses to Interrogatory No. 4 within Plaintiffs' First Set of Interrogatories, Exhibits 34 through 42. Indeed, the only internet-related payments disclosed by the casinos in response to that interrogatory were (a) Gold Strike Casino's pre-boycott contracts with Tunica.com, (b) Gold Strike's contract with AOL "during parts of 2001 and 2002 for certain internet marketing services," (c) Hollywood

As the Plaintiffs' expert economist has found, "(a) collusive decision by the Defendants substantially to limit their online advertising to free ads on the Commission's website" has both "eliminate(d) any incentive for entrepreneurs to provide online content related to the relevant submarket, thus denying such websites the potential of favorable result ranking for searches related to the relevant submarket."[78] As a consequence, "the range of useful online information on the relevant submarket is curtailed" for the traveling public interested in Tunica-related information. *(Ibid.)* Such anticompetitive conduct by the casinos also "greatly diminishes advertising price-competition within the relevant submarket, which in turn, causes the cost-per-click stated on search engines to underestimate the true willingness to pay for advertising in the relevant market." (*Ibid.*)

The expert has found that a "very high fraction of top-ranked 'Tunica' sites are now apparently controlled by individual casinos or government entities (including the Tunica County Tourism Commission's site: www.tunicamiss.org)."[79] The expert contrasts his findings about the realities of the relevant submarket (of online advertising for Tunica as a destination) with the hypothetical benefits to the traveling public of a "freely competitive market for advertising" in which "advertisers would have to compete

---

Casino's payments for its own casino's website, (d) Hollywood's payments for "web banner ads" to a local newspaper, Travelocity, Travel Worm, Trip South, Digital City, FFWD, the Marketing Continuum, gomemphis.com and three television stations, and (e) Sam's Town Casino's payments for a temporary period for advertising on the website gomemphis.com. *Ibid.* Since apparently the payments by Hollywood Casino and Sam's Town Casino for advertisements on "gomemphis.com" were at different times from one another, the casinos' discovery responses reveal that there was no website as to which two or more of the Tunica casinos competed with one another to buy advertising or internet traffic.

[78]See Exhibit 43, at Page 2.

[79]See Plaintiff's Exhibit 43 ("Tunica.com - Opinions" Report by Alex Tajirian).

with each other for the attention of websites providing information on (T)unica as a travel destination, . . . "[80]

In short, there is substantial evidence through which a reasonable juror could accept the expert opinion of the Plaintiffs' expert economist that the casinos' boycott activity has substantially restricted the development for and availability to the traveling public, throughout the relevant submarket of "online advertising for Tunica as a travel destination," of competitive private-sector internet websites serving those interested in comprehensive information about Tunica.

10. Whether Tunica.com's Lost Advertising Revenues Constitute "Antitrust Injury"Stemming from the Casinos' Boycott is a Triable Jury Issue.

Any loss claimed by a *Sherman Act* plaintiff qualifies as recoverable "antitrust injury" if it is an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violations or of anticompetitive acts made possible by the violation." *Brunswick Corp. v. Pueblo Bowl-O-Mat,* 429, U.S. 477, 489 (1977). "It should, in short, be 'the type of loss that the claimed violations . . . would be likely to cause.'" *Ibid.*, quoting *Zenith Radio Corp. v. Hazeltine Reserach*, 395 U.S., at 125.

Profits lost by the immediate and intended specific target of a boycott agreement, from a loss by the target of the very business opportunities which the boycotting defendants blocked the target plaintiff from competing effectively for, are the most obvious of all categories of "antitrust injury" and are clearly recoverable by the

---

[80] *Id.* at Page 2.

boycott target. Under *Brunswick* and its successor cases, a "victim of a successful boycott" represents "a paradigm of standing" and antitrust injury, even when "the boycottee was not a buyer or a seller but was endeavoring to provide a method whereby buyers and sellers could deal effectively with each other without paying tribute to the defendants." *Crimpers Promotions, Inc. v. Home Box Office, Inc.*, 724 F.2d 290 (2nd Cir. 1983), *cert denied*, 467 U.S. 1252 (1984)(sponsor of cable TV trade show had standing to claim profits lost from alleged boycott of trade show by cable TV companies).

Even an indirect but foreseeable victim of a boycott can demonstrate and recover "antitrust injury" from amounts paid as a direct result of the boycott. The plaintiff in *Blue Shield of Virginia v. McCready,* 457 U.S. 465 (1982), was a Blue Shield subscriber who did not get reimbursed by Blue Shield for her psychologist's bills because Blue Shield had agreed with psychiatrists not to reimburse psychologists for treatment, amounting to an illegal boycott of clinical psychologists. *Id.* at 481-82. "Although (the subscriber plaintiff) was not a competitor of the conspirators, the injury she suffered was inextricably intertwined with the injury the conspirators sought to inflict on psychologists and the psychotherapy market," sufficient to make her un-reimbursed psychologist's bills "antitrust injury". *Id.* at 483-84.[81]

The *McCready* case, like the present case, was a boycott case. The Casinos in their Brief offer ***not one case*** in which (1) a boycott in violation of the Sherman Act was

---

[81]The Supreme Court in *McCready* also emphasized that, for "antitrust injury" or "standing" purposes, an antitrust plaintiff "need not 'prove an actual lessening of competition in order to recover. (C)ompetitors may be able to prove antitrust injury before they actually are driven from the market and competition is thereby lessened.'" *McCready, supra*, at 482, quoting *Brunswick, supra,* at 489, no. 14.

found to have been properly alleged, but in which (2) standing was denied to the boycott's target/victim on the ground that no "antitrust injury" was alleged or provable. *None of those cases relied on by the Casinos, then, has apply application to this case.*

The Fifth Circuit in *Anago, Inc. v. Technol Medical Products, Inc.*, 976 F.2d 248 (5th Cir. 1992), for instance, was addressing facts peculiar to challenges by a corporate takeover target to the conduct of an acquiring firm. *Id.* at 249. That case was not only *not* about damages flowing from *boycotts,* but it was not even brought under the Sherman Act at all (having been brought instead under the Williams Act, which regulates hostile corporate takeovers). *Id.* at 250. The Fifth Circuit's finding in that Williams Act case, that the takeover target's arguments about a threatened loss of its independent decision-making from a hostile takeover did not amount to an "antitrust injury" for purposes of such a case, have no application to the present case. *Ibid.*

The "antitrust standing" section of the Casinos' Brief is indeed preoccupied with mixing and confusing an "apple" with an "orange". The requirement that (1) a boycott to be actionable must have restrained *competition generally* in the relevant market *unreasonably* (whether as a result of conduct which the law treats as *per se* unreasonable, or as a result of a "rule of reason" analysis) is indeed distinct from the separate requirement that (2) a particular plaintiff to have standing must have suffered some related loss of the kind the Sherman Act was designed to protect against. But that is why the Casinos have it wrong when they take cases which only demonstrate the *first* proposition, and use them as their authority for trying to apply the *second* proposition to the facts of this case. The physician/plaintiff in *Kiepfer v. Beller,* 944 F.2d 1213 (5th Cir.

1991), for instance, did indeed fail to present any evidence that any market of area physicians or patients had been adversely affected by the defendants' conduct in that case, and therefore had not proven any Sherman Act violation. *Id.* at 1221. But that failure had nothing to do with whether or not the physician had demonstrated any "antitrust injury" to himself. That second and different question was not addressed in the *Kiepfer* opinion, and has no application to any proper "antitrust injury" analysis in this case.

Clearly, Tunica.com is the direct and intended victim of the Tunica Casinos' boycott, and its resulting lost profits amount to antitrust injury.

Conclusion

If a product or service is commercially worthless, that worthlessness should be determined by judgments made unilaterally by competing prospective buyers, responding for their own commercial reasons to marketing efforts made to them directly by individual sellers. "Emergency meetings" among prospective buyers, and joint attempts to arrive at a market-wide "consensus" about whether or not to buy the product or service at all, and joint decisions about whether or not an entire market of buyers will "utilize" or "ban" the product or service, are neither commercially necessary nor legally justified. The peddling of a worthless service, if it is indeed worthless,[82] will fail soon

[82]Tunica.com, with or without the destructive effect of the casinos' collective "ban on advertising" on it, was never "worthless". Even as early as May of 2001, hundreds of thousands of internet users were typing "Tunica.com" into the internet for the obvious purpose of finding out about the casino-centered Tunica destination. (Exhibit 1, at 93). Getting those potential visitors to "click" (in turn) onto any particular casino (or casinos') website(s) would have been of significant and obvious value. The Tunica County Tourism Commission's own internet consultant reported that (a) "for every dollar" invested in Tunica-wide internet marketing (by the TCTC, at public expense), the casinos received "$144 in visitor receipts," and (b) Tunica.com "would outrank the traffic on TunicaMiss.org" if Tunica.com were to be permitted to have content comparable to the TCTC's website. See Footnote 74 above. Clyde Callicott, who by September of 2002 had served five of the Tunica casinos as a marketing executive, believed then that "it was actually in

enough - and efficiently enough - in a freely competitive marketplace unrestricted by such collusion among competitors. This, at any rate, is the congressional purpose which for more than a century has been behind the Sherman Antitrust Act.

Sherman Act cases by their nature are inherently complex factually. It has therefore been the rule in such cases that "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962). As a result, summary judgment is "especially disfavored" in inherently complex and fact-sensitive antitrust cases, as "the nature of the antitrust beast is such that courts cannot frequently say as a matter of law that plaintiffs have no disputed material facts upon which to proceed to trial." *C. E. Services, Inc. v. Control Data Corp.*, 759 F.2d 1241, 1245 (5th Cir. 1985)(reversing grant of summary judgment as to *Sherman Act* claim).

Of course, it is true of *any* Rule 56 motion that "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Given that summary judgment standard applicable in such complex antitrust cases, and the many factual disputes outlined above, the Casinos' Motion for Summary Judgment as to the antitrust claims under

---

the best interest of the individual casinos and of the casino industry to have a one-stop shopping, private sector website called 'tunica.com'," and for the casinos to pay a "conservative estimate" of $17,000 monthly to Tunica.com to participate. Exhibit 8, at 409 & 428.

Count 1 and Count 2 in this case should be denied.[83]

This the 23rd day of November, 2007.

Respectfully submitted,

TUNICA WEB ADVERTISING, INC.

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

OF COUNSEL:

Pigott, Reeves, Johnson & Minor, P.A.
775 North Congress Street
Jackson, Mississippi 39202
Telephone: (61) 354-2121
Facsimile: (601) 354-7854

CERTIFICATE OF SERVICE

I, J. Brad Pigott, do hereby certify that I have this day caused a true and correct copy of the foregoing Brief to be filed with the Clerk of the Court via the ECF system which sent notification of same to the following counsel of record in the above-referenced matter, and also to be served upon each such counsel through prepaid United States Mail:

Mark Herbert, Esq.
April D. Reeves, Esq.
Watkin Ludlam Winter & Stennis, P.A.
633 North State Street
Post Office Box 427
Jackson, Mississipi 39205–0427
areeves@watkinsludlam.com

Robert J. Mims, Esq.
Daniel Coker Horton & Bell
265 North Lamar Boulevard, Suite R
Post Office Box 1396

[83]Because none of the Defendants in this case have filed any Rule 56 motion seeking to address or dispose of the Plaintiff's Count 3 claim alleging tortious interference with TWA's business relations, this Brief has not addressed whether or not a jury issue would exist as to that common law tort.

Oxford, Mississippi 38655
rmims@danielcoker.com

Benjamin E. Griffith, Esq.
Griffith & Griffith
123 South Court Street
Post Office Drawer 1680
Cleveland, Mississippi 38732
bgriff@vralitigator.com

This the 23rd day of November, 2007.

s/Brad Pigott
BRAD PIGOTT