Final Jury Instructions, Deutscher Tennis Bund v. ATP Tour Inc., No. 07-CV-00178 (D.Del. August 4, 2008) (plurality instructions)

Antitrust Jury Instruction 5
Single Entity or Enterprise Defense[1]

First, as a threshold matter, in order to satisfy the element of an agreement, there must be at least two separate persons or corporations who have reached an agreement or understanding in order to find a violation of Section One. The internal decisions of a unified business enterprise do not give rise to claims under Section One of the Sherman Act. A decision agreed to by a Board of Directors on behalf of a unified business enterprise does not constitute an agreement between separate actors. You are instructed that the directors of ATP, acting in their capacity as directors, are not separate entities capable of conspiring with ATP.

Furthermore, where separate persons or corporations are commonly controlled or substantially integrated in their operations, they may be considered a "single entity" or "single enterprise" under the antitrust laws. No combination or conspiracy is possible under the law between corporations that are commonly controlled or substantially integrated, and that regularly conduct their business affairs in such a manner as to constitute, in effect, a single business entity or enterprise.[2] The law permits, and in fact encourages, cooperation inside an integrated business enterprise to better facilitate competition between that enterprise and other producers.[3]

An issue you will be called upon to decide is whether the ATP and its members function as a single business entity or single enterprise with respect to operating and participating in the ATP Tour, including with respect to the categorization of tournament members, the creation of an annual calendar, the setting of ranking points to be awarded for performance in different ATP events, and the adoption of rules pertaining to when and where player members shall play. Plaintiffs contend that the ATP is an independent business actor that competes with its member tournaments in various alleged product markets. Defendants contend that the ATP and its members function as a single economic enterprise for the purpose of producing the ATP brand of professional tennis through the ATP World Tour and for the purpose of carrying out the core functions of a global professional tennis tour.

Participants in such an enterprise may agree on all core functions of the integrated entity, including what products are produced, how, when and where to produce the products, who to sell the products to, how much of the products should be produced, and at what price the products are sold.[4] Although relevant to your consideration, it is not necessary for members of such an integrated enterprise to share common corporate ownership.[5] In determining whether, with respect to the challenged conduct, a membership organization constitutes a single business entity

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[1] *Copperweld v. Independence Tube*, 467 U.S. 752 (1984); *Toscano v. Professional Golfers Ass'n*, 258 F.3d 978, (9th Cir. 2001); ; *Seabury v. PGA*, 878 F. Supp. 771 (D. Md. 1994).

[2] *Texaco v. Dagher*, 547 U.S. 1, 6 (2006); *Copperweld v. Independence Tube*, 467 U.S. 752 (1984); *HealthAmerica Penn., Inc. v. Susquehanna Health Sys.*, 278 F. Supp. 2d 423, 435 (M.D. Pa. 2003).

[3] *Chicago Prof'l Sports v. NBA*, 95 F.3d 593, 598 (7th Cir. 1996); *Am. Needle v. New Orleans Saints*, 496 F. Supp. 2d 941, 943 (N.D. Ill. 2007).

[4] *Texaco v. Dagher*, 547 U.S. 1, 6 (2006).

[5] *Am. Needle v. New Orleans Saints*, 496 F. Supp. 2d 941, 944 (N.D. Ill. 2007); *Williams v. I.B. Fischer Nevada*, 794 F. Supp. 1026, 1032 (D. Nev. 2003), *aff'd* 999 F.2d 445 (9th Cir. 1993).

or enterprise, the most important consideration is whether the organization's members primarily compete with one another for customers of their own product, or whether the organization's members compete with outside producers of different but competing products.[6] Other factors you may consider are whether they share common ownership; whether they share expenses, capital expenditures, profits or losses; whether the tournaments and ATP are managed independently; and whether the coordination between ATP and its member tournaments is necessary to create the product ATP sells.

You must consider whether any challenged conduct involving ATP and its members was undertaken as a single business entity or enterprise, or whether it represented actions taken by one or more separate, independent actors.[7]

[6] *Chicago Prof'l Sports v. NBA*, 95 F.3d 593, 600 (7th Cir. 1996); *see also Continental v. GTE Sylvania*, 433 U.S. 36, 52 n. 19 (1977) ("The primary concern of antitrust law" is "interbrand," not "intrabrand," competition.).

[7] *Am. Needle v. New Orleans Saints*, 496 F. Supp. 2d 941, 943 (N.D. Ill. 2007).