

No. 14-1746

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

SD3, LLC and SAWSTOP, LLC,

Plaintiffs-Appellants,

v.

BLACK & DECKER (U.S.), INC., ET AL.,

Defendants-Appellees

On Appeal from the United States District Court
for the Eastern District of Virginia,
Case No. 14-cv-00191-CMH-IDD
The Honorable Claude M. Hilton, United States District Judge

**OPPOSITION TO PETITION FOR REHEARING OF
DEFENDANTS-APPELLEES ROBERT BOSCH GMBH AND
TECHTRONIC INDUSTRIES CO., LTD.**

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INTRODUCTION

In this antitrust action, Plaintiffs alleged, in Count I of the operative First Amended Complaint, a conspiracy to (1) boycott the licensing of the intellectual property (a species of advanced injury mitigation technology (“AIMT”), but not necessarily the only possible AIMT, applicable to power saws) developed and owned by Plaintiffs, and (2) to develop any AIMT or to produce products with any AIMT. FAC, ¶¶ 130, A-104. Also as part of the conspiracy alleged in Count I, Plaintiffs alleged that the defendants further conspired to fraudulently conceal that course of conduct. FAC, ¶¶ 131, A-104.

As to Count I, the Court disposed of the pending appeal by (1) affirming the district court’s dismissal of Count I as to a specifically enumerated list of defendants, certain of whom were foreign corporate parents of U.S. subsidiaries, finding that Plaintiffs’ allegations were not sufficiently specific to state claims against them, but (2) finding that Plaintiffs had stated a claim, and reversing, as to those defendants not listed.¹

Among those Defendants not included enumerated list were Robert Bosch GmbH (“Bosch,” of Germany) and Techtronics Industries Co., Ltd. (“TIC,” of

¹ The Court affirmed the district court’s dismissal of Counts II and III, which concerned certain defendants’ involvement in the activity of a private standard-setting organization. Counts II and III are not at issue in the present motion practice.

Hong Kong). Both are foreign corporate parents of U.S. subsidiaries which are also defendants. Bosch and TIC seek rehearing of the Court's decision reversing the dismissal of Count I as against them, contending that the allegations contained in the FAC were insufficient to state a claim against them.

REASONS FOR DENYING REHEARING

There was nothing inadvertent, or erroneous, in the Court's exclusion of Bosch and TIC from the list of foreign corporate parents and certain other defendants as to whom dismissal of Count I was affirmed. There were additional factual allegations made as to Bosch and TIC that were not made as to any of the enumerated defendants.

First and foremost, Plaintiffs pleaded that Bosch and TIC, among others, were alleged to be parties to a "Joint Venture Agreement" (the "JV") dated October 8, 2003, which Plaintiffs alleged was undertaken to make it appear as if the participants were actually attempting to develop some form of AIMT. FAC, ¶ 109, A-97. Plaintiffs did not make such an allegation as to *any* of the enumerated defendants as to whom dismissal was affirmed. In Count I, FAC ¶¶ 128-38, A-103-104, Plaintiffs have alleged a single conspiracy encompassing the acts of fraudulent concealment, FAC, ¶ 131, A-104, and there can be little question that there is a close nexus between the JV and the related underlying agreements not to produce any product with AIMT or to obtain licenses of Plaintiffs' AIMT. Indeed,

Defendants' themselves contend that the testimony principally relied upon by Plaintiffs in support of the existence of the conspiracy alleged in Count I related mainly, perhaps entirely, to the JV.² And Plaintiffs' counsel explained at oral argument, in response to an inquiry from the Court (Agee, J.) as to whether Plaintiffs were "attacking the joint venture," that

the purpose of the joint venture [wa]s to fulfill their basic policy which is don't take a license from SawStop. So, it becomes part of a two-part scheme, which is: What should we do? Take a license from SawStop? Naaah, I don't want to pay royalties we'll just have a joint venture.³

The underlying conspiracy and the JV, an act of concealment, are thus, as articulated by both sides to this appeal, intertwined.⁴

Second, Plaintiffs further pleaded that one or more officers of Bosch

² Appellees' Brief, at 11. ("Peot's testimony focused largely on the creation of a joint research venture that certain members of PTI formed to explore safety devices for table saws").

³ Recording available online at <http://coop.ca4.uscourts.gov/OAarchive/mp3/14-1746-20150512.mp3>, at 39:34.

⁴ Where there is a sufficient nexus between the acts of concealment and an ongoing underlying illegal conduct, a trier of fact may find the conduct to be part of the same conspiracy. *U.S. v. Justus*, 162 F.3d 1157 (Table) 1998 WL 546095, *3 (4th Cir. Aug. 20, 1998) (unpublished) ("evidence, taken in the light most favorable to the [prevailing party], clearly would allow a reasonable jury to find that the defendants were part of a conspiracy that encompassed various acts of concealment"). *See also U.S. v. Bo Wei Hua*, 207 Fed. Appx. 311, 312 (4th Cir. Nov. 30, 2006) (where acts of concealment were "central" to the conspiracy, district court properly decided the question and instructed the jury that they were part of a single conspiracy as a matter of law). *Compare Grunewald v. United States*, 353 U.S. 391, 414 (1957) (subsequent acts of concealment *not* part of underlying conspiracy when the activity of the conspiracy had already been concluded and its objectives achieved).

participated, along with representatives of a U.S. subsidiary, in licensing negotiations with Plaintiffs. *Id.*, ¶ 79, A-89 (“officers and employees of both RBTC and RBG ... participated directly in the discussions”).

In their Petition, Defendants contend that Plaintiffs’ allegations as to the JV are “conclusory.” Petition, at 2, 4. But how much more precise could they be? Plaintiffs recited the participants, the nature of the JV, and the date of its formation. Its existence is a matter of public record. The allegation is hardly conclusory.

Defendants further contend that the Court has already rejected the allegations of Paragraph 109 for any and all purposes. Petition, at 4-5 (citing Slip. Op., at 52). But the Court was clearly speaking only as to the whether certain factual allegations (contained in several parts of the FAC, including ¶ 109, A-97) were sufficient to sustain claims concerning standard-setting conduct, and not as to whether any of these allegations might also be pertinent to the conduct at issue in Count I .

Defendants have not addressed the existence of Plaintiffs’ allegation that one or more Bosch employees was involved in licensing discussions with Plaintiffs, which further supports the reversal of the dismissal of Count I as to Bosch.

CONCLUSION

For the reasons stated above, Plaintiffs-Appellants respectfully pray that the petition for rehearing be denied.

October 15, 2015

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CERTIFICATE OF SERVICE

I certify that on October 15, 2015 the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

/s/ Matthew E. Miller
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