UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

\# 10-1130

WILLIAM WHITE, KEN BAILEY, R. CARLEEN CORDWELL,
HENRY KRIEGSTEIN, JOAN KRIEGSTEIN, HILARY SCHULTZ,
NADINE MONACO, ANN BUTTRICK FLOYD, and
SANDCASTLE REALTY, INC.
Appellants/Plaintiffs

vs.

R.M. PACKER, CO., INC., DRAKE PETROLEUM CO., INC.
KENYON OIL COMPANY,
FRANCIS J. PACIELLO d/b/a EDGARTOWN MOBIL, and
DEPOT CORNER, INC.,
Appellees/Defendants

APPEAL FROM THE
UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

PLAINTIFFS/APPELLANTS' REPLY BRIEF

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Argument

I. IN ORDER TO STATE A CLAIM OF PRICE FIXING, PLAINTIFFS NEED TO SET FORTH FACTS FROM WHICH THE COURT COULD FIND THE EXISTENCE OF EITHER AN EXPLICIT OR A TACIT AGREEMENT TO FIX PRICES.

Defendants argue that “[a] merely tacit agreement is not an antitrust violation”. *Def. Br., p. 14.* They argue further that “ ‘ [t]acit collusion’ is just another name for ‘conscious parallelism’”. *Id., p. 15.* None of the cases cited by the defendants support either of the above propositions.

In fact, the Supreme Court has made clear that a “tacit”, as well as an explicit agreement, can violate the Sherman Act. While the courts have held that “interdependent behavior” in and of itself is not illegal, the courts have never held that tacit agreements to fix prices are not themselves illegal.

In *Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540 (1954), the Supreme Court noted that the “crucial question is whether respondents’ conduct toward petitioner stemmed from independent decision or from an agreement, *tacit or expressed*.” (*Emphasis Added).* In *United States v. General Motors Corp.*, 384 U.S. 127, 142-43 (1966), the Court held that "it has long been settled that explicit agreement is not a necessary part of a Sherman Act conspiracy, certainly not where, as here, joint and collaborative action was pervasive in the initiation, execution, and fulfillment of the plan."

Defendants cite to the First Circuit case of *Clamp-All Corporation v. Cast Iron Soil Pipe Institute, et. al,* 851 F.2d 478, 484 (1st Cir. 1988), in support of their proposition that a tacit agreement is not an antitrust violation. *Def. Br., p. 14.* The words "tacit agreement" do not appear in *Clamp-All.* Rather, the court in *Clamp-All* reaffirms the *General Motors'* language, noting only that "the Sherman Act prohibits *agreements* . . . [and not] individual pricing decisions." 851 F.2d at 484 (*emphasis in original*). The court states nothing about whether prohibited agreements could be tacit, as well as express.

Defendants argue that "even Judge Posner has reluctantly acknowledged 'an express manifested agreement, and thus an agreement involving actual, verbalized communication, must be proved in order for a price-fixing conspiracy to be actionable under the Sherman Act.' *In re. High Fructose*, 295 F.3d 651, 654 (7th Cir. 2002)." *Def. Br., p. 14.* Judge Posner did not reluctantly acknowledge this to be the correct law, but reluctantly acknowledged that other lower courts have acted as if this were the law, and plaintiffs in the *High Fructose* case did not argue otherwise, so that he would assume for purposes of deciding that one case, in which he denied summary judgment, that it was the law. 295 F.3d at 654.

Judge Posner made clear what he believed to be the law in an article he wrote in the Stanford Law Review. Posner, R., *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 Stan L Rev 1562 (1969). Judge (then Professor) Posner concluded that "[t]he employment of section 1 against purely tacit collusion would do no violence to the statutory language or purpose; and while difficult problems of proof and of remedy would be involved, I am not convinced that they would be insuperable." 21 Stan L Rev at 1562.

Moroever, the Supreme Court has reaffirmed, since the case of *In re. High Fructose* was decided, that the law, as stated in *General Motors*, is still good law. In *Bell v. Twombly*, 550 U.S. 544, 553 (2007), the Court reaffirmed that in cases involving parallel pricing, the crucial question remains whether conduct stems from an agreement, "tacit or expressed".

Plaintiffs do not wish to get lost in a semantic argument. Plaintiffs acknowledge that an agreement is necessary to constitute an antitrust violation. However, it is important to remember that like most plaintiffs, plaintiffs in this case need to prove their case by circumstantial evidence. However, they do not need to prove by circumstantial evidence that the defendants sat in a room together, or called each other on the phone, to set each and every price that was fixed. Rather, they have to prove that defendants either had an express or tacit agreement to fix prices. And that is exactly what the circumstantial evidence shows in this case.

The defendant Drake opened up the XtraMart gas station and began supplying the Edgartown Mobil gasoline stations in the 1990s. *App. A1106-1107.*

The presidents of the defendants Drake and Packer acknowledge meeting with each other at that time. *App. A0594, A1106-1107.* There is evidence that as of the late 1990s, the presidents of the two companies were checking in with each other, and speaking frequently, i.e. circumstantial evidence of an explicit agreement. *See Pl. Brief,, Section I.B.3.b, pp. 24-25.* In the year 2000, the defendants Drake and Paciello signed a loan agreement with inexplicable terms, making Paciello and the Edgartown gas stations dependent upon the defendant Drake, i.e. further circumstantial evidence of an explicit agreement. *See Pl. Brief, Section I.B.3.d, pp. 35-36.* After the year 2000, as the lower court noted, there is no further evidence of communications between the defendants Drake and Packer. *Add. 008.* There is considerable circumstantial evidence that an explicit agreement had been reached in the late 1990s and early 2000s, and that a tacit agreement remained to continue to fix prices through the current date. After the reaching of an explicit agreement, the defendants had no need to continue to speak "frequently", as everyone understood how the agreement worked. Whether the continued conspiracy be found, as a matter of law, because "once a conspiracy has been established, it is presumed to continue until there is an affirmative showing [by the defendant] that it has been abandoned," *U.S. v. Hoyter Oil Co.*, 51 F.3d 1265, 1271 (6th Cir. 1995), or whether it is found because there is considerable evidence that a tacit agreement existed after 2000 to allow Packer to set prices that everyone else would follow, is arguably an issue of semantics. Under either view of the facts and the law, there is sufficient evidence that defendants violated the Sherman Act to deny summary judgment.

II. PLAINTIFFS' THEORY OF A CONSPIRACY AMONG THE FOUR DEFENDANTS IS NOT IMPLAUSIBLE.

Defendants argue that "[t]he plaintiffs assert that *only* four of the nine gas stations on Martha's Vineyard conspired to set prices of gasoline". (*emphasis added). Def. Br. at p. 27.* Defendants argue that it is implausible that only four the nine stations could set prices on the island.

Plaintiffs assert that the four defendants conspired to set the price of gasoline. Plaintiffs never assert that only four of the nine gas stations on Martha's Vineyard conspired to set prices of gasoline.

Plaintiffs have chosen to sue only four of the nine gasoline stations located on Martha's Vineyard, as they believe they had and have evidence that the owners of these four stations conspired to fix gas prices. As the court noted in *In re Methyl Tertiary Butyl Ether Products Liability Litigation*, 447 F.Supp.2d 289, 301-302 (S.D. N.Y. 2006) in the context of whether a plaintiff must sue all potential tortfeasers), plaintiffs may sue any entity or entities that caused their injury, as plaintiffs need not name all potential wrongdoers, or even a substantial share of all wrongdoers, because defendants can always implead other responsible parties.

III. PLAINTIFFS' EXPERT ECONOMIC EVIDENCE IS NOT AMBIGUOUS.

Defendants argue that the opinions of plaintiffs' expert Prof. Gollop are ambiguous, contending that Prof. Gollop concludes that inferences to be drawn from defendants' pricing behavior are "mixed", and there are instances where the evidence is "not inconsistent with either cooperative or non-cooperative behavior". *Def. Br. at p. 29.*

Plaintiffs' economic expert's opinions are carefully crafted. They are not ambiguous, as defendants argue. Prof. Gollop notes certain pricing patterns that cannot be explained by "non-cooperative behavior". Defendants seek to equate "interdependent" behavior with "cooperative" behavior, and make the blanket, inaccurate statement that antitrust laws do not prohibit "cooperative" behavior. *Def. Br. at p. 29.* The fact that prices of one company in an oligopoly may be interdependent upon the prices of another company does not mean that the companies can legally cooperate in setting prices. There is certain cooperative behavior that the antitrust law allows; for example, "[c]ompetitors are permitted to engage in cooperative behavior, under trade association auspices." *In re Brand Name Prescription Drugs Antitrust Litigation*, 186 F.3d 761, 784 (7^{th} Cir. 1999). On the other hand, "[t]he antitrust laws throttle some cooperative behavior . . . to preserve the benefits of competition for consumers." *Chicago Professional Sports*

Ltd. Partnership v. National Basketball Association, 961 F.2d 667, 669 (7th Cir. 1992).

There is nothing ambiguous when Prof. Gollop states that even in an oligopoly "it makes no business sense" to initiate price increases, when your costs decline, and you know your competitor's costs went down, as happened in this case. *App. A0476-A0477.* There is nothing ambiguous when Prof. Gollop states that even in an oligopoly "it makes no business sense for a rival to follow a price increase" when costs decline, as happened in this case. *Id.* There is nothing ambiguous when Prof. Gollop concludes that "Price stability over such a long period of time in the face of these cost decreases is not the expected result of non-cooperative behavior. . . ." *Id.* Although defendants insist otherwise, the above quoted opinions clearly express Prof. Gollop's opinion that the economic data "tends to exclude the possibility of merely interdependent behavior". Unfortunately, defendants simply do not draw a distinction between interdependent behavior, which is legal, and cooperative behavior, which tends to prove the existence of an illegal agreement.

Similarly, there is nothing ambiguous when Prof. Gollop states that economic data shows the existence of (1) abnormal profits, (2) fixed market shares for substantial periods of time and (3) the existence of an industry conducive to oligopolistic price fixing, either interdependently or through a more express form of collusion, *App. A0480*, all of which have been recognized by courts and commentators as being "plus factors", which when found along with parallel pricing, are sufficient to defeat summary judgment.

Defendants take Prof. Gollop's statements out of context, when they continually quote him as stating that "there are instances where the evidence is 'not inconsistent with either cooperative or non-cooperative behavior'". *Def. Br., p. 29.* Prof. Gollop states in full that "There are instances that, *apart from circumstantial evidence and the "plus factors" described in the following section*, are not inconsistent with either cooperative or non-cooperative behavior." (*Emphasis added*). *App. A0474-A0475.* In fact, the only evidence that Prof. Gollop finds, without qualification, to be as consistent with cooperative as non-cooperative behavior is the parallel pricing that existed on the island, *App. A0482,* which as a matter of law, both parties acknowledge in and of itself does not prove price fixing.

The fact that Prof. Gollop has not sought to overstate the economic evidence only makes his opinions more credible; it does not make them ambiguous.

IV. DEFENDANTS' PROPOSED DEFINITION OF A "GROSS DISPARITY IN PRICING" WOULD NULLIFY IN ITS ENTIRETY THE PRICE GOUGING STATUTE.

According to defendants, "under Massachusetts law, unconscionability based on price requires the price of the good to be at least twice its normal retail or wholesale value." *Def. Br, p. 43.* Defendants ask this Court to adopt the criteria meant for invalidating arms length bargained contracts to determine when a gasoline station violates the “price gouging” law established to prevent the taking advantage of consumers in market emergency periods. *Def. Br. pp.41-43*.

It is understandable that a bargained for contract can only be set aside for excessive price under the most stringent of circumstances. The same stringent set of circumstances should hardly be applied to a market emergency situation, where the Attorney General has already made a determination that consumers are subject to price gouging by gas station owners who seek to take advantage of them. The common law criteria upon which defendants rely are simply inapplicable.

If this Court were to adopt the standards proposed by defendants, it would render the Massachusetts price gouging statute meaningless. In order for the defendants to have charged two times their normal retail price, the defendant stations would have had to charge a price of $6.50/gallon, i.e. twice the $3.25/gallon average price being charged by the four defendant gas stations on August 29, 2005, i.e. the day before Hurricane Katrina.[1] *App. A0541*. As noted in Plaintiff’s principal brief (*Pl. Br., p. 47*), according to the FTC Investigation of gas prices after Hurricane Katrina, of the 24,197 gasoline stations examined across the

[1] Alternatively, defendants’ proposed rule of unconscionability would require defendants to have sold their gasoline at $6.18/gallon to be unconscionable, i.e. twice the peak average wholesale cost of $3.09/gallon, experienced by defendants on September 5, 2005. *App. A0542.*

country, in only one city did the highest price stay above $3.50/gallon for more than one day.

As noted in *Commonwealth v. Boston Edison Co*, 444 Mass. 324, 339 (2005), courts will not "interpret a statute in such a way as to make a nullity of its provisions if a sensible construction is available." This Court should adopt the sensible interpretation proposed by plaintiffs, which recognizes that gas stations can indeed price gouge, when unreasonably charging excessive prices not justified by their costs in market emergencies, and not defendants' proposed interpretation under which no gas station in the country could be found to have come close to charging an unconscionable price.

V. PLAINTIFFS PROPERLY LOOK TO THE FTC FOR GUIDANCE IN DETERMINING THAT DEFENDANTS ENGAGED IN PRICE GOUGING FOLLOWING HURRICANES KATRINA AND RITA.

Plaintiffs ask this Court to look to the FTC Report issued following Hurricanes Katrina and Rita for guidance in determining whether defendants engaged in price gouging. *Pl. Br., pp. 46-49.* Plaintiffs correctly note, among other things, that the FTC concluded that a retailer had "a price increase not substantially explained by increased costs if its gross margin increased by more than five cents per gallon or more between August and September 2005." *Id., pp. 48-49.*

Defendants argue that plaintiffs "mistakenly equate a benchmark used as part of the FTC's methodology -- an increase in gross margin of more than five cents per gallon -- with a definition of price gouging, . . . and completely ignore the FTC's crucial next step in this analysis [i.e. comparing the station's retail price increases to the average price increase of stations in the local market area]." *Def. Br. p. 53.*

In fact, plaintiffs are in agreement with defendants that the FTC provides various relevant "benchmarks". Plaintiffs, however, never suggest that this Court adopt any one FTC benchmark as a "definition of price gouging", which is exactly why plaintiffs do not seek to compare defendants' price increases with price increases of other stations in the local market area. The FTC provides a number of relevant benchmarks to determine whether price gouging occurred: (1) whether a gas station sold gasoline over the price of $3.50/gallon; (2) whether the gas station continued to sell gasoline at its highest listed price for more than one day, and (3) whether the gas station increased its gross margin by more than five cents per gallon. Under all of these benchmarks, defendants price gouged.

Defendants note that the FTC also looked, as another benchmark, at whether the defendants' gas prices increased disproportionally to other gas stations in the local area. *Def. Br., p. 53.* The FTC utilized this benchmark, because it was examining gas prices across the country. This additional benchmark is not necessary for examining gas prices in this case. The Massachusetts Price Gouging Law makes it clear that a gas station is guilty of price gouging, if it either (1) sold its gas at a gross disparity in price compared to the price at which gasoline was sold immediately prior to the market emergency <u>or</u> (2) if it sold its gas at a gross disparity in price compared to the price that gasoline was obtainable by other buyers in the trade area. Plaintiffs have chosen to prove price gouging utilizing the first of the two alternative criteria set forth in the Massachusetts Price Gouging Law.

Neither plaintiffs nor defendants have good data to compare defendants' increases in prices and profits to increases in prices and profits at other gasoline stations on Martha's Vineyard after Hurricane Katrina. As defendants are well aware, the trial court did not allow plaintiffs to discover from the non-defendant gas stations on the island, data relating to their cost of gasoline, *see App. p. A0013, Order, dated 12/16/2008*, and the price data provided by other stations on the Vineyard ranged from thorough (1 station), spotty (1 station) to non-existent (3 stations).

Inexplicably, defendants suggest that the Court compare price increases on Cape Cod to price increases at the defendants' gas stations from before and after the market emergency period. There is nothing in the Massachusetts Price Gouging statute that suggests that this comparison has anything to do with the statute's definition of price gouging. 940 CMR 3.18(2)(a)(2) does provide that "a price is unconscionably high if (a) the amount charged represents a gross disparity between the price of the petroleum product and (2) the price at which the same or similar petroleum product is readily obtainable by other buyers in the trade area. Without question, the prices charged at defendants' gas stations during the emergency period were much higher than the prices charged at Cape Cod stations. If this Court wishes to accept that Cape Cod is in the same trade area as Martha's Vineyard, the Price Gouging Statute was clearly violated. Average prices at defendants' gas stations in September 2005 exceeded average prices at Cape Cod gas stations by 52 cents/gallon. *App. A508.* Average prices at defendants' gas stations in October 2005 exceeded average prices at Cape Cod gas stations by 58 cents per gallon. *Id.* Average prices at defendants' gas stations in November 2005 exceeded average prices at Cape Cod gas stations by 61 cents per gallon. *Id.*

To avoid this result, defendants suggest, without any reference to the wording of the Massachusetts Price Gouging Statute, that this court instead compare average monthly price increases during the emergency period on Cape Cod to average monthly price increases during the emergency period on Martha's Vineyard. *Def. Br., pp. 53-54.* This comparison suggested by defendants not only has no relationship to the language of the Massachusetts Price Gouging Statute, it requires a comparison of apples to oranges given the data available to the parties in this case. The parties have daily prices and profit margin data available for the defendants for before and during the market emergency period. *See A0320-324.* The parties only have average monthly figures for gas stations on the Cape for the same periods. *See A0509-0510.* As noted in Plaintiffs' principal brief, defendants' prices after Hurricanes Katrina and Rita actually were lower than pre-emergency prices on certain days toward the end of the emergency period, although defendants were still realizing record profits because of the fact that they did not lower their prices as fast as costs were decreasing. *Pl. Br., p. 56.* Because defendants rely on monthly average price increases on the Cape (rather than daily prices), there is no way to know whether the average price increases in the two areas are only comparable because of these later days in the market emergency period when defendants decreased their prices, whether prices ever spiked as high on the Cape as they spiked at defendants' stations, whether profit margins increased at Cape stations to the over $1.00 per gallon to which they increased at defendants' gas stations, or whether Cape price increases are inflated because some gas stations on Cape Cod may have engaged in price gouging. Fortunately, the court does not need to know this information, as the Massachusetts Price Gouging Law does not require a comparison of price increases of defendants' gas stations to a comparison of price increases at gas stations on Cape Cod.

Conclusion

For the reasons stated in this Brief and Plaintiffs' Principal Brief, this Court should overturn the Lower Court's granting of summary judgment in this case. In the alternative, this Court should overturn the Lower Court's granting of summary judgment on Count I and certify to the Massachusetts Supreme Judicial Court the question of whether "price gouging" under 940 CMR § 3.18 should be measured solely by changes in prices at the pump (as found by the Lower Court) or whether "price gouging" should be measured by changes in profit realized from changes in pricing at the pump.

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Certificate of Compliance with Rule 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because this brief contains 3,536 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because this brief has been prepared in a proportionally spaced typeface, i.e. 14 point Times New Roman, using Microsoft Word 2007.

/s/Stephen Schultz
Stephen Schultz