`UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 07-11601-RWZ

WILLIAM WHITE, *et al.*

v.

R. M. PACKER CO., INC., *et al.*

ORDER

January 6, 2010

ZOBEL, D.J.

I. Introduction

Martha's Vineyard is an island some seven miles off the coast of Massachusetts. The island's gas stations charge relatively high prices for gasoline, and plaintiffs, a group of residents and a corporation, see evidence of a decade-long conspiracy to fix prices and instances of price gouging following hurricanes Katrina and Rita in 2005. They now sue four of the gas stations with a two-count complaint alleging, respectively, violation of the Sherman Act § 1 and Mass. Gen. Laws ch. 93A. Defendants move jointly for summary judgment on Count I and separately on Count II.

II. Background

Martha's Vineyard is home to 15,000 year-round residents and 125,000 residents during the summer. The island is accessible by ferry, including one capable of carrying vehicles, or by air. Nine gas stations serve the island's petrol needs. The most recent gas station opening was in 1997. Since then the Martha's Vineyard

Commission ("MVC"), which must approve certain types of commercial development including gas stations, has denied all petitions to open stations. See generally Tisbury Fuel Serv., Inc. v. Martha's Vineyard Comm'n, 864 N.E.2d 1229 (Mass. App. Ct. 2007) (upholding a decision to deny an application to build a gasoline station).

On August 28, 2007, plaintiffs brought this suit against the owners of four of the stations: Tisbury Shell, XtraMart Citgo, Depot Corner Mobil, and Edgartown Mobil. Tisbury Shell, owned by defendant R.M. Packer, and XtraMart Citgo, owned by defendant Drake Petroleum ("Drake"), are located in Vineyard Haven.[1] Edgartown Mobil, owned by defendant Frank Paciello, and Depot Corner, owned by defendant Depot Corner of which Paciello is the sole shareholder (collectively "Edgartown Mobils"), are located in Edgartown, eight miles to the southeast of Vineyard Haven. R.M. Packer and Drake are also gasoline distributors, and Paciello purchases gasoline for the Edgartown Mobils at wholesale from Drake.

The record includes evidence from which a jury could infer both supracompetitive profits and parallel pricing.[2] From August 1, 2003, to October 14, 2005, the average price difference between Tisbury Shell and XtraMart Citgo was 0.9 cents. From October 15, 2005, through March of 2008, prices were identical, with rare exceptions. The Edgartown Mobils' prices rose and fell in sync with the Vineyard Haven stations and averaged slightly higher costs. Over three periods of time, from

[1] Defendant Kenyon, although named as a separate defendant, merged with defendant Drake on January 1, 2004.

[2] The record is viewed "in the light most hospitable to the party opposing summary judgment, indulging all reasonable inference in that party's favor." Griggs-Ryan v. Smith, 904 F.2d 112, 115 (1st Cir. 1990).

May 25 to September 15, 2004, March 20 to May 25, 2005, and July 15 to November 7, 2005, prices at the four gas stations rose or held steady while the wholesale cost of gas declined. This parallel pricing developed even though the relative wholesale cost of Shell, Citgo, and Mobil gasoline varied. Also, during the period from 2004 to 2006, the market share of the defendants remained stable, varying by no more than 1.2 percentage points.

According to plaintiffs' expert, during a five-year period beginning August 1, 2003, gasoline prices at the defendants' stations exceeded prices at stations in Cape Cod, Massachusetts, by an average of 56 cents per gallon. The added cost in delivering gasoline on the island amounted to 21 cents, leaving an additional net profit of 35 cents per gallon.[3]

Plaintiffs' Second Amended Complaint alleges in Count I that the four defendants fixed gas prices in violation of the Sherman Act, § 1, thereby harming a class defined as all individuals who purchased gas at the defendants' stations from December 31, 1999, to the date of filing. Count I is limited, however, by the statute of limitations to Sherman Act violations occurring on or after August 2, 2003 (Docket # 53). Count II alleges price gouging in violation of Mass. Gen. Laws ch. 93A, § 2 during the period of time following hurricanes Katrina and Rita from August 29 to December 1, 2005, with a class of all individuals who purchased gasoline at defendants' stations from approximately August 31, 2005, through December 2, 2005.

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[3]Plaintiffs' expert, Frank Gollop, calculated these numbers after reviewing financial data produced by defendants during discovery. (Docket # 137 Ex. 3.)

Defendants move jointly for summary judgment on Count I, and individually, but with nearly identical motions, on Count II.

III. Analysis

To survive a motion for summary judgment, the opposing party must "set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e)(2). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." Matsushita Elec. Indus. v. Zenith Radio Corp. 475 U.S. 574, 587 (1986).

A. Count I – Sherman Act

Section 1 of the Sherman Act, 15 U.S.C. § 1, prohibits "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." Accordingly, to demonstrate a contract, combination, or conspiracy plaintiff must "present evidence that tends to exclude the possibility that . . . [defendants] were acting independently." Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 768 (1984); see Matsushita, 475 U.S. at 588 (holding "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy").

While an agreement to fix prices is unlawful, conscious parallelism, where competitors independently decide to parallel each others' prices, is lawful.

> Tacit collusion, sometimes called oligopolistic price coordination or conscious parallelism, describes the process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions.

Brooke Group LTD., v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227 (1993). Therefore, while an antitrust claim may be predicated on parallel pricing, which for purposes of their motion, defendants concede exists, there must also be "plus factors," circumstantial evidence that suggests an associated agreement rather than the independent conduct of conscious parallelism. Apex Oil v. DiMauro, 822 F.2d 246, 253-54 (2d Cir. 1987); see Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 557 n.4 (2007) (giving examples of the type of parallel conduct allegations that would state a § 1 claim); Clamp-All Corp. v. Cast Iron Soil Pipe Inst., 851 F.2d 478, 484 (1st Cir. 1988) (finding that evidence of price lists showing parallel pricing, without more, "does not permit a finding of more than such individual, interdependent, price setting"). The theory of conspiracy, supported by these plus factors, must also be economically reasonable, Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451, 468-69 (1992), which defendants concede for purposes of this motion.[4]

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[4] The conditions in the Martha's Vineyard gasoline market are remarkably conducive to the development of parallel pricing, whether through a conspiracy or merely conscious parallelism. The market for gasoline is highly inelastic; gasoline is a necessity and residents cannot feasibly purchase gasoline off of the Vineyard, so gasoline demand is minimally affected by a change in price. Price coordination is easy, because there are only nine gas stations on the Vineyard and gasoline prices are openly posted. Further, gasoline is a non-durable good, so a consumer who does not buy today will need to buy tomorrow. Therefore, a station owner can advertise a higher price, wait a short time to see if other gas stations follow, and if they do not, the owner can reduce the price with minimal loss to sales.

Plaintiffs point to a variety of plus factors as evidence of conspiracy, but most are indicative only of parallel pricing and do not tend to exclude the possibility of independent action. Specifically, a motive to earn large profits, abnormal profits, price changes unrelated to costs, price leadership by one firm, and fixed market shares would all be expected if defendants engaged in conscious parallelism, aligning their prices without an agreement to fix prices.[5] (See Pl. Expert Report 25-27 (concluding that defendants' profits, stable market shares, and parallel pricing were consistent with non-cooperative behavior).) Plaintiffs do, however, point to some direct evidence and four plus factors which, as characterized by plaintiff, suggest an agreement. I review this evidence below.

1. Direct Evidence

Steven Wehner was part of a consortium in the late 1990s that unsuccessfully petitioned the MVC to open a gas station, and he met with both James Ahern, then president of Drake, and Ralph Packer, representing R.M. Packer, to discuss the wholesale supply of gasoline. During a discussion with Ahern in December 1999, Wehner suggested leasing this new station to Drake, but indicated that Drake would have to honor a gasoline discount proposal that the consortium had made to the MVC. Ahern responded that Drake would not be offering discounts if Packer did not "cut

[5]Nor is there evidence of an agreement in either Drake's hire of a third party to lobby before the MVC against the approval of any new gas station, which is conduct that would be expected even in a competitive gasoline retail market, or structural attributes of the Vineyard economy which are not attributable to defendants' conduct and simply make the economy ripe for the development of conscious parallelism.

those [Vineyard resident] people any slack." (Dep. of Steven Wehner 38, Docket # 137 Ex. 4.)

At a subsequent meeting in December the parties again talked about the wholesale supply of gasoline. During the meeting Ahern picked up the phone and called Packer, without introducing himself, and the two made small talk. After the call he stated "I talk to Packer frequently," and "we all work together." (Dep. of Sean Conley 12, 15, Docket # 137 Ex. 12.)

Later in the meeting, Wehner shared his belief that a new discount gas station would cause a chain reaction among gas stations on the island, lowering prices. Ahern responded that if the Edgartown Mobils, which purchased Drake gasoline, started mucking around with prices, gasoline deliveries might be interrupted and "they'll get the idea real quick." (Dep. of Steven Wehner, at 44.)

Plaintiffs' argument that these statements by Ahern are direct evidence of conspiracy has two substantial problems. First, these statements occurred in 1999, nearly four years prior to the earliest date for which plaintiffs bring this claim. Second, Mr. Wehner was talking with Ahern (and Packer) as a potential wholesale purchaser of gasoline, and wholesale pricing is not at issue in this case. Notwithstanding these problems, Ahern's aversion to a unilateral gasoline discount makes good business sense in a competitive market, and whatever the antitrust implications might be if Drake actually interrupted supplies to the Edgartown Mobils, prospective comments about interrupting supplies demonstrate a lack of agreement to fix prices. Only the statement

"we all work together" suggests coordinated behavior, and as noted above, the conversation concerned wholesale gasoline prices in 1999.

2. Verbal Communications

Plaintiff offers as evidence of conspiracy both Ahern's 1999 statement that he talks frequently with Packer and the undisputed fact that Paciello talks often with Drake, see Apex Oil, 822 F.2d at 254 (identifying a high level of interfirm communication as a plus factor), but the existence of these communications does not support a reasonable inference of conspiracy. First, as discussed, the only evidence of communications between Ahern and Packer dates to 1999, and the content of those communications is unknown. There is no evidence of any communications between Ahern or Drake and Packer after 1999. Second, no inference can reasonably be drawn from the existence of communications between Paciello and Drake, because they would necessarily have to communicate regarding their ongoing contract for the wholesale supply of gasoline. There is no evidence that their communications concerned retail pricing.

3. Personal Loan

The current sales contract between Drake and Paciello, effective February 10, 2003, for a 20-year term, includes a personal loan to Paciello, which he used to buy out the co-owner of the Edgartown Mobils. Drake has the right to terminate after 10 years, at which time the balance of the loan would become immediately due. This loan is unique; to Ahern's recollection it is the only instance where Drake loaned money to an individual, or signed a 20-year sales contract.

There is a facially legitimate justification for the loan, to allow a part-owner of a longtime customer to secure full ownership, but a jury could also reasonably infer that this unusual loan gave Paciello some incentive to conspire with Drake, and that the repayment terms could leave Paciello beholden to Drake. See In re Nasdaq Market-Makers Antitrust Litigation, 894 F. Supp. 703, 713 (S.D.N.Y. 1995) (identifying common motivation as a plus factor).

4. False Statements and Pretextual Justifications

Ahern and Packer made statements during the course of this litigation that plaintiff alleges are false or pretextual. See Fragale & Sons Bev. Co. v. Dill, 760 F.2d 469, 474 (3d. Cir. 1985) (identifying pretext as circumstantial evidence of conspiracy). First, Ahern claims he has never spoken with Packer on the phone and can recall only one business meeting with him (Dep. of James Ahern 38-42, Docket # 137 Ex. 6), which is contrary to his statements to Wehner in 1999.

Second, Packer denies that Tisbury Shell's prices are kept at a higher than competitive level (Dep. of Ralph Packer 36, Docket # 137 Ex. 29), and claims that Tisbury Shell earns less than $100,000 per year and has issued no dividends in the past 10 years. (Id. at 45-46, 70.) In contrast, there is evidence from which parallel pricing could reasonably be inferred, and financial records indicate that R.M. Packer averaged more than $800,000 in earnings and paid $950,000 in dividends between 2003 and 2007.[6] (R.M. Packer Consolidating Statements, Docket # 137 Exs. 30-34.)

However, regardless of whether these statements were false or pretextual, their

[6] R.M. Packer did not maintain a separate accounting for Tisbury Shell, but it accounted for 40% of revenues.

substance is collateral to the issue at hand: establishing the existence of an agreement to fix prices. The evidence of Ahern communications is from 1999, not 2003 or later, in a meeting concerning wholesale gasoline, not retail gasoline. The existence (or lack thereof) of competitive pricing and the profits at Tisbury Shell relate to parallel pricing, but do not help to distinguish between conscious parallelism and concerted action.

5. Summary Judgment - Significance of the Direct Evidence and Plus Factors

Plaintiff must rely on this direct evidence and the plus factors, in total, to exclude the possibility of independent action and survive summary judgment. It is not enough. The “direct evidence” is ambiguous at best and arguably suggests a lack of agreement. The evidence of verbal communications between Packer and Ahern dates to 1999, four years before the period covered by plaintiffs’ claims, and there is no information as to the content of these decade-old conversations. The alleged false statements and pretextual justifications concern matters which are collateral to proving the existence of an agreement. All that is left is a loan which could provide motive for Paciello and Drake to conspire, or could simply reflect a business decision in the context of a wholesale gasoline supply agreement. Significantly, there is no evidence of any communications between Packer and Drake after 1999, nor of any communications, at any time, among all three defendants. No reasonable jury could find an agreement to fix prices based on this evidence. Defendants are entitled to summary judgment on Count I.

B. Count II – Mass. Gen. Laws ch. 93A, § 2

The Massachusetts Attorney General has defined petroleum price gouging for the purposes of Mass. Gen. Laws ch. 93A. See id. at § 2© (giving the attorney general authority to issue regulations interpreting ch. 93A, § 2).

> (1) It shall be an unfair or deceptive act or practice, during any market emergency, for any petroleum-related business to sell or offer to sell any petroleum product for an amount that represents an unconscionably high price.
>
> (2) A price is unconscionably high if:
>
> (a) the amount charged represents a gross disparity between the price of the petroleum product and
>
> 1. the price at which the same product was sold or offered for sale by the petroleum-related business in the usual course of business immediately prior to the onset of the market emergency [the parties agree, for the purposes of the pending motions, that the market emergency was August 29, 2005 through December 1, 2005], or
>
> 2. the price at which the same or similar petroleum product is readily obtainable by other buyers in the trade area; and
>
> (b) the disparity is not substantially attributable to increased prices charged by the petroleum-related business suppliers or increased costs due to an abnormal market disruption.

940 Mass. Regs. Code 3.18.

Thus, to constitute price gouging, the price must by unconscionably high, defined as a *gross disparity* from either the price *immediately prior* to the market emergency or the price of readily obtainable product in the trade area.[7] The statute does not define any of the emphasized terms, no court has interpreted the statute, and

[7] Plaintiffs' arguments concerning margin rather than price, including those which rely on the Federal Trade Commission report and New York case law, are inconsistent with the plain language of the statute. The statute expressly directs the comparison of price, not margin.

the parties dispute the meaning. However, the plain language and Massachusetts law provide guidance. See Seideman v. City of Newton, 895 N.E.2d 439, 444 (Mass. 2008) (holding "[w]e derive the words' usual and accepted meanings from sources presumably known to the statute's enactors, such as their use in other legal contexts and dictionary definitions").

"Gross disparity" is a term of art in Massachusetts contract law. In that context, a gross disparity exists when the difference between the value and the consideration is so substantial that the exchange is facially inadequate. See Waters v. Min Ltd., 587 N.E.2d 231, 234 (Mass. 1992) (finding an unconscionable "gross disparity" where defendant purchased an annuity worth $189,000 for only $50,000, and citing a case where $4,750 in value was exchanged for $2,750); Jones v. Star Credit Corp., 298 N.Y.S. 2d 264, 266 (N.Y. Sup. Ct. 1969) (finding sale of $300 freezer for $900 is unconscionable), cited in Waters, 587 N.E.2d at 233. With price gouging in the gasoline context, the concern is that the seller uses the buyer's need for gas to drive an unjustly hard bargain. So, by analogy, a gross disparity is a rise in price so significant that it is facially not a normal market fluctuation.

The parties also differ on the meaning of "immediately prior," with the defendants suggesting either the day preceding or the average of the prior week, and plaintiffs offering the price in late May 2005. However, "immediately prior" plainly does not encompass the price three months prior to the market emergency. Defendants' prior-

week definition is logical, in keeping with the purpose of the statute and the appropriate measure.[8]

The largest disparity in price between any single day during the market emergency and the average of the week before was 11.57% at Tisbury Shell (Packer's Mem. in Supp. 8, Docket # 115), 19.36% at Xtramart Citgo (Drake Mem. in Supp. 7, Docket # 122), and 18.5% at the Edgartown Mobils (Paciello Mem. in Supp. 8, Docket # 119).[9] The average price increase over the market emergency was 3% at Tisbury Shell, 11% at Xtramart Citgo, and 4% at the Edgartown Mobils.

A review of the pricing history at defendants' stations shows that this degree of price fluctuation is consistent with the normal operation of the market. For example, the average monthly price at Tisbury Shell varied by more than 23% over the course of 2004, nearly 26% before the market emergency in 2005, and almost 36% in 2006. (Gollop Expert Report, at Table 1.) On a month-to-month basis, there was a fall of 13% between August and September of 2006, a nearly identical variation to the 14% rise over the same period in 2005, during the emergency. Id. Therefore, as a matter of law, these changes in price are not a "gross disparity" and do not represent price gouging.

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[8] There is no meaningful difference between the one-week average and the day prior. For example, the price was $3.10 at XtraMart Citgo for the entire week preceding August 29, 2005. (Gollop Expert Report, at Table 11.)

[9] Prices are for regular unleaded, although the numbers are similar and the conclusion the same for mid-level and premium. A review of the underlying evidence submitted in support of these motions indicates that the defendants used different methods to calculate the percentage change in price, but these differences have only a small and immaterial effect on the outcome of the calculation. For the sake of simplicity, this court simply relies on the numbers used by the defendants in their briefs.

Moreover, the result is the same when comparing prices on Martha's Vineyard with Cape Cod.[10] Prices are always higher on Martha's Vineyard because the cost of supplying gasoline on the island is greater than the cost of supplying gasoline on mainland Massachusetts. Tisbury Fuel Serv., 864 N.E.2d at 773 n.1 ("Gasoline prices on Martha's Vineyard are high and do not reflect market prices elsewhere in Massachusetts"). In August 2005, prior to the market emergency, the price difference was 20%. The difference during the market emergency was 16.7% in September, 21% in October, and 25% in November. (Gollop Expert Report, at Table 1.) These small shifts in relative price, with the difference actually declining in September, are not, as a matter of law, a gross disparity constituting price gouging.

IV. Conclusion

Defendants' joint motion for partial summary judgment on Count I (Docket # 111) is ALLOWED. Defendants' motions for summary judgment on Count II (Docket ## 114, 116, 120) are ALLOWED. Drake's motion to compel (Docket # 106) is DENIED AS MOOT. Drake's motion for leave to file a reply (Docket # 107) and R.M. Packer's motion for leave to file a reply (Docket # 108), both concerning previously decided motions to dismiss, are DENIED AS MOOT.

Judgment may be entered for defendants.

[10] The parties also dispute whether the relevant trade area is Martha's Vineyard or Cape Cod, but the court will assume the plaintiff-favorable Cape Cod definition, as it does not affect the outcome of the analysis. Plaintiffs do not compare defendants' prices with other gas stations on the island.

January 6, 2010
DATE

/s/Rya W. Zobel
RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE