

13-466
No. _____

In the Supreme Court of the United States

ADVANCED MICROTHERM, INC.; HVAC SALES, INC.,
Petitioners,

v.

NORMAN WRIGHT MECHANICAL EQUIPMENT
CORPORATION; F.W. SPENCER & SON, INC.,
Respondents.

*On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit*

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

It is consistently postulated by economists that free market forces will prevent long term monopolies and price-fixing conspiracies because high non-competitive prices will lure new entry competitors who will force the monopolists or price-fixers to price competitively. This theory may be hypothetically valid, but it is debunked by real world experience. The real world response is to snuff out the competitor with predatory pricing or other anticompetitive and exclusionary conduct, and then return to monopolistic or price-fixing prices and market control. See *Standard Oil Co. v. United States*, 221 U.S. 1 (1911), *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931), *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962).

In this case, the Courts below excluded any evidence of the existence of the monopoly and price-fixing prior to the entry into the market of the price cutting competitor. Therefore, the questions presented are:

1. Whether a pre-existing price fixing agreement in a market is admissible evidence to show the motive, intent, and purpose of predatory acts against a new entrant?
2. Whether massive bribes to secure tying arrangements that exclude the plaintiff from substantial markets is a per se violation of the antitrust laws, as previously held by this Court in *International Salt Co., Inc. v. United States*, 332 U.S. 392 (1947)?

3. In a market saturated by massive commercial bribes, is it error to instruct the jury that they may not consider the overall effect of the bribes on all customers receiving them, but rather may only consider them on a project by project?

4. When a Federal Court exercises pendent jurisdiction over a California state law tying claim, is an antitrust plaintiff deprived of due process if the Federal Court applies the more stringent federal tying standard to the state law tying claim, rather than the less stringent California standard?

5. Whether the credibility of an impeached material witness is for the jury, or may the Court substitute its view of the testimony and then grant directed verdict on that interpretation?

PARTIES TO THE PROCEEDINGS

Petitioners in this Court, Plaintiffs-Appellants below are: Advanced Microtherm, Inc., and HVAC Sales, Inc.

Respondents in this Court, Defendants-Appellees below are Norman Wright Mechanical Equipment Corporation and F.W. Spencer & Son, Inc.

RULE 29.6 DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, no petitioner has a parent company and no publicly held company owns 10% or more of any petitioner's stock.

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REQUESTED RELIEF

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit and reverse and remand the case for trial.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported. Appendix to the Petition for Writ of Certiorari ("App.") 1-6. The opinions of the district court (App. 7-21 and 22-69) are unreported.

JURISDICTION

The Court of Appeals entered its judgment on May 30, 2013. (App. 1.) The court denied a timely petition for rehearing with a suggestion for rehearing en banc on July 11, 2013 (App. 70-71.) Therefore, the deadline for filing a Petition for Writ of Certiorari pursuant to Supreme Court Rule 13, is October 9, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The following relevant statutory provisions are reproduced in the Appendix at Appendix E.

Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26.

Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2.

California Business and Profession Code, § 16700, et seq.

STATEMENT OF THE CASE AND OF THE BASIC FACTS

This is a private antitrust suit brought under Sections 4 and 16 of the Clayton Antitrust Act alleging injury and damage caused by and seeking injunctive relief against violations of Sections 1 and 2 of the Sherman Antitrust Act and the California Antitrust Act known as the Cartwright Act.

The parties are Plaintiffs Advanced Microtherm, Inc.'s ("AMT") and HVAC Sales, Inc.'s ("HVAC Sales"), and Defendants Norman S. Wright Equipment Company ("NSW"), and F. W. Spencer & Son, Inc. ("FWS").

The market is the sale of large scale air condition and heating products (HVAC) in large commercial buildings, principally government buildings, in Northern California, such as Moscone Center (a convention hall), Pac Bell Park (a sports ball park), San Bruno Jail facility, BART terminal buildings (a municipal transportation facility), and Federal buildings, such as the Franchise Tax Board Building. These projects involve millions of dollars of sales of air conditioning and heating equipment.

Air conditioning and heating equipment is referred to as "dry side." Plumbing is referred to as "wet side." This case involves "dry side" products.

Plaintiffs AMT and HVAC Sales competed against the defendant NSW to sell HVAC equipment in the Northern California Market. AMT and HVAC are new entrants into the market and had the financing, the staffing, and product offerings to compete with NSW. (ER 548-551) There were only two companies offering the complete line of products found in AMT's Line card. Those two companies were NSW and AMT. (ER 551-552)

The defendant FWS is a mechanical contractor which purchases and installs the HVAC equipment. NWS is a tenant in FWS's building. (ER 628) FWS's and NSW's two CEO's, William Spencer and Richard Leao, talk to each other every day. (ER 487-489)

The decisions and the flow of the business starts with the architect who in turn hires the contractor. The contractor then determines what equipment is needed, and then promulgates the specifications it wants. The plaintiffs and the defendants then compete against each other to supply the equipment the contractor needs or wants. The bribes alleged in this case were made by NSW to the contractors to favor NSW. Although plaintiffs AMT and HVAC Sales would bid \$1 million less on major projects for the sale of the same or equally functioning equipment, the bribes to the contractors and the contrived tie-ins of a pretended necessary type brand (of which NSW had an exclusive) prevented AMT and HVAC Sales from competing on the merits and ultimately drove the plaintiffs out of business.

The District Court below excluded the evidence of the defendants' price-fixing and bid-rigging on the

ground that the plaintiffs were not injured by reason of that price-fixing and bid-rigging. The Court of Appeals affirmed that decision for the same reason. The plaintiffs conceded that they were not injured because they were competitors, not customers. However, the plaintiffs argued that the evidence demonstrated motive and intent, and the purpose of the bribes and anticompetitive conduct against the plaintiffs. The plaintiffs asserted that the price-fixing provided the platform from which the anticompetitive acts against the plaintiffs were launched. Indeed, the defendants' economic expert, Dr. Lawrence Wu, easily recognized and understood that the evidence would show motive to eliminate the plaintiffs:

Q. MR. ALIOTO: Would you agree that one of the purposes of bid-rigging is to eliminate competition between and among potential bidders?

A. MR. WU: Bid-rigging among horizontal competitors would have that effect if—if successful.

Q. I know it would have that effect, but do you believe that, that's one of the incentives or motives?

A. That's—that's probably a fair characterization, that the desire to reduce competition and raise prices is a motivation for anti-competitive bid rigging. (ER 1741-1745)

[* * *]

Q. I'm only asking you whether or not it's an illogical assumption for conspirators who have in place a bid-rigging conspiracy—and let's say it is long-term—and someone new comes into the market and upsets that bid-rigging conspiracy that is on-going by coming into the market at lower prices, is it illogical to assume that one of their motives might be to attempt to eliminate that competitor in order to return to the bid-rigging?

A. Well, if you're asking me whether that's one strategy that the bid riggers may want to contemplate, then, yes, it might be one strategy that they would contemplate. (ER 1749)

Notwithstanding this Court's prior cases showing that such evidence is necessary to show the "whole picture" and that subsequent acts are in furtherance of the monopoly or price-fixing, such as *Standard Oil*, *supra*, (evidence of defendant's monopoly even before the passage of the Sherman Act), *Story Parchment*, *supra*, and *Continental Ore*, *supra*, (evidence of the defendants' price-fixing and monopoly before the plaintiffs entered the market), both the District Court and the Court of Appeals completely misunderstood the basis for the evidence and thereupon excluded it.

The trial court prohibited Plaintiffs from putting in evidence of bribes unless the bribes were tied to P-Projects. (ER 819; 825-826; 807-808; 812-816; 76:10-12)

**Landscaping for Customer's
(or Neighbor's) Residence.**

Richard Ghoukassi had worked for NSW as a sales engineer for 18 years. He reported directly to Richard Leao, NSW's CEO [and owner]. (ER 826-1)

Q. Now you want to sell your products to that contractor, correct? A. Yes. Q. So you give your products like this and he gives you money for that, correct? A. Correct. Q. But in this instance you are paying for this contractor's landscaping, aren't you? A. Yes, it could be part of it, sure. Q. Okay. So that instead of just selling him products, you are also going to pay him, for some his landscaping? A. Okay. (ER 805)

[* * *]

Q. Why did you pay for this landscaping if you already had the job? A. Why not? He is a customer. Q. Okay. So customers, you wouldn't mind paying for things like landscaping because they're customers? A. – This not a regular occurrence. It happens from time to time and, you know – Q. And so do you –do you go back to this contractor for additional business in the future? A. Of course. (ER 806; see also, ER 809-810)

Home furnishings for Summer Home in Mexico

Mike Rubio, worked for NSW's as a Senior Vice President for Sales for ten years. (ER 817) He testified:

Q. You were advised, were you not, that Mr. Loeffler at West States Mechanical [East Bay] wanted NSW to provide him with housing materials for his house in Mexico? A. I don't remember all the specifics, but generally that's the case, yes. (ER 818-824) See also ER 427, which is an e-mail from Mr. Rubio to Mr. Leao obtaining authorization to pay a bribe.

Deep Sea Fishing Trips to Cabo San Lucas for Mechanical Design Engineers like John Markowitz

John Markowitz was employed by Ove Arup as a mechanical design engineer. He was the mechanical design engineer for the Stanford CCSR Project. (ER 757; 583-1-583-8; 584-585) He went on a deep sea fishing trip to Cabo San Lucas paid for by NSW, to wit:

Q. Did you go fishing? A. I went fishing. Q. Deep sea fishing? A. Yes. Q. Did you pay for any portion of that trip? A. No, I didn't. Q. Is it your understanding that NSW paid for it? A. That's my understanding. [***] Q. Who from NSW do you recall being on that trip? Steve Dobberstein [senior NSW sales engineer]; Sal Giglio [NSW owner]; another guy whose name slips my mind. (ER 756-757)

**Refusal to Lower Pricing unless the
Substituted Product Was Supplied by NSW.**

Ted Treat [ACCO engineer] was hired to reduce the price of HVAC equipment on the Stanford CCSR project. John Markowitz would not accept products unless they supplied by NSW, even if they were cheaper. (ER 1487-1489)

Q. MR. BRASSO: What did you [i.e., Burns] say when he gave his explanation that he couldn't accept the Phoenix Valve? Q. What were the reasons given for his [i.e., Ted Treat] refusal to deal with you? A. MR. BURNS: He said the design engineer [i.e., John Markowitz] would not accept that valve or any other product unless it was sold by NSW. (ER 584-585; 583-1-583-8)

**NSW Paid for Deep Sea Fishing
Trips to Central America.**

Victor Critchfield was Vice President of Critchfield Mechanical, Inc. ("CMI") He worked as a mechanical engineer and mechanical contractor for that company. (ER 511-512)

Q. MR. ALIOTO: From time to time have you gone on trips that were funded by NSW? A. MR. CRITCHFIELD: Yes. Q. When I say "funded," I mean paid for by NSW, not by you? A. Fishing trips. Q. Where would you have these trips? A. We went to Belize twice or three times. Q. Belize in Central America? A. Correct. Went to Belize twice. Q. How long were these trips? A. Four days, maybe five.

Q. Four or five days each? A. Yes. Q. They would pay for you to go down there with them, have these trips for four or five days? A. Yes. (ER 514-515)

**Admission by NSW Owner, Sal Giglio,
That Dell Computers Were Sent to
Design Engineer's Homes.**

Sal Giglio, NSW owner, told Michael Sabbaghian that NSW sent computers to engineers' homes. (ER 574-576)

**Expert Victor Neuman's Testified That a
Gift or Gratuity in Excess of \$320 Violates
the Ethical Guidelines That Govern the
Conduct of Mechanical Engineers.**

Expert Victor Neuman was qualified as an expert on mechanical engineers' ethical guidelines. He testified that mechanical engineers cannot accept gifts or gratuities in excess of \$320, and he commented on other ethical violations as well.

Q. MR. BRASSO: And were you familiar that there were certain limits as to gifts you can accept? A. MR. NEUMAN: Yes. Q. What's the limit? A. The limit was \$320 per year per person from each vendor. Q. So that means if you are a mechanical engineer, you're not supposed to accept a gift of more than \$320, is that correct? A. That's correct? (ER 791-793; 795-797; 784-790). See also, testimony of NSW's ethics expert where he testified that "there could be a dependence created by, over

time, generosity from one party to another.” (ER 465-467)

JMOL in Favor of FWS

1. William Spencer testified in his deposition that it was the business policy of his company to always accept the lowest price. (ER 627; 629-636; 644-645; 662) On the Moscone Center Project, Plaintiff AMT's price was almost \$1 million lower than NSW's price, but FWS accepted NSW's higher price. (ER 637-639; 642-643; Trial Exhibit 73 (ER 616-624; 640-642; 644-645) He changed his testimony at trial. Nonetheless, the Trial granted a directed verdict based on his changed testimony, taking the matter of credibility of the witness away from the jury and thereby usurping the jury's function.

2. William Spencer testified that on the Moscone Center Project when he had “change orders,” he submitted those change orders to multiple vendors to supply the change orders. (ER 646-648) But FWS had over \$4,000,000 in change orders on San Francisco Bart Extension, Concourse H. (ER 663) It purchased all the HVAC products needed for change orders from NSW. (ER 596; 651; 653-654; 655-656; 657-660)

3. Plaintiffs' Expert, Victor Neuman, testified that no knowledgeable mechanical contractor would have paid the high prices FWS paid to NSW in the absence of collusion. (ER 802-803)

4. Q. MR. BRASSO: When Mr. Norman [San Francisco Deputy District Attorney] asked you [Troy Smith] whether you were

telling him that AMEC [former Defendant who settled] already had its clique or knows who it is going to award the contract to, your answer was right? Is that true? A. MR. REESE: That was my answer, Yes. Q. And then Mr. Norman asked you, "So its predetermined that the work is going to go to Spencer? A. I answered right. (ER 535)

5. Q. Now you [Troy Smith] purchased [for FWS] on the San Bruno Jail project over \$653,000 of dry side products from NSW? A. I believe so, yes. (ER 536) But Spencer paid the money. (ER 1587, 1676-1677)

REASONS FOR GRANTING THE PETITION

This Court has consistently ruled that the jury in an antitrust case should be allowed to consider "the whole picture," including evidence of trade restraints that existed prior to a plaintiff's entry into the market. In this case, the evidence of prior trade restraints in the market would have given the jury the motive, purpose and intent of the subsequent acts against the plaintiffs, and demonstrate that those anticompetitive acts were in furtherance of the defendants' past control of the market. The strength of this Court's prior decisions should be reaffirmed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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