

NEW PRIME, INC.,
a Nebraska corporation,

Plaintiff

v.

ESPAR, INC.,
and
ESPAR PRODUCTS INC.,

Defendants.

ESPAR, INC.,)
and)
ESPAR PRODUCTS INC.,)
)
Defendants.)

COMES NOW plaintiff New Prime, Inc., a Nebraska corporation, (“Prime”), by and through its attorneys of record, HOSMER KING & ROYCE, LLC, and for its cause of action against defendants Espar, Inc. and Espar Products, Inc., states to the Court as follows:

2. Defendants and their co-conspirators agreed to fix, stabilize, and maintain prices of parking heaters for commercial vehicles sold to aftermarket customers in the United States, including Prime. Defendants' conspiracy unreasonably restrained interstate and foreign trade and commerce in violation of Section 1 of the Sherman Act, 15 U.S.C. §1.

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described herein, Prime was damaged and paid more for the parking heaters than it would have in the absence of the price-fixing conspiracy.

4. Prime brings this action to recover damages, including treble damages, costs of suit, and reasonable attorneys' fees arising from Defendants' antitrust violations.

JURISDICTION AND VENUE

5. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1337(a) and 1367.

6. Venue is proper in this judicial district pursuant to 15 U.S.C. §§ 15 and 22, and 28 U.S.C. § 1391(b) and (c), in that at least one of the defendants resides in this judicial district, is licensed to do business or is doing business in this judicial district.

PARTIES

7. Prime is a Nebraska corporation, with its principal place of business located in Springfield, Greene County, Missouri.

8. Defendant Espar, Inc. is an Illinois corporation with its principal place of business located at 29101 Haggerty Road, Novi, Michigan 48377-2913.

9. Defendant Espar Products Inc. is a Canadian corporation with its principal place of business located at 6099A Vipond Drive, Mississauga, Ontario, L5T 2B2. Espar Products Inc. is an affiliate of Espar Inc.

10. Both Espar Inc. and Espar Products Inc. are wholly-owned subsidiaries of J. Eberspacher GmbH & Co. and the Eberspacher Group, a German company headquartered in Esslingen, Germany.

FACTS

11. Parking heaters are devices that heat the interior compartment of a motor vehicle

independent of the operation of the vehicle's engine. Parking heaters are used in a wide variety of commercial vehicles.

12. Defendants sold and shipped parking heaters for commercial vehicles in a continuous and uninterrupted flow of interstate and foreign trade and commerce to aftermarket customers located in states and countries outside the place of origin of the shipments. In addition, substantial quantities of equipment and supplies necessary to the production and distribution of such parking heaters, as well as payments for those parking heaters, traveled in interstate and foreign trade and commerce.

13. During the relevant period, the business activities of Defendants in connection with the sale of parking heaters to aftermarket customers that were the subject of the charged conspiracy were within the flow of, and substantially affected, interstate, and foreign trade and commerce.

14. The relevant product market is the aftermarket for parking heaters for commercial vehicles.

15. The parking heater product market is a cognizable antitrust market. The boundaries of the parking heater product market are determined by the low cross-elasticity of demand between parking heaters and potential substitutes. A small non-transitory increase in price for parking heaters would not cause consumers of parking heaters to switch to any other product to provide heat to the interior of the vehicle when the engine is not running in sufficient numbers to defeat the price increase.

16. The parking heater product market is highly concentrated, with few main competitors, including Defendants.

17. The parking heater product market has high barriers to entry. The design and

manufacture of parking heaters requires complex technology, know-how, and infrastructure. Manufacturers bear substantial upfront development costs as well as significant facility and other infrastructure costs. Entry barriers for parking heater manufacturers include patents. The cost of competing in the parking heater product market includes significant costs for marketing and advertising, as well as dealer training.

18. The geographic market is the United States.

19. Parking heaters sold by Defendants included two primary types: air heaters, which work by heating interior or outside air drawn into the heater unit, and water or "coolant" heaters, which are integrated into the engine coolant circuit and heat the engine as well as the interior compartment.

20. As used in this Complaint, the term "parking heaters" includes the heaters themselves, accessories sold for use with heaters, and packages containing heaters and selected accessories.

21. On March 12, 2015, defendant Espar, Inc. pleaded guilty to participating in a combination and conspiracy suppress and eliminate competition in the sale of parking heaters for commercial vehicles in the aftermarket by agreeing to fix, stabilize, and maintain prices of parking heaters, sold to aftermarket customers in the United States and elsewhere in North America, from at least as early as October 1, 2007 through at least December 31, 2012, all in violation of the Sherman Antitrust Act, 15 U.S.C. §1.

22. According to the Plea Agreement and Information, defendant Espar, Inc. admitted that "for the purpose of forming and carrying out the charged conspiracy," it and its co-conspirators knowingly:

a. participated in communications, discussions, and meetings in the United States

and elsewhere to discuss aftermarket prices for parking heaters for commercial vehicles;

- b. agreed, during those conversations and meetings, to set a price floor for parking heater kits for commercial vehicles sold to aftermarket customers in the United States and elsewhere in North America;
- c. agreed, during those conversations and meetings, to coordinate the timing and amount of price increases for parking heaters for commercial vehicles sold to aftermarket customers in the United States and elsewhere in North America;
- d. exchanged information during those conversations and meetings for the purpose of monitoring and enforcing adherence to the agreements described in subparagraphs (b) and (c) above; and
- e. sold parking heaters for commercial vehicles to aftermarket customers at collusive and non-competitive prices in the United States and elsewhere in North America.

23. Prime purchased parking heaters produced by Defendants and, by reason of the antitrust violations herein alleged, paid more for such products than it would have paid in the absence of such antitrust violations. As a result, Prime has sustained damages to its businesses and property in an amount to be determined at trial.

24. Prime had neither actual nor constructive knowledge of the facts constituting its claim for relief despite diligence in trying to discover the pertinent facts. Prime did not discover, and could not have discovered through the exercise of reasonable diligence, the existence of the conspiracy alleged herein until March 12, 2015 when the antitrust investigation by the Department of Justice became public. Defendants and their co-conspirators engaged in a secret conspiracy that did not give rise to facts that would put Prime on inquiry notice that there

was a conspiracy to fix prices for parking heaters in the aftermarket.

25. Upon information and belief, Defendants and their co-conspirators had secret discussions about price and output. Defendants agreed not to, and did not, publicly discuss the nature of the price fixing scheme.

26. Defendants' purported reasons for the pricing of parking heaters were materially false and misleading and made for the purpose of concealing Defendants' price fixing scheme as alleged herein. As a result of Defendants' fraudulent concealment of their conspiracy, the running of any statute of limitations has been tolled with respect to any claims that Prime has as a result of the anti-competitive conduct alleged in this complaint.

29. Beginning in October 2007 and continuing at least through December 31, 2012, Defendants engaged in a conspiracy and agreement in unreasonable restraint of trade in violation of Section 1 of the Sherman Act (15 U.S.C. §1).

27. Defendant Espar, Inc. admitted that it and its co-conspirators knowingly:
- a. participated in communications, discussions, and meetings in the United States and elsewhere to discuss aftermarket prices for parking heaters for commercial vehicles;
 - b. agreed, during those conversations and meetings, to set a price floor for parking heater kits for commercial vehicles sold to aftermarket customers in the United States and elsewhere in North America;
 - c. agreed, during those conversations and meetings, to coordinate the timing and amount of price increases for parking heaters for commercial vehicles sold to aftermarket customers in the United States and elsewhere in North America;
 - d. exchanged information during those conversations and meetings for the purpose of monitoring and enforcing adherence to the agreements described in

subparagraphs (b) and (c) above; and

- e. sold parking heaters for commercial vehicles to aftermarket customers at collusive and non-competitive prices in the United States and elsewhere in North America.

28. As a result of Defendants' unlawful conduct, prices for parking heaters were raised, fixed, maintained and stabilized in the United States.

29. As a result of Defendants' unlawful conduct, Prime has been injured in its businesses and property in that it has paid more for parking heaters than it otherwise would have paid in the absence of that conduct.

30. Prime seeks monetary relief and attorneys' fees and costs.

WHEREFORE, Prime asks the Court for its judgment adjudging and decreeing that:

- A. Defendants have engaged in a contract, combination, and conspiracy in violation of Section 1 of the Sherman Act (15 U.S.C. § 1), and that Prime has been injured in its business and property as a result of Defendants' violations;
- B. Prime recover damages sustained by it, as provided by the federal antitrust laws, and that a judgment in favor of Prime be entered against the Defendants in an amount to be trebled to the extent such trebling is permitted pursuant to such laws;
- C. Prime be awarded pre-judgment and post-judgment interest, and that such interest be awarded at the highest legal rate from and after the date of service of the initial complaint in this action;
- D. Prime recover its costs of this suit, including reasonable attorneys' fees as provided by law; and
- E. Prime and members of the Class receive such other and further relief as may be just and proper.

JURY TRIAL DEMAND

Pursuant to Federal Rule of Civil Procedure 38(b), Prime demands a trial by jury of all of

the claims asserted in this Complaint so triable.

HOSMER KING & ROYCE, LLC

By: /s/ Stuart H. King

Stuart H. King

Missouri Bar Number 39410

313 South Glenstone Avenue

Springfield, Missouri 65802

Telephone: (417) 869-9999

Facsimile: (417) 869-9999

E-mail: stuart.king@hkrlawoffice.com

By: /s/ Justin A. Collins

Justin A. Collins

Missouri Bar Number 65388

2740 North Mayfair

Post Office Box 4208

Springfield, Missouri 65808-4208

Telephone: (417) 521-3162

Facsimile: (800) 454-4782

E-mail: JCollins@primeinc.com