USFL VS. NFL

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INTRODUCTION

- USUALLY TALK ON INDUSTRY STRUCTURE
  - 5 FORCES
  - IS AN INDUSTRY ATTRACTIVE?
  - IS IT LIKELY TO CHANGE?

Competitive Analysis

- TODAY IS A DIFFERENT MATTER
  - THE NFL IS INVOLVED IN A CONFLICT WITH THE USFL
    - THE CONFLICT IS PRIMARILY ONE OF GUERILLA WARFARE
    - THE STAKES WILL UNDOUBTEDLY ESCALATE
  - TODAY WE WILL ADDRESS SPECIFIC COMPETITIVE STRATEGY
    - WHAT THE USFL IS DOING
    - WHAT THE NFL CAN DO TO RESPOND

- WE ARE EXPERTS ON COMPETITIVE STRATEGY
  - WE WILL TRY TO BE AS SPECIFIC AS POSSIBLE BUT WE ARE NOT EXPERTS ON ALL THE SITUATIONS AND THE PLAYERS

- LETS TALK ABOUT COMPETITIVE STRATEGY AND THE ART OF WAR

USFL VS. NFL

THE ART OF WAR - CHINA 500 B.C.

"TO WIN EVERY BATTLE BY ACTUAL FIGHTING BEFORE A WAR IS WON, IT IS NOT THE MOST DESIRABLE. TO CONQUER THE ENEMY WITHOUT RESORTING TO WAR IS THE MOST DESIRABLE.

THE HIGHEST FORM OF GENERALSHIP IS TO CONQUER THE ENEMY BY STRATEGY. THE NEXT HIGHEST FORM OF GENERALSHIP IS TO CONQUER THE ENEMY BY ALLIANCE. THE STILL NEXT HIGHEST FORM OF GENERALSHIP IS TO CONQUER THE ENEMY BY BATTLES. THE WORST FORM OF GENERALSHIP IS TO CONQUER THE ENEMY BY BESIEGING WALLED CITIES."

USFL VS. NFL

THE ART OF WAR

- CONQUER BY ALLIANCE
  - THE COMBINATION OF LEAGUES - SIMILAR TO THE AFL AND NFL
- CONQUER BY BATTLES
  - THE LAWRENCE TAYLOR CONTRACT NEGOTIATIONS OR THE BILLY SIMS LEGAL NEGOTIATIONS
- BESIEGING WALLED CITIES
  - CHANGING THE NFL DRAFT DATE TO ONE WEEK AFTER THE USFL'S
  - SPECIFICALLY RAIDING PLAYERS OR COACHES FROM THE USFL

- CONQUER BY STRATEGY
  - WE ARE HERE TO EXPLORE THE POSSIBILITY
  - WHAT IS THE USFL'S STRATEGY

USFL VS. NFL

WHAT QUESTIONS MUST BE ASKED AND ANSWERED ABOUT COMPETITORS?

1. IS THE COMPETITOR SATISFIED WITH ITS CURRENT POSITION?
2. WHAT LIKELY FUTURE MOVES, OR STRATEGY SHIFTS WILL THE COMPETITOR MAKE AND HOW DANGEROUS ARE THEY?
3. WHERE IS THE COMPETITOR VULNERABLE?
4. WHAT WILL PROVOKE THE GREATEST AND MOST DAMAGING RETALIATION BY THE COMPETITOR?

USFL VS. NFL

DISTRIBUTION

- IF USFL'S NIELSON ~~HAVE~~ RATING ~~OF 6~~ HOLDS FOR 1984, WHAT WILL HAPPEN TO THE VALUE OF TV RIGHTS?
  - ABC WILL BE PAYING 10 MILLION A YEAR FOR A NIELSON RATING OF 6 FOR THE USFL
  - NBC WILL BE PAYING APPROXIMATELY 60 MILLION A YEAR FOR A NIELSON RATING OF 5.7 ON BASEBALLS GAMES OF THE WEEK
  - BIDDING ALMOST SURELY WILL DRIVE UP THE PRICE FOR THE USFL

- IS ABC MAKING MONEY ON THE USFL?
  - ABC'S AD VOLUME WAS $40MM FOR USFL
  - ABC INCREASED 1983 RATE BY 10%
  - ANNHEUSER-BUSCH AND OTHERS HAVE ALREADY RENEWED

- THE USFL HAS A DECENT CHANCE OF AT LEAST CONTINUING ITS TV CONTRACTS

USFL VS. NFL

PURCHASING OF PLAYERS

- THE MAIN HIGHLIGHTS OF THE USFL PLAYER STRATEGY SEEM TO BE
  1) RECRUIT THE VERY TOP TALENT POSSIBLE FROM THE COLLEGE RANKS
  2) "RAID" NFL FOR
     - SOME ESTABLISHED STARS
     - GOOD FOOTBALL PLAYERS WITHOUT STAR CREDENTIALS
     - AGING "NAME" PLAYERS PAST THEIR PEAK
  3) FILL IN THE GAPS IN THE ROSTERS WITH LOW COST, PREFERABLY LOCAL PLAYERS

- ALMOST ALL NFL PLAYER TAKEN WERE:
  - IN THE LAST OR OPTION YEAR OF THEIR CONTRACT
  - RELATIVELY LOWER PAID THAN THEIR PEERS
    - NOT IN THE TOP 25%

USFL VS. NFL

GOALS

- USFL GOALS AND ITS OWNERS APPEAR TO BE QUITE DIVERSE
  - -TRUMP AND FOLLOWERS ARE QUITE MILITANT
  - - MANY IN THE USFL DESIRE MORE CAUTION IN DEALING WITH THE NFL

- SEVERAL THEMES DO REMAIN CONSISTENT THROUGHOUT THE USFL
  - - ALL FEEL THAT THE LEAGUE WILL BE VIABLE IN SOME TIME PERIOD
  - - ALL BELIEVE THAT QUALITY PLAYERS ARE NEEDED FOR LONG-TERM EXISTENCE
  - - ALL ARE WILLING TO LOSE SOME MONEY TO BUILD THE LEAGUE

- THE USFL INTENDS TO BE A DIRECT COMPETITOR OF THE NFL
  - - INDIRECTLY AT PRESENT
  - - DIRECT CONFLICT EVENTUALLY APPEARS UNAVOIDABLE

USFL VS. NFL

DIAGNOSING THE USFL'S GOALS AND ASSUMPTIONS

Thinker Ground Here

- GIVEN THE PUBLIC STATEMENTS OF THE USFL AND THE BEHAVIOR THEY HAVE EXHIBITED IN BOTH THE PLAYER DRAFT AND BY RAIDING NFL PLAYERS - WHAT ARE THEY LIKELY TO DO NEXT?

- WHAT ELSE DO WE NEED TO KNOW?
  - PROFILES OF THE OWNERS
    - FINANCIAL RESOURCES
    - DESIRES
  - BUYING CRITERIA OF ABC/CABLE NETWORKS
    - HOW TO DISSUADE THEM
  - WHAT ADVISORS DOES THE USFL USE TO SHAPE THEIR THINKING?
    - AGENTS - TROPE
    - PETER HADHAZY

- THE USFL IS SERIOUS
- THE USFL CAN CAUSE SERIOUS HARM TO THE PRODUCT AND PROFITS OF THE NFL
- WHAT CAN THE NFL DO?

USFL VS. NFL

DEFENSIVE STRATEGIES

- SIGN CURRENT "STAR" PLAYERS TO CONTRACT EXTENSIONS
  - DETER USFL FROM ATTEMPTING TO GAIN CONTROL OF PLAYERS LATER WHEN THEY HAVE MORE FUNDS

- ESTABLISH VERY STRONG RELATIONS WITH COLLEGE COACHES AND/OR AGENTS TO REDUCE USFL CREDIBILITY

- ATTEMPT TO "DISSUADE" ABC FROM CONTINUING USFL CONTRACT
  - SHOW NFL HIGHLIGHT FILMS OR SPECIAL NFL PROGRAMS DIRECTLY OPPOSITE USFL BROADCASTS TO LOWER NIELSEN RATINGS
    - JOHN MADDEN ON FOOTBALL STRATEGY
    - GIVE ABC MONDAY NIGHT FOOTBALL A WEAK SCHEDULE BY FORCING THE TELEVISING OF GAMES THAT HAVE BEEN STRONGLY HURT BY USFL RAIDS
      - CINCINNATI
      - BUFFALO

- ENCOURAGE TRADING OF RIGHTS AMONG NFL TEAMS TO ACCOMODATE PLAYERS WITH STRONG GEOGRAPHIC PREFERENCES
  - JOE CRIBBS
  - DAN ROSS

USFL VS. NFL

OFFENSIVE STRATEGIES

- MOVE THE NFL DRAFT TO ONE WEEK AFTER THE USFL DRAFT
  - DO IT SECRETLY IF POSSIBLE
  - COMPETE HEAD-ON-HEAD FOR 1985 COLLEGE TALENT
- SIGN THE BEST USFL PERSONNEL TO EITHER FUTURE CONTRACTS OR DETERMINE IF CURRENT CONTRACTS CAN BE BROKEN
  - HERSCHEL WALKER
- ACTIVELY ENCOURAGE SENDING UNDESIRABLE PLAYERS TO USFL
  - PRIORITIZE PLAYERS ON FOOTBALL TALENT VS. PUBLIC APPEAL MATRIX
  - ACTIVELY INFLUENCE PROBLEM PLAYERS AND OVERVALUED PLAYERS TO JUMP LEAGUES
  - THE STRATEGY WILL DEPLETE USFL SCARCE RESOURCES
- HELP ENCOURAGE STRONG UNIONIZATION OF THE USFL
  - DRIVE UP PLAYER COSTS WITH FRINGE BENEFITS AND UNIFIED BARGAINING POWER
- ATTEMPT TO CO-OPT THE MOST POWERFUL AND INFLUENTIAL OWNERS WITH PROMISES OF NFL FRANCHISES
- ATTEMPT TO BANKRUPT THE WEAKEST TEAMS TO REDUCE USFL SIZE AND CREDIBILITY
  - DISRUPTION OF GATE REVENUES

USFL VS. NFL

SUMMARY

- THE USFL REPRESENTS A CREDIBLE AND IMMEDIATE THREAT TO THE NFL
  - AVERAGE PLAYER COST PER TEAM COULD RISE $6-8 MILLION IN THE NEXT 3-5 YEARS
  - OVERALL QUALITY OF PLAY - AND NIELSEN RATINGS - COULD DROP AS A FUNCTION OF TALENT DILUTION
  - FUTURE TV REVENUES - BOTH NETWORK AND PAY-PER-VIEW CABLE - WILL BE AFFECTED BY THE ACTIONS OF THE NFL IN THE IMMEDIATE FUTURE

- THE NFL NEEDS TO DEVELOP A COHESIVE STRATEGY FOR DEALING WITH THE USFL
  - THE NFL NEEDS TO ACT IN A UNIFIED FASHION
  - THE NFL NEEDS BOTH A LEAGUE-WIDE AND A TEAM BY TEAM STRATEGY
  - THE NFL NEEDS TO ACT QUICKLY TO AVERT COST PROBLEMS SIMILAR OR WORSE THAN THOSE CAUSED BY
    - FREE AGENCY IS BASEBALL
    - THE NBA/ABA CONFLICT
    - THE NHL/WHA CONFLICT

    BECAUSE THE USFL COMBINES THE MOST DAMAGING FEATURES OF BOTH FREE AGENCY AND A COMPETITIVE LEAGUE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES FOOTALL LEAGUE, et al.,:

Plaintiffs, : 84 Civ. 7484 (PKL)

-against- :

NATIONAL FOOTBALL LEAGUE, et al., :

Defendants. :

- x

DEFENDANTS' OBJECTIONS TO ADMISSIBILITY
OF THE PROFESSOR PORTER SLIDE PRESENTATION

Defendants have objected to the admissibility of the slide presentation by Professor Porter at the February 1984 Harvard seminar. It is clear that the slide presentation is highly inflammatory, including as it does language about "conquering the USFL." In light of Fed. R. Evid. 403, the Court should be (as it has been) wary of allowing this material in evidence unless and until its admissibility is solidly established.

Defendants summarize herein the grounds for this objection. Specifically, the slide presentation is inadmissible for each of the following reasons:

1. the presentation is relevant only if Professor Porter was defendants' agent for the purpose of developing a "plan to conquer" the USFL, or a co-conspirator with the NFL for

that purpose, and Professor Porter was not such an agent or co-conspirator; and

2. to establish a violation, plaintiffs must present probative evidence that defendants engaged in unlawful conduct restraining trade, and proof of talk or boardroom discussions such as the Porter presentation is not probative evidence as required.

Each of these grounds is discussed below.

A. Professor Porter's Statements Are Not Those of An Agent or Co-Conspirator

Plaintiffs seem to suggest that the Porter materials are admissible against the NFL on the basis that Porter is an agent or co-conspirator of defendants. (Pl. Prop. Jury Instr., pp. 14-16.) To the contrary, Professor Porter's speculations are not admissible: He was not an agent of or co-conspirator with defendants at the time of his presentation in February 1984. Unless plaintiffs prove that Porter was acting as an agent and within the scope of his employment, or as a co-conspirator in furtherance of a conspiracy, the Porter evidence simply is not relevant to support any claim against defendants. Zenith Radio Corp. v. Matsushita Electric Industrial Co., 505 F. Supp. 1190, 1238 n. 58 (E.D. Pa. 1980), aff'd in part, rev'd in part on other grounds, 723 F.2d 238 (3d Cir 1983), rev'd on other grounds, [Current] Trade Reg. Rep. (CCH) ¶ 67.004 (U.S. March 26, 1986).

Porter was a full-time professor at the Harvard Business School and an independent third party rendering consulting services to numerous business clients, including the NFL Management Council on a one-time basis. In legal terms, Porter was a "non-agent independent contractor," i.e., a person who "contracts to accomplish something for another . . . but who is not acting as a fiduciary for the other . . . " Restatement (Second) of Agency, ¶ 14N at 80 (1958).

Nor are Professor Porter's statements those of a co-conspirator made during and in furtherance of a conspiracy, as is required. For one thing, there is no independent proof or evidence aliunde that Porter was a participant in a conspiracy to restrain business competition in professional football.*

The present conspiracy issue must be resolved in light of the conclusion in Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984), that the predicate finding for a

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* The rule regarding when hearsay statements are admissible in a conspiracy case is instructive. As the Second Circuit has put it:

> "Hearsay statements of a purported conspirator are not admissible against a co-defendant unless there is independent, non-hearsay evidence that establishes the declarant's participation in the conspiracy." Oreck Corp. v. Whirlpool Corp., 839 F.2d 75, 80 (2d Cir. 1980), cert. denied, 454 U.S. 1083 (1981).

Sherman Act conspiracy is the joining together of two or more entities that "previously pursued their own interests separately." Id. at 769. In a recent assessment of Copperweld, Professor Areeda directly considers the antitrust significance of the conduct of parties who perform "a discrete, designated task" at the direction of a principal actor, including consulting tasks. VII Areeda, Antitrust Law § 1474, at 319 (1986). Referring to such subordinates as "pawns" (because they only assist the principal actor's marketplace behavior), Areeda concludes that rarely would such a person be deemed to be a co-conspirator. He indicates that the following standards should control:

> "No conspiracy with a pawn should be found unless the behavior assisted itself violates the law. Apart from that issue, there are three prerequisites to finding a conspiracy with a pawn. First, the pawn must have knowledge of the principal's objective to restrain trade. Second, the pawn must not only facilitate the principal's restraint, but must also intend to restrain trade. This usually means that the pawn must have a stake in the restraint, as distinct from merely selling his own services for their usual market price. Third, the pawn must contribute materially to the restraint. Materiality will usually be absent where he brings no special resources or talents that the principal could not as easily accomplish through his own employees. Unless these requirements are satisfied, the pawn should be deemed an independent actor pursuing his own lawful business rather than a conspirator with the principal who engages him." Id. at 320 (emphasis in original).

All of Areeda's standards must be met to establish a co-conspirator relationship with a consultant. But there is no

basis here for treating Professor Porter as a co-conspirator with the NFL -- or for admitting Professor Porter's materials into evidence on that ground -- because plaintiffs cannot meet even one of the pertinent standards. Among other things, Professor Porter merely brainstormed ideas -- whether or not appropriate or feasible (Porter Dep. 176) -- and did not "assist" the NFL in undertaking any conduct that itself violated the antitrust laws; there is no suggestion that Professor Porter intended to restrain trade (he explicitly testified that he had never considered the legal aspects of his speculative ideas); Professor Porter had no economic stake in any trade restraint in the professional football business, "as distinct from merely selling his own services for their usual market price" (VII Areeda, supra); and there is no evidence that Professor Porter's slide show presentation contributed "materially" to any restraint of trade.

B. The Porter Presentation Is Not Probative of Any Unlawful Conduct

Proof of an antitrust violation requires proof of unlawful conduct and actual trade restraining effects in the marketplace. See, e.g., Borger v. Yamaha International Corp., 625 F.2d 390, 397 (2d Cir. 1980) (discussing the requirement of anti-competitive effects in a Section 1 action). In suits alleging monopoly violations, "it is equally clear that actual steps toward interference with the competitive process, and not

boardroom ruminations, is the evil against which Section 2 is directed. As Justice Holmes taught us, there is a difference, even in antitrust law, between preparation and attempt." William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1028 (9th Cir. 1981), cert. denied, 459 U.S. 825 (1982) (emphasis added). See also Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 273-75 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980), and other authorities discussed in "Defendants' Memorandum Regarding the Requirements for Liability Under Section 2 of the Sherman Act, filed May 13, 1986.

Moreover, in Matsushita Electric Industrial Co. v. Zenith Radio Corp., [Current] Trade Reg. Rep. (CCH) ¶ 67,004 (U.S. March 26, 1986), the Supreme Court recently rejected the argument that even where defendants have "a plausible reason to conspire, ambiguous conduct could suffice to create a triable issue of conspiracy." Id. at 62,171 n.21. The Court reasoned:

> Our decision in Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984), establishes that conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy.

Id. See also id. at 62,167.

Thus, if defendants engaged in conduct that restrained trade to the USFL's disadvantage, plaintiffs are required to prove such conduct. If defendants have not engaged in such conduct, it is of no moment that Professor Porter may have rumi-

nated on the Harvard campus about "strategies" for "conquering" the USFL.

The Porter materials simply are not "assertions" of any factual matter.* Instead, they are classic examples of loose talk about "competitive prowess" that should, as Professor Posner (now a Seventh Circuit judge) has stated, be scrutinized carefully because they often involve only "the clumsy choice of words to describe innocent behavior." R. Posner, Antitrust Law: An Economic Perspective, 189-90 (1976), quoted in William Inglis & Sons Baking Co., 668 F.2d at 1028 n.6.

Professor Porter's "clumsy choice of words" would plainly be prejudicial to defendants. Loose talk about a plan to "conquer the USFL" is just the kind of "boardroom rumination" that should be excluded even if made by an NFL owner or League official. The jurors should not be allowed to deliberate on the evidence presented during a lengthy and complex trial with such inflammatory language -- which is not probative of NFL conduct or NFL intent -- ringing in their ears.

CONCLUSION

For the foregoing reasons, the Porter slide show presentation should not be admitted into evidence.

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* See Zenith Radio Corp. v. Matsushita Electric Industrial Co. 505 F. Supp. at 1242.