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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Advanced Microtherm, Inc., et al.

NO. C 04-02266 JW

Plaintiffs,

v.

Norman Wright Mechanical Equipment
Corporation, et al.,

Defendants.

**ORDER ADOPTING REPORT AND
RECOMMENDATION OF MAGISTRATE
JUDGE; DENYING MOTION TO
CONFIRM PARAMETERS OF
SEPARATE RULE 42(b) TRIAL;
MODIFYING SCHEDULING ORDER;
SETTING CASE MANAGEMENT
CONFERENCE**

Presently before the Court is Defendant Norman Wright Mechanical Equipment Corporation's ("NSW") Motion to Confirm Parameters of Separate Rule 42(b) Trial and the Magistrate Judge's April 7, 2009 Report and Recommendation Regarding Case Schedule and Scope of Trial.¹ Defendant NSW seeks to have this Court confirm its previous ruling that separate trials will be conducted with respect to a discrete number of projects, and to decline to adopt the Magistrate Judge's April 2009 Recommendation that the Court conduct a single unified trial.

The Court conducted a hearing on June 18, 2009. Based on the papers submitted to date and oral argument, the Court ADOPTS the Magistrate Judge's April 7, 2009 Report and

¹ (Defendant Norman Wright Mechanical Equipment Corporation's Motion to Confirm Parameters of Separate Rule 42(b) Trial, hereafter, "Motion," Docket Item No. 938; April 7, 2009 Report and Recommendation Regarding Case Schedule and Scope of Trial, hereafter, "April 2009 Recommendation, Docket Item No. 935.) NSW also filed an Objection to the April 2009 Recommendation concerning the same issues presented here. (See Docket Item No. 943.) On May 18, 2009, the Court issued an Order consolidating the issues raised in the April 2009 Recommendation and NSW's Objection with the hearing on NSW's Rule 42(b) Motion. (See Docket Item No. 968.)

1 Recommendation Regarding Case Schedule and Scope of Trial and DENIES Defendant Norman
2 Wright Mechanical Equipment Corporation's Motion to Confirm Parameters of Separate Rule 42(b)
3 Trial.

4 **A. Background**

5 On June 9, 2004, Advanced Microtherm, Inc., HVAC Sales, Inc., and John Karamanos
6 (collectively, "Plaintiffs") filed this action against various Defendants alleging antitrust violations of
7 the Sherman Act, Clayton Act and California antitrust laws. (See Docket Item No. 1.) Plaintiffs
8 allege that Defendant NSW used unlawful tactics to get its products designated as having "no known
9 equal" by design engineers on construction projects, and leveraged that status into tying undesired
10 products and charging supracompetitive prices.²

11 On March 23, 2006, the Court considered a report and recommendation of a Special Master
12 previously appointed in this case regarding whether the case should proceed through a series of
13 separate trials with a discrete number of projects at issue in each trial. The Court found as follows:

14 Although antitrust cases generally tend to be complex, the present case is unusual in
15 that it alleges a scheme involving a large number of customized products used in a
16 large number of construction projects. . . . Focusing the litigation would be more
17 convenient for the parties and for the Court, and greatly reduce the risk of jury
18 confusion. Providing the contours of the separate trials are properly delineated, the
19 Court does not foresee that prejudice would occur to either party.

20 (March 23, 2006 Order at 3-4, Docket Item No. 239.) Based on these "preliminary" findings, the
21 Court ordered the parties to select five discrete projects to be the subject of discovery and tentatively
22 ordered that a separate trial pursuant to Rule 42(b) would be conducted. (Id. at 4.) On September
23 25, 2008, the Court denied Defendants' various motions for summary judgment on the original five
24 selected projects and ordered the parties to meet and confer in an effort to present a joint discovery
25 plan regarding expanded discovery relating to additional selected projects. (See Docket Item No.
26 779, 782.)

27 ² The full factual background of this case can be found in the Court's prior Orders. (See
28 Docket Item Nos. 28, 779.)

1 On December 9, 2008, the Court adopted the Magistrate Judge’s recommendation to relieve
2 the Special Master of his duties. (See Docket Item No. 831.) Accordingly, the Court referred the
3 parties to the Magistrate Judge to establish a discovery plan incorporating additional projects and a
4 proposed schedule for advancing this case, and referred “all current pending and future discovery
5 disputes . . . back to the Magistrate Judge.” (Id.) On February 6, 2009, the Magistrate Judge issued
6 an order expanding the scope of discovery to a total of fifteen projects identified by Plaintiffs. (See
7 Docket Item No. 886.) The Magistrate Judge also invited the parties to brief the issue of whether
8 separate trials, as tentatively ordered by the Court on March 23, 2006, was still appropriate based on
9 the Magistrate Judge’s view that separate trials “appears to be becoming an obstacle to efficient
10 discovery and trial preparation by the parties remaining in this case.” (See Docket Item No. 887.)

11 On April 7, 2009, after briefing and oral argument, the Magistrate Judge issued her April
12 2009 Recommendation, which reported as follows:

13 It is hereby recommended that the Court conduct a single unified trial of the
14 antitrust claims in this case. The parties’ attempts to delineate discovery limitations
15 that would facilitate an efficient trial of any separate issues has revealed that artificial
16 limitations on the projects included in a separate trial will inevitably result in
17 prejudice to one party or another. For example, currently the case is focused on 15
18 projects selected by Plaintiffs.

19 . . .

20 [NSW] has also stated that it intends to ‘introduce evidence related to general
21 project history outside of the 15 projects to put those in context,’ and that it ‘must be
22 allowed to present evidence that it bid on hundreds of other jobs during the applicable
23 period where it was not the winning bidder and/or where the bid procedures
24 contained no named product’”

25 Strictly limiting all parties’ evidence at trial to the 15 projects selected by
26 Plaintiffs would unfairly prejudice Defendants. Yet limiting Plaintiffs’ evidence to
27 the 15 projects it selected, while allowing Defendant to introduce evidence from an
28 unlimited number of other projects (perhaps even in the hundreds), would unfairly
prejudice Plaintiffs. Absent full discovery on all projects that were bid on during the
relevant time frame, it would not be possible to determine how many examplar
projects should be allowed to include in a separate trial. Thus, it is recommended that
at a minimum Plaintiffs’ antitrust claims be tried in one unified trial.

(April 2009 Recommendation at 1-2.) The Magistrate Judge also recommended a trial schedule
closing all of discovery on November 20, 2009 and setting the last date for hearing dispositive
motions as March 8, 2010. (Id. at 2-3.)

1 **B. Discussion**

2 Defendant NSW moves to confirm the Court’s March 23, 2006 findings and tentative Order
3 that this matter may proceed with separate trials concerning a limited number of projects. (Motion
4 at 4.) NSW contends that it will be prejudiced if the Court were to adopt the Magistrate Judge’s
5 April 2009 Recommendation because Plaintiffs have presented this case, until now, as a case
6 concerning multiple single conspiracies, not a “rimless wheel conspiracy.” (Motion at 14.)
7 Similarly, NSW represents that expanding discovery to a huge number of projects will cost millions
8 of dollars and will make the Magistrate Judge’s proposed schedule impracticable. (Motion at 7-11.)
9 As examples, NSW provides numerous discovery requests submitted by Plaintiffs after the
10 Magistrate Judge’s April 7, 2009 Recommendation that are not limited to the fifteen identified
11 projects.³

12 In response, Plaintiffs contend that it is entitled to establish a “global conspiracy” under the
13 Supreme Court’s decision in Continental Ore v. Union Carbide Corp., 370 U.S. 690 (1962).⁴
14 Plaintiffs further contend that the scope of trial and discovery recommended by the Magistrate are
15 workable and that Plaintiffs are willing to undertake the work and expense of retrieving certain
16 discovery.⁵ (Opposition at 2.)

17 Federal Rule of Civil Procedure 42(b) permits a court “in the furtherance of convenience or
18 to avoid prejudice,” to “order a separate trial of any claim, cross-claim, counterclaim, or third-party
19 claim or of any separate issue or any number of claims, cross-claims, counterclaims, third-party
20 claims or issues.” The limitation on a court’s discretion to order separate trials is its duty to

21 ³ (See Declaration of Robert H. Bunzel in Support of Defendant Normal Wright’s (1)
22 Objection to Recommendation Regarding Scope of Trial and (2) Motion to Confirm Parameters of
23 Separate Rule 42(b) Trial, Ex. C, Docket Item No. 939.)

24 ⁴ (Opposition to Normal Wright’s (1) Objection to Recommendation Regarding Scope of
25 Trial and (2) Motion to Confirm Parameters of Separate Rule 42(b) at 11, hereafter, “Opposition,”
Docket Item No. 949.)

26 ⁵ The Court notes that Plaintiffs also contend that the Court has already adopted the
27 Recommendation of the Magistrate Judge. (Opposition at 5-6.) However, as clarified by the Court,
the issues raised by the April 7, 2009 Recommendation were not resolved until after the June 1,
2009 hearing. (See Docket Item No. 968.)

1 “preserve any federal right to a jury trial.” Fed. R. Civ. P. 42(b). Ordering separate trials is, in
2 effect, the “flip side” of consolidation. See De Anda v. City of Long Beach, 7 F.3d 1418, 1421 (9th
3 Cir. 1993). Unlike separate trials ordered under Rule 21, separation of issues under Rule 42 does
4 not result in separate judgments for each issue tried separately. See Vann v. Citicorp Sav. of Ill.,
5 891 F.2d 1507, 1511 (11th Cir. 1991).

6 Based on the parties’ representations and the Magistrate Judge’s findings, separate trials are
7 no longer appropriate in this case.⁶ Both sides anticipate introducing evidence concerning
8 Defendants’ general business practices at trial. As explained by the Magistrate Judge, strictly
9 limiting the evidence at trial to 15 projects would unfairly prejudice Defendants, while allowing
10 Defendants to introduce evidence beyond the 15 projects would unfairly prejudice Plaintiffs.
11 Moreover, despite the Court’s efforts at the June 18, 2009 hearing to identify alternative ways of
12 limiting the scope of the trial and the parties’ burdens with respect to discovery, the parties could not
13 agree on a means of doing so. Thus, the Court finds a single unified trial on Plaintiffs’ antitrust
14 claims is the most appropriate way to proceed with the remainder of this litigation.

15 **C. Conclusion**

16 The Court ORDERS as follows:

- 17 (1) The Court ADOPTS the Magistrate Judge’s April 7, 2009 Report and
18 Recommendation Regarding Case Schedule and Scope of Trial and DENIES
19 Defendant Norman Wright Mechanical Equipment Corporation’s Motion to Confirm
20 Parameters of Separate Rule 42(b) Trial. Plaintiffs’ antitrust claims will be tried in a
21 single unified trial.
- 22 (2) All discovery will close on **November 20, 2009**.
- 23 (3) Last date for hearing on dispositive motions is **March 8, 2010**.

24
25 _____
26 ⁶ With respect to Plaintiffs’ contention that they are entitled to a unified trial to establish a
27 global antitrust conspiracy, the Court has previously considered this contention and declines to
28 reconsider it. (See March 23, 2006 Order; May 14, 2006 Order Denying Motion for Certification,
Docket Item No. 566.)

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(4) The parties shall appear for a Case Management Conference on **December 8, 2009 at 9 a.m.** The parties shall submit a Joint Case Management Statement on or before **November 20, 2009.**

Dated: July 16, 2009



JAMES WARE
United States District Judge

1 **THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:**

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23 **Dated: July 16, 2009**

Richard W. Wieking, Clerk

24
25 By: /s/ JW Chambers
26 **Elizabeth Garcia**
27 **Courtroom Deputy**
28