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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

THOMAS WILLIAM SLATTERY, Individually, And On Behalf Of All Others Similarly Situated,

Plaintiff,

v.

APPLE COMPUTER, INC.,

Defendant.

Case No. C 05 00037 JW

APPENDIX

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ALBERT O. STEIN, individually and on behalf of all others similarly situated,

Plaintiff,

v.

PACIFIC BELL TELEPHONE COMPANY, SBC COMMUNICATIONS, INC., et al.,

Defendants.
_____/

No. C 00-2915 SI

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT; DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT; AND DENYING MOTIONS TO EXCLUDE EVIDENCE AND TO STAY

The Court has six motions pending before it in this litigation. On February 27, 2004, the Court heard further argument from both parties regarding the impact on the litigation of the United States Supreme Court's decision in Verizon Communications Inc. v. Law Offices of Curtis V. Trinko LLP, 02-682, 124 S.Ct. 872, 540 U.S. ___ (2004). Having carefully considered the arguments of the parties and the papers submitted, the Court GRANTS defendants' motion for summary judgment; DENIES plaintiff's motion for summary judgment on his California Business and Professions Code § 17200 claim and DISMISSES the claim without prejudice; DENIES as moot defendants' motion to exclude the reports and testimony of plaintiff's experts, Yale M. Braunstein and Kenneth Wilson; DENIES as moot plaintiff's motion to exclude defendants' evidence of broadband share; DENIES as moot plaintiff's August 4, 2003 miscellaneous administrative request to strike defendants' evidence of a consumer survey; and DENIES as moot defendants' motion to stay. Reasons for the Court's decisions are set forth below.

BACKGROUND

Plaintiff Albert O. Stein ("Stein") brings this action on behalf of himself and others similarly situated to challenge alleged anticompetitive conduct by defendants (collectively "Pacific Bell"), relating to the offering of Digital Subscriber Line ("DSL") service. Stein claims that this anticompetitive conduct has denied consumers a competitive choice in DSL service providers.

DSL is a transmission service that provides consumers with dedicated, high-speed access to the internet and other computer networks. Second Amended Complaint ("SAC") ¶ 16. Utilizing new technology that permits simultaneous data exchange over traditional transmission lines, DSL service is provided through already existing telephone networks and facilities, thus allowing users to have concurrent access to the internet and traditional telephone service.

Pacific Bell is an incumbent local exchange carrier ("ILEC"), as defined by the Telecommunications Act of 1996 Act ("the 1996 Act" or "the Telco Act"). As an ILEC, Pacific Bell was required to negotiate in good-faith and to enter into interconnection agreements with competitors to make available its local telephone network. Id. at ¶ 18. As a result, Pacific Bell entered into several interconnection agreements with DSL competitors. Stein claims that, in violation of these interconnection agreements, Pacific Bell has "engaged in a pattern of anticompetitive conduct . . . generally designed to leverage Pacific's monopoly power obtained through its ubiquitous local telecommunications network . . . . with the intent and inevitable effect of injuring, thwarting or eliminating actual or potential [DSL service provider] competitors, to the detriment of consumers like Plaintiff and the Class." Id. at ¶ 28.

Based on such alleged anticompetitive behavior, Stein charged Pacific Bell with violating section 2 of the Sherman Act, 15 U.S.C. §§ 1 et seq.; the Cartwright Act, California Business and Professions Code §§ 16700 et seq.[1]; the Telecommunications Act of 1996, 47 U.S.C. §§ 151 et seq.[2]; and California Business and Professions Code § 17200. Defendants filed a motion to dismiss and the Court granted the motion in large part on February 3, 2001. Among the grounds for dismissal was this Court's finding

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[1]This Court dismissed Count VI based on the Cartwright Act.

[2]This Court dismissed Count V based on the Telco Act.

that the filed rate doctrine barred claims alleging that defendants' anti-competitive conduct resulted in payment of supracompetitive prices for Pacific Bell DSL service.[3] Stein then amended his complaint twice.

This Court granted Stein's motion for class certification on July 24, 2002. The class includes all California subscribers to defendants' DSL services between May 20, 2000 and September 30, 2001. Order granting motion at 1. Pacific Bell has acknowledged that it ceased to provide DSL service and withdrew its federal tariff in May 2000. From that point forward, SBC Advanced Solutions, Inc. ("ASI") became the SBC-affiliated provider of DSL service in California.[4] ASI's DSL service was not tariffed until September 10, 2001.

Now before the Court are defendants' motion for summary judgment, plaintiff's motion for summary judgment on his California Business and Professions Code § 17200 claim, defendants' motion to exclude the reports and testimony of plaintiff's experts, Yale M. Braunstein and Kenneth Wilson, class plaintiffs' motion to exclude defendants' motion of broadband share, plaintiff's request to strike defendants' consumer survey, and defendants' motion to stay.

LEGAL STANDARD

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323; 106 S.Ct. 2548 , 2553 (1986). The moving party, however, has no burden to negate or disprove matters on which the non-moving party will

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[3]Stein argued that he could avoid the filed rate doctrine by amending to plead a claim based on damages attributable to denial of access to *existing* lower filed rates.

[4]Pacific Bell is a wholly owned subsidiary of Pacific Telesis, which is a wholly owned subsidiary of SBC. SAC, ¶8. ASI was created when the Federal Communications Commission (FCC) required that DSL be offered through a separate affiliate where an SBC entity (Pacific Bell, in this case) is the ILEC.

have the burden of proof at trial. The moving party need only point out to the Court that there is an absence of evidence to support the non-moving party's case. See id. at 325.

The burden then shifts to the non-moving party to "designate 'specific facts showing that there is a genuine issue for trial.'" See Celotex Corp., 477 U.S. at 324 (quoting Fed. R. Civ. P. 56(e)). To carry this burden, the non-moving party must "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586; 106 S.Ct. 1348, 1356 (1986). "The mere existence of a scintilla of evidence . . . will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party]." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252; 106 S.Ct. 2505, 2512 (1986). In a motion for summary judgment, the evidence is viewed in the light most favorable to the non- moving party, and all justifiable inferences are to be drawn in its favor. See id. at 255. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . ruling on a motion for summary judgment." Id.

DISCUSSION

A. Defendants' motion for summary judgment

1. The Supreme Court's Trinko opinion

The opinion of the United States Supreme Court in Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, No. 02-682, 124 S.Ct. 872, 540 U.S. ___ (2004), governs this case. As the Supreme Court explained, "[t]he Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, imposes certain duties upon incumbent local telephone companies in order to facilitate market entry by competitors, and establishes a complex regime for monitoring and enforcement." Trinko, 124 S.Ct. at 875. In Trinko, the Court considered "whether a complaint alleging breach of the incumbent's duty under the 1996 Act to share its network with competitors states a claim under § 2 of the Sherman Act, 26 Stat. 209." Id.

In Trinko, Verizon was the incumbent local exchange carrier (LEC) in the state of New York. Trinko, 124 S.Ct. at 875. Defendant SBC is the LEC in California. Before the 1996 Act, incumbent LECs enjoyed exclusive franchises in their local service areas. Id. "The 1996 Act sought to 'uproot'

the incumbent LECs' monopoly and to introduce competition in its place." Id. (bracket and citation omitted). An "incumbent LEC's obligation under 47 U.S.C. § 251(c) to share its network with competitors" was "[c]entral" to the Act's statutory scheme. Id. at 875-76 (citation omitted).

Section 251(c)(3) of the 1996 Act obligated Verizon to provide "access to operations support systems (OSS), a set of systems used by incumbent LECs to provide services to customers and ensure quality." Trinko, 124 S.Ct. at 876. A rival could not fill its customers' orders without access to OSS; thus, for competition to occur, competitors absolutely needed access to OSS. Regulators received complaints that competitive LECs' orders remained unfilled, in apparent violation of Verizon's statutory obligation to provide access to OSS functions. Id. Parallel regulatory investigations ensued; the New York Public Service Commission (PSC) issued a "series of orders" causing Verizon to incur $10 million of liability to competitive LECs. Id. at 876-77. The FCC entered a consent decree with Verizon, under which Verizon made a $3 million "'voluntary contribution'" to the United States Treasury. Id. (citation omitted).

The day after Verizon entered the consent decree with the FCC, Trinko, a New York City law firm and local telephone customer of AT&T, filed suit on behalf of itself and similarly situated customers. Trinko, 124 S.Ct. at 877. The complaint "alleged that Verizon had filled rivals' orders on a discriminatory basis as part of an anticompetitive scheme to discourage customers from becoming or remaining customers of competitive LECs, thus impeding the competitive LECs' ability to enter and compete in the market for local telephone service." Id. The complaint included a "single example of the alleged 'failure to provide adequate access to [competitive LECs],' namely the OSS failure that resulted in the FCC consent decree and PSC orders." Id. (internal quotation marks and brackets in the original). Trinko alleged that Verizon violated § 2 of the Sherman Act.[5] The district court dismissed the complaint, the Court of Appeals for the Second Circuit reversed, and the Supreme Court granted certiorari to determine if the Court of Appeals erred in reversing the district court's dismissal of Trinko's antitrust claims. Id.

The Supreme Court began by examining whether any antitrust liability could exist in the

[5]Trinko alleged other violations of federal statutes and state law, but the Supreme Court limited its grant of certiorari to the antitrust claims. Trinko, 124 S.Ct. at 877.

presence of the Telco Act's detailed regulatory scheme. Although Congress created the duties, the Court could not automatically conclude that the duties could be "enforced by means of an antitrust claim." Trinko, 124 S.Ct. at 878. In fact, the Court considered and rejected the possibility of antitrust immunity. The 1996 Telco Act barred a finding of statutory immunity since "[s]ection 601(b)(1) of the 1996 Act is an antitrust-specific saving clause." Id. The Court explained, though, that the statutory "saving clause preserve[d] those 'claims that satisf[ied] established antitrust standards.'" Id. (brackets added, internal quotation marks in the original, citation omitted). The Act "[did] not create new claims that go beyond existing antitrust standards." Id.

The Court turned to an examination of the alleged anticompetitive conduct, namely the alleged "deni[al of] interconnection services to rivals in order to limit entry," Trinko, 124 S.Ct. at 878, under existing antitrust standards. If the Court were to find any antitrust liability, it explained that it would need to do so under § 2 of the Sherman Act, "which declares that a firm shall not 'monopolize' or 'attempt to monopolize.'" Id., citing 15 U.S.C. §2. In order to establish this offense, a plaintiff would need to show possession of monopoly power in the relevant market and "'the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'" Id. at 878-79, citing United States v. Grinnell Corp., 384 U.S. 563, 570-571 (1966). In order to "safeguard the incentive to innovate," a court can find antitrust liability only if "anticompetitive *conduct*" accompanies the possession of monopoly power. Id. at 879.

The Court explained that the Sherman Act generally recognizes the right of a private business to choose with whom it will deal. Trinko, 124 S.Ct. at 879, citing United States v. Colgate & Co., 250 U.S. 300, 307 (1919). At the same time, the Court has recognized that "'[t]he high value that [it has] placed on the right to refuse to deal with other firms does not mean that the right is unqualified.'" Id., citing Aspen Skiing v. Aspen Highlands Skiing Corp., 472 U.S. 585, 601 (1985) (internal quotations and first brackets in the original). The Court continued that "[u]nder certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate § 2." Trinko, 124 S.Ct. at 879. The Court warned that it is "very cautious in recognizing such exceptions." Id. With respect to its case at hand, the Court needed to determine if the allegations of the complaint fit within the confines

of existing antitrust doctrine, or if the plaintiff had demonstrated grounds for establishing a new exception under traditional antitrust principles. Id.

The Court briefly summarized Aspen Skiing, which it characterized as the "leading case for §2 liability based on refusal to cooperate with a rival" and warned again that "Aspen Skiing is at or near the outer boundary of § 2 liability." Trinko, 124 S.Ct. at 879. In Aspen Skiing, the owners of different ski areas had cooperated to offer a multi-day, all-area lift ticket. When the owner of three of the areas ceased cooperation with the owner of the fourth, the Court upheld a jury verdict against the defendant. In Trinko, the Court explained that it had rested its finding of liability in Aspen Skiing on the "defendant's decision to cease participation in a cooperative venture." Trinko, 124 S.Ct. at 879-80. (citation omitted). The defendant in Aspen Skiing had "unilateral[ly] terminat[ed]' a "voluntary (*and thus presumably profitable*) course of dealing," reflecting an anticompetitive motive. Trinko, 124 S.Ct. at 880 (brackets added; emphasis in the original).

Turning to its case at hand, the Supreme Court in Trinko concluded that Verizon's anticompetitive conduct in its alleged refusal to deal failed to "fit within the limited exception recognized in Aspen Skiing." Trinko, 124 S.Ct. at 880. Verizon did not voluntarily cooperate with its rivals; instead, Verizon cooperated with its rivals because the 1996 Act required it to do so. The Court continued that Trinko differed from Aspen Skiing in a "more fundamental way." Id. at 10. The lift tickets at issue in Aspen Skiing were available to the public at retail; in contrast, the services allegedly withheld in Trinko were "not otherwise marketed or available to the public." Id. In fact, "[t]he unbundled elements offered pursuant to §251(c)(3) exist only deep within the bowels of Verizon; they are brought out only on compulsion of the 1996 Act and offered not to consumers but to rivals, and at considerable expense and effort." Id. Thus "Verizon's alleged insufficient assistance in the provision of service to rivals is not a recognized antitrust claim under this Court's existing refusal-to-deal precedents." Id.

The Court briefly discussed the "essential facilities" doctrine, explaining that it has neither accepted nor rejected "such a doctrine." Trinko, 124 S.Ct. at 880-81. If the doctrine were accepted, access to facilities would need to be unavailable; "where access exists, the doctrine serves no purpose." Id. at 881. Although the plaintiff in Trinko argued that the regulatory sharing duties supported its case,

the Court found the opposite; the Act's requirement of access made it "unnecessary to impose a judicial doctrine of forced access." Id. Thus the Court rejected the plaintiff's essential facilities argument. Id.

The Court also concluded that the plaintiff in Trinko had failed to justify adding its case "to the few existing exceptions from the proposition that there is no duty to aid competitors." Trinko, 124 S.Ct. at 881. The Court discussed at length the difficulties courts would face in enforcing antitrust laws in the midst of a sophisticated regulatory regime and also emphasized the costs of judicial intervention. In its case at hand, the Court recognized that the regulatory response to the "OSS failure" demonstrated that the regulatory "regime was an effective steward of the antitrust function." Trinko, 124 S.Ct. at 881-82. "[A]n incumbent LEC's failure to provide a service with sufficient alacrity might have nothing to do with exclusion," and antitrust courts necessarily find the evaluation of alleged violations of the Telco Act's sharing duties difficult. Id. at 882.

Finally, the Court concluded that the plaintiff had failed to state a claim under a monopoly leveraging theory. Monopoly leveraging, the Court explained, presupposes anticompetitive conduct. In its case at hand, anticompetitive conduct could exist only under a refusal to deal theory, which the Court had rejected. Thus the Court necessarily also rejected plaintiff's monopoly leveraging theory. Trinko, 124 S.Ct. at 883, n.4. In rejecting plaintiff's refusal to deal theory, its essential facilities claim, and its monopoly leveraging theory, the Supreme Court held that Trinko had failed to state a claim against Verizon under the Sherman Act. Id. at 883.

2. Stein's antitrust claims, then and now

Plaintiff Stein's antitrust claims have narrowed considerably since he filed this lawsuit. At this litigation's outset, plaintiff broadly claimed that defendants' failures timely to comply with the provisions of the Telco Act constituted antitrust violations. In his Second Amended Complaint, Stein alleged that Pacific Bell enjoyed a market share in excess of 85% of the DSL market and controlled the existing local telephone network and the supporting physical facilities through which DSL service must be installed. SAC ¶ 17. Competitors wishing to enter the market for DSL service depend on Pacific Bell's telephone lines and physical facilities. Id. at ¶ 22. Pacific Bell is an incumbent local exchange carrier ("ILEC"), as defined by the Telco Act. As an ILEC, Pacific Bell was required to negotiate in

good-faith and to enter into interconnection agreements with competitors to make available its local telephone network. Id. at ¶ 18. As a result, Pacific Bell entered into several interconnection agreements with DSL competitors. Stein claimed that, in violation of these interconnection agreements, Pacific Bell "engaged in a pattern of anticompetitive conduct . . . generally designed to leverage Pacific's monopoly power obtained through its ubiquitous local telecommunications network . . . . with the intent and inevitable effect of injuring, thwarting or eliminating actual or potential [DSL service provider] competitors, to the detriment of consumers like Plaintiff and the Class." Id. at ¶ 28.

According to the Second Amended Complaint, Pacific Bell has "routinely and arbitrarily" denied physical collocation with its equipment and misrepresented the availability of space for collocation. Id. at ¶¶ 28-33. Pacific Bell has allegedly also stifled competition by requiring and charging unreasonable prices for collocation cages. Id. at ¶¶ 34-37. Furthermore, Pacific Bell allegedly has discriminated against and imposed "hindrances and delays" on competitors trying to enter the DSL market by refusing timely to deliver collocation cages, dedicated unbundled transport lines, and installed unbundled loops. Id. at ¶¶ 38-42. Based on such alleged anticompetitive behavior, Stein charged Pacific Bell with violating section 2 of the Sherman Act, 15 U.S.C. §§ 1 et seq.

When defendants moved for summary judgment, the Supreme Court had not decided Trinko. As a result, the motion was broad and addressed plaintiff's theories of antitrust liability allegedly resulting from defendants' regulatory violations with regard to both collocation and the provision of loop qualification information. Before Trinko, plaintiff sought to show defendants' monopoly or attempted monopoly and proffered three theories of antitrust liability, namely refusal to deal, denial of essential facilities, and monopoly leveraging.[6] The Supreme Court has now made it absolutely clear that all these theories of liability fail.

After Trinko, plaintiff understandably seeks to narrow his antitrust claim considerably. The

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[6]In their original motion for summary judgment, defendants argued that they lacked market power in the relevant market; that no actionable conduct had occurred, even under plaintiff's pre-Trinko theories of liability; and that plaintiff had failed to show any antitrust injury or damage to consumers. Because the Supreme Court's opinion in Trinko made the landscape so clear, this Court need not reach all these issues to find that plaintiff fails to survive defendants' motion for summary judgment with respect to plaintiff's antitrust claims. Thus the definition of the relevant market is not to be decided.

arguments concerning spectral requirements and collocation practices have disappeared. Oppo. Regarding Trinko, at 9 (Oppo.). Now, in an effort to survive Trinko, plaintiff simply argues, at great length, that defendants voluntarily agreed to provide loop qualification information to competitors as part of an effort to earn regulatory approval of SBC's merger with Ameritech. When defendants "reneged" on their commitment to provide the loop qualification information, according to Stein, they violated § 2 of the Sherman Act.

The Telco Act required defendants to provide the loop qualification information at issue; most important, even if defendants had voluntarily agreed to provide the loop qualification information, the regulatory breaches that occurred simply do not afford the basis for antitrust liability. As the Supreme Court made abundantly clear, the refusal to deal set forth in Aspen Skiing is extremely narrow. In this case, as in Trinko, the regulatory "regime was an effective steward of the antitrust function." Trinko, 124 S.Ct. at 882.[7]

An entity hoping to provide DSL service needs access to loop qualification information. George Guerra, Pacific's Area Manager for Regulatory Affairs, testified, "you need [a] loop to be of the appropriate parameters, so as to be able to support the DSL service that you're seeking to obtain and provide." Ex. 8 to Kolbe Decl. at 91:25-92:3. He continued to explain that "if any one of those components are absent, you will not be able to provide DSL service." Id. at 92:10-12. The OSS access obligations that Verizon failed to fulfill in Trinko were mandated by §§ 251 and 271 of the Telco Act. Oppo. at 7, citing Trinko, 124 S.Ct. at 876. According to plaintiff, in contrast, defendants in the instant case voluntarily agreed to provide competitors with loop qualification information. Oppo. at 9. Plaintiffs argue that when defendants voluntarily agreed to provide competitors loop qualification information and "unilaterally reneged on that undertaking" by "filter[ing]" the information, they "deceptively misled competitors into believing that loops serving California premises could not support DSL," thereby allegedly violating the antitrust laws. Oppo. at 9. Plaintiff argues that this unilateral breach of a voluntary commitment allows him to survive summary judgment, even after Trinko. This

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[7]Plaintiff argues that Trinko failed to address whether a monopolist's bad faith breach of a statutorily mandated duty can constitute a refusal to deal. Oppo. at 8, n.1. Defendants correctly point out that the Trinko plaintiff made exactly such an allegation of bad faith by alleging that the defendants engaged in an "anticompetitive scheme." Trinko, 124 S.Ct. at 877.

Court disagrees, but also finds that defendants were statutorily obligated to provide the loop qualification information under § 251(c)(3) of the Telecommunications Act. Plaintiff cannot distinguish his case from Trinko.

In an effort to demonstrate that defendants voluntarily agreed to provide competitors access to loop qualification information, plaintiff introduces Appendix C to the FCC Merger Order concerning SBC's merger with Ameritech. Kolbe Decl., Ex. 6. Plaintiff argues that SBC voluntarily agreed, after extensive negotiations, to provide its competitors with loop qualification information in an effort to earn regulatory approval of its proposed merger with Ameritech. The Court does not find that any conditions entered into by defendants in order to earn regulatory approval of the merger were voluntary in any real sense of the word; instead, defendants made some concessions as part of the price they had to pay to earn regulatory approval of the merger. More important, defendants introduced evidence showing that the Telco Act has always required defendants to provide loop qualification information, thus placing the instant case squarely within Trinko's confines.

Telco Act § 251(c)(3) requires incumbents, such as defendants, to provide "access to network elements on an unbundled basis." 47 U.S.C. § 251(c)(3). The FCC ruled in 1996 that "operations support systems and the information they contain fall squarely within the definition of 'network element' and must be unbundled upon request under section 251(c)(3)." In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, ¶¶ 516, 523 (1996) (First Report and Order). For this conclusion, the FCC relied on the statutory definition of "network element" as including "databases" and "information sufficient for billing and collection or used in the transmission, routing, or other provision of telecommunications service." First Report and Order, ¶ 516.

In 1998, the FCC repeated this statutory requirement and explicitly ruled that it includes information about loop qualification information for the provision of DSL:

> Under our existing rules, incumbent LECs are also required to provide competing carriers with nondiscriminatory access to the operations support systems (OSS) functions for pre-ordering, ordering, and *provisioning loops.* If new entrants are to have a meaningful opportunity to compete, they must be able to determine during the pre-ordering process as quickly and efficiently as can the incumbent, *whether or not a loop is capable of supporting xDSL-based services.* In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, Memorandum Opinion and Order, and

Notice of Proposed Rulemaking, 13 FCC Rcd 24011, ¶ 56 (1998) (emphasis added).

In 1999, the FCC issued its UNE Remand Order and confirmed the requirement to provide loop qualification information:

> [P]ursuant to our existing rules, an incumbent LEC must provide the requesting carrier with nondiscriminatory access to the same detailed information about the loop that is available to the incumbent, so that the requesting carrier can make an independent judgment about whether the loop is capable of supporting the advanced services equipment the requesting carrier intends to install. In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, ¶ 427 (1999).

Finally, the FCC confirmed that the obligation extended to all information possessed by the ILEC, regardless whether the ILEC provided the information to its own retail provider:

> [U]nder our existing rules, the relevant inquiry is not whether the retail arm of the incumbent has access to the underlying loop qualification information, but rather whether such information exists anywhere within the incumbent's back office and can be accessed by any of the incumbent LEC's personnel. Denying competitors access to such information, where the incumbent (or an affiliate, if one exists) is able to obtain the relevant information for itself, will impede the efficient deployment of advanced services. Id. at ¶ 430.

Thus the Telco Act of 1996, in addition to the FCC Rules implementing it, required defendants to provide loop qualification information to competitors and Trinko governs the case at hand.[8]

Plaintiff introduces evidence attempting to show breaches of defendants' duties to provide loop qualification information. For example, plaintiff relies on the testimony of John Mileham and Carol Chapman, in addition to a Notice of Apparent Liability issued by the FCC. The Notice of Liability, however, primarily concerned defendants' submission of inaccurate affidavits and, in any event, concluded that the loop qualification errors were not "competitively significant under the circumstances." Kolbe Decl. Ex. 14 at ¶ 90.

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[8]Plaintiff filed a surreply, to which defendants filed a response. In the surreply, plaintiff argued that the "pre-existing UNE Remand Order did not compel defendants to provide real-time electronic access to defendants' online loop qualification database. Instead, SBC was permitted to provide such information in manual form – a difference that, as shown below, is competitively significant." Surreply at 1. Plaintiff's case does not fall within the confines of Aspen Skiing and reducing his case to this possible tiny failure to satisfy a regulatory obligation simply demonstrates the chimerical quality of plaintiff's antitrust claims. In his surreply, plaintiff concludes that "[t]o prevail on summary judgment, defendants must show that, *inter alia,* there is no factual dispute that defendants' duty to provide competitors with real-time computerized access to defendants' loop qualification information in electronic form about all loops serving a particular address was a statutorily compelled duty under the FCC's UNE Remand Order." Surreply at 2. In Trinko, the Supreme Court clearly held that such regulatory minutiae are not the concern of antitrust law.

More important, the evidence of regulatory action is exactly the type of evidence that the Supreme Court in Trinko found persuasive when it found that regulatory enforcement, as opposed to judicial enforcement, more effectively supports antitrust goals. Trinko, 124 S.Ct. at 882. Plaintiff incorrectly argues that a material question of fact exists as to whether the FCC could compel defendants to provide loop qualification information. The Telco Act mandates that the FCC can impose a forfeiture penalty for violation of "any of the provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter." 47 U.S.C. § 503(b)(1)(B). In fact, plaintiff submitted evidence of this very type of enforcement with regard to defendants' provision of loop qualification information when it presented the FCC's Notice of Apparent Liability for the Court's consideration. Kolbe Decl. Ex. 14 at ¶ 5 ("The *UNE Remand Order* required, among other things, that an incumbent local exchange carrier such as SBC make loop qualification information available to competitors as part of the pre-ordering functionality of its OSS."). The FCC merger order did not impose any additional loop qualification obligations on defendants.

Even assuming *arguendo* that defendants voluntarily obligated themselves to provide competitors with loop qualification information, this case does not fit within the very narrow confines of the refusal to deal doctrine, most recently articulated by the Supreme Court in Trinko. In Aspen Skiing, two competitors voluntarily cooperated to offer an attractive product to the public at retail. When the dominant partner ceased cooperation despite the weaker partner's increasingly desperate efforts to have the venture continue, the Court allowed an inference of the stronger partner's anticompetitive purpose, namely that it "was not motivated by efficiency concerns and that it was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival." Aspen Skiing v. Aspen Skiing Highlands Corporation, 472 U.S. 585, 610-611 (1985); see also Trinko, 124 S.Ct. at 879-80.

The ski area in Aspen Skiing sold its lift tickets to the public at retail for profit. In contrast, defendants in this case did not offer loop qualification information directly to the public. Instead, like the OSS access at issue in Trinko, the loop provision information at issue in this case "exist[s] only deep within the bowels of" defendants, Trinko, 124 S.Ct. at 880, and is not directly available to the public, much less directly available to the public at a profit under a voluntarily cooperative venture between

competitors. In Aspen Skiing, the formerly dominant partner terminated the joint venture, whereas in the case at hand, defendants simply failed to comply exactly with the requirements of a regulatory scheme.

Thus, under Trinko, this Court GRANTS defendants' motion for summary judgment on plaintiff's antitrust claims. As a matter of law, plaintiff's case does not fit within the narrow confines of the refusal to deal doctrine articulated by the Supreme Court in Trinko. The Court also finds, as a matter of law and based on Trinko, that defendants have prevailed on their motion for summary judgment with respect to plaintiff's monopoly leveraging and essential facilities antitrust claims.

B. Plaintiff's motion for summary judgment

Plaintiff has moved for summary judgment on his supplemental state law claim under California Business and Professions Code § 17200. Now that the Court has granted defendants' motion for summary judgment, the landscape has changed because the antitrust claims which originally conferred jurisdiction on this Court have disappeared. 28 U.S.C. § 1367(c) lists situations in which a federal court may decline to exercise supplemental jurisdiction. Such a situation arises when "the district court has dismissed all claims over which it has original jurisdiction." This Court finds that it may, and should, decline to exercise its discretionary jurisdiction over plaintiff's state law claim, since the Court has dismissed all the claims over which it had original jurisdiction and because the case raises complex issues of state law. The Court DENIES plaintiff's motion for summary judgment and DISMISSES plaintiff's § 17200 claim without prejudice.

C. Plaintiff's motion to exclude evidence of broadband share

Plaintiff has moved to strike defendants' evidence regarding defendants' share of the broadband market. Given the Court's ruling on the underlying antitrust claims in light of Trinko, the admissibility of the evidence has become moot and, on that ground, the motion is DENIED.

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D. Defendants' motion to exclude testimony and reports of Braunstein and Wilson

Defendants have moved to exclude the testimony and reports of plaintiff's experts, Yale M. Braunstein and Kenneth Wilson. Given the Court's ruling on the antitrust claims, the admissibility of this evidence has become moot and, on that ground, the motion is DENIED.

CONCLUSION

For the foregoing reasons, the Court GRANTS defendants' motion for summary judgment; DENIES plaintiffs' motion for summary judgment and DISMISSES class plaintiff's California Business and Professions Code § 17200 claim without prejudice; DENIES defendants' motion to exclude the reports and testimony of Braunstein and Wilson; and DENIES plaintiff's motion to exclude defendants' evidence of broadband share. [Docket ## 238, 260, 261, 264 and 265] The Court also DENIES as moot plaintiffs' administrative request to strike defendants' evidence of consumer survey [docket # 274] and defendants' motion to stay. [Docket ## 274, 303 and 317]

IT IS SO ORDERED.

Dated: March 4, 2004

SUSAN ILLSTON
United States District Judge

UNITED STATES DISTRICT COURT

FOR THE

NORTHERN DISTRICT OF CALIFORNIA

ALBERT O. STEIN,

Plaintiff,

v.

PACIFIC BELL,

Defendant.
_____/

Case Number: CV00-02915 SI

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on March 4, 2004, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

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Dated: March 4, 2004

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