WHAT EVERY IN-HOUSE LAWYER NEEDS TO KNOW ABOUT ANTITRUST AND COMPETITION LAW

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I. WHAT IS ANTITRUST?

A. Antitrust and competition laws around the world seek to ensure competition and prohibit unfair practices in business and professions for the benefit of consumers.

B. In the United States, the primary antitrust and competition law is the Sherman Antitrust Act. "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition."[1]

C. Primary Statutes and Violations

1. Section 1 of the Sherman Antitrust Act: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[2]

a. Most antitrust actions arise under this statute. Examples of actions that are prohibited under Section 1 of the Sherman Act include price fixing, group boycotts, and customer and territorial allocation.

b. Section 1 of the Sherman Act does not prohibit "independent action of a single entity, regardless of its purpose or effect on competition."[3] Instead, it "reaches unreasonable restraints of trade effected by a 'contract, combination . . . or conspiracy' between separate entities. It does not reach conduct that is 'wholly unilateral.'"[4]

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[1] Northern Pac. Ry. Co. v. U.S., 356 U.S. 1, 4 (1958).

[2] 15 U.S.C. §1.

[3] ABA Section of Antitrust, Antitrust Law Developments 3 (6th ed. 2007) (*citing, e.g.,* Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761 (1984)).

[4] Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767-68 (1984) (citations and footnote omitted).

c. By its literal terms, the Sherman Act prohibits any contract, combination, or conspiracy in restraint of trade or commerce. Courts have consistently held, however, that in practice the Sherman Act only prohibits unreasonable restraints.[5]

2. Section 2 of the Sherman Antitrust Act: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . ."[6]

3. Section 3 of the Clayton Antitrust Act (Exclusive Dealing): "It shall be unlawful for any person [. . .] to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities [. . .] or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."[7]

4. Section 7 of the Clayton Antitrust Act: "No person [. . .] engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[8]

5. Section 5 of the Federal Trade Commission Act: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."[9]

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[5] *See, e.g.,* Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 289 (1985).

[6] 15 U.S.C. §2.

[7] 15 U.S.C. §14.

[8] 15 U.S.C. §18.

[9] 15 U.S.C. §45(a)(1).

6. Robinson-Patman Act: The Robinson-Patman Act is an amendment to the Clayton Antitrust Act aimed at preventing unfair price discrimination.

   a. Price discrimination: "It shall be unlawful for any person [...] to discriminate in price between different purchasers of commodities of like grade and quality [. . .] where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . ."[10]

   b. Commissions: "It shall be unlawful for any person [. . .] to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid."[11]

   c. Inducement: "It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."[12]

7. Tying arrangements: A tying arrangement is "an agreement by a party to sell one product [the tying product] but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier."[13]

   a. In addition to sales, tying arrangements can also involve services and leases.[14]

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[10] 15 U.S.C. §13(a).

[11] 15 U.S.C. §13(c).

[12] 15 U.S.C. §13(f).

[13] Northern Pac. Ry. Co., 356 U.S. at 5-6 (footnote omitted).

[14] *See* Antitrust Law Developments at 172 (*citing* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984); United Shoe Mach. Corp. v. U.S., 258 U.S. 451 (1922)).

b. Tying arrangements can be challenged under Section 1 of the Sherman Act, Section 3 of the Clayton Act, and Section 5 of the FTC Act.[15]

c. Tying arrangements can also be challenged as conduct constituting monopolization under Section 2 of the Sherman Act.[16]

D. How Are Antitrust Claims Analyzed?

1. The analysis of whether a restraint on trade or commerce is unreasonable depends on whether it is a horizontal or vertical restraint.

a. Horizontal restraints are "restrictions established by agreements among actual or potential competitors."[17]

b. Vertical restraints are "restrictions imposed by a firm at one level of the supply chain on firms at a different level (*e.g.,* restrictions imposed by a manufacturer on its distributors)."[18]

2. *Per se*: Courts analyze potentially anticompetitive practices under the *per se* rule when "'the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output.' In such circumstances a restraint is presumed unreasonable without inquiry into the particular market context in which it is found."[19] "*Per se* rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct."[20]

3. Rule of reason: "[M]ost antitrust claims are analyzed under a 'rule of reason,' according to which the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors,

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[15] *See id*. at 174 (citations omitted).

[16] *See id*. (citations omitted).

[17] Antitrust Law Developments at 78.

[18] *Id*.

[19] NCAA v. Board of Regents of the University of Oklahoma, 468 U.S. 85, 100 (1984) (*quoting* Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 19-20 (1979)).

[20] *Id*. at 103-04 (citations omitted).

including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect."[21]

4. A restraint of trade may be found unreasonable "based either (1) on the nature or character of the contracts, or (2) on surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices."[22]

5. Under the rule of reason analysis, "the plaintiff bears the burden of establishing that the conduct complained of 'produces significant anticompetitive effects within the relevant product and geographic markets.'"[23]

    a. A plaintiff must show that "the effect upon competition in the marketplace is substantially adverse."[24] "Restraints that produce only an 'insignificant,' 'de minimis,' 'trivial,' or 'insubstantial' restriction of competition are not unlawful."[25]

    b. There are three methods by which a plaintiff can show anticompetitive effect: (1) "proof of a restraint with adverse competitive impact so obvious that only a quick look rule of reason analysis is necessary, (2) proof of actual anticompetitive effect, and (3) market analysis indicating that the restraint will create or facilitate the exercise of market power."[26]

6. If a plaintiff can show that a restraint on trade has had or is likely to have a substantially adverse effect on competition, then the burden shifts to the defendant to "provide evidence to establish that the restraint complained of has procompetitive effects sufficient to justify the injury resulting from the anticompetitive effects of the restraint."[27]

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[21] State Oil Co. v. Khan, 522 U.S. 3, 10 (1997).

[22] NCAA, 468 U.S. at 103.

[23] Worldwide Basketball and Sport Tours, Inc. v. NCAA, 388 F.3d 955, 959 (6th Cir. 2004) (*quoting* National Hockey League, 325 F.3d at 718).

[24] United States v. Arnold, Schwinn & Co., 388 U.S. 365, 375 (1967), *overruled on other grounds by* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58-59 (1977).

[25] Antitrust Law Developments at 59 (*citing, e.g.,* United States v. Topco Assocs., Inc., 405 U.S. 596, 606 (1972)).

[26] *Id*.

[27] World Wide Basketball, 388 F.3d at 959 (*quoting* National Hockey League, 325 F.3d at 719).

a. The types of procompetitive justifications that can be asserted are limited.[28] The rule of reason inquiry "focuses exclusively on the challenged restraint's impact on competitive conditions."[29] Justifications for a challenged restraint "unrelated to the restraint's effect on competition are generally irrelevant to the analysis."[30]

b. Therefore, justifications related to the public interest or the integrity of the industry are generally insufficient without an economically procompetitive relation.[31] Indeed, the rule of reason "is not designed to protect the convenience or financial benefits of the conspirators or even other entities involved in the industry."[32] Instead, the purpose of antitrust analysis is "to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favouring competition is in the public interest, or in the interest of the members of an industry."[33]

7. If the defendant can justify a restraint on trade with procompetitive effects, then the burden shifts back to the plaintiff "to prove that the legitimate procompetitive objectives can be achieved in a substantially less restrictive manner."[34]

8. Even if a plaintiff can prove a violation of the antitrust laws, it cannot prevail unless it also proves (1) injury in fact, or causation, and (2) antitrust injury.

a. Injury in fact: A plaintiff must "establish the existence of 'injury' to itself. . ."[35] The existence of an underlying injury must be shown "with a 'reasonable degree of certainty.'"[36] Further, while "a plaintiff need not exhaust all possible

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[28] *See, e.g.,* General Cinema Corp. v. Buena Vista Distribution Co., Inc., 532 F.Supp. 1244, 1267-68 (D. C. Cal. 1982).

[29] *Id*. at 1267 (*citing* National Society of Professional Engineers v. U.S., 435 U.S. 679, 688 (1978)).

[30] Antitrust Law Developments at 72.

[31] *See, e.g.,* National Society of Professional Engineers, 435 U.S. at 695; FTC v. Indiana Federation of Dentists, 476 U.S. 447, 462 (1986).

[32] General Cinema Corp., 532 F. Supp. at 1267.

[33] National Society of Professional Engineers, 435 U.S. at 692.

[34] World Wide Basketball, 388 F.3d at 959 (*citing* National Hockey League, 325 F.3d at 718).

[35] Antitrust Law Developments at 814 (citations omitted).

[36] *Id*. at 815 (citations omitted).

alternative sources of injury," a plaintiff does have to prove "that the illegality is shown to be a material cause of the injury."[37]

b. Antitrust injury: In addition to proving injury with a causal link to the alleged violation, a plaintiff must also prove "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."[38] A plaintiff cannot prevail by merely showing "injury due to an illegal presence in the marketplace."[39] It must "link its alleged injury proximately to the purpose of the antitrust laws."[40]

E. Enforcement

1. The United States has a decentralized enforcement authority.

a. Federal.

i. Department of Justice.

ii. Federal Trade Commission.

iii. Sectoral regulators.

iv. Private actions (customers, suppliers, competitors).

v. Collateral government bodies (*e.g.,* Patent and Trademark Office).

b. State.

i. State Attorneys General and NAAG.

ii. Sectoral regulators.

iii. Private actions (customers, suppliers, competitors).

2. Businesses must also be cognizant of the antitrust laws of the foreign countries where they either have operations or do business. Most major economic powers, such as the European

[37] Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 n. 9 (1969).

[38] Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334 (1990) (*quoting* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977)).

[39] Antitrust Law Developments at 818.

[40] *Id*. (citations omitted).

Union, China, Japan, Brazil, and Australia, for example, have sophisticated antitrust laws that are similar to some aspects of Untied States antitrust law, but are substantially different in others.

3. The roles of public and private enforcement are meant to complement one another.[41]

   a. Public enforcement.

      i. Detection and deterrence.

      ii. Courts provide an institutional check on public prosecutors.

   b. Private enforcement.

      i. Detection and deterrence.

      ii. Compensation.

      iii. Remediation.

      iv. Courts provide an institutional check on frivolous claims and frivolous litigating.

F. How Are Violations of the Antitrust Laws Punished?

   1. Criminal.

      a. Imprisonment of up to ten years.

      b. Fines against companies of up to $100 million or twice the gross gain or loss resulting from the antitrust violation.

      c. Fines against individuals of up to $1 million for each offense.

      d. Asset forfeitures.

      e. Injunctive relief.

   2. Civil.

      a. Damages (double, treble, or even more).

      b. Injunctive relief or consent decrees (structural and behavioral).

[41] ABA Section of Antitrust, Fundamentals 6 (59th Antitrust Spring Meeting 2011).

c. Attorneys' fees and court costs.

d. Disgorgement.

3. Recent indictments.[42]

a. DeMilta Iron.[43]

i. In 2008, a federal grand jury indicted an Ohio scrap metal dealer, DeMilta Iron & Metal Ltd., and its owner, Francis DeMilta under Section 1 of the Sherman Act for conspiracy to restrain interstate trade and commerce by allocating scrap metal suppliers as part of an industry-wide investigation by the Department of Justice.

ii. The indictment charged DeMilta with, among other things, agreeing not to compete with other dealers, denying other suppliers a competitive price, and agreeing which co-conspirator would purchase scrap metal from a particular supplier.

iii. Criminal fines and restitution totalling over $15.5 million were imposed as part of the investigation of the scrap metal industry.

b. Sea Star Line.[44]

i. In November 2011, a federal grand jury indicted the former president of Sea Star Line LLC for conspiracy to fix prices in violation of the Sherman Act.

ii. He is accused of meeting with competitors to allocate customers, rig bids, and set prices for freight services from Florida to Puerto Rico.

[42] The recent indictments listed here are summaries of press releases from the Department of Justice. They do not indicate innocence or guilt.

[43] Press release, Department of Justice, Cleveland Scrap Metal Dealer and Owner Indicted in Antitrust Conspiracy (February 6, 2008) http://www.justice.gov/atr/public/press_releases /2008/229926.htm.

[44] Press release, Department of Justice, Florida-Based Sea Star Line LLC Agrees to Plead Guilty and Its Former President Is Indicted for Price Fixing on Coastal Freight Services between the Continental United States and Puerto Rico (Nov. 17, 2011) http://www.justice.gov/opa/pr/ 2011/November/11-at-1505.html.

iii. Sea Star Line, based in Jacksonville, pleaded guilty to conspiring to set prices and rig bids, and will pay a $14.2 million fine.

iv. Five former shipping executives from both Sea Star Line and its competitor Horizon Lines LLC have been sentenced to pay a total of nearly $85,000 in criminal fines and to serve more than eleven years in prison, collectively.

c. Florida West International Airways.[45]

i. In December 2010, Miami based Florida West International Airways Inc., a former executive, and two executives of a competitor were indicted for a conspiracy to fix air cargo prices.

ii. They were charged with price fixing in violation of the Sherman Act by allegedly conspiring to suppress and eliminate competition by agreeing to fix air cargo rates on shipments from Colombia to Miami and not to compete for certain customers.

iii. The indictments resulted from an investigation into the entire air freight industry.

iv. As of December 2010, twenty-one airlines and nineteen executives have been charged in the air freight industry investigation. Over $1.7 billion in fines have been imposed, and four executives have been sentenced to prison.

II. WHAT STEPS ARE ESSENTIAL TO ENSURE ANTITRUST COMPLIANCE?

A. Create an Atmosphere of Compliance

B. Conduct a General Antitrust Survey of All Company Structures and Operations

1. List past investigations or litigation involving company or industry.

2. List trade association memberships.

3. Interview senior managers including head of sales.

4. List competitors.

[45] Press release, Department of Justice, Florida West International Airways, Inc., Three Executives Indicted in Conspiracy to Fix Rates on Air Cargo Shipments (Dec. 3, 2010) http://www.justice.gov/atr/public/press_releases/2010/264754.htm.

5. List collaborative activities.

6. Review how prices are determined.

7. Review all contracts.

   a. Entered into with competitors or potential competitors.

   b. With "non-compete" clauses.

   c. With "no-hire" clauses.

   d. Involving joint buying or joint selling groups.

   e. Involving joint R&D or production.

8. List areas of risk and concern.

C. Create an Antitrust Compliance Policy for All Directors, Officers and Employees

D. Add an Antitrust Section to Employee Manuals

E. Review Industry or Activity Specific Guidelines Collected at: http://www.justice.gov/atr/public/business-resources.html[46]

F. Confer Regularly with Outside Antitrust Counsel

G. Conduct Antitrust Compliance Seminars for Management and Sales Forces at least Annually

H. Include Antitrust Sections in Employee Manuals, with New Employee and Annual Sign-off

I. Consider Joint Ventures for Collaboration with Competitors or Potential Competitors[47]

J. Consider how the antitrust laws apply to your specific industry. There may be special considerations, such as special considerations for insurance, healthcare, sports, gaming, paper and cement.

K. Recognize that no company is too small to be concerned with antitrust law. There have been substantial antitrust cases against relatively small companies and associations.[48]

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[46] These policy statements reflect enforcement policy and not necessarily the law.

[47] *See, e.g.,* Texaco Inc. v. Dagher, 547 U.S. 1 (2006); American Needle, Inc. v. National Football League, 130 S.Ct. 2201 (2010).

L. Minimize the Risks of Trade Association Activities

1. Weigh rewards and risks of participation.

2. Make sure that meetings are attended by antitrust counsel.

3. Insist on agendas for all meetings.

4. Counsel attendees.

5. Spill coffee on someone and leave if price discussions occur.

M. Understand Document Handling and Retention, Company-wide

N. Be Aware of Antitrust "Swearwords"[49]

1. "Good neighbor policy."

2. "Ethical pricing."

3. "Maintaining rational markets."

4. "Rub my back and I'll rub yours."

5. "You heard the economist's speech; an overall 10 percent price hike will produce sufficient funds to finance the capital investments our industry needs."

6. "Look, you bid low in the full moon; I'll bid low in the new."

7. "What goes around comes around."

8. "We weren't colluding, we were engaging in Coopetition."

O. Conduct an Antitrust Audit: Detailed Antitrust Review of all Operations and Strategic Plans, usually Conducted by Outside Counsel

1. Useful if antitrust survey indicates potential problem areas.

2. Interviews of all key employees, with preservation of attorney client privilege.

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[48] *See, e.g.,* Press release, Department of Justice, Department of Justice and Arizona State Attorney General Break Up Dental Group's Conspiracy to Eliminate Discounting (Aug. 30, 1994) http://www.justice.gov/atr/public/press_releases/1994/211902.htm; U.S. v. Mrs. Baird's Bakeries, Inc. and Floyd Carroll Baird, Criminal No. 3-95CR-294-R (N. D. Tex. September 28, 1995).

[49] *See, e.g.,* Dean Harvey, "Anticompetitive Social Norms as Antitrust Violations," 94 Calif. L. Rev. 769 (2006) (discussing whether anticompetitive social norms can constitute violations of §1 of the Sherman Act).

3. Review of key files.

4. Provide a report to General Counsel, Chairman or Board with specific recommendations for preventive or remedial action.

III. WHAT DO I DO IF I THINK THERE MAY BE AN ANTITRUST CLAIM AGAINST THE COMPANY?

A. Safeguard the Record/Issue a Litigation Hold

1. The obligation to preserve relevant evidence, whether paper or electronic, arises when litigation is commenced or reasonably anticipated.[50]

2. Measures to safeguard the record include:

a. Determine the record retention policy for both paper and electronic documents.

b. Issue a litigation hold notice:

i. The notice should describe the nature of the asserted claims, the documents that are to be preserved, potential locations of the documents, the time period during which the documents may have been created or stored, and the steps that must be taken to comply with the obligation to preserve evidence.

ii. The notice should cover all documents and data, including but not limited to hard copy documents, audio recordings, videotapes, instant messages, emails, text files (*e.g.,* word processing documents, spreadsheets, databases, presentation data, slide shows, etc.), calendars, telephone logs, contact manager information, internet usage files, etc.

iii. The notice should also cover all devices that store electronic or hard copy information, including hard copy files, computer hard drives, removable media (*e.g.,* CDs, DVDs, thumb drives, etc.), laptop or similar computer devices (*e.g.,* computer notebooks, tablets, iPads, etc.), PDAs, smart phones (*e.g.,* iPhones, BlackBerrys, Droids, etc.), personal computers, servers, back-up tapes and any other locations where hard copy and/or electronic data is stored.

[50] *See* Zubulake v. UBS Warburg LLP, 220 F.R.D. 212 (S.D.N.Y. 2003).

c. Interview key employees including IT personnel to:

i. Understand the facts and circumstances underlying the asserted claims.

ii. Determine if additional people should be subject to the hold.

iii. Understand the paper and electronic document retention policies.

iv. Understand how electronic information is stored, retained, and/or deleted and how to retrieve and produce electronic information in its native form.

v. Ensure that the relevant employees are exempt from destruction policies and are complying with the requirements of the hold.

vi. Determine if there is any information that may be the subject of a privilege.

d. Preserve paper and electronic documents subject to the litigation hold.

e. Make copies of hard drives and backup servers.

f. Consistently monitor compliance with the litigation hold.

B. Consider Separate Counsel for Individuals

C. What Is a CID?

1. Civil Investigative Demands (CIDs) are the basic pre-complaint discovery tool of the Antitrust Division of the Department of Justice. They are general discovery subpoenas authorized under the Antitrust Civil Process Act and may command production of documents, oral testimony, or answers to interrogatories.[51]

2. CIDs may be issued to any person who the Attorney General has reason to believe may have material relevant to a civil investigation. They are issued in connection with investigations of: alleged violations; activities in preparation for mergers, acquisitions, joint ventures, or similar transactions, which, if consummated, may result in violations; and violations of final orders, decrees, and judgments in antitrust cases.

[51] 15 U.S.C. §1311-1314.

3. The Antitrust Division may use information gathered pursuant to a CID in any case or proceeding before any court, grand jury, or federal administrative or regulatory agency. The Division may also use information from a CID in connection with taking oral testimony under another CID and, in certain circumstances, may provide information from a CID to the FTC. Information from a CID may also be provided to Congress.

4. The recipient of a CID can attempt to negotiate a reduction in the scope of the CID, as well as initiate an action to set aside or modify the CID. Also, recipients often present their position to the Antitrust Division, which eventually makes a decision whether to file an enforcement suit.

5. The civil investigation process can range from weeks to months. At the end of the process, the Antitrust Division may close the investigation (in which case the recipient may simply not receive any further communications), may attempt to negotiate a settlement or consent decree, or may file suit.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA	)	Filed:
	)	
v.	)	
	)	Criminal No.: 1:08CR0068
	)	
ALLIANCE NATIONAL LIMITED PARTNERSHIP, d/b/a DEMILTA IRON & METAL, LTD;	)	JUDGE DONALD C. NUGENT
	)	
FRANCIS DEMILTA; and	)	Violations: 15 U.S.C. § 1
	)	18 U.S.C. § 1623; and
RONALD VAUGHN	)	18 U.S.C. § 1503
	)	
Defendants.	)	

SUPERSEDING INDICTMENT

The Grand Jury charges:

COUNT I

CONSPIRACY TO RESTRAIN TRADE
IN VIOLATION OF THE SHERMAN ANTITRUST ACT
(15 U.S.C. § 1)

THE DEFENDANTS

1. The following companies and individuals are hereby indicted and made Defendants in the charge stated below in Count One:

(a) ALLIANCE NATIONAL LIMITED PARTNERSHIP, d/b/a/ DEMILTA IRON & METAL, LTD. (hereinafter "DEMILTA IRON & METAL" unless otherwise noted); and

(b) FRANCIS DEMILTA.

DESCRIPTION OF THE OFFENSE

2. Beginning at least as early as August 1997 and continuing at least until January 2004, the exact dates being unknown to the Grand Jury, the Defendants DEMILTA IRON & METAL and FRANCIS DEMILTA and co-conspirators entered into and engaged in a combination and conspiracy to suppress and restrain competition by allocating scrap metal suppliers for the purchase of scrap metal in Northeast Ohio. The charged combination and conspiracy unreasonably restrained interstate trade and commerce in violation of Section 1 of the Sherman Act (15 U.S.C. § 1).

3. The charged combination and conspiracy consisted of a continuing agreement, understanding, and concert of action among the Defendants and co-conspirators, the substantial terms of which were to allocate scrap metal suppliers for the sale of scrap metal in Northeast Ohio, and, in return for not soliciting scrap suppliers of its co-conspirators, DEMILTA IRON & METAL was sold scrap metal by its co-conspirators at prices below market value.

MEANS AND METHODS OF THE CONSPIRACY

4. For the purpose of forming and carrying out the charged combination and conspiracy, the Defendants and co-conspirators did the following things, among others:

(a) participated in meetings and conversations to discuss allocating suppliers of scrap metal (also referred to in the industry and by Defendants as accounts and customers);

(b) agreed, during such meetings and discussions, to allocate scrap metal suppliers and to not compete against each other for the purchase of scrap metal;

(c) allocated, pursuant to their agreement, scrap metal suppliers, denying such scrap metal suppliers a competitive price and thereby depressing or maintaining the price that DEMILTA IRON & METAL, FRANCIS DEMILTA, and their co-conspirators paid for scrap metal;

(d) agreed, during such meetings and conversations, which designated co-conspirator would purchase scrap metal from particular scrap metal suppliers;

(e) participated in meetings and conversations to discuss the submission of bids for the purchase of scrap metal;

(f) refrained from, pursuant to their agreement, competing against each other;

(g) agreed, pursuant to their meetings and discussions, that DEMILTA IRON & METAL would be sold scrap metal by its co-conspirators at a price below market value in return for DEMILTA IRON & METAL's agreement not to solicit scrap metal suppliers of its co-conspirators;

(h) DEMILTA IRON & METAL's co-conspirators sold, pursuant to their agreement, scrap metal to DEMILTA IRON & METAL at a price below market value in return for DEMILTA IRON & METAL's not soliciting scrap metal suppliers of its co-conspirators; and

(i) DEMILTA IRON & METAL paid, pursuant to their agreement, prices below market value for scrap metal sold to it by its co-conspirators in return for DEMILTA IRON & METAL's not soliciting scrap metal suppliers of its co-conspirators.

THE DEFENDANTS AND CO-CONSPIRATORS

5. Defendant ALLIANCE NATIONAL LIMITED PARTNERSHIP is an Ohio limited partnership that was formed in or about April 1993 and does business as DEMILTA IRON & METAL, LTD. DEMILTA IRON & METAL is headquartered in Willoughby, Ohio, and has its principal place of business in Northeast Ohio. At all times relevant to this Indictment,

DEMILTA IRON & METAL was owned by FRANCIS DEMILTA. At all times relevant to this Indictment, DEMILTA IRON & METAL was engaged in the purchase and sale of ferrous and nonferrous scrap metal in Northeast Ohio and elsewhere. DEMILTA IRON & METAL purchased scrap metal for resale from suppliers of scrap metal, then sold the scrap metal it purchased to mills and foundries located inside and outside the State of Ohio.

6. At all times relevant to this Indictment, FRANCIS DEMILTA was the founder, owner, and president of ALLIANCE NATIONAL LIMITED PARTNERSHIP, d/b/a DEMILTA IRON & METAL, LTD. Prior to forming ALLIANCE NATIONAL LIMITED PARTNERSHIP and DEMILTA IRON & METAL, FRANCIS DEMILTA was the founder, owner, and president of DeMilta Scrap & Salvage, Inc., a business that FRANCIS DEMILTA started in the early 1980s and which also was engaged in the purchase and sale of scrap metal. At all times relevant to this Indictment, FRANCIS DEMILTA was directly engaged in the purchase and sale of scrap metal and supervised the business activities of DEMILTA IRON & METAL.

7. Various individuals, companies, and corporations not made Defendants in this Indictment, participated as co-conspirators in the offense charged and performed acts and made statements in furtherance of it.

8. Whenever this Count refers to any act, deed, or transaction of any company or corporation, it means that the company or corporation engaged in the act, deed, or transaction by or through its officers, directors, employees, agents, or other representatives while they were actively engaged in the management, direction, control, or transaction of its business or affairs.

TRADE AND COMMERCE

9. Ferrous and nonferrous scrap metal is a residual product that has value. Typically, manufacturing plants, mills, and foundries generate ferrous and nonferrous scrap

metal as a by-product. In the scrap metal industry, this type of scrap is generally referred to as industrial scrap. For example, tool and die makers or stamping plants end up with small or odd-shaped pieces of scrap that are a by-product of their manufacturing process. This scrap is valuable if picked up, sorted, and sold to mills or foundries that desire scrap metal as part of their manufacturing process. The business of scrap metal companies, such as the Defendants and co-conspirators, generally involves placing collection boxes (*e.g.*, lugger and roll off containers) at manufacturers' sites to collect the scrap metal, then picking it up, processing it, and reselling it to customers.

10. At all times relevant to this Indictment, Defendants DEMILTA IRON & METAL, FRANCIS DEMILTA, and co-conspirators (1) purchased ferrous and nonferrous scrap metal from individuals and companies located inside and outside the State of Ohio; (2) sold or shipped ferrous and nonferrous scrap metal to individuals and companies located inside and outside the State of Ohio; and (3) caused ferrous and nonferrous scrap metal to be purchased from, sold to, or shipped from or to, individuals and companies located inside and outside the State of Ohio.

11. At all times relevant to this Count, substantial quantities of ferrous and nonferrous scrap metal bought and/or sold by the Defendants and co-conspirators were shipped across state lines in a continuous and uninterrupted flow of interstate trade and commerce.

12. The activities of the Defendants and co-conspirators that are the subject of this Count were within the flow of, and substantially affected, interstate trade and commerce.

JURISDICTION AND VENUE

13. The combination and conspiracy charged in this Count was formed and carried out, in part, by the Defendants DEMILTA IRON & METAL, FRANCIS DEMILTA, and co-

conspirators in the Northern District of Ohio within the five years preceding the return of this Indictment.

ALL IN VIOLATION OF TITLE 15, UNITED STATES CODE, SECTION 1.

COUNT II

FALSE DECLARATIONS
(18 U.S.C. § 1623)

The Grand Jury further charges:

THE DEFENDANT

14. RONALD VAUGHN is hereby indicted and made a Defendant in the charge stated below.

15. At all times relevant to this Indictment, Defendant RONALD VAUGHN was an employee of Alliance National Limited Partnership, d/b/a DeMilta Iron & Metal, Ltd. At all times relevant to this Indictment, RONALD VAUGHN was the vice president of DeMilta Iron & Metal, was directly engaged in the purchase and sale of scrap metal, and supervised the business activities of DeMilta Iron & Metal. RONALD VAUGHN and Francis DeMilta are brothers-in-law.

DESCRIPTION OF THE OFFENSE

(False material declarations about an agreement or understanding between DeMilta Iron & Metal and co-conspirators not to solicit each other's scrap metal suppliers)

16. On June 7, 2005, in the Northern District of Ohio, RONALD VAUGHN testified under oath as a witness before the Grand Jury, duly empaneled by the United States District Court for the Northern District of Ohio, sitting in Cleveland, Ohio, and knowingly made false material declarations concerning matters the Grand Jury was investigating, in violation of 18 U.S.C. § 1623.

UNITED STATES OF AMERICA v. ALLIANCE NATIONAL LIMITED PARTNERSHIP, d/b/a DEMILTA IRON & METAL, LTD; FRANCIS DEMILTA; and RONALD VAUGHN

A TRUE BILL.

FOREPERSON

Dated:

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Assistant Attorney General

SCOTT M. WATSON
Chief, Cleveland Field Office

SCOTT D. HAMMOND
Deputy Assistant Attorney General

RICHARD T. HAMILTON, JR.
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