UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION
CIVIL ACTION NO. 5:98-CV-108-R

CONWOOD COMPANY, L.P., ET AL. PLAINTIFFS

v.

UNITED STATES TOBACCO COMPANY, ET AL. DEFENDANTS

**MEMORANDUM OPINION**

This matter is before the Court on Defendants' renewed motion for judgment as a matter of law (doc. #366-1), and motion for a new trial (doc. #366-2), or in the alternative, a reduced damages award (doc. #366-3), and Defendants' motion for permission to conduct post-verdict juror interviews (doc. #373). These motions are denied for the following reasons.

## I. BACKGROUND

Plaintiffs, Conwood Company, L.P. and Conwood Sales Company, L.P. ("Conwood"), brought this antitrust action against United States Tobacco Company, United States Tobacco Sales and Marketing Company, Inc., United States Tobacco Manufacturing Company, Inc. and UST Inc. ("UST"). Both Conwood and UST manufacture and sell moist snuff smokeless tobacco to retail stores throughout the United States. The United States moist snuff industry makes over $1 billion in profits a year. UST controls about 78% of the moist snuff market in the United States with its popular Copenhagen and Skoal brands. Conwood, which manufactures the Kodiak brand, among others, is its largest competitor with about 13 % of the market. Only two other companies manufacture and sell moist snuff in the United States, Swisher and Swedish Match.

Moist snuff is sold to consumers at retail stores throughout the United States. Moist snuff comes in a small, round can. The cans are displayed in stores in plastic racks that sit on shelves or counters. The racks contain several slots or facings for different brands of moist snuff. The racks also contain an area where manufacturers can place advertisements. Each manufacturer will provide a rack to retail stores at no charge.

Conwood alleged monopolization and attempted monopolization in violation of the Sherman Act, 15 U.S.C. § 2. At trial, Conwood alleged that, beginning in 1990, UST engaged in a campaign to limit the growth of competition that had begun in the 1980's. The price-value market of moist snuff had been growing in the previous decade. Conwood alleges that the strategy of UST executives was not to compete on price, but to limit the distribution at retail outlets of competing brands of moist snuff. Conwood presented UST documents supporting this allegation. Conwood executives and employees, some UST employees, other competitors and retailers testified about widespread conduct by UST that harmed competitors. This conduct included removing competitors' racks and point of sale advertising, which Conwood claimed was especially harmful because of government restrictions on other forms of tobacco advertising. Conwood also presented proof that UST misrepresented facts to the retailers and used its position as the industry leader to influence retailers to use UST's racks exclusively and reduce the facings of competitors' brands.

UST was well-represented by counsel and vigorously defended these allegations. UST presented proof that the alleged conduct was ordinary business practice. UST also presented testimony of some retailers indicating that their decisions were made independently of any action by UST.

At the end of a jury trial that lasted over four weeks, the jury found Defendants guilty of antitrust violations. Pursuant to 15 U.S.C. § 15(a), the Court entered judgment in the amount of $1,050,000,000 in favor of Plaintiffs,, treble the jury verdict of $350,000,000. Defendants have moved for either post trial judgment as a matter of law, Fed.R.Civ.P. 50(b), or a new trial under Fed.R.Civ.P. 59(a), or a remittitur.

## II. STANDARDS

### A. Judgment as a Matter of Law

UST is entitled to judgment as a matter of law if there is "no legally sufficient evidentiary basis for a reasonable jury" to find for Conwood. Fed.R.Civ.P. 50(a)(1). The Sixth Circuit has set forth the standard of review for a Rule 50 motion based on sufficiency of the evidence :

> The evidence should not be weighed. The credibility of the witnesses should not be questioned. The judgment of this court should not be substituted for that of the jury. Instead, the evidence should be viewed in the light most favorable to the party against whom the motion is made, and that party given the benefit of all reasonable inferences. The motion should be granted . . . only if reasonable minds could not come to a conclusion other than one favoring the movant.

*K & T Enterprises, Inc. v. Zurich Ins. Co.,* 97 F.3d 171, 175-76 (6th Cir. 1996).

### B. New Trial

Defendants are entitled to a new trial under Fed.R.Civ.P. 59 only if the jury reached "a seriously erroneous result." *Holmes v. City of Massillon*, 78 F.3d 1041, 1045-46 (6th Cir. 1996). Defendants must demonstrate that 1) the verdict was against the weight of evidence; 2) damages were excessive; or 3) the trial was unfair to Defendants. *Id.* at 1046. U.S. Tobacco argues all three points.

"[C]ourts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that

other results are more reasonable." *Barnes v. Owen-Corning Fiberglass Corp.*, 201 F.3d 815, 820-21 (6th Cir. 2000).

C. Remittitur

"A motion for a remittitur should only be granted if the award clearly exceeds the amount which, under the evidence in the case, was the maximum that a jury reasonably could find to be compensatory for the plaintiff's loss." *In re Lewis*, 845 F.2d 624, 635 (6th Cir. 1988)(internal quotation marks omitted). "If there is any credible evidence to support a verdict, it should not be set aside." *Farber v. Massillon Bd. of Educ.*, 917 F.2d 1391, 1395 (6th Cir. 1990)

III. MOTION FOR JUDGMENT AS A MATTER OF LAW

Defendants now seek judgment as a matter of law, claiming that Conwood did not prove a single element of its Sherman Act § 2 claim. The offense of monopolization under § 2 of the Sherman Act has two elements: "(1) the possession of monopoly power in the relevant market and (2) 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." *Re/Max International, Inc. v. Realty One, Inc.,* 173 F.3d 995 (6th Cir. 1999)(citations omitted). U.S. Tobacco vigorously denies that any of its conduct constituted antitrust violations, and it further objects to the amount of damages that the jury awarded. Defendants argue that to let the judgment stand would "revolutionize" antitrust law. U.S. Tobacco's motion challenges each element of Conwood's monopolization claim. However, U.S. Tobacco does not specifically address the verdict in Conwood's favor on the attempt to monopolize claim.

At trial, UST twice moved for judgment as a matter of law/directed verdict. Both times, this Court found that Conwood had produced enough evidence for a reasonable jury to find in

their favor. U.S. Tobacco's current motion for judgment as a matter of law reargues the same points it made to this Court in its motion for summary judgment and motions for directed verdict. The court previously ruled against U.S. Tobacco on the motions, and U.S. Tobacco has not demonstrated to this court why it now should find otherwise.

A. Existence of Monopoly Power

There are two ways for Conwood to establish that UST holds monopoly power. The first is by presenting direct evidence "showing the exercise of actual control over prices or the actual exclusion of competitors." *Byars v. Bluff City News Co.*, 609 F.2d 843, 850 (6th Cir.1979). The second is by presenting circumstantial evidence of monopoly power by showing a high market share within a defined market. *Re/Max Intl., Inc. v. Realty One, Inc.*, 173 F.3d 995, 1016 (6th Cir. 1999). "In recent years, parties and courts have increasingly moved toward utilizing the circumstantial method as a 'shortcut.'" *Id.* The Sixth Circuit has noted that the "Supreme Court has concluded that an 87% share of the market and over two-thirds of the market both constitute monopoly power under § 2." *See PSI Repair Servs., Inc. v. Honeywell, Inc.*, 104 F.3d 811, 821 (6th Cir. 1997) (citing *United States v. Grinnell Corp*., 384 U.S. 563, 571 (1966); *American Tobacco Co. v. United States*, 328 U.S. 781, 797 (1946)).

Conwood presented sufficient circumstantial evidence of monopoly power because UST had at least 74% of the relevant market. Conwood also presented other evidence of UST's control over prices or actual exclusion of competitors. During the alleged period of antitrust activity, no new competitors entered the market. And although UST's market share was shrinking somewhat, its decline slowed during the alleged period of anticompetitive conduct. UST had a very high profit margin and never lowered prices. UST vigorously argued against

these allegations at trial, but a jury found otherwise. UST's high market share, coupled with UST's raising prices and high profit margins, and the fact that not a single new firm entered the moist snuff industry after 1990, indicate that it was reasonable for a jury to find that UST possessed monopoly power in the relevant market.

Furthermore, UST did not challenge specifically the jury's verdict in Conwood's favor on its attempted monopolization claim. In the attempt claim, Conwood did not have to prove that UST actually had monopoly power, but that there was a dangerous probability the UST would achieve its goal of monopoly power in the relevant market. The jury found that there was such a dangerous probability.

B. Willful Maintenance of Monopoly Power

The Court's instructions to the jury correctly stated the law on this element:

> Restrictive or exclusionary conduct is conduct that has the effect of preventing or excluding competition or frustrating or impairing the efforts of other firms to compete for customers within the relevant market. It is not necessary that such conduct be unlawful in and of itself, apart from its effect in maintaining U.S. Tobacco's monopoly power . . . The acts or practices that result in the maintenance of monopoly power must represent something more than the conduct of business that is part of the normal competitive process or extraordinary commercial success. They must represent conduct that has made it very difficult or impossible for competitors to engage in fair competition.

U.S. Tobacco argues at length that its conduct does not rise to antitrust violations, but rather, constitutes ordinary business practices. U.S. Tobacco argued this to the jury. However, there was extensive evidence presented by Conwood that UST's conduct was not ordinary competition. Conwood presented evidence through witnesses and documents that UST had eliminated competitive distribution in stores, obscured the presence of competitor's advertising and products, and provided misleading data to retailers to obtain exclusive vending. Former UST

sales representatives, Conwood sales representatives, and store witnesses testified that UST eliminated competitors' sales racks and point of sale advertising without retailer or competitor consent. Conwood witnesses testified that this activity was widespread. Internal UST documents supported Conwood's theories. Even some current U.S. Tobacco executives would not condone the alleged conduct and refused to say that it was "ordinary business conduct." It was for the jury to determine whether to believe UST's argument that "everybody does it, " and it was reasonable for the jury to find that UST willfully maintained monopoly power through restrictive or exclusionary acts or practices.

The evidence supported Conwood's theory that UST's interrelated practices successfully limited competition. UST once again attempts to divide the practices into discreet, distinct activities, each of which prior courts may have found to be lawful. The case law cited by UST is not persuasive. The moist snuff industry is unique compared to the snack food or soda industry. Point of sale advertising and visibility in the moist snuff industry is very critical because government restrictions severely limit other methods of advertising. *See R.J.Reynolds Tobacco v. Philip Morris, Inc.*, 60 F.Supp.2d 502 (M.D.N.C. 1999). Defendants argue that no one instance of improper conduct standing alone would lead to § 2 liability. However, taken together, they show a pattern of exclusionary behavior sufficient to support the jury verdict.

C. Injury and Causation

The Court's instruction on this element correctly read:

> For Conwood to establish that it is entitled to recover damages, it must prove that it was injured as a result of U.S. Tobacco's alleged violation of antitrust laws. . . . To establish injury, Conwood must have offered evidence that establishes as a matter of fact and with a fair degree of certainty that U.S. Tobacco's alleged illegal conduct was a material cause of Conwood's injury. This means that Conwood must have proved that some damage flowed to it as a result of U.S.

Tobacco's alleged antitrust violation

UST cannot demonstrate that it is entitled to judgment as a matter of law on this issue. Although UST makes legitimate arguments similar to those made to the jury, there is sufficient evidence for the jury to find for Conwood on this element. Both Conwood's chairman and Swedish Match's chairman testified that UST's conduct restricted their growth. Furthermore, Conwood presented expert testimony through Dr. Kamien that there was a direct relationship between the number of facings controlled by UST and higher prices for consumers. Much of Conwood's proof on this element was based on the credibility of Kamien and Rosson. Apparently, the jury gave much weight to their testimony. Conwood also presented evidence that UST systematically removed their racks and facings, causing Conwood to lose sales. Although Conwood experienced some growth during the period of antitrust activity, its growth was sharply curtailed between 1990 and trial. All of these facts lead the Court to believe that the jury was reasonable in finding for Conwood on this element.

The Court also finds that the jury was reasonable in finding that UST's illegal conduct was a material cause of Conwood's injury. UST argues that other factors caused Conwood's decline in growth, such as the independent, uncoerced decisions of retailers, additional competition from other manufacturers and Conwood's failure to compete. UST ignores the evidence that it limited competitor's distribution without retailer consent. Nothing indicates that the jury did not consider UST's arguments.

D. Damages

The Court's instruction correctly stated the law:

> If you find that U.S. Tobacco either monopolized or attempted to monopolize in accordance with these instructions, the law provides that Conwood should be

> fairly compensated for all damages to its business or property that were a direct result or likely consequence of the conduct that you have found to be unlawful. . . . You may not, however, calculate damages based only on speculation or guesswork, and you must remember that you can award Conwood damages only for injuries caused by a violation of the antitrust laws. You may not award damages for injuries or losses caused by other factors.

As it did with Defendants' motions for directed verdict, the Court again rejects Defendants' argument that Conwood's proof of injury and damage is based on speculation. Although the court did characterize Plaintiff's damage proof as weaker than its proof of the other elements, UST is not entitled to judgment as a matter of law. The Court should not substitute its judgment for that of the jury where a reasonable jury could find for Conwood.

The jury awarded Conwood $350 million in damages. Although this amount is high, it is supported by a legally sufficient evidentiary basis. Conwood presented expert testimony through Dr. Leftwich that UST's antitrust activity caused between $155 and $488 million. Conwood's chairman's testimony also supported Leftwich's analysis. UST thoroughly cross-examined Leftwich about his opinions and theories, as well as Rosson. The high profit margins of moist snuff sales, the length of the antitrust activity and the decline in Conwood's growth support Leftwich's range of damages for lost profits. The fact that the jury awarded damages in the mid-range indicates that the jury adequately considered only those damages that were a direct result or likely consequence of UST's unlawful conduct.

In conclusion, while the Court may not have reached the same verdict, the evidence supports the jury's verdict. In their argument, UST ignores the primary factor that most likely results in an adverse verdict. At trial, UST's counsel and CEO clearly recognized that the videotaped testimony of several key UST employees was damaging. The CEO even testified that he was "embarrassed" by some of the testimony. While UST argued that such testimony

was not reflective of their conduct and intentions, it is clear that the jury felt otherwise. Any reviewer of this record should observe the videotapes of the UST representatives presented by Plaintiff during their proof to have a true picture of their testimony.

## IV. MOTION FOR A NEW TRIAL

To receive a new trial, Defendants must demonstrate that 1) the verdict was against the weight of evidence; 2) damages were excessive; or 3) the trial was unfair to Defendants. *Holmes v. City of Massillon*, 78 F.3d 1041, 1046 (6th Cir. 1996). U.S. Tobacco argues all three points.

The challenged verdict must be unreasonable before the Court can grant a new trial. *Barnes v. Owen-Corning Fiberglass Corp.*, 201 F.3d 815, 820-21 (6th Cir. 2000). The verdict was not against the weight of evidence. UST focuses on the evidence that supports its position. However, there was much contrary evidence supporting the verdict. Even if the Court feels that a verdict in favor of UST would have been more reasonable, it cannot set aside the jury verdict. *Id.*

U.S. Tobacco argues that the damages were excessive. The jury's damage award was well within the range that Conwood proved at trial. Once again, the court does not find that Conwood's damages evidence was mere speculation. Proving antitrust damages involves complicated matters of economics. Both parties had expert witnesses who gave contradictory testimony on damages. In such a case "[w]here the jury was free to determine which expert to believe, this Court should not disturb the jury's decision." *See Morales v. American Honda Motor Co., Inc.*, 151 F .3d 500, 506 (6th Cir.1998).

U.S. Tobacco claims that many of this court's rulings caused it to have an unfair trial. Neither party hesitated in providing numerous opportunities for the Court to make rulings of

record. In each case the Court carefully considered the arguments of counsel and attempted to make fair rulings that followed the law. UST believes that this Court's rulings on its motion for summary judgment, motions in limine, and the Court's evidentiary rulings during trial were so erroneous that UST did not receive a fair trial. Obviously, this Court does not believe that its rulings were in error, or it would not have ruled so. This Court will not revisit those rulings individually. UST may raise those issues on appeal.

## V. REMITTITUR

Beside expert evidence that Conwood suffered no damages, U.S. Tobacco chose not to present alternate damage evidence. Now it seeks the Court to fashion a new award based on evidence that was never presented at trial. Conwood presented evidence that UST caused it to suffer over $450 million in damages. The jury awarded damages well within the range argued by Conwood. Plaintiffs motion for a remittitur is denied because the jury award is not "beyond the maximum damages that a jury reasonable could find to be compensatory for a party's loss." *Farber*, 917 F.2d at 1395.

## VI. JUROR INTERVIEWS

Generally, the Court does not allow the parties to conduct post-trial juror interviews. Jurors provide a tremendous public service, especially to the parties and the court. The court reimburses jurors for their expenses, but they lose their income and their time from business, family and friends. The jurors in this case served faithfully for over four weeks. They should not be subject to further questioning absent good cause. Defendants have not demonstrated any compelling reason to contact jurors. Defendants argue that they only seek to gain an understanding of what marketing practices were unlawfully exclusionary. Plaintiffs have filed a

motion for permanent injunctive relief. The Court's ruling on that motion will negate the need to interview jurors.

An appropriate order shall issue.

This is the ____ day of August 2000.

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Thomas B. Russell
Judge, United States District Court