Message from the Editors

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Dear Friends of the Trial Practice Committee,

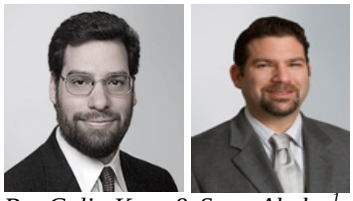
We are pleased to bring you the Spring 2017 edition of *Trying Antitrust*. This edition features three articles we believe you will find useful to your practice. In our first article, Colin Kass and Scott Abeles discuss their recent trial of a Robinson-Patman Act claim and their effective use of trial graphics, some of which are included in the article. Our next article, by Austin Smith and Dan Graulich, discusses the implications of the Second Circuit's *United States v. American Express* decision on two-sided markets on the trial of US Airways' section 1 claim against Sabre Holdings in the S.D.N.Y.; Sabre's JMOL motion on the issue is pending following a jury verdict in US Airways' favor. Finally, David Reichenberg discusses his recent *pro bono* trial of a 1983 claim and some lessons learned that cross over into antitrust practice.

The Trial Practice Committee is excited to present our annual Mock Trial at the upcoming Spring Meeting on Thursday, March 30 at 1:30 p.m. The Mock Trial will present a section 2 claim involving the movie theater industry. The Committee would like to thank David Reichenberg, Chris Dachniwsky, and Bill Katz for their terrific work in developing a fascinating fact pattern and jury instructions, which are included in this newsletter.

We welcome all volunteers. Please contact any of the Committee officers listed below to find out how to get involved.

Trying Antitrust, the newsletter of the Trial Practice Committee, is published twice a year by the American Bar Association Section of Antitrust Law. The views expressed in the newsletter are the authors' only and not necessarily those of the American Bar Association, the Section of Antitrust Law, the Trial Practice Committee or the editors of this newsletter.

TRIAL GRAPHICS AND YOUR ANTITRUST STORY



By: Colin Kass & Scott Abeles[1]

In September and October of 2016, we had the rare opportunity to try an antitrust case to jury verdict, one made rarer still as the case was brought under the infrequently-invoked Robinson-Patman Act of 1936. In brief, the plaintiff, Mathew Enterprises Inc. (known as "Stevens Creek") is a franchised auto dealer for FCA US LLC (known until recently as "Chrysler"). In 2012, Chrysler appointed a new dealer in Fremont, less than 20 miles away from Stevens Creek's location in San Jose, CA. That appointment supposedly cut into the sales it would otherwise have garnered, which in turn made it more difficult for it to earn incentive payments under Chrysler's "Volume Growth Program" (VGP).

Under the VGP, Chrysler set incumbent dealers' volume objectives formulaically by taking each one's historic sales in a given month or year and multiplying it by a growth factor. Stevens Creek alleged that its relatively high historic sales were not a fair barometer for its potential, given Fremont's entry. In Stevens Creek's view, this warranted a downward adjustment to its objectives, which it sought from Chrysler, but did not receive. In the year following Fremont's entry, Stevens Creek missed its objectives, and so earned no incentives, while Fremont (whose objectives were set first via a proxy metric, as it had no historic sales), earned such payments every month during the same period. The difference in these payments, claimed Stevens Creek, caused Stevens Creek to pay lower "effective" prices to Chrysler for the same vehicles, violating the RPA's prohibition against price discrimination.

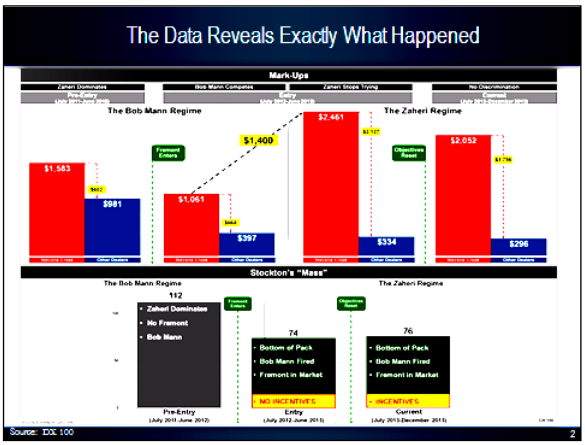
Chrysler (our client) prevailed after one day of deliberation by the eight-person jury. The jury found that Stevens Creek had not shown that the incentive payments were "functionally unavailable" to it; that is, Stevens Creek did not demonstrate that it could not have hit its objectives had it used commercially reasonable efforts to achieve them.

After discharge, members of the jury suggested that our graphical presentation during closing provided us with a lift, so we present a sampling of those slides here.

The Opening of the Closing: Encapsulating the Key Trial Theme from the Get-Go with a Quote

As an antitrust defendant, it was important for us to reframe the jury's attention onto the plaintiff's conduct. The quote on this slide – from hockey icon Wayne Gretzky – first arose during cross examination of plaintiff's economist and crystalized our case message, that Stevens Creek did not try hard enough to earn the incentives Chrysler offered. We therefore led our closing with it. Because the opening slide in any presentation can linger while the lawyers switch places or set up, or while the jurors, court staff, and public situates itself after a break, devoting extra time to the cover slide offers manifold repayment.

An Omnipresent Storyboard: Making the Data Come Alive and Ingraining it in the Jury's Mind



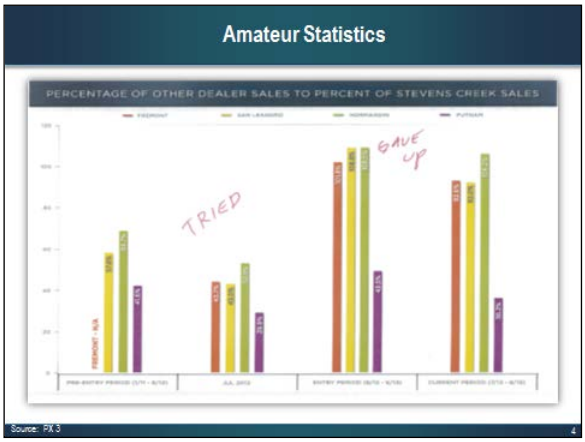
By the time of closing, the jury had seen a variation of this slide many times. We transformed this slide into a large foam board and placed it on an easel for use during direct and cross exams of nearly every witness. During the opening, we told the story around this slide, "building" each part of the board as we went, and showing how the data backed up our view of the facts. The board, for example, shows how Stevens Creek's prices (in red) compared to surrounding dealers' (in blue), and how Stevens Creek raised prices in pursuit of higher margins, even as the other surrounding dealers were lowering prices in response to increased competition.

[1] Colin Kass is Co-Chair of the antitrust group, and Scott Abeles is a senior associate, at Proskauer Rose LLP. The opinions expressed in this article are the authors' alone and do not necessarily reflect the opinions of any other person or organization, including FCA US LLC.

Ultimately, this slide brought to life the most compelling fact of the case: Stevens Creek jacked up prices by more than $2,000/vehicle as compared to its competitors. But the slide did even more. In addition to the comparison of local market prices in the top half, the bottom half focused on the flaw in plaintiffs' damages calculations. It contains what we dubbed "The Mountain and Two Hills," which show that Stevens Creek's sales were essentially identical during the first year following Fremont's entry (when it was supposed to be a victim of price discrimination) and the second year (when all agreed there was no discrimination) – these two years are the "Two Hills" in the graphic.

We spent many hours ensuring that this slide had the "right" information: pertinent and unassailable. We made an effort to use some aspect of this board with every witness, constantly reminding the jury of its presence, usefulness, and importance. By the end of the trial, even opposing counsel was pointing to the board, validating it even as he sought to take a few pot shots.

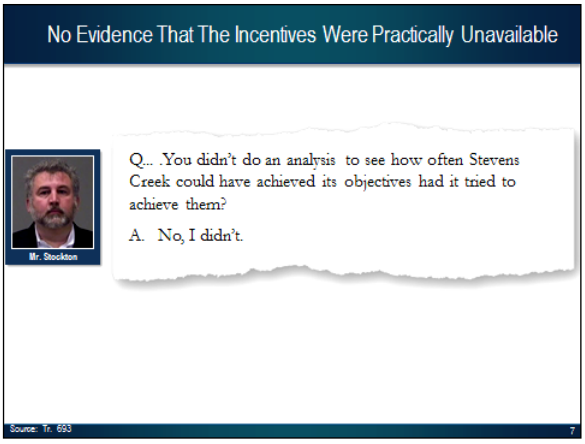
Capturing the Flag: Using the Elmo to Swat Away Plaintiff's Core Statistics



Stevens Creek responded to our statistics with statistics of its own. The chart above was the most compelling of its attempts: it shows that Stevens Creek performed worse, while other nearby dealers performed better, after Fremont entered the market. Plaintiff claimed that this established the effect of the incentives.

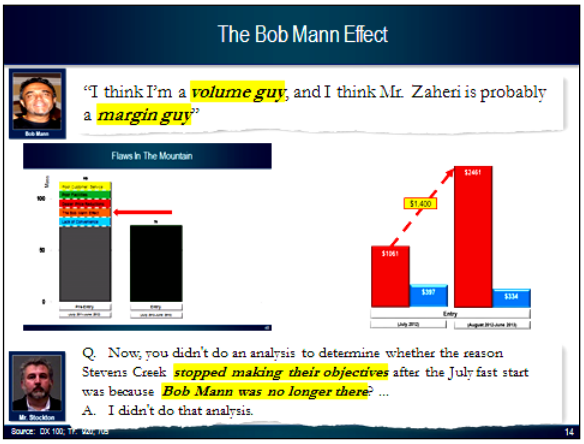
During our expert's examination, we placed this chart on the Elmo, and asked him what he thought about it. He gave a short, intuitive explanation. Stevens Creek, when operating with prior management, had tried hard to sell cars, lowering price to do so. When it changed management, which happened to coincide with Fremont's entry, Stevens Creek stopped trying to hit its objectives, preferring exorbitant margins on few cars over low margins on many.

Sometimes a Simple Quote Says So Much



The construction of a closing is a balancing act between bringing back all key facts and hammering home the best of them. The slide above falls into the latter camp, with an important admission from Stevens Creek's economist. It stands in relief to the "Super-slide" a couple bullets down used to maximize information transference.

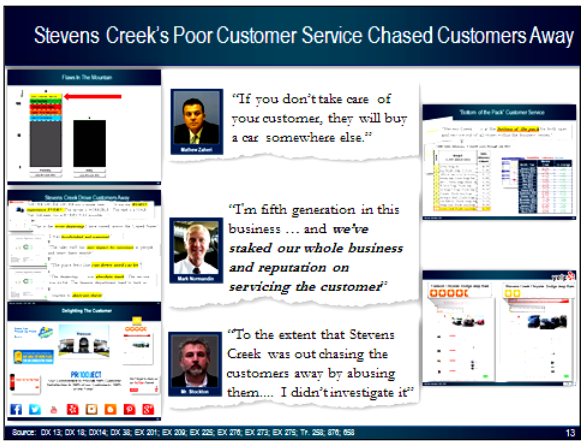
Personalizing the "Alternative Cause" Defense



Going into trial, we had a problem. Stevens Creek had an easy story to tell, one that struck an emotional chord: all it wanted was to be treated fairly, and because it wasn't, it couldn't compete. We knew this wasn't true. But we needed a way to claim the moral high ground. Enter "the Bob Mann Effect."

"The Bob Mann Effect" was the name we gave to the impact a dynamic Bay Area sales executive had on various dealerships during his career. As it happened, Mr. Mann was terminated by Stevens Creek just before the damages period. The jury heard about "the Bob Mann effect" from opening statements forward; witnesses, whether ours *or* plaintiff's, uniformly spoke of Mr. Mann's sales prowess in glowing terms. When it was his turn to testify, Mr. Mann boiled down the differences in his management style versus Stevens Creek's owner's (who replaced him at "the desk") in one easy, and brutal sentence.

A Summary "Super-Slide" that Encapsulates Together Days of Testimony



Claiming the moral high-ground on pricing was only part of the challenge. The other was to explain why Stevens Creek's sales fell after Fremont entered, while those of other neighboring dealers' increased. To do this, we focused on another "alternative" cause: Stevens Creek's customer service.

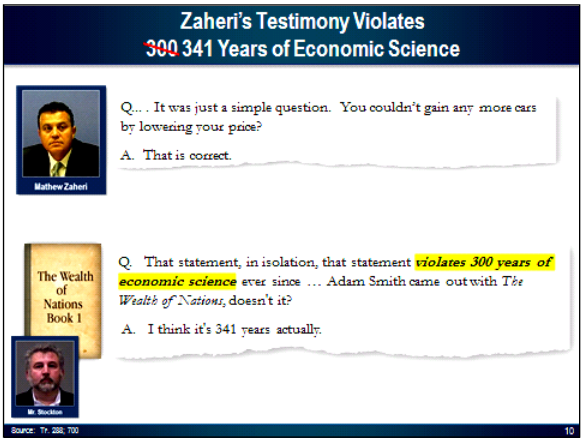
Evidence that Fremont's customer service surpassed Stevens Creek's was essentially unrebutted. The social media and third-party survey firms presented us with colorful quotes galore, enough to show any juror what type of dealership Stevens Creek was.

By the time of closing, there was no need to repeat every statistic or Yelp review on the subject. Indeed, we wanted to maintain the moral high ground by not piling on. So we constructed an amalgamation of five slides used during trial on this point with quotes from three witnesses to remind the jury, not of any particular piece of evidence, but of the overwhelming and one-sided nature of it.

Juxtaposing: The Facts from a Credible Witness to Impeach the Biased Speculation of Another

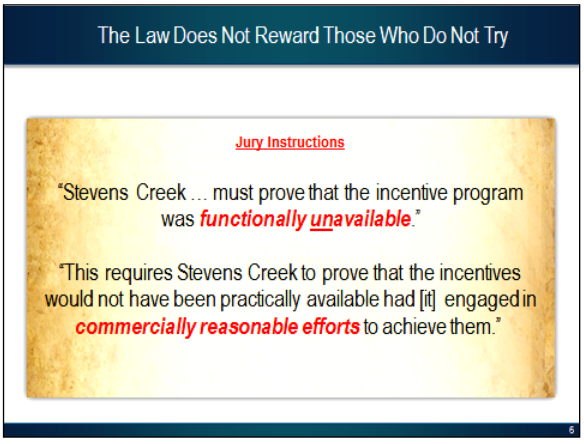
Mr. Mann's uncommon charisma lent itself to creative graphics. It came out during his exam that after arriving in a small town known as "The Garlic Capital of the world," Gilroy, California, Mr. Mann took that dealership to number one in the state. He was able to do this, he explained, through "conquest" selling, the industry term for converting customers of other brands (like GM or Toyota) into new Chrysler customers. We were able to set this fact off against Stevens Creek's contention that, in the highly-populated Silicon Valley containing his dealership, he could not sell as many cars as Mr. Mann could sell in sleepy Gilroy.

Juxtaposing: Impeaching One Witness's "Excuse" With Plaintiff's Own Expert Testimony



As noted, the functional availability doctrine focuses on whether Stevens Creek could have sold more cars, and thus, hit its sales objectives, if it tried to do so. Stevens Creek said this was impossible. But the key fact – that it was charging $2,000 more than other dealers – suggested that it could have lowered prices if it wanted, and that this would have caused it to sell more cars. During cross-examination, Stevens Creek's owner, Mr. Zaheri, testified that lowering prices would not have increased his sales. We printed an excerpt from this trial testimony, and asked plaintiff's economist, Mr. Stockton, whether Mr. Zaheri's testimony violated 300 years of post-Adam Smith economic theory. Mr. Stockton responded that, actually, it was 341 years. Besides being humorous, the exchange further cemented our lack-of-trying defense.

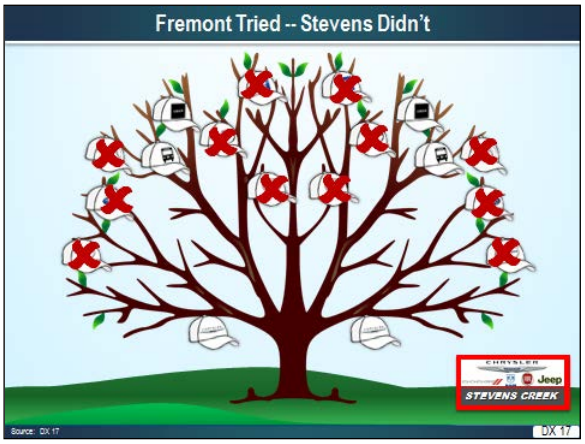
Structuring the Closing Around the Jury Instructions



None of this evidence would have mattered unless the jury instructions showed that it mattered. We highlighted the key

instruction and point of law here, all within a frame that the RPA provides no salve to dealers who lose business because of a lack of effort.

Using the Elmo to Create a Fresh Mock Up of a Closing Slide



We wrapped our closing in the same place we completed our witness exams, on a graphic first introduced during the opening that is peculiar out of context, but precise in context. Over the course of trial, the Chrysler dealerships' legacy customer base – customers in a dealer's "draw area" who already owned Chrysler cars – were described as "low hanging fruit," while the much greater number of non-Chrysler owners in a given area were "high hanging fruit" that dealers typically needed to exert additional effort to convert (or "conquest") to Chrysler.

Stevens Creek testified that it did not compete for customers of interbrand competitors, while Mr. Mann and the General Managers of the surrounding dealerships testified that they did compete for such customers.

The issue came to head when Stevens Creek called its owner, Mr. Zaheri, as its sole rebuttal witness. During his direct exam Mr. Zaheri explained how customers first chose a car model, and then negotiate prices with multiple dealers of the same brand. On cross, we allowed him to continue making this point, knowing he was digging his own grave. We then put this chart on the Elmo (minus the red X's). Asked whether he competed for customers that like GM or Ford or any other mode of transportation, he said no. We then placed an X through each customer his shop blew off. Because the other surrounding dealers all testified that they competed for these customers, this put the nail in the coffin, and we closed both the testimony and the closing with a devastating slide plaintiff's lead witness "co-authored" with us.

* * *

Antitrust is a notoriously complex area of the law, while the Robinson-Patman Act has been famously derided as "bogged in a dense undergrowth of confusion, ambiguity, controversy and babel."[2] That does not mean that trial under these laws must lead to complex or confused jury presentations. The use of graphics to slice through the "babel" and illustrate and cement core concepts and themes can be the sharpest arrow in the trial lawyer's quiver.

[2] Corwin D. Edwards, *The Price Discrimination Law: A Review of Experience*, 55 Nw. U.L. Rev. 653 (1960).

TWO-SIDED MARKET ANALYSIS FOLLOWING *AMEX* AND ITS APPLICATION IN THE *SABRE* CASE

By: Austin Smith and Dan Graulich[1]

As the use of two-sided platforms and economic intermediaries has grown, antitrust practitioners have been faced with increasingly complex legal questions about how to allocate evidentiary burdens at trial. The Second Circuit's *United States v. American Express*[2] ("*Amex*") case provided a legal framework for analyzing two-sided markets and the use of non-discrimination provisions (NDPs), but lower courts are only beginning to apply this framework in other contexts.

The *US Airways v. Sabre*[3] ("*Sabre*") case represents one of the first attempts to apply the *Amex* framework to a different alleged market, in this case the market for global distribution systems (GDS). This article proceeds by providing background on the two-sided markets, *Amex*, and *Sabre*. It then explores the arguments presented in the parties' memorandum of law surrounding Sabre's motion for judgment as a matter of law (JMOL) and their disagreements as to how *Amex* ought to be applied when evaluating markets that are potentially two-sided.

Two-Sided Markets and the *Amex* Case

As explained in *Amex*, a two-sided market is one in which two distinct sets of participants (typically suppliers and customers) transact through a platform or intermediary. Because each set of users derive more value from the intermediary as the number of users on each side increases, two-sided markets are said to be categorized by "demand interdependence," or "feedback effects."[4]

In *Amex*, the Second Circuit reversed the lower court's decision that Amex's NDPs violated Section 1 of the Sherman Act. The NDPs prevented merchants that chose to accept Amex cards from discriminating against Amex cardholders by attempting to "steer" those cardholders to use a different card at the point of sale. In analyzing the NDPs, the district court restricted its analysis to merchants. In reversing the district court's decision, the Second Circuit found that the lower court improperly ignored the effects on cardholders.[5] Whereas the district court viewed customers' desire to use their Amex cards as evidence had market power to impose NDPs on merchants, the Second Circuit found that customer loyalty was due to investments Amex made in offering greater rewards, which in turn benefited merchants by providing them a more dedicated clientele.[6]

The *Sabre* Case

Sabre is a global distribution system (GDS), which is an online business-to-business platform for airlines and travel agents. These systems automate travel bookings for users and provide travel agents with a single point of access in which they can compare schedules and fares for participating airlines. GDS is the primary tool travel agents use to book flights. The three major global GDS platforms are Sabre, Amadeus, and TravelPort.

The main issue in *Sabre* is whether the "full content" provisions (FCs) in Sabre's contracts with US Airways, which is now part of American Airlines, were unreasonable restraints of trade that violated Section 1 of the Sherman Act. The FCs required US Airways to provide Sabre with access to all its flights and fares. They also required that the fares charged for these seats through Sabre's platform were at least as favorable as those offered by the airline through any alternative distribution channel.

At trial, the parties disagreed as to whether the FCs allowed Sabre to impose higher booking fees on US Airways or whether the FCs enabled Sabre to offer travel agencies greater transparency and access to fares. As a result, the analysis of competitive effects turned in part on whether the jury limited its analysis to airlines or also considered the potential benefits to travel agents.

Following trial, the jury returned a verdict in US Airways' favor and found that Sabre's FCs constituted unreasonable restraints of trade in violation of Section 1. In reaching this conclusion, the jury determined that the market was one-sided but that the provisions were anticompetitive even if the market was two-sided. Sabre then filed a JMOL motion, which remains pending as of this writing.

Market Definition and Application of the Hypothetical Monopolist Test in the Two-Sided Market Context

The parties first disagree whether the market is two-sided. US Airways contends that Sabre failed to show "demand interdependence" between airlines and travel agents. Central to US Airway's argument is the idea that the market for GDS services is "mature."[7] In a "mature" market, existing supply matches demand and the number of participants does not materially change.[8] As applied to the GDS context, US Airways argues the payment of incentives merely shifts bookings from one GDS to another.[9] Such payments do not tend to benefit airlines since airlines already connect to a GDS.[10] Thus, US Airways argues that Sabre's FCs primarily attracted customers away from other platforms but did not provide value to airlines generally.

By contrast, Sabre argues that US Airways improperly characterizes *Amex*'s analysis of feedback effects. Because the number of travel agents that participate on the GDS platform influence an airline's decision to use the platform, and vice versa, Sabre argues that the market ought to be categorized as two-sided.[11] As applied to the GDS context, Sabre claims that its incentive payments to travel agents are primarily designed to help

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[1] Austin Smith and Dan Graulich are associates with the Antitrust, Competition, and Economic Regulation Group at Hogan Lovells US LLP in Washington, DC. The opinions expressed in this article are ours and do not necessarily reflect the opinions of any other person or organization.

[2] *United States v. Am. Express Co.*, 838 F.3d 179 (2d Cir. 2016).

[3] *US Airways, Inc. v. Sabre Holdings Corp.*, No. 11 CIV. 2725 LGS, 2015 WL 5188812 (S.D.N.Y. Sept. 4, 2015).

[4] *Amex*, 838 F.3d at 186-87.

[5] *Id.* at 200.

[6] *Id.* at 202.

[7] US Airways' Memorandum Of Law In Opposition To Sabre's Motion For Judgment As A Matter Of Law ("US Airways Memorandum"), No. 11 CIV. 2725 LGS at 8 (S.D.N.Y. Sept. 4, 2015).

[8] *Id.* at 9.

[9] *Id.*

[10] *Id.*

[11] Sabre's Memorandum Of Law In Support of its Motion For Judgment As A Matter Of Law ("Sabre Memorandum"), No. 11 CIV. 2725 LGS at 4 (S.D.N.Y. Sept. 4, 2015).

the company retain travel agency business.[12] By retaining this business, the platform is able to provide its airline customers, like US Airways, with a greater number of bookings.[13] Sabre argues that this positive relationship between users proves the market is two-sided.

Sabre also maintains that whether the market is mature is irrelevant to the two-sided inquiry. Sabre's FCs, like the NDPs in *Amex*, were specific to the manner in which Sabre priced its services for its *own* customers.[14] Because such provisions are primarily designed to increase customers' use of a given platform's *own* service offerings, it is beside the point whether customers increase their use of GDS at the market level.[15]

The maturity metric presumes that market-wide participation is a useful proxy for demand interdependence. However, it is unclear how market-wide participation speaks to the value associated with a given platform's pricing and contractual practices. Another issue is whether the maturity concept is consistent with the hypothetical monopolist test (HMT) utilized in *Amex*.[16] The HMT analyzes competitive effects in reference to a single hypothetical firm that controls the output for an entire market. Thus, whereas a mature market assumes maximum participation in which supply matches demand, the HMT presumes that supply and demand do not match since a monopolist sets price above the competitive level. Another issue is that the maturity concept was used to analyze the FCs in reference to a given platform's competitors. By contrast, the HMT presumes the existence of a single firm without any competitors. As such, a restraint imposed by a hypothetical platform monopolist under this framework is only analyzed in reference to the platform's own users.

While this analysis suggests that Sabre's position is more consistent with *Amex*, which primarily analyzed the effects of the NDPs on Amex's own cardholders and merchants, the issue of industry-wide effects is likely to remain open for courts. As noted by US Airways, the Second Circuit made several references to market level demand.[17] In addition, the Second Circuit found that the industry-wide transaction volume and the quality of card services improved during the time in which Amex's NDPs were in place.[18] By contrast, US Airways presented at least some evidence that participation and innovation had stagnated during this time, suggesting the potential for lower output and reduced quality of service.[19]

Anticompetitive Effects and the Net Price Calculation

Next, the parties disagree whether US Airways provided sufficient evidence of anticompetitive effects assuming the market was two-sided. While most of the evidence presented at trial presumed the existence of a one-sided market, US Airways argued that the FCs allowed Sabre to engage in "supracompetitive" pricing, which is pricing above the competitive level in a material way.[20] To show that Sabre's net booking fees (*i.e.*, the price charged to the airline for use of the GDS platform) were supracompetitive, US Airways primarily relied on the testimony of Professor Joseph Stiglitz. Stiglitz claimed that because Sabre's booking fee revenue exceeded the costs associated with its incentive payments to agents, the net booking fees charged to US Airways were supracompetitive.[21]

Sabre argues that Stiglitz's calculations were methodologically flawed and that US Airways failed to provide a reliable measure of Sabre's net booking fees. Of particular relevance to the burden shifting analysis, Sabre argues that Stiglitz's net price calculation only accounted for the costs associated with the incentive payments to agents.[22] Because Stiglitz's calculation did not attempt to estimate or incorporate the value to agents in obtaining real time access to a large range of fares, Sabre contends that the net price calculation did not reflect the true price faced by agents (in the form of incentive payments and real-time access).[23] As a result, Sabre contends that US Airways failed to carry its burden since the net price calculation must account for both the costs *and value* provided to both sets of consumers (*e.g.*, agents and airlines) on each side of the platform.[24]

In defending Stiglitz's methodology for calculating net booking fees, US Airways rejects Sabre's characterization of the burden shifting analysis. Specifically, US Airways explains that, even assuming the GDS platform provides value to agents, "it is the defendant that has the burden of evidence of proving any such procompetitive 'benefits.'"[25] As a result, US Airways argues that it satisfied its burden in providing a net price calculation that accounted for the direct costs associated with providing GDS services.[26]

This disagreement touches two issues that remain unresolved following *Amex*. The first issue is how courts should distinguish between pricing that incorporates the value provided to consumers and procompetitive effects more generally. Whereas Sabre argues that the value of providing access is directly reflected in its booking fees, US Airways argues that the value of access is a more generalized benefit that the defendant must prove. US Airways' position would be inconsistent with *Amex* to the extent US Airways argues that the value provided to customers need not be accounted for in the net price calculation. As noted in *Amex*, the court held that DOJ failed to carry its burden because it failed to provide "a reliable measure of American Express's two-sided price that appropriately accounts for *the value or cost* of the rewards paid to cardholders."[27] Yet it remains an open issue whether the plaintiff bears the entire burden to affirmatively prove each aspect of the net price calculation (*i.e.*, the value and cost to customers reflected in the net price) in demonstrating anticompetitive effects or whether defendants

12 *Id.* at 4.
13 *Id.*
14 *Id.* at 5.
15 *Id.*
16 *Amex*, 838 F.3d at 198.
17 US Airways Memorandum at 5-6 (citing *Amex*, 838 F.3d at 185-86).
18 *Amex*, 838 F.3d at 206.
19 US Airways Memorandum at 15.
20 *See e.g.*, *Amex*, 838 F.3d at 205.
21 US Airways Memorandum at 11-12.
22 Sabre Memorandum at 13.
23 *Id.*
24 *Id.* (citing Amex at 205-206).
25 US Airways Memorandum at 12.
26 *Id.*
27 *Amex*, 838 F.3d at 206 (emphasis added).

should be required to prove and estimate the value it provides to customers.

The second issue left open by *Amex* is the extent to which price increases can be offset by the value provided to customers on the other side of the platform. In *Amex*, the court suggested that proof of complete "pass through" is not required, noting that "[a] finding that not every dime of merchant fees is passed along to cardholders says nothing about other expenses that Amex faces, let alone whether its profit margin is abnormally high."[28] On this point of materiality, US Airways suggests that the primary focus should be on direct costs and expenditures. Because Stiglitz's net price calculation showed that the price to airlines exceeded Sabre's direct expenditures (*i.e.*, incentive payments to agents), US Airways argues that it successfully showed Sabre's prices were supracompetitive. By contrast, Sabre argues that the value provided to customers is reflective of the company's costs and the investments it makes in operating the GDS platform. It remains an open question as to how a company's profit margins should be adjusted in light of the value it provides through its platform.

[28] *Id.* at 205.

ANTITRUST LESSONS LEARNED IN A 1983 CIVIL RIGHTS TRIAL

By: David Reichenberg[1]

Introduction

Judge Carol Amon of the Eastern District of New York requested *pro bono* counsel to represent a *pro se* plaintiff who was awarded a trial on his 1983 claims under the Fourth Amendment.[2] Although my full-time job is an antitrust litigator and counselor, we were proud to take on the matter, and were fortunate to convince the jury that a decorated NYPD detective violated the Fourth Amendment by taking our client's cell phone that the client had used to videotape police violence.

This was a case that had 40 trial exhibits and 9 witnesses, which is large by 1983 standards, as opposed to the hundreds of exhibits and dozens of witnesses antirust trials can involve. It was also just a 1-week trial, and the Defendants asserted a qualified immunity defense in which they would not be found liable if the Court found that the law was not sufficiently settled such that the Defendants would have been on reasonable notice that their conduct violated the Constitution. Despite these differences with an antitrust case, I found that there were important lessons from this experience that could be applied to antitrust cases presented to a jury.

This article will focus on three points: (1) sufficiently educating the jury on the law; (2) embracing the purpose of the law you are litigating and developing your case narrative appropriately; and (3) determining whether the jury can empathize with your client's intent.

Sufficiently Educating the Jury on the Law

The language of the Sherman Act is broad, and requires consulting further case law to determine its application to a given set of facts. For instance, Section 1 of the Sherman Act states that "[e]very 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." Section 1983 is similarly broad, stating in relevant part: "[e]very person who, under color of any statute, ordinance, regulation, custom or usage of any State . . . subjects or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injury in an action at law . . ."[3] In both 1983 and antitrust jury instructions, this language is then further defined, and the Court will also explain the legal elements of the claims at issue under the statutes. In my civil rights case, the causes of action were a "false arrest" and an unreasonable search and seizure, both actionable under the Fourth Amendment.

Once the jury has heard this statutory language and the subsequent legal elements in the jury instructions, a question will be whether, through advocacy, the legal terminology and meaning has already been effectively and practically conveyed by either side's advocates.

One approach (implicit or otherwise) is to focus on the purpose of the law, discussed next, but I would suggest that skipping to the purpose, rather than first educating the jury on what the text conveys, is a missed opportunity to explain why the law is on your client's side.

In the civil rights context, the text of 1983 conveys that all citizens are equal before the law, including both parties themselves. This is an important concept in the civil rights context, because a traditional plaintiff's theme is that the client was not treated as any and all American citizens have the right to be treated under the factual circumstances being discussed.

In a Sherman Act Section 1 case, for instance, educating the jury on the phrase "restraint of trade" is critical to both sides. A plaintiff may claim that certain agreements or conduct at issue is the "restraint" the law is referencing and condemning. A defendant may focus on the fact while every contract is technically a "restraint of trade," the law only condemns unreasonable restraints, and the alleged restraints at issue are not restraints at all, and if anything, were reasonable in a given case. Again, this language presents an opportunity for both to explain what it means in the context of the case.

The same concept applies to the legal claim elements articulated later in the jury instructions. In the civil rights case, for the unreasonable seizure claim, we had to prove that the acts of the Defendants (1) "caused the plaintiff to suffer the loss of a constitutional right," and (2) "as a matter of law, it [was] not necessary to find that any of the Defendants had a specific intent to deprive the plaintiff of his Constitutional rights [but] rather, the Defendants need only to have intended to commit that particular act or acts that resulted in the violation of plaintiff's constitutional rights."[4] These two concepts were articulated about five minutes apart from one other in the Judge's instructions, so we thought it was important to highlight these two concepts together. If a juror thought that a Defendant needed to knowingly deprive a party of an unalienable right, that likely would have been too high a hurdle to overcome.

Similarly, in antitrust cases, while the meaning of "anticompetitive and procompetitive effects" may be intuitive to

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1 Antitrust Of Counsel of Wilson Sonsini Goodrich and Rosati P.C. The opinions expressed in this article are mine alone and do not necessarily reflect the opinions of any other person or organization.

2 "1983 claims" refer to civil rights claims brought under 42 U.S. Code §1983 – civil action for deprivation of rights.

3 Case No. 12-CV-02702 (CBA), ECF No. 253 at 8.

4 *Id.* at 9, 14.

an antitrust lawyer, they are key concepts that should be sufficiently explained to the jury before they hear them used in the jury instructions. Examples include a plaintiff's argument that decreased consumer choice is an anticompetitive effect of alleged conduct, and a defendant's assertion that output increased, prices fell, and innovation increased over the relevant time period are procompetitive effects. Similarly, if a defendant is claiming that there is a lack of "antitrust injury" to the plaintiff, it should highlight that antitrust injury requires a more specific showing, linking the alleged harm to competition to the harm to plaintiff, as opposed to any injury to the plaintiff. Antitrust terminology can be difficult, but if effectively conveyed to the jury, it gives your client a better case.

The foregoing is addressed to make the law understandable, but it is also important to make it approachable. This likely involves jury research and/or consultation on how members of the community you are litigating before are likely to be drawn to the concepts you are articulating. While it helps your client if the jury understands the law, it makes it more likely that they will apply the concepts favorably if you have articulated it in a way that is approachable and engaging.

Embracing the Purpose of the Law, and Developing Your Case Narrative Appropriately

One purpose of 1983 is to create a remedy for U.S. citizens who have been deprived by state officials of the rights secured by the Constitution. Put differently, it is to ensure that we do not live in a police state in which our freedoms can be tossed aside if they are not deemed important in certain circumstances. Given this purpose, we argued that our client's right not to have his cell phone taken from him is just one example of how all fundamental rights are held sacred in this Country, no matter how they are violated.

At an antitrust trial, neither party can afford to ignore the purpose of the antitrust laws. If only one side successfully educates the jury on the law, and then explains how the evidence shows that the purpose of the law is being served by finding for your side, then that is likely an insurmountable advantage the other side will not be able to overcome.

If both sides are aware of this phenomenon, then a key to success is how well your case narrative and supporting facts illustrate how the law's purpose is being served by a finding for your side. For instance, if an antitrust defendant in a monopolization case between competitors effectively conveys that it invested more successfully in its offerings and the plaintiff is using the antitrust laws as a shortcut to competing in the marketplace, then the purpose of the antitrust laws is being served by a finding for the defendant. By the same token, if an antitrust plaintiff shows that the defendant merely resorted to exclusionary tactics once it knew it would no longer be dominant if it had to compete on the merits, then the purpose of the antitrust laws would be served by a finding for the plaintiff.

In both the 1983 and antitrust contexts, the purpose of the law is powerful and fundamental to our economic and social freedoms. Thus, it is critical to craft a case narrative and highlight facts that go to those themes.

Once you have explained the law and how the purpose of it is achieved by your client's case, it should be apparent which asserted key facts can control the outcome and should be highlighted in your case narrative. One such fact in the civil rights case was the reason the Defendant took my client's cell phone. The Defendant asserted that he took the phone to "gain control of the situation" given that my client was speaking on the phone at the time the client's colleague was being arrested. We identified call log and forensic cell phone evidence confirming that, if the Defendant was telling the truth that the client was on the phone at the time he took it, the Defendant took it right after hearing my client make a call to an independent agency (called the CCRB) to lodge a complaint about the Defendants' violent conduct toward his colleague. This evidence addressed both the meaning and purpose of the Fourth Amendment, and was consistent with our case theme that the Defendant believed he was above the law.

While the facts in an antitrust case can be more complicated, there can be market facts that control the outcome and should similarly be highlighted. For instance, when it can be shown that overall output and innovation went up, and prices went down in the relevant market in the time period at issue, it can be hard to show an antitrust violation occurred. On the other hand, if the economic evidence is ambiguous, you likely want to build your case around key moments that give a snapshot into the industry events that give color as to why your client acted how it did. These key facts should meet your burden of proof (arguably even if the party does not initially bear the prima facie burden) and embrace your case themes.

Determining Whether the Jury Can Empathize with Your Client's Intent

Intent can either be a stated or implied element of an antitrust claim, *e.g.*, a "specific intent to monopolize" under Section 2, or a "conscious commitment to a common scheme" under Section 1, but anticompetitive intent can be asserted by an antitrust plaintiff regardless of the theory at issue. The intent of a defendant may not control the outcome (based on objective market facts), but it can be a highly probative finding that can sway the jury. Similarly, in the civil rights case, intent was an element of the false arrest claim (in that we needed to show that the Defendants physically intended to confine our client at a police precinct), but it was a different argument on intent that we believe led to the Defendants prevailing on that claim.

Our client claimed that a year and a half before the illegal seizure, he was falsely arrested and brought to a police precinct against his will for over 5 hours. The Defendants' primary argument was that they were looking for a missing 7-year-old boy, and that is why they were able to allegedly convince the client to consent to going to the precinct. We knew that if the Defendants were able to argue that they were looking for a missing boy, which of course is a tragedy, the jury would likely be swayed to find in the Defendants' favor regardless of whether our client consented to going to the precinct. Knowing this, we moved *in limine* to exclude the details of the Defendant's investigation, specifically the fact that they were looking for a 7-year-old, under Rule 403. We argued that the Defendants could

still make their defense by referencing a "missing person" rather than a "missing boy," as the latter was unduly prejudicial. The Court denied our motion, and as we predicted, the Defendants' entire case became about the missing boy, even on the cell phone seizure claim. We attempted to persuade the jury that our client did not intend to go to the precinct on the day of the false arrest, but the Defendants detailed their intent and could use sympathy in their favor. The jury clearly empathized with the Defendants' intent. However, we were able to overcome this intent argument on the seizure claim, because the key indisputable facts about the circumstances surrounding the seizure controlled the outcome.

The same lesson applies to an antitrust case. Regardless of whether intent is an element of the given claim, a jury is likely to determine the intent behind the conduct that is being litigated. As an advocate, you want to be sure you are presenting that intent in as persuasive and genuine a way as possible. If you believe that an intent argument may be made that is powerful by your adversary but has little to do with the merits (as we asserted), then you likely want to think about moving *in limine* to exclude such evidence, or at least seek a limiting jury instruction.

In short, while there may be facts that control the outcome under the law and embrace the purpose of the law, one should not forget about intent arguments that may make the difference in a case on the margin. Similarly, if an intent argument may not go your way, it is critical to focus on objective facts that overcome this hurdle.

Conclusion

Representing a civil rights plaintiff was an extremely rewarding experience, and to my surprise, it revealed some lessons which are applicable to antitrust trials.

ABA ANTITRUST SECTION

2017 MOCK TRIAL PROGRAM

Sponsored by the Trial Practice Committee

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DISTRICT OF COLUMBIA

Ultimate Picture Experience, Inc., Plaintiff, v. TheaterMax, Inc., Defendant.	Case No. ABA 2017 MOCK TRIAL **CASE BACKGROUND** MATTER TO BE HEARD AT MARRIOTT MARQUIS WASHINGTON, D.C. Date: March 30, 2017 Time: 1:30 P.M.

CASE BACKGROUND & SUMMARY OF STIPULATED FACTS

ABA ANTITRUST SECTION

2017 MOCK TRIAL PROGRAM

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DISTRICT OF COLUMBIA

Ultimate Picture Experience, Inc., Plaintiff, v. TheaterMax, Inc., Defendant.	Case No. ABA 2017 MOCK TRIAL **CASE BACKGROUND** MATTER TO BE HEARD AT MARRIOTT MARQUIS WASHINGTON, D.C. Date: March 30, 2017 Time: 1:30 P.M.

INTRODUCTION

This antitrust lawsuit involves two movie theater multiplexes in Washington, D.C., one run by the Ultimate Picture Experience, Inc. ("UPE"), and the other run by TheaterMax, Inc. ("TheaterMax"). TheaterMax's multiplex presently has 25 screens and 5,000 seats, and it has been continuously upgraded with more screens and seats since its opening in 1991, when it started with 10 screens and 2,000 seats. UPE's theater opened in January 2015 with 8 screens and 600 seats, and brands itself as offering a "premium experience" to moviegoers. UPE's theater offers reserved "pod" seating in leather reclining seats, seating one can reserve in advance, blankets, pillows, free popcorn, and wait service for those who order from UPE's full bar or from its food menu designed by an award-winning chef. Due to these amenities, a ticket at the UPE theater averages $25, whereas a ticket at TheaterMax tickets currently averages $14. The TheaterMax and UPE theaters are 1.5 miles from each other, with TheaterMax located just up Wisconsin Avenue from UPE's location in the heart of Georgetown.

Both theaters exhibit what are referred to as "first-run" films, meaning those that were recently released by major movie studios. Since UPE's opening in 2015, it has shown approximately half of the first-run films shown by TheaterMax, meaning that if there are 12 first-run films playing at TheaterMax, generally about 6 of them will also be playing at UPE's theater. With its remaining screens, UPE will show about 2-3 first-run films from non-major studios that predominantly make documentaries and other niche films that do not play at TheaterMax.

The subject of this lawsuit is UPE's ability to gain access to all films played at TheaterMax. Specifically, UPE challenges TheaterMax's use of "clearances" starting in 2016, in which TheaterMax informed six major film distributors that TheaterMax would be "clearing" UPE, meaning that TheaterMax would not license a film to play at its theater if the distributor licensed the film to play simultaneously, or "day-and-date," at UPE's theater. UPE alleges that TheaterMax's clearance practice forces film distributors to choose between licensing a film to UPE or TheaterMax, contrary to distributors' ordinary incentive to license films to play on the maximum number of screens possible. UPE also alleges that TheaterMax's clearance practice not only harms UPE but also the market for premium exhibition of first-run films, by reducing the number of films that UPE exhibits and thereby diminishing consumer choice in the premium movie exhibition market. UPE also alleges that it cannot survive without access to first-run films that form a core part of its product.

TheaterMax contends that it is not in the film studios' best interest to play films day-and-date with the UPE theater in Georgetown. After UPE had been open for one year, TheaterMax did an analysis of films that were played day-and-date at both theaters. Specifically, TheaterMax wanted to determine whether the total box office revenue for such films went up or down, once UPE stopped playing the film but TheaterMax continued to play it. TheaterMax identified a total of six such films, and observed that in all cases, once the film stopped playing day-and-date, the total box office revenue for the film went up on average by 10% versus the last month the film played day-and-date. There was also one additional film that played day-and-date with both theaters in the first half of 2015, but then played only at UPE for the remainder of the year. For that film, the total box office revenues also went up by 10% for the second six months.

TheaterMax showed this analysis to the six major movie studios at the start of 2016, as a justification for its clearance of UPE in Georgetown. Three of the studios consented to the clearance, in that they agreed they would not license their films to play day-and-date between the theaters. The other three studios did not agree to the clearance, meaning that they still maintained their right to try to license films to play day-and-date between the theaters. For these three studios, TheaterMax later agreed to play two out of the ten films day-and-date with UPE when the studio asked for that accommodation—these two films ultimately were the highest grossing films of the year at the box office across all major movie studios. For the other eight films where TheaterMax again requested specific clearances by film, the studios granted that request and played them only at TheaterMax.

UPE's access to first-run films in 2016 is the focus of the antitrust lawsuit to be decided today. UPE claims that TheaterMax is coercing at least half of the major movie studios not to play day-and-date when it is in their best interest to do so. TheaterMax claims that its clearance policy is justified and is in the best interest of studios. TheaterMax also points out that its policy encourages offering a greater range of movies to moviegoers. UPE claims that its display of movies should be considered in a market of its own, namely the "premium exhibition" market. It claims that TheaterMax is using its power in the traditional movie exhibition market to foreclose competition it faces in a separate market in which it does not want to invest to compete.

THE PARTIES

Defendant TheaterMax is a nationwide exhibitor of first-run films, with theaters in all major metropolitan areas. Its multiplex in the Washington, D.C. area has been open since 1991, and has continuously updated with more screens and seats. Its D.C. multiplex, managed by Layla Cooper, presently has 25 screens and 5,000 seats, and it started with 10 screens and 2,000 seats in 1991; these renovations have cost TheaterMax approximately $10 million over this time. TheaterMax is a generally well known and respected multiplex company by moviegoers across the country.

Plaintiff UPE was founded in 2015 by Riley Dean. Mr. Dean had a vision to revolutionize the movie going experience for those who were willing to spend a bit more per ticket. Under Mr. Dean's leadership, UPE opened four theaters in Washington, D.C., Los Angeles, Chicago, and New York in January 2015, and all were successful. UPE has invested heavily in state-of-the-art multiplexes in those cities to achieve Mr. Dean's vision; it cost approximately $30 million total to build its 4 theaters and contract with an acclaimed chef to consult on the theaters' menus. UPE typically earns a 50% profit on the movie tickets it sells, versus a 20% profit that TheaterMax generally earns across the country per ticket.

STIPULATED FACTUAL BACKGROUND

UPE took the movie theater industry by storm when its four theaters opened in the beginning of 2015. It was reviewed by the most popular magazine for movie reviews, "What's playing tonight," and couples and others rushed to reserve their seats and view the latest movies with the amenities provided by UPE. In 2015, UPE made a $50 million profit across its theaters, with $15 million of profit in Washington, D.C. specifically. In that same year, TheaterMax made a $400 million profit across all its theaters, with $30 million of profit in Washington, D.C. specifically. (Both companies draw their ticket profits by paying the studios a set fee per ticket they sell for the licensed movies, and then the excess goes to the movie theater itself as profit. UPE and TheaterMax pay the same licensee fee for each film from the major studios.)

In January 2016, TheaterMax shared its analysis of 2015 first-run films with all six major movie studios regarding films that played day-and-date with UPE in Washington, D.C. Specifically, TheaterMax identified six films for which once the film stopped playing day-and-date, the total box office revenue for the film across both TheaterMax and UPE went up on average by 10% versus the last month the film played day-and-date. This increase was after several months of flat box office revenue. There was also one film that played day-and-date with both theaters in the first half of 2015, but then played only at UPE for the remainder of the year. For that film, the total box office revenues also went up by 10% for the following six months, after having been flat for several months. TheaterMax cited these statistics as justification for its stated clearance of the UPE theater in Georgetown.

At the end of 2015, Mr. Dean of UPE thought his Washington, D.C. theater was poised to make an even greater profit in 2016, as he and his team learned how to determine which movies to license and how many theaters in which to play them. However, Mr. Dean learned in January 2016 that three of the six major studios—which represent 50% of all first run movies and are of roughly equal size—would not be able to play day-and-date with TheaterMax. The three studios alerted Mr. Dean that after considering TheaterMax's statement to clear UPE, along with the information about the first-run films in 2015, they would honor the clearance request. In 2016, those three major studios did not license any films to UPE.

Also in January 2016, the other three major movie studios, which also received the same information from TheaterMax regarding 2015 first-run film performance, did not agree to the clearance proposed by

TheaterMax. One of the studio managers wrote back to Ms. Cooper's email: "Layla – you are probably right, but I think we have to wait and see what the best strategy is for the movies we are scheduled to release in 2016." The other two studios responded to Ms. Cooper's request with a similar sentiment; both thought the analysis may carry through to 2016 but they would wait to see what would happen. Subsequently, Ms. Cooper followed up for ten films that TheaterMax sought to display in 2016 from these studios, seeking a clearance for each of the films. The studios declined to grant the clearance for two films, and requested TheaterMax play the films day-and-date with the UPE. TheaterMax agreed, and those were the two highest grossing films nationwide in 2015. For the remaining eight films, the studios granted TheaterMax's requested clearance, and played the films only at the TheaterMax location in Washington, D.C.

Despite these events, UPE still did well financially in 2016, and better overall than in 2015. It made a $80 million profit across its theaters, with a $18 million profit in Washington, D.C. specifically. That said, for the $18 million profit in Washington, 75% of it was attributable to the food, alcohol, and other concessions offered in the innovative theater (therefore, profits from box office were $4.5 million). In 2015, 40% of UPE's Washington, D.C. profits were attributable to such concessions (therefore, profits from box office were $9 million).

TheaterMax had a banner year nationwide as well as in Washington, D.C. in 2016. It made $60 million in profits in D.C. and $600 million in profit across all of its theaters. The success of the top films attributed to this, with films such as Star Wars and Captain America breaking box office records. The percentage of TheaterMax's profits attributable to concessions remained constant at 50% in 2015 and 2016. The table below lays out these financials.

	Year			
	2015		**2016**	
	Total DC Profit	**Box Office Profit[1]**	**Total DC Profit**	**Box Office Profit[2]**
UPE	$15 million	$9 million	$18 million	$4.5 million
TheaterMax	$30 million	$15 million	$60 million	$30 million

1. Based on 60/40 split of UPE profits and 50/50 split of TM profits between box office and concessions
2. Based on 75/25 split of UPE profits and 50/50 split of TM profits

UPE contends it would have had an even better year if it had access to all of the major box office successes, and not just the top two movies (Star Wars and Captain America). UPE points to the fact that in 2016 it first engaged in advertising campaigns in Washington, D.C. to encourage more awareness and spending on the premium concessions it offered. If it had access to all major first-run movies, UPE claims, both its profits from ticket sales and those concessions would have been ever greater. UPE also cites to a survey it completed of its customers in which 70% said they would not have seen the movie at all unless it was offered at UPE's premium theater. UPE also points to evidence that revenue related to ticket sales increased at its non-Washington, D.C. theaters, as would be expected where TheaterMax did not enforce any clearance policy. UPE also asserts that, although it is still able to display first-run film from non-major studios on its available screens, it should be able to make a free determination, unaltered by TheaterMax's conduct, as to what movies should be played on those screens for its customer base.

TheaterMax maintains that all the major studios determined what was in their own business interests when deciding whether to honor the clearances. It contends that providing information to the studios, along with a request for certain treatment, is within its business interests and beneficial for consumers. Namely, consumers had access to a greater variety of films—the total number of films shown in Washington, D.C. increased by 15%—and more people came to see films in its theaters in 2016. TheaterMax maintains that it carefully assessed market conditions, and studios agreed with its analysis and acted in their best interests. TheaterMax maintains that there is no separate market for "premium exhibition" of movies, as the primary draw for seeing a movie is the movie itself, not the amenities provided. Thus, UPE's contentions that TheaterMax seeks to foreclose competition to avoid having to make investments in amenities is false. TheaterMax also cites to data that overall national box office revenue for first-run films was 20% greater in 2016 than in 2015, which is consistent with UPE's experience.

It is acknowledged that TheaterMax is a monopolist in Washington, D.C. regardless of whether the "premium exhibition" market is found to be a separate market or combined with the sale of all first-run movie ticket sales. However, TheaterMax's market share goes from 65% to 100% if premium exhibition is considered to be a separate market. The parties stipulate that the relevant geographic market is Georgetown, and the parties are the only companies with theaters that display first-run films in that market.

TheaterMax's manager in Washington, D.C., Layla Cooper, had separate meetings with all six of the major movie studios at the end of 2016. Ms. Cooper explained that, in her view, the success of each studio's pictures in 2016 was at least in part due to the distribution strategy, which for the most part did not involve day-and-date arrangements with UPE in Washington. Ms. Cooper was successful in persuading all of the major studios to clear UPE for all of their films in 2017.

Mr. Dean learned this information from each studio, and UPE filed this lawsuit in January 2017. UPE alleges that TheaterMax's clearance policy for UPE's Washington, D.C. theater violates Section 2 of the Sherman Act, and it moves for a preliminary injunction to stop TheaterMax from enforcing its clearance policy. UPE relies on two theories under Section 2. First, it claims that TheaterMax monopolized the market for the exhibition of first-run films in Georgetown, even if one assumes that the market encompasses both parties' theaters. UPE alleges that TheaterMax started it clearance policy only to maintain and further increase its monopoly power. UPE also argues that there are high barriers to entry in this market, including due to TheaterMax's own clearance policy and conduct. Second, UPE alleges attempted monopolization of the first-run film "premium exhibition" market, which it maintains should be considered a separate market. UPE contends that TheaterMax is leveraging its monopoly power in the non-premium exhibition market to prevent the growth of the premium exhibition market in which TheaterMax does not wish to invest. UPE contends that TheaterMax is not willing to make the necessary investments to bring the experience UPE customers demand, and that this stifles consumer choice and limits the output of movies.

TheaterMax denies that its clearance policy improperly maintained its monopoly power in the market for exhibition of first-run films. It maintains that competition between movie theaters for the exhibition of films is necessary, good for consumers, and ensures that movie studios are able to continue to invest in a wide range of movies. TheaterMax maintains that studios have acted and will continue to act in their best interests, which is the in the interest of movie goers across the country. TheaterMax denies that there is a separate "premium exhibition market," and that even if there were, UPE has not shown that output or quality has been reduced in that market, because UPE continues to prosper both in Washington, D.C. and in other cities.

ABA ANTITRUST SECTION

2017 MOCK TRIAL PROGRAM

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DISTRICT OF COLUMBIA

Ultimate Picture Experience, Inc., Plaintiff, v. TheaterMax, Inc., Defendant.	Case No. ABA 2017 MOCK TRIAL **JURY INSTRUCTIONS** MATTER TO BE HEARD AT MARRIOTT MARQUIS WASHINGTON, D.C. Date: March 30, 2017 Time: 1:30 P.M.

Members of the jury, now that you have heard all the evidence and arguments of the attorneys, it is my duty to instruct you on the law that applies to this case:

INSTRUCTION NO. 1: DUTIES OF JURY TO FIND FACTS AND FOLLOW LAW

It is your duty to find the facts from all the evidence in the case. You are the sole judges of the facts. To those facts you will apply the law as I give it to you. You must decide the case solely on the evidence before you.

INSTRUCTION NO. 2: EVIDENCE DEFINED

The evidence you may consider includes: the sworn testimony of witnesses; the exhibits received into evidence; and any facts to which the parties have agreed, which may be called stipulated facts.

On the other hand, arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they have said in their opening statements, closing arguments, and at other times is intended to help you to interpret the evidence, but it is not evidence. If the facts as you remember them differ from how the lawyers have stated them, your memory controls.

You are to decide the case solely on the evidence received at the trial.

INSTRUCTION NO. 3: TESTIMONY OF WITNESSES

In finding the facts in this case, you may have to decide what testimony to believe and what testimony not to believe. You may believe everything a witness says, or part of it, or none of it. That is up to you.

During the trial, you also heard testimony from two expert economists. You should treat expert witness testimony like any other witness's testimony. You should give it as much weight as you think it deserves, which may include rejecting it entirely.

INSTRUCTION NO. 4: BURDEN OF PROOF

In this case, the plaintiff has the burden to prove its claims by a "preponderance of the evidence." That means the plaintiff must produce evidence that, considered in the light of all the facts, leads you to believe that the plaintiff's claims are more likely true than not. If the plaintiff fails to meet this burden, you must return a verdict for the defendant.

The plaintiff has two separate claims in this case, monopolization and attempted monopolization.

INSTRUCTION NO. 5: MONOPOLIZATION — ELEMENTS

Plaintiff Ultimate Picture Experience's ("UPE") first claim is that TheaterMax has violated Section 2 of the Sherman Act by unlawfully monopolizing the market for the exhibition of first-run films in Georgetown. To prevail on its claim, UPE must prove each of the following elements by a preponderance of the evidence:

First, that the market for general exhibition of first-run films in Georgetown is a valid antitrust market;

Second, that TheaterMax possessed monopoly power in that market;

Third, that TheaterMax willfully acquired or maintained its monopoly power by engaging in anticompetitive conduct;

Fourth, that TheaterMax's conduct occurred in or affected interstate commerce; and

Fifth, that UPE was injured in its business because of TheaterMax's anticompetitive conduct.

The parties have stipulated that the market for general exhibition of first-run films in Georgetown is a valid market, that TheaterMax is a monopolist in that market, and that TheaterMax's conduct occurred in or affected interstate commerce.

It is up to you to decide (1) whether TheaterMax acquired or maintained its monopoly power by engaging in anticompetitive conduct, and (2) whether UPE was injured by TheaterMax's anticompetitive conduct. If you find that UPE has not proven these two elements by a preponderance of the evidence, then you must find for TheaterMax and against UPE on UPE's claim of monopolization. If you find that the evidence is sufficient to prove both of these elements, then you must find for UPE and against TheaterMax on UPE's claim of monopolization.

INSTRUCTION NO. 6: WILLFUL ACQUISITION OR MAINTENANCE OF MONOPOLY POWER BY ANTICOMPETITIVE CONDUCT

It is not enough that TheaterMax is a monopolist in the market for general exhibition of first-run films. The acquisition or maintenance of monopoly power by supplying better products or services, possessing better business skills, or because of luck, is not unlawful.

Instead, UPE must prove that TheaterMax willfully acquired or maintained its monopoly power through anticompetitive acts or practices. Anticompetitive acts are acts, other than competition on the merits, that have the effect of preventing or excluding competition or frustrating the efforts of other companies to compete for customers within the relevant market. Harm to competition must be distinguished from harm to a single competitor or group of competitors, which does not necessary constitute harm to competition. Some examples of harm to competition include increased prices, decreased production levels, and reduced quality. However, it is possible that harm to competition can be shown by harm to one competitor, depending upon the circumstances.

A monopolist may compete aggressively without violating the antitrust laws, and a monopolist may charge monopoly prices without violating the antitrust laws. A monopolist's conduct only becomes unlawful when it involves anticompetitive acts.

All companies have a desire to increase their profits and increase their market share. These goals are an essential part of a competitive marketplace, and the antitrust laws do not make these goals — or the achievement of these goals — unlawful, as long as a company does not use anticompetitive means to achieve those goals.

In determining whether TheaterMax's conduct was anticompetitive or whether it was legitimate business conduct, you should determine whether the conduct is consistent with competition on the merits, whether the conduct provides benefits to consumers, and whether the conduct would make any business sense apart from any effect it has on excluding competition or harming competitors.

The acts or practices that result in the acquisition or maintenance of monopoly power must represent something more than the conduct of business that is part of the normal competitive process or commercial success. They must represent conduct that has made it very difficult or impossible for competitors to compete and that was taken for no legitimate business reason. You may not find that a company willfully acquired or maintained monopoly power through anticompetitive means if it has acquired or maintained that power solely through the exercise of superior foresight and skill; or because of natural advantages such as unique geographic access to raw materials or markets; or because of economic or technological efficiency, including that resulting from scientific research; or by obtaining a lawful patent; or because changes in cost or consumer preference have driven out all but one supplier.

If you find that UPE has proven by a preponderance of the evidence that TheaterMax willfully acquired or maintained monopoly power through anticompetitive acts, then you must consider whether UPE has proved the remaining elements of this claim. If, however, you find that UPE did not prove this element by a preponderance of the evidence, then you must find for TheaterMax and against UPE on this claim.

INSTRUCTION NO. 7: ATTEMPTED MONOPOLIZATION — ELEMENTS

UPE's second claim is that TheaterMax unlawfully attempted to monopolize the market for premium exhibition of first-run films in Georgetown. To prevail on its claim, UPE must prove each of the following elements by a preponderance of the evidence:

First, that TheaterMax engaged in anticompetitive conduct;

Second, that TheaterMax had a specific intent to achieve monopoly power in a relevant product and geographic market;

Third, that there was a dangerous probability that TheaterMax would achieve its goal of monopoly power in the relevant market;

Fourth, that TheaterMax's conduct occurred in or affected interstate commerce; and

Fifth, that UPE was injured in its business or property by TheaterMax's anticompetitive conduct.

The parties have stipulated that the relevant geographic market is Georgetown, and that TheaterMax's conduct occurred in or affected interstate commerce. But it is up to you to determine (1) whether the market for premium exhibition of first-run films is a relevant antitrust market; (2) whether TheaterMax had a specific intent to achieve monopoly power in the market for premium exhibition of first-run films; and (3) whether there was a dangerous probability that it would succeed.

If you find that the evidence is insufficient to prove any of these three elements, then you must find for TheaterMax and against UPE on UPE's claim of attempted monopolization. If you find that the evidence is sufficient to prove these three elements as to TheaterMax, then you must find for UPE and against TheaterMax on UPE's claim of attempted monopolization.

INSTRUCTION 8: ANTICOMPETITIVE CONDUCT

The first element that UPE must prove is that TheaterMax engaged in anticompetitive conduct. UPE claims that the conduct element is satisfied by TheaterMax's use of anticompetitive conduct and its monopoly power in one product market in an attempt to obtain monopoly power in a second product market. Specifically, UPE claims that TheaterMax is leveraging its monopoly power in the non-premium or general exhibition market to prevent the growth of the premium exhibition market, in which TheaterMax does not wish to compete.

To establish that TheaterMax engaged in anticompetitive conduct by leveraging its position from one market to another market, UPE must prove the following: (1) the premium exhibition market was a separate relevant product market; (2) TheaterMax, through anticompetitive conduct, used its monopoly position in the general exhibition market in an attempt to monopolize the premium exhibition market; and (3) TheaterMax had a dangerous probability of monopolizing the premium exhibition market.

INSTRUCTION NO. 9: RELEVANT MARKET

There are two aspects you must consider in determining whether UPE has met its burden to prove the relevant market by a preponderance of the evidence. The first is the relevant product market, and the second is the relevant geographic market. It has been stipulated that TheaterMax has a monopoly in the general exhibition market for first-run films and that the relevant geographic market is Georgetown, but it is up to you to determine whether plaintiffs have proven by a preponderance of the evidence that premium exhibition of first-run films is also a relevant market.

INSTRUCTION NO. 10: RELEVANT PRODUCT MARKET

The basic idea of a relevant product market is that the products within it are reasonable substitutes for each other from the buyer's point of view; that is, the products compete with each other. In other words, the relevant product market includes the products that a consumer believes are reasonably interchangeable or reasonable substitutes for each other. This is a practical test with reference to the actual behavior of buyers and the marketing efforts of sellers. Products need not be identical or precisely interchangeable as long as they are reasonable substitutes.

To determine whether products are reasonable substitutes for each other, you must consider whether a small but significant and non-transitory increase in the price of one product would result in enough customers switching from that product to another product such that the price increase would not be profitable. Generally speaking, a small but significant and non-transitory increase in price is approximately a 5 percent increase in price not due to cost factors (*but you may conclude in this case that some other percentage is more applicable to the product at issue*). If you find that customers would switch and that the price increase would not be profitable, then you must conclude that the products are in the same product market. If, on the other hand, you find that customers would not switch, then you must conclude that the products are *not* in the same product market.

In evaluating whether various products are reasonably interchangeable or reasonable substitutes for each other under the price increase test I have just given you, you may also consider:

- consumers' views on whether the products are interchangeable;
- the relationship between the price of one product and sales of another;
- the presence or absence of specialized vendors;
- the perceptions of either industry or the public as to whether the products are in separate markets;
- the views of UPE and TheaterMax regarding who their respective competitors are; and
- the existence or absence of different customer groups or distribution channels.

In this case for purposes of the attempted monopolization claim, UPE contends that a relevant product market is the market for premium exhibition of first-run films. By contrast, TheaterMax contends that there is no separate market for premium exhibition of first-run films, and that there is only one market for exhibition of first-run films. If you find that UPE has proven a relevant product market, then you should continue to evaluate the rest of UPE's claim. However, if you find that UPE has failed to prove that a market for premium exhibition of first-run films exists, then you must find in TheaterMax's favor on this claim.

INSTRUCTION 11: SPECIFIC INTENT

The second element that UPE must prove is that TheaterMax had a specific intent to monopolize the market for premium exhibition of first-run films. In other words, you must decide if the evidence shows that TheaterMax acted with the conscious aim of acquiring the power to control prices and to exclude or destroy competition in that market.

There are several ways in which UPE may prove that TheaterMax had the specific intent to monopolize. There may be evidence of direct statements of TheaterMax's intent to obtain a monopoly. Such proof of specific intent may be established by documents prepared by responsible officers or employees of TheaterMax at or about the time of the conduct in question or by testimony concerning statements made by responsible officers or employees of TheaterMax. You must be careful, however, to distinguish between a defendant's lawful intent to compete aggressively, which may be accompanied by aggressive language, and a true intent to acquire monopoly power by using anticompetitive means.

Even if you decide that the evidence does not prove directly that TheaterMax actually intended to obtain a monopoly, specific intent may be inferred from what TheaterMax did. For example, if the evidence shows that TheaterMax lacked a legitimate business justification and that the natural and probable consequence of TheaterMax's conduct in the market for premium exhibition of first-run films was to give TheaterMax control prices and to exclude or destroy competition, and that this was plainly foreseeable by TheaterMax, then you may (but are not required to) infer that TheaterMax specifically intended to acquire monopoly power.

INSTRUCTION 12: DANGEROUS PROBABILITY OF SUCCESS

If you find that TheaterMax had the specific intent to achieve a monopoly and engaged in anticompetitive conduct, you also must determine if the evidence shows the next element of attempting to monopolize: namely, that there was a dangerous probability that TheaterMax would succeed in achieving monopoly power if it continued to engage in the same or similar conduct.

Monopoly power is the power to control prices, restrict output, and exclude competition in a relevant antitrust market. More precisely, a firm is a monopolist if it can profitably raise prices substantially above the competitive level or excluded competition for a significant period of time.

In determining whether there was a dangerous probability that TheaterMax would acquire the ability to control price in the market, you should consider such factors as:

- TheaterMax's market share;
- The trend in TheaterMax's market share;
- Whether the barriers to entry in the market made it difficult for competitors to enter the market; and
- The likely effect of any anticompetitive conduct on TheaterMax's share of the market.

Again, the purpose of looking at these and other factors is to determine whether there was a dangerous probability that TheaterMax would ultimately acquire monopoly power in the market for premium exhibition of first-run films. A dangerous probability of success need not mean that success was nearly certain, but it does mean that there was a substantial and real likelihood that TheaterMax would ultimately acquire monopoly power.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DISTRICT OF COLUMBIA

Ultimate Picture Experience, Inc., Plaintiff, v. TheaterMax, Inc., Defendant.	Case No. ABA 2017 MOCK TRIAL **CASE BACKGROUND** MATTER TO BE HEARD AT MARRIOTT MARQUIS WASHINGTON, D.C. Date: March 30, 2017 Time: 1:30 P.M.

VERDICT FORM

We, the Jury, unanimously find as follows:

1. Has the plaintiff, Ultimate Picture Experience, Inc. (UPE), proven by a preponderance of the evidence that TheaterMax, Inc. monopolized the market for general exhibition of first-run films in Georgetown?

Yes _____ No _____

2. Has the plaintiff, Ultimate Picture Experience, Inc. (UPE), proven by a preponderance of the evidence that TheaterMax, Inc. attempted to monopolize the market for premium exhibition of first-run films in Georgetown?

Yes _____ No _____

_____ _____
Jury Foreperson **Date**