

IN THE 251ST DISTRICT COURT
Potter County, Texas

Kay Floyd, et al,
Plaintiffs,

vs.

American Quarter Horse Association
Defendant.

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' NO. 87,589 B C
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AFFIDAVIT OF CHRISTOPHER C. PFLAUM, Ph.D.

My name is Christopher C. Pflaum. I am the same Christopher C. Pflaum who provided earlier affidavits in this matter. My qualifications and experience are provided in the body of and attachments to the first affidavit.

The plaintiffs in this matter have asked me to respond to the Defendant's *Motion To Reconsider Interlocutory Judgment*. Though my expertise is in the area of economics not law, those areas come together in antitrust and so, therefore, must the arguments and observations that I will present in this affidavit.

I.

The AQHA Continues To Misinterpret the Nature of Harm to Competition

1. As I noted in my first affidavit, it is beyond argument that the antitrust laws were designed for "the protection of competition, not competitors." Brown Shoe Co. v. United States (370 U.S. 294, 320, 82 S.Ct. 1502, 1521, 8 L.Ed.2d 510 (1962)). By protecting the process of competition, the antitrust laws benefit consumers by providing them with the fruits of competition, low prices and a variety of products. To secure the benefits of competition for society, the antitrust laws give

competitors standing to file lawsuits to enforce the provisions of the various antitrust Acts and, if successful, to collect trebled money damages.

2. In its latest motion, the AQHA appears to suggest that the plaintiffs are tainted because they are seeking damages for the loss of value of their property and assert, incorrectly, that the plaintiffs' complaint in this matter does not address harm to competition. It is undisputed among students of antitrust that the provisions of the law that provide for private action and trebled damages are crucial to creating the legions of private attorney generals that enforce its provisions. Economists active in antitrust analysis have long recognized the importance of these incentives to the functioning of the antitrust laws and the associated protection of the competitive process. Furthermore, because competitors are more likely to have substantial, provable damages than ultimate consumers are, providing competitors with standing is vital to antitrust enforcement. Consumers are what economists call "atomistic." That means that they are not a cohesive group capable of collective action. Consumers also do not generally have available the specialized knowledge necessary to prosecute an antitrust action whereas competitors frequently do. Therefore, competitors are knowledgeable, cohesive and have the financial resources to litigate an antitrust action and have provable damages.

3. The AQHA argues that the plaintiffs have not established harm to competition but have only complained that they could secure higher prices for their horses but for Rule 212. This is the same argument that they have previously made and it remains empty. As I demonstrated in my initial affidavit the restriction on embryo transplants imposed by Rule 212 artificially reduces the supply of high-quality American Quarter Horses and is what antitrust experts call a "naked restraint." Any time that supply is reduced, price increases – this is the fundamental finding of the so-called "law

of supply and demand.” Nowhere in any of its briefs has the AQHA seriously disputed this fact nor, it is worth noting, has the AQHA produced any testimony, affidavit or analysis by a competent economist disputing my conclusions. This is probably because for an economist to disagree with my findings in this matter would be analogous to a physicist disputing the laws of thermodynamics.

4. A naked restraint cannot, by definition, have a positive effect on competition. This is not, however, to say that such a restraint may not be necessary for a product to exist. Amateur sports, for example, would not be amateur were it not for restraints placed upon the persons and organizations competing in those sports events. For this reason, certain activities that are obviously anticompetitive and would normally be found to be per se violations of the antitrust laws are examined under a “quick look” rule of reason. In this “quick look” the defendant is given an opportunity to provide a business justification for the restraint and explain how the elimination of the restraint would ultimately harm the competitive process or eliminate the product itself.

5. The AQHA has not put forward any sound economic argument as to why Rule 212 is important to Quarter Horse competition or breeding. Rather, it continues to make the argument that the rule protects small, inefficient breeders. Even this argument is questionable. In any case, as I explain in my previous affidavit, the protection of small, inefficient producers is the antithesis the competitive process and cannot be cover for anticompetitive behavior.

6. Because of the offensive nature of naked restraints and the economic reality that such conduct must harm competition, it is standard practice not to require an expansive analysis of relevant product market and harm to competition. Therefore, though the AQHA is correct that a showing of injury to competitors does not show injury to competition they are demonstrably

incorrect when they suggest that “Before a plaintiff can even trigger antitrust scrutiny, it must demonstrate some harm to competition.” Since naked restraints do harm competition, the only question is the balancing of that harm with offsetting effects that enhance competition.

7. Because Rule 212 is so obviously anticompetitive, it must injure competition. The AQHA argument that there has been no showing of such a harm is disingenuous. No economist could dispute the theoretical effects of Rule 212. As a matter of empirical proof, the fact that otherwise identical horses, one AQHA registered and one not, sell at dramatically different prices demonstrates that Rule 212 raises prices of AQHA horses. The rule of one price teaches that identical products cannot sell at different prices in the same market. The above-noted finding of different prices demonstrates that AQHA registered horses are in a different market than Quarter Horses that are not registered. If these horses were registered, as shown in my first affidavit, the supply of AQHA registered Quarter Horses would increase and the price would decline. Anything that prevents this expansion of supply, by definition, harms competition.

8. The AQHA asserts that its restrictions are necessary to promote athletic competition in the events it sanctions by providing opportunities for small breeders. This argument is without merit. Even if competition is viewed as that which takes place in the arena or on the racetrack, rather than the market, that competition has also been harmed because the supply of quality mounts has been artificially reduced by the operation of Rule 212. If the competition is between riders in these events, that competition has also been harmed because the AQHA has raised the price of a competitive mount, tilting the scales of the competition to favor affluence over talent and hard work.

II

The AQHA's Case Citations Undercut Its Arguments

9. I have read the cases cited by the defendant to ascertain what economic and legal arguments they believe are contained therein that supports their position. In my opinion, all of the cases except *Hennessey v. NCAA*, 564 F.2d 1136 present situations in which the economic circumstances are very different than the one before this court. Furthermore, *Hennessey* appears to be in contradiction with several later cases in which similar conduct by the NCAA was found to be unlawful. One of these cases, *NCAA v. Board of Regents of the University of Oklahoma, et anon.*, was reviewed by the U.S. Supreme Court and is frequently cited in the antitrust literature in economics.

10. My reading of the defendant's first citation, *California Dental Assn. V. Federal Trade Commission*, is that the court was concerned that dentistry is a complex good of the type where consumers have a difficult time differentiating between producers (dentists). The court decided, therefore, that the Association's ban on certain types of advertising might be of benefit to consumers by protecting them from deceptive advertising. Given this complexity, the Court ruled that the FTC could not rely on a "quick look." Specifically, the court found that the effect of the ban on competition between dentists was "far from intuitively obvious."¹

11. The competitive effect of Rule 212 is intuitively obvious and "an observer with only a rudimentary understanding of economics could conclude that the arrangements in question have an

¹ *California Dental Association v. FTC*, 526us, 143 L Ed 2d 935, 119 S Ct pg. 942

anticompetitive effect on consumers and markets.”² The AQHA has not demonstrated any benefit of Rule 212 to the competitive process. In fact, it has not even effectively rebutted the plaintiffs’ evidence that the rule is anticompetitive.

12. In its motion, the AQHA asks that the Court take “a longer look” under an extended Rule of Reason analysis. As an economist experienced in antitrust analysis, I do not see how an extended analysis would change the fact that Rule 212 is facially anticompetitive. Further, the plaintiffs have now provided evidence that there has also been harm to competitors and through that evidence on the prices of American Quarter Horses has shown that market prices are artificially inflated by the Rule 212 limitations. In its latest motion, the arguments that the AQHA presents are the same that they have made throughout this litigation.

13. On the basis of my previous examination of the facts of this matter, the market for AQHA registered horses and my knowledge and experience in antitrust economics, I remain of the opinion that Rule 212 is facially anticompetitive because it restricts the supply of AQHA registered horses and in so doing raises their prices above the level that would obtain in a competitive market. For these reasons, Rule 212 harms competition and, from an economic perspective, is the type of restriction that is generally considered by antitrust economics experts to be a violation of the antitrust statutes.

² Ibid.

STATE OF KANSAS)

) ss.

COUNTY OF JOHNSON)

CHRISTOPHER C. PFLAUM, being first duly sworn according to law, says that he is the President of Spectrum Economics, that he has personal knowledge of the contents and Supporting Materials which follow and that the facts and information set forth therein are true and correct.

Christopher C. Pflaum

Subscribed and sworn to before me this 15th day of August, 2001.

Judy C. Conn, Notary Public

My Commission Expires: August 10, 2005

