

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

FAIRFAX COUNTY WATER AUTHORITY,)	
)	
Plaintiff,)	
)	
v.)	CL-2008-16114
)	
CITY OF FALLS CHURCH,)	
)	
Defendant.)	

FAIRFAX WATER'S PRE-TRIAL BRIEF ON LIABILITY PHASE (COUNTS I-II, IV)

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The City of Falls Church has a monopoly on water service in the eastern portion of Fairfax County and has engaged in various acts to exclude Fairfax Water from the market. It blocked at least one developer from connecting to Fairfax Water's system by refusing permission to relocate existing water lines unless the developer promised to connect *only* to the City's water system. The City has continued to tell people that it has an "exclusive" service area after losing that claim resoundingly in federal court. And it has told a number of developers that they will be caught up in litigation if they connect to Fairfax Water. These indefensible practices must end.

GENERAL SUMMARY OF EVIDENCE TO BE PRESENTED AT TRIAL

In 1959, Fairfax Water agreed that the City would have an exclusive service area in the eastern portion of Fairfax County for a period of 30 years (the "1959 Area"). In 2005, after the agreement expired, Fairfax Water announced that it would begin offering water service to new development in the 1959 Area. In 2007, the City sued in federal court, claiming an "exclusive" legal right to serve the 1959 Area. The federal court dismissed the City's case, ruling that Fairfax Water has a right to provide water service anywhere it can in Fairfax County. The Fourth Circuit affirmed.

Despite losing that case, the City *continued* to take steps to block Fairfax Water from the market. First, the City used its control over existing easements and water lines to prevent the "Halstead Developer" from connecting to Fairfax Water's system. The City's position was "unprecedented." Water utilities generally welcome such relocations because they obtain a brand new water line, at the developer's expense, in exchange for an aging one. Halstead pleaded with Falls Church and accused the City of holding it "hostage," but the City refused to relent.

As Fairfax Water predicted in its December 2008 complaint, the City's position blocked the project and forced the developer to seek a "proffer condition amendment" (PCA) from the Fairfax County Board of Supervisors. Recognizing that the developer's project had been delayed "through no fault of its own," and seeking to "extract" the developer from the legal controversy here, the Board of Supervisors last month granted Halstead's PCA. And while Halstead has been the most

egregious example, the City has engaged in other anticompetitive acts as well. It has continued to claim a legally “exclusive” service area despite losing that argument in federal court. It has also told various developers that their projects might become entangled in litigation -- the worst possible scenario for a developer -- if they used Fairfax Water.

I. COUNTS I & II: THE VIRGINIA ANTITRUST ACT.

The Virginia Antitrust Act (“VAA”), Code §§ 59.1-9.1 to -9.18, was modeled on federal law and must be interpreted in harmony with precedents construing comparable federal statutes. *Id.* § 59.1-9.17. The VAA prohibits monopolization and attempted monopolization. *Id.* § 59.1-9.6.¹

Although the City claims it is exercising an unqualified property right to tie permission to relocate an easement to the developer’s promise to use City water, that position cannot be squared with *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951). In *Lorain Journal*, a newspaper had a monopoly in the local advertising market. When a radio station began offering ad space, the newspaper refused to run ads from any company that did business with the competitor. 342 U.S. at 148. The Supreme Court ruled that the newspaper had illegally tried to monopolize the advertising market. The Court rejected the newspaper’s argument that it had an unqualified “right as a private business concern to select its customers and to refuse to accept advertisements from whomever it pleases.” *Id.* at 155. The Court said that a defendant may *not* use otherwise lawful contract rights “to create or maintain a monopoly.” *Id.* at 155. *See also Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985) (extending *Lorain* to monopolist’s failure to cooperate with a smaller rival); *Parks v. Watson*, 716 F.2d 646, 649-50 (9th Cir. 1983) (permitting developer to maintain antitrust claims against city for tying development rights to the developer’s surrendering geothermal wells the city wanted for its local heating market); *Summit Water Distrib. Co. v. Summit*

¹ The City claimed on demurrer that Code § 15.2-2111 *allowed* it to monopolize water service in Fairfax County. Judge Thacher rejected that argument, explaining that a locality’s unquestioned power to monopolize water service in its *own* jurisdiction does not permit it to monopolize water service in a neighboring jurisdiction. (*See* Letter Op. at 4-5 (Mar. 13, 2009).)

County, 123 P.3d 437, 451 (Utah 2005) (holding that non-profit water company stated valid antitrust claims against the county for tying zoning approvals to using the county’s water supplier).

Moreover, when a defendant with market power attempts to exclude a competitor, the competitor, as a matter of law, has “antitrust injury” and standing to challenge the exclusionary practices. *E.g., Gulf States Reorg. Group, Inc. v. Nucor Corp.*, 466 F.3d 961, 966-68 (11th Cir. 2006) (potential competitor suffered antitrust injury when blocked from entering the market).

A. The City Has Engaged in Monopolization (Count I).

Monopolization “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.” *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). Both elements are satisfied here.

1. Falls Church Possesses Monopoly Power in the Relevant Market.

The “relevant” market has two dimensions -- the product market and the geographic market. The parties agree that the relevant product market is “public drinking water.” The relevant geographic market is “the area of effective competition . . . in which the seller operates, and to which the purchaser can practicably turn for supplies.” *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961). Consistent with that definition, Fairfax Water’s antitrust economist, Professor Mayo, of Georgetown University, will testify that the relevant geographic market here consists of those portions of the 1959 Area within reasonable proximity to an existing Fairfax Water main that Fairfax Water can reasonably serve. While Falls Church’s expert will claim that the geographic market is narrower, it does not matter. For even in his more narrowly defined market, Falls Church still has 100% market share *and* the power to exclude competition by refusing easement relocations.

2. Falls Church Has Sought to Willfully Maintain Its Monopoly Power.

The City’s most effective weapon to maintain its monopoly is its power to refuse to permit developers to relocate existing City water lines unless the developer promises to use the City’s water

service. The City deployed that weapon successfully against Halstead. The City also admits that whether a developer will use its water service will be a core consideration in permitting water line relocations in the future. The City's second weapon is telling people falsely that it has a legally exclusive service area in Fairfax County.² And third, the City has threatened developers that they would be caught up in litigation if they elected to connect to Fairfax Water's system. Alone or in combination, these are all acts of willful maintenance and abuse of monopoly power.

B. In the Alternative, Falls Church Has Engaged in Attempted Monopolization.

Both § 2 of the Sherman Act and Code § 59.1-9.6 prohibit not only successful monopolization but also "attempts" to monopolize. "Attempted" monopolization requires a specific intent to monopolize the relevant market and a "dangerous probability" of success. *Lorain Journal*, 342 U.S. at 153; *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993). There is overwhelming evidence of Falls Church's monopolistic intent. In addition to the conduct described above, the City's representatives have repeatedly admitted that they are *trying* to maintain and defend the City's water service area, despite the expiration of the 1959 Agreement. The "dangerous probability" of success is evidenced by the fact that Falls Church has maintained its 100% market share, and also by the City's success in forcing the Halstead developer to seek a PCA that rescinded its earlier proffer to use Fairfax Water. The fact that the Halstead developer has a fresh choice, again, to decide on water providers "does not excuse" the City's prior anticompetitive conduct. *See Otter Tail Power Co. v. United States*, 410 U.S. 366, 381 (1973).

C. The City's Claim that Fairfax Water Has Tried to Exclude It from the Market is Untrue and, in any case, Not a Defense.

In dismissing the City's countersuit with prejudice on August 14, 2009, Judge Ney ruled that,

² The City has taken inconsistent positions on whether it *still* claims an exclusive service area. It said at the end of discovery that it had *stopped* claiming an exclusive area last May 2008, when it lost its federal appeal. That claim was false. Moreover, the City's affirmative defenses here assert that Fairfax Water *should not be allowed to serve* the City's customers because it would disappoint

even assuming Falls Church were correct that the Fairfax County Board of Supervisors had *required* developers to connect to Fairfax Water's system, Code § 15.2-2111 plainly allows that. The City will try to resurrect its failed claim here by arguing that certain Fairfax Water staff considered *lobbying* Fairfax County officials to require that new development projects connect to Fairfax Water's system. The City will fail to prove that *any* developer was ever forced to connect to Fairfax Water's system, much less that Fairfax Water ever pressured or forced any developer to connect. But here again, the City's factual argument, even if true, would be no defense. For it has long been established that an antitrust plaintiff's own anticompetitive actions -- even if proven -- cannot "legalize" or "immunize" the defendant's antitrust violations. *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 214 (1950). Indeed, because the antitrust laws vindicate important public interests, defenses like *in pari delicto* and unclean hands are unavailable as a matter of law. *E.g., Chrysler Corp. v. General Motors Corp.*, 596 F. Supp. 416, 419 (D.D.C. 1984).

II. FALLS CHURCH'S TORTIOUS INTERFERENCE (COUNT IV).

In October 2007, the Halstead Developer proffered to Fairfax County that it would connect its project to Fairfax Water's system. When that proffer was accepted by the Board of Supervisors, it became part of the local zoning law. Code § 15.2-2303. This gave Fairfax Water a binding, legal entitlement to expect future tap fees and water commodity charges from the project. By intentionally forcing the Halstead developer to seek a PCA from Fairfax County to cancel the proffer, the City tortiously interfered with Fairfax Water's business expectancy. Assuming *arguendo* that this tort requires proof of improper methods, the evidence will show several used by the City, including: "threats and intimidation," "misrepresentation or deceit," "duress," violating "an established standard of a trade," "[s]harp dealing, overreaching," and "unfair competition." *Duggin v. Adams*, 234 Va. 221, 227-28, 360 S.E.2d 832, 836-37 (1987).

the City's prior investment of effort. In other words, the City *still seeks an exclusive service area here* while swearing it abandoned that claim in May 2008.

CONCLUSION

Falls Church can offer no proper business justification for misrepresenting to people that it has an exclusive service area in Fairfax County, threatening developers with litigation if they choose Fairfax Water, or tying easement relocations to the developer's promise to use the City's water service. At the end of this phase of the trial, the Court should find Falls Church liable under Counts I, II and IV.

Respectfully submitted,

FAIRFAX COUNTY WATER AUTHORITY

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CERTIFICATE OF SERVICE

I certify that on January 27, 2010, a copy of the foregoing Brief was sent by both electronic and U.S. first-class mail to the offices of the following counsel for the City of Falls Church:

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