IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

McKENZIE-WILLAMETTE HOSPITAL, an Oregon nonprofit corporation,

Plaintiff,

v.

PEACEHEALTH , a Washington State nonprofit corporation,

Defendant.

Civil No. 02-6032-HA

OPINION AND ORDER

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HAGGERTY, Chief Judge:

A jury returned a special verdict in this action on October 31, 2003. After three days of deliberations the jury concluded in part that plaintiff MacKenzie Willamette proved a relevant product and geographic market, and that defendant PeaceHealth did not enter into an

unlawful exclusive dealing agreement, did not monopolize the provision of health care and did not harm market-wide competition in the relevant market, and did not enter into a conspiracy to monopolize.

The jury also concluded, however, that defendant attempted to monopolize the provision of health care and harmed market-wide competition in the relevant market, unlawfully discriminated in price of services, and unlawfully interfered with plaintiff's prospective relations with others. The jury determined that plaintiff was entitled to a damages award of $5.4 million for each of these three claims, as well as punitive damages of $9.2 million as a result of defendant's interference with plaintiff's prospective relations with others.

Subsequent to the return of this verdict, defendant moved for a new trial. Rule 59 of the Federal Rules of Civil Procedure allows a trial court, in its discretion, to grant a new trial "on all or part of the issues in an action where there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States . . . ." Fed. R. Civ. P. 59(a)(1). Motions for new trials should be granted judiciously, because ordering a new trial "effects a denigration of the jury system and to the extent that new trials are granted the judge takes over, if he [or she] does not usurp, the prime function of the jury as the trier of the facts." *Lind v. Schenley Indus., Inc.*, 278 F.2d 79, 90 (3d Cir. 1960) (en banc). The Ninth Circuit has stated that a court may grant a new trial "'if the verdict is contrary to the clear weight of the evidence, or is based upon evidence which is false, or to prevent, in the sound discretion of the trial court, a miscarriage of justice.'" *Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814, 819 (9th Cir. 2001) (quoting *U.S. v. 40 Acres of Land*, 175 F.3d 1133, 1137 (9th Cir. 1999).

## BACKGROUND

There is little need to present more than a brief summary of this thoroughly litigated action. Plaintiff McKenzie-Willamette Hospital is a 114-bed community hospital in Springfield, Oregon. Defendant PeaceHealth is a nonprofit healthcare organization headquartered in Bellevue, Washington. Defendant operates hospitals in Lane County that compete with plaintiff by providing general acute hospital care. After the trial and the jury's determination that defendant attempted to monopolize the provision of health care and harmed market-wide competition in the relevant market, unlawfully discriminated in price of services, and unlawfully interfered with plaintiff's prospective relations with others, defendant moved for a new trial, citing four general grounds for granting the motion:

- plaintiff Mackenzie was permitted to amend claims without providing sufficient notice to defendant;
- certain evidence was improperly admitted or excluded;
- erroneous jury instructions were issued; and
- the damage awards from the jury were unsupported.

These grounds are reviewed in turn, below.

### 1. AMENDMENT OF CLAIMS

Defendant first complains that plaintiff was allowed to (1) add "discount bundling" as a claim under monopolization and attempt to monopolize claims; and (2) add Weyerhaeuser, Monaco Coach and several physicians as entities involved in the claim for interference with prospective economic advantage that previously identified only Regence.

#### Bundling Claim

Defendant asserts that plaintiff inserted the bundling claim in the proposed pretrial order over defendant's objections, and that the court overruled defendant's objections to the substantial prejudice of defendant. The discount bundling claim was added after the close of discovery and defendant had no opportunity to prepare an effective defense or amend its expert reports.

Federal Rule of Civil Procedure 15(a) provides that a trial court shall grant leave to amend freely "when justice so requires." The Supreme Court has stated that "this mandate is to be heeded." *Foman v. Davis*, 371 U.S. 178, 182 (1962) (reasons for denying leave to amend identified as "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment"); *see also DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987) (four factors are commonly used to determine the propriety of a motion for leave to amend: bad faith, undue delay, prejudice to the opposing party, and futility of amendment). The party opposing amendment bears the burden of showing prejudice. *DCD Programs*, 833 F.2d at 187 (citing *Beeck v. Aquaslide 'N' Dive Corp.*, 562 F.2d 537, 540 (8th Cir. 1977)). The standard for granting leave to amend is generous. *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 701 (9th Cir. 1990).

In this case, the theory of bundling arose as part of plaintiff's response to defendant's Motion for Summary Judgment. Bundling was referred to in this court's Opinion denying summary judgment to defendant: "in light of the evidence that defendant may be a monopolist

who bundled products to exploit its monopoly power . . . defendant's motion for summary judgment on this issue is denied." Summary Judgment Opinion at 27-28.

In the subsequent pretrial order, plaintiff contended that one way defendant obtained monopoly power was through coupling or bundling discounts on separate products. Defendant was made aware of the bundling issue at least as early as the parties' summary judgment briefing and did not (1) move to reopen discovery; (2) seek permission to allow its expert to expand his report to address it; (3) made no motion in limine against the theory; and (4) only objected to the amendment as it applied to the federal claim, and further made no objection to the state price discrimination claim. This court concludes that no miscarriage of justice occurred when it permitted the jury to consider this form of predatory pricing.

**Amendment of the Tortious Interference Claim**

Defendant complains that the court erred in allowing the jury to consider whether defendant interfered with plaintiff's contracts it had with the entities Weyerhaeuser, Monaco Coach and several physicians when considering plaintiff's claim for interference with prospective economic advantage. That claim previously identified only Regence as an "interfered-with" entity in the First Amended Complaint. The Amended Pretrial Order revised the claim, asserting that defendant interfered with "plaintiff's contracts and/or prospective advantage." In the instructions to the jury, the court stated:

> THE FINAL CLAIM OF PLAINTIFF IS THAT DEFENDANT WRONGFULLY INTERFERED WITH PROSPECTIVE BUSINESS RELATIONSHIPS BY ENTRY INTO EXCLUSIVE OR SEMI-EXCLUSIVE AGREEMENTS WITH REGENCE BLUECROSS BLUESHIELD, PROVIDENCE HEALTH PLAN, WEYERHAEUSER AND MONACO, AND BY PROHIBITING SOME OF ITS EMPLOYED PHYSICIANS FROM TREATING PATIENTS AT PLAINTIFF.

Defendant contends that if plaintiff intended to introduce evidence at trial about its relationships with Weyerhaeuser, Monaco Coach and the physicians as they pertained to plaintiff's claim for interference with prospective economic advantage, plaintiff should have specifically identified those relationships prior to trial. Defendant asserts that plaintiff was allowed to materially and improperly expand the scope of liability on the claim at the end of trial, and thereby deprived defendant of meaningful notice with which defendant could have prepared a defense.

The Amended Pretrial Order included eight paragraphs of agreed-upon facts relating to Monaco Coach and Weyerhaeuser. Defendant offered exhibits regarding Monaco Coach (Defense Ex. 544), its employed physician contracts (Defense Exs. 643, 647), and Weyerhaeuser (Defense Exs. 537, 548). Defendant's only objections to the inclusion of these entities came during the instruction phase after evidence and argument was heard. This court concludes that defendant demonstrated awareness of the potential scope of plaintiff's interference claim, submitted evidence regarding that scope, did not assert objections to evidence and argument presented by plaintiff, and now fails to establish any showing of prejudice suffered by defendant as a consequence of the entities that were encompassed by the claim being specified in the instructions to the jury. No grounds for concluding that a miscarriage of justice has occurred are presented.

2. **ADMISSION OF EVIDENCE**

Defendant's second ground in support of its Motion for a New Trial is that the court impermissibly favored plaintiff by excluding evidence supporting defendant and admitting evidence that was prejudicial to defendant. This argument focuses on five evidentiary rulings:

- excluding evidence of plaintiff's merger with Triad;
- excluding evidence of non-compete provisions in physician contracts that were less onerous than those used by defendant;
- excluding evidence that plaintiff tried to enter into a price-fixing agreement with defendant;
- admitting evidence regarding the undoctored call problem;
- admitting expert testimony in support of plaintiff that was unsupported by fact.

These are analyzed in turn below.

**Triad Evidence**

Defendant contends that although plaintiff moved in limine to exclude evidence of its merger with Triad, and received a partially favorable ruling (evidence agreed to in the pretrial order pertaining to Triad could be admitted), plaintiff nevertheless allegedly elicited testimony from witnesses that exceeded the limitations set on this evidence. Defendant objected to the evidentiary exclusion on grounds that the merger was evidence of how easy it was to enter the market, and also was quite relevant to the current financial status and true identity of the plaintiff appearing before the jury. At trial, defendant subsequently requested permission to refer to this evidence when defendant questioned its expert, but plaintiff argued that if defendant did so, then plaintiff should be permitted to present evidence about the Certificate of Need (CON) process (which defendant had successfully moved to exclude).

This court advised counsel that if defendant pursued Triad evidence with its expert, the court would be inclined to permit plaintiff to present evidence about the CON process.

Defendant contends that this ruling unfairly favored plaintiff and bolstered plaintiff's attempted monopolization claim, upon which plaintiff succeeded.

No miscarriage of justice was created by this ruling. The pretrial order acknowledged that plaintiff had signed a letter of intent to merge with Triad; Triad was the third largest for-profit hospital chain; and that the Oregon Attorney General had approved the merger. Evidence regarding these points was allowed at trial. Plaintiff introduced testimony that explained that the merger was sought solely because of plaintiff's dire financial situation, and also revealed that Triad had also purchased a failing hospital in Roseburg but had been unable to save that entity.

Defendant sought to introduce evidence that could be construed as suggesting that the marketplace at issue is open and competitive because of that merger. That evidence lacked probative value because Triad was *not a new competitor*, but a substitute for an existing competitor (plaintiff). Moreover, sufficient evidence was presented at trial regarding plaintiff's new financial structure and its plans with Triad so that the jury was not misled and defendant was not unfairly prejudiced.

Accordingly, a new trial is not warranted by the rulings of which defendant complains. Defendant fails to establish that the evidence admitted at trial regarding Triad unfairly exceeded the scope permitted, nor is there a showing of prejudice arising from the exclusion of other facts about the merger with Triad.

**Evidence of less onerous non-compete provisions in physician contracts**

Defendant next complains that it was not permitted at trial to elicit testimony from Dr. White regarding the allegedly onerous terms of the non-compete provisions contained in

plaintiff's Surgery Group physician employment contracts. Defendant asserts that this testimony should have been allowed so that the jury could more fairly evaluate the reasonableness of the restrictive covenants in defendant's employment contracts, which were presented to the jury. Defendant argues that similar evidence was allowed pertaining to the Eugene Clinic and plaintiff's own employed physicians. Had defendant been permitted to present this additional evidence about the MacKenzie Medical Group non-compete terms, the jury would have been able to determine that the non-compete terms in defendant's Medical Group employment contracts were not unduly restrictive.

The evidence in dispute here pertains to a contract provision used by an entity that was not a party in the case. As such, this evidence was unrelated to the issues being tried. The non-compete terms of defendant's Medical Group were relevant and admissible to show the alleged "tentacles of power" that defendant has in the Lane County medical community. Evidence of other non-compete provisions used by other entities have little relevance to this question. No miscarriage of justice occurred because of the exclusion of this evidence.

**Evidence that plaintiff tried to enter into a price-fixing agreement with defendant**

Defendant next argues that the court erred when it granted a motion from plaintiff excluding evidence of a draft settlement proposal from plaintiff to defendant. The draft pertained to an unsuccessful attempt to settle plaintiff's claim of wrongful exclusion from defendant's preferred provider arrangement with Regence. Defendant describes the draft proposal as an offer to enter into an illegal price-fixing agreement. Defendant opposed the exclusion of the evidence on two grounds – the evidence supported defendant's affirmative defense of unclean hands, and also supported the assertion that defendant's preferred provider

contracts served to lower the prices of its services so well that plaintiff sought to create a "false floor" for the prices.

The court excluded the evidence from going to the jury, even upon an advisory basis, because the draft was unrelated to the questions being posed on the verdict and because the prejudicial effect of the evidence far outweighed its probative value. Tr. 9/15/03, pp. 2-4 (Ex. 10 to Plaintiff's Memorandum in Support).

Defendant argues that this exclusion "effectively eviscerated PeaceHealth's unclean hands defense." Defendant asserts that the exclusion was also highly prejudicial because the proposal supports defendant's assertion that preferred provider contracts are good for competition.

The exclusion was proper. In light of the fact that price fixing never occurred, the draft proposal arose in the context of pre-litigation attempts at compromise, and the proposal was unrelated to the antitrust claims actually litigated, the evidence of the draft has little or no probative value. As it was intended to merely cast plaintiff in a poor light, its prejudicial impact upon plaintiff far outweighed any probative value. Nothing about the exclusion of this evidence, which lacked significant relevance and was highly prejudicial, suggests that a miscarriage of justice occurred or otherwise forms the basis for granting a new trial.

**Evidence regarding the undoctored call problem**

Defendant next seeks a new trial because the court allowed, over defendant's objections, evidence pertaining to patients who arrived at plaintiff's emergency room without a known physician or with a doctor who lacked privileges at McKenzie. Defendant argues that this evidence was presented merely to cast doubt upon the quality of care provided by

defendant. However, defendant argues, there was no evidence that plaintiff was precluded from billing for the "undoctored" patients' services, and plaintiff's Chief Executive Officer testified that he did not know whether undoctored patients had a negative economic impact upon plaintiff.

This evidence tended to show some effects of defendant's refusal to allow its doctors to provide care at plaintiff's facility. The inferences drawn from the evidence regarding the impact upon patient care were not unfairly prejudicial or improper, regardless of whether plaintiff presented evidence regarding the possible financial consequences of treating undoctored patients. Defendant was not unfairly prejudiced by the admission of this evidence.

**Expert testimony**

Defendant also argues that a new trial should be granted because the court allowed the admission of expert opinions that were factually unsupported. Defendant moved in limine to exclude the plaintiff from eliciting certain opinions from plaintiff's economic expert, Dr. Ed Whitelaw. The motion was denied, and defendant now complains of two specific opinions that were elicited: (1) that defendant's participation in preferred provider plans that cover only fifteen percent of the commercial lives in Lane County nevertheless forecloses plaintiff from competing; and (2) that Regence would have contracted with plaintiff but for defendant's coercion.

Defendant argues that these opinions were factually unsupported. Defendant asserts that Dr. Whitelaw could not explain why plaintiff was foreclosed from competing when eighty-five percent of the commercial market was still available to plaintiff. Defendant also contends that Dr. Whitelaw also failed to offer any evidence to support his conclusion that

Regence would not contract with plaintiff because of defendant's coercion. Defendant contends that the admission of this evidence was highly prejudicial and compels a new trial.

This court allowed the testimony, and finds no grounds for ordering a new trial now. There was sufficient evidence that plaintiff was excluded from significantly more than fifteen percent of the market of patients who could pay through insurance benefits or otherwise. The jury agreed that the evidence of exclusion relied upon by Dr. Whitelaw was significant.

Although defendant asserts that Dr. Whitelaw "admitted that his assertion of harm from foreclosure was based on nothing more than an assurance by McKenzie's Chief Financial Officer that 'MacKenzie was doing the best they could,' and that it still could not obtain sufficient business," a fair examination of the trial transcript establishes that this unfairly misconstrues the testimony.

Dr. Whitelaw was asked in cross examination whether his opinion was based upon anything other than being told that plaintiff was doing the best it could. The doctor replied, "No. I assume that MacKenzie was doing the best [it] could. I assumed [defendant] was doing the best it could in these other areas. No, it is just based on my understanding of how markets operate." Tr. 10/17/03 p.m. at 32.

Defendant unfairly misinterprets the doctor's response to a compound question. There was factual support presented for Dr. Whitelaw's conclusion that plaintiff was foreclosed by defendant's partial control of the market. While defendant disagrees with the possible impact from that exclusion, that disagreement does not render Dr. Whitelaw's opinion factually unsupported.

As to the second challenged opinion, plaintiff characterizes it as an assumption that a consumer or insurer would choose a low-cost provider over a more expensive provider in a competitive market if the services were equal. Defendant's attempt to offer plausible alternatives to this assumption (that an insurer might choose a more expensive provider because of its better reputation) fails to render the initial assumption factually unsupported.

This court denied the motion in limine on this point in part on grounds that the Supreme Court has recognized that "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 596 (1993). Moreover, a fair interpretation of Dr. Whitelaw's testimony is that he based his opinion upon his expert understanding of how markets operate. Defendant properly attempted to refute that opinion, and the jury was properly given an opportunity to decide the issue and the appropriate damages. Defendant was not unfairly prejudiced by the admission of this evidence.

3. **JURY INSTRUCTIONS**

Defendant's next general argument for a new trial is based upon alleged errors in the final instructions read to the jury. "Jury instructions must fairly and adequately cover the issues presented, must correctly state the law, and must not be misleading." *White v. Ford Motor Co.*, 312 F.3d 998, 1012 (9th Cir. 2002) (citations omitted). "[A]n error in instructing the jury in a civil case does not require reversal if it is more probably than not harmless." *Bourns, Inc. v. Raychem Corp.*, 331 F.3d 704, 708 (9th Cir. 2003) (citing *Mangold v. Cal. Pub. Util. Comm'n*, 67 F.3d 1470, 1473 (9th Cir. 1995) (quotation omitted).

**Employment of physicians**

Defendant first refers to its conduct regarding the employment of physicians. In arguing for summary judgment, defendant asserted that its employed doctors had no duty to aid or assist a competitor. In denying summary judgment, this court stated:

> Moreover, while there may be authority for declaring that there is no general duty to cooperate with a competitor, in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), the Supreme Court reasoned that the refusal to cooperate may not be exercised with an intent to create or maintain a monopoly and that such refusals were relevant to the question of whether there was exclusionary or anti-competitive conduct. "The question whether [the monopolist's] conduct may be properly characterized as exclusionary cannot be answered by simply considering its effect on [its competitor]. In addition, it is relevant to consider its impact on consumers and whether it has impaired competition in an unnecessarily restrictive way." *Id.* at 605.
>
> Plaintiff presents sufficient evidence of possible compromised patient care, higher costs to plaintiff because of defendant's control of referrals, and other consequences of defendant's alleged attempts to drive plaintiff out of business, to preclude defendant from obtaining summary judgment at this juncture. Plaintiff will be permitted at trial to support these claims by presenting evidence of defendant's alleged hiring of physicians for purposes of controlling hospital admissions.

Summary judgment Opinion at 23-24.

In light of this ruling, defendant later requested instructions that supported its position that its employment of physicians does not violate antitrust laws:

Defense Request 3.2.3 (in part):

> *For example, a monopolist does not violate the antitrust laws by employing individuals and contractually requiring them to provide services only to their employer unless the employees were hired solely to keep them from a rival;*

and

Defense Request 3.1:

*Even a firm which possesses monopoly power has no general duty to help its competitors. Further, a monopolist's refusal to aid a competitor may not be condemned as restrictive or exclusive if there was a legitimate business justification for the conduct, even if that conduct was partially motivated by a desire to restrict competition. For example, even if there is an adverse impact on a competitor, a defendant's efforts to increase its capacity, replace aging physical plants or upgrade to more modern medical technology are legitimate and procompetitive activities because they improve quality and efficiency for the benefit of the community. In determining whether there has been an unlawful exercise of monopoly power, you must bear in mind that a company has not acted unlawfully simply because it has engaged in ordinary competitive behavior that would have been an effective means of competition if it were engaged in by a firm without monopoly power, or simply because it is large and efficient.*

Defense Request 3.2.3 was offered in regards to the monopolization claim, a claim upon which defendant prevailed. Moreover, although the court did not include the sentence quoted above in the instructions given, the court presented much of the intent by instructing as follows:

UNDER THE ANTITRUST LAWS, A MONOPOLIST IS ENCOURAGED TO COMPETE VIGOROUSLY WITH ITS COMPETITORS. IN DETERMINING WHETHER THERE HAS BEEN AN UNLAWFUL EXERCISE OF MONOPOLY POWER, YOU MUST BEAR IN MIND THAT A COMPANY HAS NOT ACTED UNLAWFULLY SIMPLY BECAUSE IT HAS ENGAGED IN ORDINARY COMPETITIVE BEHAVIOR THAT WOULD HAVE BEEN AN EFFECTIVE MEANS OF COMPETITION IF IT WERE ENGAGED IN BY A FIRM WITHOUT MONOPOLY POWER, OR SIMPLY BECAUSE IT IS LARGE AND EFFICIENT. TO PROVE THAT DEFENDANT ACTED WILLFULLY TO ACQUIRE OR MAINTAIN MONOPOLY POWER, PLAINTIFF MUST PROVE EITHER THAT DEFENDANT ENGAGED IN PREDATORY OR EXCLUSIONARY ACTS OR PRACTICES WITH THE INTENT OF FURTHERING ITS DOMINANCE IN THE RELEVANT MARKET, OR THAT THIS WAS THE NECESSARY DIRECT CONSEQUENCE OF DEFENDANT'S CONDUCT OR BUSINESS ARRANGEMENTS. YOU MAY NOT FIND THAT DEFENDANT WILLFULLY ACQUIRED OR MAINTAINED MONOPOLY POWER IF IT ACQUIRED OR MAINTAINED THAT POWER SOLELY THROUGH THE EXERCISE OF SUPERIOR FORESIGHT AND MANAGEMENT SKILL; OR BY OFFERING SUPERIOR QUALITY; OR BECAUSE OF HISTORICAL ADVANTAGES SUCH AS BEING THE FIRST COMPETITOR IN A MARKET; OR BECAUSE OF ECONOMIC OR TECHNOLOGICAL EFFICIENCY; OR BECAUSE A CHANGE IN COST OR TASTE DROVE OUT ALL BUT ONE SUPPLIER.

THE ACTS OR PRACTICES THAT RESULTED 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.

The court concludes that the law was not misstated and defendant was not prejudiced by the modifications of its requested instructions that were given to the jury in this regard.

**Price discrimination and other alleged errors**

The other alleged errors in the instructions asserted by defendant are that: (1) when instructing on the state law price discrimination claim, the court ignored Ninth Circuit precedent that holds that "primary line" price discrimination claims by competitors require proof of predatory pricing; and that the court erred in the adoption of an instruction based upon the ruling from *LePage's, Inc. v. 3M*, 324 F.3d 141, 151 (3rd Cir. 2003). For reasons that will be amplified in this court's subsequent ruling regarding defendant's Motion for a Directed Verdict, this court concludes that the law was not misstated and defendant was not prejudiced by instructions that were given to the jury.

4. **THE JURY'S DAMAGE AWARDS**

The final argument presented by defendant as grounds for a new trial addresses the damage awards found by the jury. Defendant argues that (1) the damage awards were erroneous because the jury considered both legal and illegal conduct when setting the award; and (2) the damage awards are unsupported by the evidence. These are reviewed in turn:

**Were the awards based upon proper legal theories?**

Defendant first asserts that the jury's compensatory damages award in the attempted monopolization, price discrimination, and tortious interference claims of $5.4 million each is

based solely upon damages arising from plaintiff's exclusion from defendant's preferred provider contracts. Defendant says these awards are invalid because the jury found that the defendant's preferred provider arrangements were reasonable under Section 1 of the Sherman Act. Defendant contends that if the conduct was reasonable under Section 1, the conduct must be reasonable under Section 2. Therefore the damages awarded under these three claims were based upon a defective antitrust theory – plaintiff's Section 1 claim that the jury rejected. Similarly, defendant argues that the punitive damages of $9.2 million awarded under the tortious interference claim are invalid because the jury was asked to consider whether defendant had interfered with prospective business relationships between plaintiff and Weyerhaeuser and between plaintiff and defendant's physicians. Defendant says its exclusive contract with Weyerhaeuser was terminated in 1998, so any impermissible conduct ended outside the statute of limitations for tortious interference. Further for the reasons stated in its Motion for Directed Verdict, defendant contends that no permissible liability arises from defendant's employment of physicians.

This court concludes that neither position presents grounds for granting defendant's Motion for a New Trial. An evidentiary basis for the awards was available to the jury, regardless of whether the conduct was found lawful under Section 1. The jury was instructed not to award damages for conduct prior to February 1, 2000, rendering the Weyerhaeuser argument moot. The court concludes that the jury's award of damages was properly founded in the evidence.

**Were the awards adequately supported by the evidence?**

Next, defendant contends that because the expert for plaintiff allegedly attributed damages only to the preferred provider contracts, and the jury found those contracts to be lawful, plaintiff is unable to establish that its injuries were caused by reason of defendant's "unlawful competition." *See Farley Transp. Co. v. Sante Fe Trail Transp. Co.*, 786 F.2d 1342, 1348 (9th Cir. 1985). Therefore a new trial is necessary to prevent a miscarriage of justice.

This argument is unpersuasive. The jury awarded damages after concluding that defendant unlawfully attempted to monopolize the hospital health care market. The evidence from which this conclusion could be drawn and damages could be based includes defendant employing one-third of the doctors in Lane County, the use of non-compete provisions in employment contracts; the purchase and closing of competing hospitals; entering into preferred provider contracts that are lawful but exclusionary; seeking restrictive covenants on property to deter hospital construction; and plans to locate a new hospital near a competitor's hospital.

The Ninth Circuit has recognized:

> Once the fact of antitrust injury is proven, we have traditionally required a lesser quantum of proof to support the amount of damages. An antitrust plaintiff must simply provide evidence to support a just and reasonable estimate of the damage. A jury's finding of the amount of damages must be upheld unless the amount is grossly excessive or monstrous, clearly not supported by the evidence, or only based on speculation or guesswork.

*Handgards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282, 1297 (9th Cir. 1984) (citations and quotations omitted).

The evidence upon which the jury based its conclusion that defendant unlawfully attempted to monopolize was not limited to the preferred provider contracts, and defendant's

attempt to construe the testimony regarding damages by plaintiff's expert as being limited to those contracts fails to establish a miscarriage of justice warranting a new trial.

**CONCLUSION**

For the reasons provided, defendant's Motion for a New Trial (Doc. # 239) is denied.

IT IS SO ORDERED.

Dated this 30 day of September 2004.

/s/Ancer L.Haggerty
Ancer L. Haggerty
United States District Judge