

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FRANCIS W. MURRAY, ET AL. : CIVIL ACTION  
 :  
 v. :  
 :  
 NATIONAL FOOTBALL LEAGUE, : NO. 94-5971  
 ET AL. :

MEMORANDUM

Giles, J.

April 24, 1998

Francis Murray ("Murray"), a Pennsylvania resident, and FWM Corporation, a Delaware corporation, the stock of which is wholly owned by Murray, allege that Defendants<sup>1</sup> have conspired to restrain trade in the market for the purchase and sale of professional football franchises in violation of the Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2 (West 1985 & Supp. 1995). Plaintiffs also assert several state law causes of action against Defendants.<sup>2</sup> Considered herein is Defendants' motion for

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1. Remaining Defendants are the National Football League ("NFL") and its 27 member football clubs and two persons sued in their individual capacities: Paul Tagliabue, as NFL Commissioner, and Neil Austrian, as President of the NFL. Two franchises have been established since the commencement of this lawsuit. They have not been named as defendants.

2. Against the NFL, Commissioner Tagliabue, and Neil Austrian, Plaintiffs allege common law claims for conspiracy, bad faith breach of contract, breach of fiduciary duty, intentional interference with prospective contract, and fraud.

summary judgment. The court has subject matter jurisdiction pursuant to § 4 of the Clayton Act, 15 U.S.C. § 15<sup>3</sup> and 28 U.S.C. § 1331. Supplemental jurisdiction over Plaintiffs' state law claims is exercised pursuant to 28 U.S.C. § 1367(a). For the reasons which follow, the court grants Defendants' motion for summary judgment in its entirety.

## I. FACTUAL BACKGROUND

In 1986, NEP Partners, L.P. obtained an option to purchase the New England Patriots ("Patriots") football club franchise from then owner William Sullivan. Murray owned one hundred percent (100%) of the stock of N.E.P. Corporation which was the controlling partner of NEP Partners, L.P. In December 1986 NEP borrowed \$13.5 million from National Westminster ("NatWest") which was, in turn, loaned to Sullivan.

In October 1988 Murray and Kiam formed a limited partnership known as KMS Patriots, L.P. ("KMS Patriots") to acquire the Patriots franchise. (Am. Compl. at ¶ 30.) Through FWM Corporation, Murray became a forty-nine percent (49%) general

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3. Section 4 of the Clayton Act confers standing upon private parties to sue for damages under the Sherman Act. It provides,

[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15 (West 1973 & Supp. 1996).

partner in KMS Patriots. Kiam owned the remaining fifty-one percent (51%) divided between two entities wholly owned by him: VKK Corporation (50.5%), as general partner, and VKK Patriots (.5%), as a limited partner. (Id.)

The Murray-Kiam partnership agreement, approved by the NFL, included a "put" clause that entitled Murray to "put" his 49% interest in the Patriots to Kiam on October 10, 1991, in exchange for a \$38 million payment. (Am. Compl. at ¶ 31.) Murray asserts that he intended to use the monies received from the "put" to pay off his creditors and to pursue possible NFL club expansion opportunities in St. Louis, Missouri. (Id.)

Murray held a forty percent (40%) interest in a venture seeking to bring an NFL team to St. Louis. (Id.) Murray further asserts that under the "put" agreement, if Kiam failed to pay the "put" price upon demand, Murray would replace Kiam as the sole general partner of KMS Patriots. (Am. Compl. at ¶ 32.) As controlling partner, Murray asserts that he would have taken steps to relocate the Patriots franchise either to St. Louis or to Hartford, Connecticut. According to him, the "put" agreement was essential to the partnership venture. (Am. Compl. at ¶ 31.)

At the time KMS purchased the Patriots, Murray arranged with NatWest to transform its loan to NEP into a loan to FWM. (Murray Dep. at pp. 383-84.) Murray also pledged FWM's ownership interest in KMS as a security for a number of other loans. Also around this time, Murray asserts that he was negotiating simultaneously with his St.

Louis partners to move the Patriots to St. Louis or to apply to the NFL for an expansion team for that city. (Am. Compl. at ¶¶ 32-34.) In anticipation of operating a professional football franchise in St. Louis, Murray and his partners allegedly secured a stadium lease, lobbied for and obtained enabling legislation, invested personal funds, and organized operating entities there. A similar plan was allegedly developed for Hartford, Connecticut. (Id.)

Murray and James Orthwein (“Orthwein”) were partners in the St. Louis venture. (Am. Compl. at ¶ 35.) In July 1990, Orthwein extended a line of credit to Murray taking, as collateral against the loan, a secured interest in Murray's forty-nine percent interest in the Patriots franchise. Orthwein's secured interest, worth approximately \$15.5 million, (Plaintiffs' Facts at ¶ 6), became secondary to the secured interest held by NatWest, (Am. Compl. at ¶ 37). Murray's continued participation in the St. Louis venture, however, required that he first satisfy the Orthwein and NatWest indebtedness.

On July 8, 1991, Murray notified Kiam that he intended to exercise the "put" on October 10, 1991. (Plaintiffs' Ex. 26.) Murray, Kiam, and the NFL then entered into discussions regarding alternatives to Kiam defaulting on the put, including one suggestion which would have required the NFL to fund the “put” for a temporary period. (Plaintiffs' Ex. 10.)

On September 30, 1991, Murray learned that IBJ Schroder Bank had been given a secured interest in Kiam's interest in the Patriots. The IBJ Schroder loan was a "proceeds loan" which meant that the Schroder Bank had an interest in the proceeds that Kiam would receive from a sale of the Patriots. Murray believed that the loan caused Kiam to violate the League's rules regarding debt limits, and notified the NFL to that effect. (Plaintiffs' Ex. 38) The NFL determined, however, that a "proceeds loan" would not count in a debt limit calculation.

At this juncture, Murray was insisting that he was entitled to \$38 million or the controlling interest of the Patriots franchise. Orthwein was insisting that he was entitled to payment on the loan to Murray or foreclosure upon Murray's interest in the Patriots franchise. NatWest was insisting that it was entitled to payment on its loan to Murray and that its right was superior to any execution on assets by Orthwein. Also, at this time, Murray's right to participate in the St. Louis venture was canceled because he failed to repay Orthwein and NatWest.

In early October, Kiam made it clear that he would not pay the \$38 million "put" by October 10, 1991. Instead, he requested an extension of time to pay the amount demanded while he disputed Murray's contention that he was entitled under the partnership agreement to become sole owner of the Patriots. (Am. Compl. at ¶ 40.) On October 14, Murray and Kiam signed an agreement providing for an extension of the put

payment date to November 12, 1991. (Defendants' Tab 24.) The agreement also provided that two NFL representatives would be appointed to the board of VKK. (Id.)

On October 14, 1991, Orthwein informed the NFL that he intended to foreclose on his secured interest in the Patriots franchise if Kiam failed to perform under the "put" agreement. (Am. Compl. at ¶ 42.) The following day, a meeting was held between Austrian, Kiam, Murray and their counsel. At that meeting, Austrian allegedly affirmed to Murray that the NFL would arbitrate his dispute with Kiam.

Notwithstanding the agreed upon extension to the "put" agreement, on November 4, 1991, Murray sent a letter to Commissioner Tagliabue invoking Article 8.3 of the NFL Constitution and Bylaws<sup>4</sup> which thereby certified the dispute for arbitration. Moreover, in that letter Murray asked the NFL promptly to declare in writing that Murray should be designated the general partner of the Patriots. (Plaintiffs' Ex. 35.) Later that same day, NFL counsel Jay Moyer ("Moyer") wrote back to Murray, stating:

You have long been aware of the arbitration provisions in the NFL's Constitution and Bylaws. In requesting arbitration, you have invoked a process that normally includes notice to the other side, and an opportunity for it to respond; scheduling and holding a hearing at which both sides can present witnesses, or at least legal arguments; reviewing the hearing record; and reaching and formulating a reasoned decision. Compressing the entire arbitration process into this week, as you have requested, would be next to impossible, unless a mutually acceptable truncated procedure can be devised and completed within that time frame.

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4. Article 8.3 provides: "The Commissioner shall have full, complete, and final jurisdiction and authority to arbitrate: (a) Any, dispute . . . involving two or more holders of an ownership interest in a member club of the League, certified to him by any of the disputants."

(Defendants' Tab 26.)

On November 11, 1991, a proposed agreement between Kiam, Murray and NFL negotiators was drafted which included the following: (1) an extension of the put deadline to May 1992; (2) maintenance of the two NFL representatives on the Board of VKK; (3) retention of an investment banker to sell the Patriots; (4) a guarantee by the NFL that, in the event that the team could not be sold for a higher price, the NFL would buy the club for \$90 million; and (5) a promise by Kiam to cause the Patriots to vote for St. Louis when the expansion decision was made. (Defendants' Tab 48.) Although Kiam and Murray signed the document, the NFL did not. (Id.) According to Moyer, the NFL did not sign because upon reflection it considered the provision requiring the Patriots to vote for a St. Louis franchise to be an improper condition, one in which the NFL should not be involved. (Moyer Dep. at p. 248.)

On November 12, 1991, NatWest sued Murray, VKK Corporation and Kiam in New York to collect on its loan to Murray, thus placing more pressure on Murray.

Negotiations continued. On November 22, 1991, the NFL negotiators sent an alternative draft agreement to Murray and Kiam which excluded the provision requiring Kiam to support a St. Louis franchise expansion but which did provide that if no buyer could be found who would pay more than \$90 million and keep the Patriots in New England, then the NFL would buy the Patriots for \$90 million. (Plaintiffs' Ex. 29.)

This proposal was to have been presented to the NFL's Finance Committee meeting on December 17, 1991. (Id.)

In a December 10, 1991, letter from Neil Austrian to Kiam, Kiam and Murray were invited to address the December 17, 1991, Finance Committee meeting to discuss the possibility of an NFL buy out. The letter, in part, stated, "Both you and Fran should be prepared to attend with, hopefully, a written plan for the Committee to review and act upon."

It is unclear what resulted from the Finance Committee meeting. There is some indication that the Committee approved the NFL's draft agreement to buy the Patriots. (See Benson Dep. 38-41; February 26, 1992, Boston Globe article Plaintiffs' Ex. 43.) Murray concluded, however, that nothing happened at the meeting and that he does not remember "coming away with anything." (Murray Dep. at p. 162.) In any event, no purchase agreement was ever signed by the NFL.

Following the Finance Committee meeting, Moyer sent a letter to Kiam and Murray stating that arbitration would go forward if Murray still wished as much, and that opening briefs were to be filed not later than January 3, 1992, replies by January 15, 1992, and a hearing would be held at a "subsequent date to be determined." (Defendants' Tab 31.)

By letter of December 26, 1991, Kiam's lawyers objected to the schedule set out by NFL. Kiam took the position that Murray's arbitration request had been

mooted by the November 11, 1991, agreement. By letter of December 30, 1991, Murray's lawyer responded that arbitration was still necessary because the November 11 agreement had never been agreed upon by the NFL. In the letter, Plaintiffs' counsel also highlighted the need for an "expeditious" end to this dispute:

The parties and the League have known of this issue since October 1988 when the agreements were signed and have worked with them intensely since at least Mr. Murray's letter on July 8, 1991. VKK Corp. and Kiam have known of the request for arbitration for almost two months and have had more than adequate opportunity to prepare any necessary presentation. In light of the parties' long history and familiarity with this issue, the fifteen day time period provided by your December 19 letter for submission of initial memoranda is fair and reasonable. Additionally, resort to the arbitration process will not prevent the parties from continuing to negotiate, if they choose to do so. Any further delay will severely prejudice Mr. Murray and FWM Corporation and will cause them further loss and harm, including with their creditors. The time is long past where FWM Corporation and Mr. Murray can tolerate any further delays without a final resolution.

We therefore request that the arbitration proceed as scheduled.

(Defendants' Tab 33.)

On January 3, 1992, Kiam and Murray submitted their opening briefs. Thereafter, several extensions were requested by Kiam, unopposed by Murray's attorney, William Sullivan, and agreed to by the NFL.<sup>5</sup> Joint written requests by Kiam and Murray for extensions were submitted on January 21, January 30, February 7, February 13, February 19, and February 28. (Defendants' Tabs 73-79.) Neither party, however, filed a reply brief. No arbitration hearing date was scheduled.

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5. In Sullivan's deposition testimony, he does not dispute that he did not oppose Kiam's repeated requests for extensions. (Sullivan Dep. at 115-36.)

On March 13, 1992, Murray contends that Orthwein asked him to attend an owners' meeting to persuade Kiam to sell his interest in the Patriots to Orthwein. (Am. Compl. at ¶ 48.) For securing Kiam's agreement, Orthwein allegedly promised Murray that his interests in the Patriots and the St. Louis venture would be preserved. (Id.) Relying on that promise, Murray went to the owners' meeting and secured Kiam's agreement to sell his interest in the Patriots to Orthwein. Murray agreed to pay Kiam \$1 million (over three years) in consideration for Kiam's promise. (Am. Compl. at ¶ 49.)

On March 16, 1992, Orthwein purchased NatWest's loan to Murray and assumed control of the NatWest litigation. By reason of that purchase Orthwein then held the first secured interest in Murray's interest in the Patriots. (Am. Compl. at ¶ 50.)

On March 17, 1992, allegedly at Orthwein's suggestion, Murray filed suit against Kiam in the Chancery Court for the State of Delaware seeking an adjudication of his right of control of the Patriots under the "put" agreement, together with injunctive relief. (Am. Compl. at ¶ 51.) On April 27, 1992, the Chancery Court stayed the action believing that the issues raised by Murray were pending in the NatWest litigation. Murray contends that Orthwein refused his request to withdraw the NatWest litigation so that the Chancery Court action could proceed. Instead, Orthwein allegedly demanded Murray's interest in the Patriots pursuant to their loan agreement and threatened to obtain Murray's St. Louis interests as well. (Am. Compl. at ¶ 52.)

On May 11, 1992, Murray and Orthwein settled their dispute by agreeing in writing that Orthwein would succeed to Murray's (49%) interest in the Patriots franchise. (Id.)

In 1993, after Murray no longer had an interest in the Patriots, Murray conceived the idea of persuading Connecticut officials to approve the funding of a new stadium in Hartford that could be the home venue for the Patriots. (Plaintiffs' Facts at ¶ 48.) He discussed this idea with NFL officials and forwarded a series of proposals to Orthwein suggesting that the Patriots move to Hartford. (Id.) Nothing came of this. Murray admits that the events at issue in 1991-1992 were not affected by Murray's Hartford proposal. (Plaintiffs' Facts at ¶ 49.)

In addition, Murray claims that as part of his plan to move the Patriots and/or to win a franchise team in St. Louis, he intended to fund those activities by using Contractually Obligated Income "COI Financing," under which certain revenues normally earned by a team in the course of the presentation of its games would be paid instead to Murray, who theoretically would borrow money secured by the future stream of such revenues. (See Plaintiffs' Facts at ¶¶ 50-51.) Murray asserts that any COI prohibition injures competition because that would exclude from the market for ownership and control interests in NFL franchises competitors who seek to use innovative means of financing. (Plaintiffs' Facts at ¶¶ 50-51.) There is no expressed NFL policy prohibiting COI financing.

On September 30, 1994, Plaintiffs filed the instant suit. In a Memorandum and Order dated June 26, 1998, this court dismissed Count 1 of the complaint regarding the NFL's relocation policy, and granted individual Defendant Norman Braman's Motion for Summary Judgment, and Individual Defendant James Orthwein's Motion to Dismiss. In that same Order, however, the court declined to grant Defendants' motion to dismiss pertaining to the NFL's financing and arbitration policies, Plaintiffs' § 2 claim, and declined to dismiss Tagliabue and Austrian in their individual capacities.

Consequently, pending before the court is Defendants' Motion for Summary Judgment as to NFL's policies regarding arbitration, financing, the claim that the NFL is a monopoly in violation of § 2 of the Sherman Act, and the state law claims.

#### I. SUMMARY JUDGMENT STANDARD

Summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(e); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

The party seeking summary judgment bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. See

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). In demonstrating this absence, the moving party must introduce evidence beyond the mere pleadings on "an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. When the moving party makes such a showing, the burden shifts to the non-moving party to "set forth specific facts showing that there is a genuine issue for trial." Id. at 324. The court's function is not to weigh the evidence and determine the truth of the matter, but rather to determine whether there is a genuine issue for trial. Anderson, 477 U.S. at 249. An issue is "genuine," if the evidence is such that a reasonable jury could return a verdict for the non-moving party. If the evidence is "merely colorable" or is "not significantly probative," summary judgment may be granted. Id. In the antitrust context, summary judgment is appropriate where "there is an absence of any significant probative evidence tending to support the claim." First Nat'l Bank of Arizona v. Cities Service Co., 391 U.S. 253, 290 (1968).

## II. SECTION 1 CLAIMS

The gist of Plaintiffs' remaining claims is that the Defendants conspired in violation of § 1 of the Sherman Antitrust Act, 15 U.S.C. § 1<sup>6</sup>, to restrain trade in the

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6. Section 1 provides in relevant part,

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or within foreign nations, is declared to be illegal.

(continued...)

market for the sale and purchase of ownership interests in professional football franchises by adopting and employing anti-competitive policies regarding team financing and dispute resolution.

To defeat a motion for summary judgment in a § 1 case, a plaintiff must present evidence of (1) concerted action by the defendants; (2) that was designed to achieve an unlawful objective; (3) and that produced injury to competition within the relevant and geographic markets; and (4) injured plaintiff as a proximate result of the concerted actions. Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., Inc., 998 F.2d 1224, 1229 (3d Cir. 1993) (citations omitted). “Without proof of all of these elements, a plaintiff cannot maintain a section 1 claim.” Id.

#### A. Arbitration

As to the arbitration issue, Defendants argue that Plaintiffs have failed to show evidence for each of the factors required in a § 1 case. Plaintiffs, on the other hand, assert that they have presented sufficient evidence to allow their § 1 claim go to the jury. Specifically, Plaintiffs assert that the facts show that “Murray was entitled to control of the Patriots, defendants used NFL arbitration policies and procedures to deny him that control, and they did so to prevent Murray from moving the Patriots and challenging the

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6. (...continued)  
15 U.S.C. § 1 (West 1973 & Supp. 1995).

relocation policy.” (Plaintiffs’ Memo. in Opposition to Defendants’ Motion for Summary Judgment “Plaintiffs’ Memo.” p. 32.)

In addressing the Plaintiffs’ challenge of the NFL’s arbitration policy, a step by step analysis of the factors required for a § 1 claim is not necessary since the court hereby finds that the “injury to competition” requirement is not met. Accordingly, summary judgment must be granted against Plaintiffs on this issue. See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977) (reversing a jury finding for plaintiffs because defendants had not shown anti-competitive effects on the affected industry).

Plaintiffs attempt unsuccessfully to show injury to competition by arguing that arbitration as used by the NFL violates the “essential facilities” doctrine. Satisfaction of the essential facilities doctrine may establish per se liability under § 1. See Hecht v. Pro-Football Inc., 570 F.2d 982, 992-93 (D.C. Cir. 1977). Precluding access to a market, without question, will affect competition within the market. Id.

The essential facilities doctrine requires proof of “(1) control of the essential facility by a monopolist; (2) the competitor’s inability practically or reasonably to duplicate the essential facility; (3) denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.” See Ideal Dairy Farms, Inc. v. John Labatt, LTD., 90 F.3d 737, 748 (3d Cir. 1996) (citations omitted).

Plaintiffs allege that the NFL and its member teams use the compulsory

arbitration policy to restrain trade in the market for the sale of ownership interests in professional football franchises. Furthermore, Plaintiffs assert that by reason of the compulsory arbitration provision, the NFL effectively denies certain competitors access to the courts to resolve disagreements regarding ownership issues. (Am. Compl. at ¶ 66(b).) Also, Plaintiffs allege that the NFL's failure to hold the requested arbitration hearing and declare Plaintiffs' entitlement was deliberate and designed to prevent Plaintiffs from being named sole owners of the Patriots.

Plaintiffs' evidence and arguments fail to support an essential facilities claim. The evidence shows that they were not denied arbitration by the NFL. While Murray argues that the arbitration was never scheduled for a date certain, he ignores the fact that he failed to comply with an agreed upon prerequisite to the hearing being scheduled and held. Kiam and Murray agreed that each would file reply briefs to the other's opening written salvo, then agreed upon continuances of this mutual obligation while they continued to engage in negotiations to resolve their disputes. Neither filed a reply brief, and they never agreed not to do so. A hearing was never scheduled.

It is undisputed that the following occurred. On November 4, 1991, Murray certified the dispute to the NFL for arbitration and requested an expedited proceeding. In a letter dated November 6, 1991, Kiam informed the NFL that he had defenses to Murray's claims regarding the put agreement. The NFL established a briefing schedule on December 19, 1991, which allowed for initial briefs to be submitted on January 3,

1992, reply submissions by January 15, 1992, and a hearing to be “held at a subsequent date to be determined.” (Defendants’ Tab 31.) This schedule was deemed “fair and reasonable” by Murray’s representative.<sup>7</sup> (Defendants’ Tab 33.)

In early January, Murray and Kiam did submit initial briefs. Thereafter, negotiations continued between Murray, Kiam, their individual creditors and the NFL. Kiam’s representative requested numerous extensions in the due date for response submissions. It is undisputed that Plaintiffs’ representative did not object to these requests. (Sullivan Dep. at 117-126; Plaintiffs’ Tabs 73-79.) It is also undisputed that no response briefs were filed.

Because Plaintiffs failed to perform a triggering task for the arbitration scheduling agreed upon, a rational jury could not find that Plaintiffs were denied arbitration by actions of the NFL as opposed to their own inaction. Thus, because Plaintiffs have failed to present evidence to support their claim that the “essential facilities doctrine” is applicable to this case, they have, therefore, failed to show “injury to competition.” As to that claim, summary judgment must be granted.

## B. Public Financing

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7. Plaintiffs argue that they did not object to the schedule since under the NFL rules the Commissioner acted as the “judge and jury,” and they, therefore, did not want to antagonize him. (Plaintiffs’ Facts p.16; Sullivan Dep. at 139-40.)

As with Plaintiffs' challenge to the NFL's arbitration policies, their claims against the NFL's restriction on public financing fail at least one prong of the § 1 Sherman Antitrust Act test, and must also be denied.

Plaintiffs bear the burden of showing causation. Defendants' alleged unlawful conduct must be shown to be a material cause of injury to Plaintiffs' business or property. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 n.9 (1969).

Plaintiffs argue that the NFL's policy against public financing prevented them from attempting to proceed with a public financing plan. This argument, however, ignores the holding of Out Front Productions, Inc. v. Magid, which holds that a plaintiff who claims that a defendant prevented him from entering into business "must show not only that it had the background, experience, and financial ability to make a viable entrance, but even more important, that it took affirmative actions to pursue the new line of business." 748 F.2d 166, 170 (3d Cir. 1984) (citations omitted). Here, Plaintiffs have presented no evidence to support contentions that a public offering would have been viable, and they have presented no evidence to show that they actually developed concrete plans to pursue public ownership or that they took affirmative steps to implement such a plan. Finally, Plaintiffs have not alleged, and have not shown, that they ever sought NFL approval of any public ownership proposal.

Therefore, since no reasonable jury could find that the NFL's public financing policy caused Plaintiffs an antitrust injury, Defendants are entitled to summary judgment on the claim. See id.

### III. Violation of § 2 of the Sherman Antitrust Act

Defendants move for summary judgment on Plaintiffs' claim that they have monopolized the market for professional football by adopting anti-competitive policies and by denying Plaintiffs the essential facility of compulsory arbitration. (Am. Compl. at ¶¶ 69-73.)

To withstand summary judgment on this claim, Plaintiffs must offer evidence that under § 2 of the Sherman Antitrust Act, 15 U.S.C. § 2<sup>8</sup>, Defendants have (1) possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power in an exclusionary manner. Grinnell Corp., 384 U.S. at 570-71; Fineman v. Armstrong World Indus., Inc., 980 F.2d 171, 197 (3d Cir. 1992).

Monopoly power is the power to control prices or to exclude competition. United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377 (1956). It is the power "to force a purchaser to do something that [the purchaser] would not do in a competitive market." Eastman Kodak Co. v. Image Technical Serv., Inc., 504 U.S. 451, 464 (1992)

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8. Section 2 sanctions "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any person or persons, to monopolize any part of the trade or commerce among the several States, . . . ." 15 U.S.C. § 2 (West & Supp 1995).

(citations omitted). The size of a defendant's market share "is a significant determinant of whether the defendant has a dangerous probability of successfully monopolizing the relevant market . . . ." Barr Laboratories, 978 F.2d at 112.

Central to assessing Plaintiff's monopolization claim is the determination of the relevant product and geographic markets. The burden to define those markets rests with Plaintiffs. Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993). Here, Plaintiffs assert that the relevant product market is the market for the sale and purchase of ownership interests in a professional football franchise. The relevant geographic market has been labeled as the nationwide market for NFL football franchises, generally, and particularly, the metropolitan areas of Boston, Hartford and St. Louis. (Am. Compl. at ¶¶ 61-63.)

Plaintiffs allege that the Defendants combined and conspired "to eliminate competitors with access to public financing and other sources of investment capital, including Plaintiffs, from the market for the sale and purchase of ownership interests in NFL professional football franchises, and to create and maintain a monopoly in the ownership of such franchises." (Am. Compl. at ¶ 65.)

Plaintiffs further allege that Defendants have attempted to establish and maintain that monopoly by creating and enforcing policies designed to prevent prospective owners (1) from seeking judicial enforcement of their rights; (2) by selectively enforcing the NFL debt limit rule to the detriment of competitors in the

market; (3) by prohibiting the use of public funds and stadium lease revenue to purchase ownership interests in teams; (4) by aiding and abetting certain purchasers to the exclusion of others; and (5) by the NFL making its own offer to purchase a franchise rather than to declare the rights of existing owners. (Am. Compl. at ¶¶ 66(a)-(k).) Defendants have allegedly taken these actions to protect present franchise owners from competing with large public or corporate conglomerates, (*id.* at ¶ 61), and to protect revenue sharing among the teams derived from expansion franchises and television revenue, (*id.* at ¶ 66(k).)

Defendants do not contest that the NFL operates as a monopoly. In fact, the NFL concedes, accepting Plaintiffs' market definition as the market for ownership and control interests in NFL clubs, "the members of the NFL have a 'monopoly' by definition, not as a result of any act by defendants to 'create' or 'maintain' it." (Defendants' Reply Memo. at p. 20.)

As with their § 1 claims, Plaintiffs have failed to offer evidence which supports their contention that the NFL's policies have caused injury to competition by unlawful monopolization. Plaintiffs argue that Defendants used the NFL arbitration policy to exclude all competitors who sought control of the Patriots with any intention of moving the team and that it employed other policies to exclude competitors who attempted to use innovative financing methods such as Contractually Obligated Income ("COI").

Again, since the court has found that the Plaintiffs were not denied arbitration, they cannot prove that the NFL's arbitration policies were used to injure competition. Plaintiffs have not put forth any other alleged examples of the NFL's arbitration policy being used to exclude potential team purchasers. Plaintiffs have merely argued that the NFL might delay arbitration so that justice delayed might become justice denied.

Plaintiffs allegedly developed COI for the proposed St. Louis and Hartford franchises. Plaintiffs admit that they never submitted a definite proposal to the NFL for permission to use this kind of financing for a franchise opportunity. What the NFL would actually have done had Plaintiffs made a proposal to use COI, is speculative, at best. Consequently, there is no competent evidence to support Plaintiffs' theory that the NFL caused injury to competition because of an alleged bias against innovative financing techniques.

Thus, because Plaintiffs have failed to put forth evidence on injury to competition as required by § 2 of the Sherman Antitrust Act, Count II must be dismissed as a matter of law.

### C. Individual Liability of Tagliabue and Austrian

Since the court has found no antitrust conspiracy in the actions alleged, there is no basis for the individual liability of Tagliabue and Austrian. Consequently, summary judgment is entered on those claims.

#### IV. STATE LAW CLAIMS

Defendants also move for summary judgment on Plaintiffs' state law claims for Conspiracy (Count III), Bad Faith Breach of Contract (Count IV), Breach of Fiduciary Duty (Count V), Intentional Interference with Prospective Advantage (Count VI), and Fraud (Count VII). Although the court has granted summary judgment on all of Plaintiffs' remaining federal claims, the court may still maintain jurisdiction pursuant to 28 U.S.C. § 1367(a).

As a threshold matter, Defendants argue that Plaintiffs released Defendants from all past or future liability. Their argument as to this point is that when Murray became an owner of the Patriots in October 1988, he agreed to be bound by the NFL Constitution and By-Laws, which contain a general release clause to the effect that all owners, officers and stockholders of the Patriots agree to release and indemnify the NFL, its employees, and its member teams against all claims for actions which they may have taken or not taken in their official capacities with the NFL. See NFL Constitution and By-Laws § 3.11(c). Defendants argue further that this release clause was agreed upon by

Murray in exchange for the valuable consideration of the right to own an NFL member team, and thus should be enforced.

In opposition, Plaintiffs argue four points: that 1) this sort of release cannot protect a party from liability for harm that it has caused intentionally; 2) Defendants have failed to meet their burden of proving the existence of a release which governs the subject matter of the instant lawsuit; 3) the release fails for Defendants' fraud in its inducement; and 4) the alleged release is void for a lack of consideration.

The court agrees that Plaintiffs' state law claims allege intentional torts. Therefore, a general release is not enforceable and Defendants' release must fail. See Farnsworth on Contracts, § 5.2 at 14; 76 C.J.S. Release, § 63 ("intentional torts are outside the scope of a valid release"). The court now examines each state law claim separately.

#### A. Common Law Conspiracy

Defendants allege that there was a "common law conspiracy" among Defendants to keep the Patriots in New England so that shared television revenues would not be diminished due to the lack of a professional football team in the metropolitan Boston area. Plaintiffs' common law conspiracy claim, however, cannot survive now that summary judgment has been entered on the underlying substantive claims. See Rosen v. Tesoro Petroleum Corp., 582 A.2d 27, 33 (Pa. Super. Ct. 1990) ("[A] claim for civil

conspiracy must fail, due to the absence of a valid claim for the underlying tortious acts . . . .”). At the core of the conspiracy claim is that there was a denial of arbitration by the NFL. As that claim goes, so does the civil conspiracy claim. Summary judgment is, therefore, entered on Plaintiffs’ common law conspiracy claim.

#### B. Intentional Interference with Prospective Advantage

Plaintiffs claim that Defendants interfered with their “ability to obtain ownership of an NFL professional football franchise in Boston, Massachusetts; St. Louis, Missouri; and/or Hartford, Connecticut.” (Am. Compl. at ¶ 87.) Under Pennsylvania law, to have a valid claim for this tort a plaintiff must prove (1) a purpose or intent to harm plaintiffs by preventing the prospective contractual relationship from occurring and (2) actual damage resulting from the defendant’s conduct. See Thompson Coal Co. v. Pike Coal Co., 412 A.2d 466, 471 (Pa. 1979) (citations omitted). Because this court has found that Plaintiffs cannot prove that the NFL caused their alleged injuries, it follows that Plaintiffs cannot maintain a suit for intentional interference with prospective advantage.

#### C. Breach of Fiduciary Duty and Bad Faith Breach of Contract

Plaintiffs allege that the Defendants by applying their policies on expansion, relocation, public ownership, and arbitration, “breached their good faith contractual obligation to Plaintiffs to adhere to and follow the NFL Constitution, Rules, and Bylaws,” (Am. Compl. at ¶ 79), and, further, that Defendants breached their fiduciary duties to Plaintiffs in “failing to adhere to and follow the NFL Constitution, Rules and Bylaws with respect to their treatment of Plaintiffs,” (Am. Compl. ¶ 84). Plaintiffs claim that Defendants manifested bad faith through application of the arbitration and relocation policies.

As to the NFL’s arbitration policy, the court reiterates its findings that Plaintiffs cannot show as a matter of law that they were denied arbitration.

As to Plaintiffs’ claim that the NFL displayed bad faith in refusing to allow them to relocate the Patriots, this cause of action is invalid as a matter of law. It is undisputed that Plaintiffs never had control over the Patriots so they could not relocate the Patriots. Therefore, it is impossible for the NFL to have applied its relocation policies against Plaintiffs in bad faith.

Plaintiffs also allege that Defendants manifested bad faith in ignoring their contractual obligations, that is, by permitting Kiam to violate the NFL debt limits, and by making their own offer to acquire the Patriots rather than permit Plaintiffs to obtain control, and by aiding and abetting Orthwein’s acquisition of the team. These arguments also presuppose that Plaintiffs controlled the Patriots. This right of control was to be

determined through arbitration. Since Plaintiffs were not denied arbitration, these claims fail.

#### D. Fraud

Plaintiffs allege that “Defendants made misleading representations and statements to Plaintiffs and their representatives regarding the NFL’s intention to intervene, arbitrate and resolve the dispute between Plaintiffs and Kiam and VKK . . . .” To prove fraud, a plaintiff must show clear and convincing evidence of “(1) a misrepresentation, (2) a fraudulent utterance thereof, (3) an intention by the maker that the recipient will thereby be induced to act, (3) justifiable reliance by the recipient on a misrepresentation, and (4) damage to the recipient as the proximate result.” See e.g., Delahanty v. First Pennsylvania Bank, 464 A.2d 1243, 1252 (Pa. Super. Ct. 1983).

Again, the core of Plaintiffs’ fraud claim is that Defendants fraudulently promised to arbitrate the Murray-Kiam dispute. Since Plaintiffs never submitted the reply brief, there was no obligation on the part of the NFL to schedule an arbitration. Hence, there could not have been fraud by the NFL in not scheduling an arbitration hearing. Defendants are, therefore, entitled to summary judgment on this claim.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FRANCIS W. MURRAY, ET AL. : CIVIL ACTION  
 :  
 v. :  
 :  
 NATIONAL FOOTBALL LEAGUE, ET AL. : NO. 95-5971

ORDER

AND NOW, this day of April, 1998, upon consideration of Defendants' motion for summary judgment and responses thereto, it is hereby ORDERED that the motion is GRANTED. Judgment is hereby entered in favor of Defendants and against Plaintiffs.

BY THE COURT:

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J.