



trying to rent their vacant apartment units. Its customers are apartment communities that have more than 100 apartment units and that pay Apartment Source a fee only if it successfully places a renter in a vacant unit. Apartment Source serves apartment communities located in the greater Philadelphia metropolitan area, which includes Camden, Gloucester, and Burlington counties in New Jersey and Bucks, Delaware, Chester, Montgomery, and Philadelphia counties in Pennsylvania (the "Philadelphia Region").

PNI's Apartment Solutions, another ALS that serves apartment communities in the Philadelphia Region, opened for business in June, 1997. Although there are certain differences in the operations of Apartment Solutions and Apartment Source, there are a number of marked similarities between the two companies. First, both companies serve the same function: matching renters with available apartments. Second, both serve the same customers: apartment communities with more than 100 units. Third, both entered the apartment locator business based on the belief that they would be introducing to the Philadelphia Region a service that was already available and successful in other American cities. And finally, to date both companies are losing large amounts of money and are struggling to stay afloat.

There are also key differences between the two companies. First, Apartment Solutions is larger than Apartment Source, as

measured by the number of apartment communities that have signed up with each company and the number of leads generated by each company. Second, Apartment Source charges its customers a full month's rent as a fee whereas Apartment Solutions charges its customers 62% of one month's rent as its fee. And finally, Apartment Source has been barred from advertising in The Inquirer and The Daily News. In contrast, as a wholly-owned subsidiary of PNI, Apartment Solutions advertises extensively in PNI's newspapers at a fraction of the going advertising rates.

It is against this backdrop that the Court analyzes Apartment Source's claim that PNI's refusal to accept advertisements for Apartment Source constitutes an unlawful attempt to monopolize (Counts I and III) or unlawful monopolization (Count II) under Section 2 of the Sherman Antitrust Act ("Sherman Act"), 15 U.S.C.A. § 2 (West 1997).<sup>1</sup> At trial, Plaintiffs pursued the following two distinct theories of recovery under each of their Section 2 claims: (1) that Defendants are liable under what is known as the "essential facilities doctrine" for denying Plaintiffs access to PNI's newspapers, the alleged essential facility, and (2) to the extent

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<sup>1</sup>Plaintiffs also bring state law claims for violations of Section 4 of the New Jersey Antitrust Act for Unlawful Attempt to Monopolize and Unlawful Monopolization (Counts IV and V) and for Tortious Refusal to Deal under the common law of Pennsylvania and New Jersey (Counts VI and VII).

that PNI's newspapers do not constitute an essential facility, that Defendants are nevertheless liable under an unlawful or predatory intent theory. Plaintiffs based their antitrust claims against Defendants on the following: that the relevant product market in the Philadelphia Region is the ALS market, that the competitors in this market are Apartment Source and Apartment Solutions,<sup>2</sup> and that Apartment Solutions has monopoly power in the ALS market.

Based on the evidence adduced at trial, the Court concludes that PNI's refusal to deal with Apartment Source does not violate the antitrust laws. The Court's decision rests largely on the basis that Plaintiffs have failed to establish the existence of an ALS product market or submarket in the Philadelphia Region. Instead of constituting a separate ALS market or submarket, Apartment Source and Apartment Solutions are part of a broader market for apartment rentals, which also includes PNI's newspapers as well as numerous other vehicles or "means" that are used by apartment communities in the Philadelphia Region to fill their vacant apartment units. In this broader market, PNI has at most a 25% market share, and therefore, as a matter of law, does not possess monopoly power. Moreover, numerous means to secure

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<sup>2</sup>Plaintiffs maintain that PNI, as the parent corporation of its wholly-owned subsidiary, Apartment Solutions, is a competitor of Apartment Source in the ALS market.

renters other than PNI's newspapers are available to apartment communities in the Philadelphia Region. Without a showing of monopoly power and the essentialness of PNI's newspapers, Plaintiffs' essential facility claim against Defendants fails. Plaintiffs also cannot prevail on their Section 2 claim based on a general theory of predatory intent. The record does not support findings of predatory intent or anticompetitive effect required for such a claim. Moreover, Defendants have established a valid business reason for their refusal to deal.

Although the Court has concluded that Plaintiffs have failed to prove their case, the Court is not without sympathy for the difficulties faced by Plaintiffs in their new business venture. After all, PNI controls Philadelphia's largest daily newspapers, aggressively promotes Apartment Solutions in its newspapers, and flatly denies Apartment Source any access to this advertising vehicle. Apartment Source is run by skilled professionals with extensive experience in the real estate field who are clearly frustrated by PNI's refusal to permit advertising for Apartment Source. In their eyes, PNI's actions are unfair; while PNI props up its subsidiary with one hand, PNI pushes Apartment Source down with the other. Plaintiffs sincerely believe that access to PNI's newspapers is essential to their ability to compete effectively with their larger rival, Apartment Solutions, and to

survive in the marketplace. With this lawsuit, they do not seek a hand-up from the Court. Rather, they ask the Court to level the playing field by requiring PNI to accept a modest amount of Apartment Source advertising.

But the antitrust laws are not designed to redress the alleged harm suffered by Plaintiffs. The general rule is that a company is free to do business with and to refuse to do business with anyone it pleases; a company is not obligated to give its competitors a helping hand. As one court explained, "[a]ntitrust law . . . does not require one competitor to give another a break just because failing to do so offends notions of fair play. A particular plaintiff's plight is relevant only as it bears on market effect." Twin Laboratories, Inc. v. Weider Health & Fitness, 900 F.2d 566, 568 (2nd Cir. 1990)(citations omitted). A refusal to deal violates the antitrust laws in only very limited circumstances. Plaintiffs knew this and were aware that they faced an uphill battle in this lawsuit. Despite their considerable efforts at trial, their evidence fell short of proving the existence of an ALS market in the Philadelphia Region, an essential facility controlled by Defendants, and conduct by Defendants motivated by predatory intent that resulted in anticompetitive effect. As a result, Defendants are entitled to prevail.

**I. FINDINGS OF FACT**

## **1. The Plaintiffs**

**1.1** Plaintiffs are two apartment locator services, The Apartment Source of New Jersey and The Apartment Source of Pennsylvania, which operate in the eight-county Philadelphia Region. (4/5/99 N.T. at 68.)

**1.2** David Marshall, CEO of Amerimar Enterprises ("Amerimar"), controls both Apartment Source locators and various apartment communities owned by Amerimar.<sup>3</sup> (4/5/99 N.T. at 23.)

**1.3** Lisa East is the multi-family leasing and marketing director for Amerimar, with responsibility for Amerimar's various apartment communities, including Fountainview Village Apartments ("Fountainview"), an apartment community in the Philadelphia Region. She is also the director of Apartment Source. (4/6/99 N.T. at 10-11, 21.)

**1.4** Jon Cummins is the executive vice president of Amerimar and oversees Amerimar's apartment communities. He supervises Lisa East. (4/6/99 N.T. at 163, 167.)

## **2. The Defendants**

**2.1** Defendant PNI publishes The Inquirer and The Daily News. (4/8/99 N.T. at 9.) Both newspapers print advertisements

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<sup>3</sup>The term "apartment community" refers to an apartment building or series of apartment buildings that are operated by one owner and offer a variety of different facilities. (4/5/99 N.T. at 29.)

for apartment rentals. (4/8/99 N.T. at 12.) PNI also has a website, phillynews.com, which contains a list of the line advertisements from the newspapers' classified sections, but which does not duplicate display ads from the newspapers. (4/8/99 N.T. at 166, 220.)

**2.1.1** Todd Brownrout is the senior vice president of sales and marketing for PNI. (4/8/99 N.T. at 5.)

**2.1.2** Gordon Henry is the vice president of new business development for PNI. (4/8/99 N.T. at 180-81.)

**2.2** Defendant Apartment Solutions, an apartment locator service, is a wholly-owned subsidiary of PNI. (4/8/99 N.T. at 7-8.)

**2.3** For the purposes of this lawsuit, PNI and Apartment Solutions are functionally equivalent entities.

### **3. Apartment Advertising in PNI's Newspapers**

**3.1** PNI categorizes its advertising by industry. (4/8/99 N.T. at 11.) For example, the "apartment" advertising category is separate from the "real estate for sale" advertising category. Rates vary from category to category depending on a number of factors, including the competition in that category. (4/8/99 N.T. at 11.) Due to the high level of competition in the apartment advertising category in the Philadelphia Region, PNI



has been cutting its apartment advertising rates. (4/8/99 N.T. at 18; Exhibit D-192.)

**3.2** By mid-1996, PNI's apartment advertising category was suffering a loss of volume, with fewer than 100 apartment communities advertising in PNI's newspapers. (4/8/99 N.T. at 12.)

**3.3** The losses in the apartment advertising category came to the attention of PNI's former general manager, Steve Rossi, who expressed his concern to Brownrout. (4/8/99 N.T. at 13.)

**3.4** In response, Brownrout recommended that PNI form a "rental task force" to define and analyze the apartment advertising market and recommend ways to stop PNI's losses and earn back some of the lost revenue. (4/8/99 N.T. at 14-15.)

#### **4. PNI's Rental Task Force**

**4.1** PNI's rental task force was composed of eight people from different departments within PNI. (4/8/99 N.T. at 14.)

**4.2** The task force researched and analyzed the apartment advertising market for four months. Its work included interviewing apartment owners, rental agents and renters, and visiting other geographic markets. (4/8/99 N.T. at 14-15, 20, 24; Exhibit D-121 at 770, 778, 791-95.)

**4.3** The task force concluded that there are different ways that an apartment community can fill its vacant apartments and

that many products and services compete with PNI for apartment advertising dollars, including suburban newspapers, weekly publications, niche publications (otherwise known as apartment guidebooks), online ventures, and locator services. (4/8/99 N.T. at 37-39, 54-56; Exhibit D-104 at 68-69.)

**4.4** The work of the task force culminated in August 1996, when it issued a written report with its conclusions and recommendations. (4/8/99 N.T. at 15; Exhibit D-121.) In its report, the rental task force concluded that PNI's apartment advertising category was in crisis.

**4.4.1** It concluded that PNI's market share in the apartment advertising market was only about 25%. (Exhibit D-121 at 790.)

**4.4.2** It concluded that the "rental advertising category lost \$400,000 in revenue" in the last year. (Exhibit D-121 at 768.)

**4.4.3** It concluded that "[e]rosion of advertising in the rental category can be primarily attributed to growth in advertising of apartment guide books." (Exhibit D-121 at 768.)

**4.4.4** It concluded that "[t]here are strong signs that For Rent magazine, a major competitor which specifically targets newspaper rental advertising, is coming into the Philadelphia Market." (Exhibit D-121 at 768.)

**4.4.5** It concluded that PNI's "newspapers do not provide to our readers and advertisers a distinctive rental marketplace." (Exhibit D-121 at 768.)

**4.4.6** It concluded that "[a]dvertisers claim that we do not value their business and have made no attempt to understand it." (Exhibit D-121 at 768.)

**4.4.7** It concluded that PNI does not "offer the same level of customer service that [its] competitors do." (Exhibit D-121 at 768.)

**4.4.8** It concluded that advertisements "placed in our newspapers produce too many unqualified leads at a higher price, raising the cost-per-lease of doing business with us to a level substantially higher than the competition." (Exhibit D-121 at 768.)

**4.5** The task force made four recommendations to PNI, one of which was to cut rental advertising rates, and another of which was to start a locator service.

**4.5.1** The first recommendation of the rental task force was to "[c]reate a rental environment in our newspapers, online, and with audiotext by introducing new products and product enhancements." (Exhibit D-121 at 768.) This recommendation was implemented, but it has been only "marginally"

successful in recouping lost rental advertising revenue. (4/8/99 N.T. at 39-40.)

**4.5.2** Its second recommendation was to "[e]stablish a dedicated and professional sales unit whose mission is to work closely with advertisers." (Exhibit D-121 at 768.) This recommendation was also implemented, but again without much success. (4/8/99 N.T. at 39-40.)

**4.5.3** Its third recommendation was to "[o]ffer rental rate packages that will encourage our advertisers to commit to a higher level of spending." (Exhibit D-121 at 768.) As a result of this recommendation, PNI cut its apartment advertising rates by about 20-25%. (4/8/99 N.T. at 21.) Nonetheless, once again, the implementation of this recommendation met with little success. (4/8/99 N.T. at 39-40.)

**4.5.4** Its fourth recommendation was to "[i]ntroduce a referral service," also known as an apartment locator service. (Exhibit D-121 at 768.)

**4.5.4.1** The task force expressed some concern that a referral business might take apartment advertising dollars from PNI's classified. (Exhibit D-121 at 796; 4/8/99 N.T. at 29-30). Nonetheless, it ultimately concluded that the worst possible solution would be to do nothing, because referral services "are in many other cities and eventually will be in

Philadelphia," competing with PNI. (Exhibit D-121 at 796.) The task force reasoned that, since PNI only had 25% of the market share, PNI would be better off even with its referral service taking some of its own classified advertising dollars, because PNI would presumably gain, via its new locator, a portion of the 75% of the market share held by PNI's competitors, such as other newspapers and guidebooks. (4/8/99 N.T. at 30.)

**4.5.4.2** PNI followed this recommendation of the task force and created Apartment Solutions.

## **5. The Creation of PNI's Apartment Solutions**

**5.1** After the rental task force recommended the creation of an apartment locator service, PNI hired consultants Arnie Appelbaum and Ken Klimpl, who were running a successful locator business in Washington D.C. and Baltimore. (4/8/99 N.T. at 34; Klimpl Dep. at 33, 36.)

**5.1.1** The consultants' own locator service was permitted to advertise in the large daily newspaper in Washington D.C., but it was not permitted to advertise in the large daily newspaper in Baltimore. Nevertheless, both locators were successful. (Klimpl Dep. at 93, 202; 4/8/99 N.T. at 34.)

**5.2** PNI also appointed Edward Poletti to be the first general manager of Apartment Solutions. Poletti had been a member of the task force and had spent months studying the

apartment advertising market and visiting locator services in other cities. (4/8/99 N.T. at 35-36.)

**5.3** Apartment Solutions issued its first business plan in October 1996, which concluded that its principal competitors would be apartment guides and newspapers. (4/8/99 N.T. at 34-35; Exhibit D-105.)

**5.3.1** The business plan contained a detailed analysis of the market, concluding that a "variety of products/services" compete in the market, including locator services, apartment guidebooks, suburban newspapers, online ventures, cable, and weekly publications. (Exhibit D-105 at 193; 4/8/99 N.T. at 35, 37-38.)

**5.3.2** The plan further concluded that "the primary competition for this category of business is the two larger apartment guide books -- the Apartment Shoppers Guide and the Apartment Guide. Both of these guide books are owned by Haas Publishing Co., which publishes and distributes over 51 apartment publications nationwide. These two guide books account for a total of approximately \$4 million in advertising revenue," out of the total market of \$10 to \$12 million. (Exhibit D-105 at 223.)

**5.3.3** Haas' market share has continued to increase. (4/8/99 N.T. at 44-45; Exhibit D-189a.)

**5.4** It cost Apartment Solutions less than \$300,000, and it took less than a year, to open for business in June 1997. (Ex. D-190a.)

## **6. The Operations of Apartment Solutions**

**6.1.** Apartment Solutions takes phone calls from people looking for apartments, spends approximately 10 minutes on the phone, and produces for the prospective renters a list of apartments that meet their needs. (4/8/99 N.T. at 50.) If a renter signs a lease with one of the recommended apartment communities, the community pays Apartment Solutions 62% of the first month's rent. (4/7/99 N.T. at 113.)

**6.1.1** Apartment Solutions closes approximately 10% of its leads. (4/8/99 N.T. at 49.)

**6.2** Apartment Solutions has about ten employees and a simple office, with some desks, telephones, and personal computers. (4/8/99 N.T. at 65-66.)

**6.3** Apartment Solutions has listed approximately 400 apartment communities, a minority of the communities in the eight-county area. (Henry Dep. at 181; 4/5/99 N.T. at 61.)

**6.4** The consumer of the service provided by Apartment Solutions is the apartment community that pays a fee to Apartment Solutions if a lead produced by Apartment Solutions signs a lease.

## **7. The Creation and Operations of The Apartment Source**

**7.1** The Apartment Source opened for business in May 1997, after less than one year of planning. (4/6/99 N.T. at 39, 168.) Start-up costs were only \$335,000. (Exhibit D-190a.)

**7.2** The Apartment Source is a small apartment locator business with fewer than 5 employees who take calls over the telephone from people looking for apartments. These employees spend approximately 20-40 minutes on the phone with each prospect; they fill out a form on the computer, and then electronically match each potential renter with a few apartments that meet their needs. They then connect the potential renter with each apartment community via conference call, and set up appointments to visit with the rental agents. (4/6/99 N.T. at 23-27, 84.) If a renter signs a lease with one of the recommended apartment communities, the community pays Apartment Source 100% of the first month's rent. (4/6/99 N.T. at 42.)

**7.2.1** The Apartment Source sets its price based on the prices charged by locators in other geographic markets. (4/5/99 N.T. at 32-33.)

**7.2.2** Like Apartment Solutions, Apartment Source closes approximately 10% of its leads. (4/6/99 N.T. at 200.)

**7.3** The Apartment Source has marketed itself to apartment communities as a way to "save on inefficient fixed-cost marketing



sources" (Exhibit D-97) and as the "#1 most cost effective marketing source" for property owners who "understand the challenge of maximizing marketing dollars." (Exhibit P-7.)

**7.4** The Apartment Source has listed approximately 200 apartment communities. (4/6/99 N.T. at 43.)

**7.5** The consumer of the service provided by Apartment Source is the apartment community that pays a fee to Apartment Source if a lead produced by Apartment Source signs a lease. (4/5/99 N.T. at 82.)

## **8. The Locators Efforts to Generate Leads**

**8.1** Apartment Solutions advertises heavily in the newspapers owned by its parent company. This is because PNI charges Apartment Solutions only 1/6 of the retail cost for each classified advertisement it decides to place in The Inquirer or The Daily News. (4/8/99 N.T. at 67, 141.)

**8.1.1** In addition, Apartment Solutions gets a significant amount of free advertising, or "filler ads," in various sections of PNI's newspapers. (4/8/99 N.T. at 67-68.) These filler ads often appear in the "A" section of The Inquirer, and frequently there is as much as a 1/4 page ad on the editorial page. These ads in the "A" section would normally cost substantially more than a classified advertisement of the same size. (4/8/99 N.T. at 71-72.)

**8.1.2** Apartment Solutions also gets a free link on PNI's website, phillynews.com, as well as free banner advertising. (4/8/99 N.T. at 166.)

**8.1.3** Despite its extensive advertising in The Inquirer and The Daily News, Apartment Solutions has obtained disappointing results. As a result, after four months, Apartment Solutions cut back substantially on its paid PNI advertising. (4/8/99 N.T. at 169.)

**8.1.4** In May 1998, Apartment Solutions stopped placing paid advertising in The Daily News altogether, even though it gets a 5/6 discount. (4/8/99 N.T. at 195.) The few leads it obtains from The Daily News are generated by filler advertisements in that newspaper. (4/8/99 N.T. at 195.)

**8.1.5** The leads obtained by Apartment Solutions from its PNI advertisements decreased proportionately with its decrease in spending. (4/8/99 N.T. at 169.)

**8.1.5.1** Plaintiffs' analysis of Apartment Solutions' lead data (focusing on the summer months), and their conclusion that the number of leads did not decrease proportionally, is flawed because it does not take into account the fact that the locator business is a seasonal business, i.e., renters tend to move in the warm summer months. (4/8/99 N.T. at 181-82.)

**8.1.5.2** Similarly, Plaintiffs' conclusion that they could obtain a similar number of leads by spending less than the retail value of Apartment Solutions' PNI advertising is not supported by the record. An analysis of The Inquirer data shows that Apartment Solutions' decrease in spending has resulted in a proportional decrease in the number of leads. (Exhibit D-227a; 4/8/99 N.T. at 169.) Moreover, by grouping Apartment Solutions' cost per lead for Inquirer advertising with the cost per lead for The Daily News and phillynews.com advertising, Plaintiffs skew the lead data because (1) Apartment Solutions stopped submitting paid advertisements to the Daily News in May 1998, relying entirely on the free filler ads which would not be available to Apartment Source and (2) phillynews.com provides a free link to Apartment Solutions' website and banner advertising, while such a link and banner advertising would not be free for Apartment Source. (4/8/99 N.T. at 194-95; 219-20.)

**8.1.6** Even though Apartment Solutions has a virtually free advertising source with PNI's newspapers, it continues to pay retail prices for other advertising.

**8.1.6.1** Apartment Solutions advertises in a variety of vehicles, including suburban papers, weekly newspapers, Renter's Guide and the Yellow Pages. (Exhibits P-1a to P-1j.) Apartment Solutions continues to experiment with its

advertising portfolio, and it has not yet tried all of the different possible vehicles. (4/8/99 N.T. at 151.)

**8.1.6.2** Apartment Solutions was denied permission to advertise in the Haas guides. Advertising in the Haas guides would be an efficient and effective source of leads, because the ads are reasonably priced, area wide, and geared only to people looking for apartments. (4/7/99 N.T. at 37; 4/8/99 N.T. at 83, 92.) A letter written by one apartment community to The Apartment Guide praised the fact that "20-25% of our Apartment Guide traffic turn into satisfied residents." (Exhibit D-105 at 227.)

**8.1.7** An analysis of Apartment Solutions' lead data for the first ten months of 1998 -- the only period for which information is part of the record -- indicates that Apartment Solutions' advertisements in non-PNI sources was more effective and efficient than its advertisements in PNI sources.

**8.1.7.1** In the first ten months of 1998, Apartment Solutions spent 90% of its advertising dollars (at retail value) in PNI's newspapers but only generated 66% of its leads from those advertisements (including the free leads generated from phillynews.com and The Daily News). (4/8/99 N.T. at 185-86.) The other 10% of its advertising dollars (in non-PNI

sources) generated the remaining 34% of its leads. (4/8/99 N.T. at 187.)

**8.1.7.2** Also in the first ten months of 1998, Apartment Solutions spent just over \$104,000 in non-PNI media and took in \$175,000 in revenues from leads generated by these non-PNI media. (4/8/99 N.T. at 188.) The retail value of Apartment Solutions' expenditures in PNI's newspapers for those ten months totaled approximately \$940,000, but generated only \$332,000 in lease revenue. (4/8/98 N.T. at 187.)

**8.2** Apartment Source has access to over 60 potential marketing vehicles, including daily and weekly newspapers in Philadelphia and the suburbs, college campus advertising, billboards, the Yellow Pages, the Internet, and direct mail. (Exhibit D-3.)

**8.2.1** Plaintiffs advertise in a selection of those vehicles. For example, Apartment Source advertises in the largest daily newspapers in South Jersey -- the Courier Post, the Burlington County Times, and the Gloucester County Times. (4/6/99 N.T. at 93-94; Exhibit D-98.)

**8.2.2** Almost all of the counties surrounding Philadelphia have at least one daily newspaper with circulation greater than or about equal to PNI's in that county. For example, in Camden County, the Courier Post has a larger

circulation than PNI's newspapers. In Gloucester County, the Gloucester County Times has a comparable circulation to PNI's newspapers. In Burlington County, the Burlington County Times has a comparable circulation to PNI's newspapers. In Delaware County, the Delaware County Times has the same or a larger circulation than PNI's newspapers. In Chester County, the West Chester Daily is larger than PNI's newspapers. In Montgomery County, there are multiple community newspapers which often exceed the circulation of PNI's newspapers in their given geographic area. Even within Philadelphia County there are many newspapers other than PNI's newspapers, such as City Paper and Philadelphia Weekly. (4/8/99 N.T. at 85-87.)

**8.2.3** Overall, the Phone Directory is Apartment Source's most effective advertising vehicle. (Exhibit D-98.)

**8.2.4** Apartment Source tried to advertise in the two Haas apartment guidebooks, but was turned down. Plaintiffs' witnesses admit that they do not know the effect this denial has had on Apartment Source's profitability. (4/5/99 N.T. at 76; 4/6/99 N.T. at 112; 4/8/99 N.T. at 178-79.)

**8.2.5** Apartment Source has also been denied advertising access by PNI.

**8.2.6** Plaintiffs have not tried a number of possible advertising vehicles. (4/6/99 N.T. at 143, 190.)

**9. PNI's Refusal to Publish Advertising For The Apartment Source**

**9.1** The Apartment Source of New Jersey's initial business plan did not provide for advertising with PNI until its fourth month of operation, and then it allocated less than 20% of its advertising budget for ads in The Inquirer. (Exhibit D-2.)

**9.1.1** The Apartment Source of New Jersey projected that in its first year it would spend 14.9% of its advertising budget in The Inquirer, as compared to the 63.2% of its budget allocated to the Courier Post. (Exhibit D-2.)

**9.1.2** The Apartment Source of New Jersey projected that in its second year it would spend 17.9% of its advertising budget in The Inquirer, as compared to the 57.4% allocated to the Courier Post. (Exhibit D-2.)

**9.1.3** It projected spending 19.1% of its budget in The Inquirer in its third year, as compared to the 55.6% of its budget allocated to the Courier Post. (Exhibit D-2.)

**9.1.4** It projected spending 18.7% of its budget in The Inquirer in its fourth year, as compared to the 54.5% of its budget allocated to the Courier Post. (Exhibit D-2.)

**9.2** When Apartment Source did eventually try to advertise with PNI, it was turned down. (4/6/99 N.T. at 53.)

**9.3** PNI refused to publish plaintiffs' advertisements pursuant to its longstanding policy of refusing to publish

advertisements for competitors. Consistent with this refusal, PNI's written advertising policy prohibits the publication of advertisements for "aggregators," or businesses that compete with PNI's classified section by advertising a phone number which consumers can call for information about many different advertisers. The advertising policy further provides, "Nor will we accept advertising that, in our judgment, would result in a net decrease in profits to our newspapers or on-line ventures." (Exhibit P-125 at 10.)

**9.3.1** For example, Autobytel is a business that takes phone calls from people shopping for cars. It has access to information from many different automobile dealers, and it matches each shopper with a dealer and price that meets his or her needs. PNI has refused to carry ads for Autobytel because Autobytel is an aggregator and because PNI believes the phone service competes with its classified advertising for automobiles. (4/8/99 N.T. at 94-95.)

**9.3.2** Plaintiffs' expert, Dr. Hurdle, admitted that an economist would expect a publication to refuse to publish a competitor's advertisements. (4/8/99 N.T. at 244.)

**9.3.3** Apartment Solutions itself has been denied advertising access in various newspapers and apartment guides. (4/8/99 N.T. at 92.)



**9.4** Plaintiffs are aggregators of apartment advertising, and therefore compete not only with Apartment Solutions but also with PNI's classified. For this reason as well, PNI would not accept Plaintiffs' advertisements even if Apartment Solutions went out of business. (4/8/99 N.T. at 94-97.)

**9.4.1** As Plaintiffs assert in the "DEFINITIONS" section of their Complaint, "Apartment renter locators serve the owners of the apartment communities by offering to pool an apartment community's efforts to find renters together with the similar efforts of other communities, thus permitting several apartment communities to cost-effectively find renters through a single classified advertisement placed by the apartment renter locator. . . . Apartment renter locators offer apartment communities a cost-saving alternative to placing individual advertisements in PNI's newspapers . . . ." (Compl. at ¶ 27(b).)

**9.4.2** Plaintiffs further assert in the "PARTIES" section of their Complaint that they provide "an efficient and cost-effective alternative to apartment communities' placing classified ads." (Compl. at ¶ 22.)<sup>4</sup>

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<sup>4</sup>The allegations from the Complaint, which are set forth in ¶¶ 9.4.1 and 9.4.2 above, constitute judicial admissions and as such cannot be contradicted at trial. Conte Brothers Automotive, Inc. v. Quaker State-Slick 50, Inc., 165 F.3d 221, 235 (3d Cir. 1998).

**9.5** Apartment Source was able to place one advertisement into The Inquirer by omitting any mention of the "Apartment Source" name. This ad ran for a six-week period, after which PNI discovered that the advertisement was from Apartment Source and refused to run it again. (4/6/99 N.T. at 60.) East testified that Apartment Source got no leases or revenue from its six weeks of advertising in The Inquirer. (4/6/99 N.T. at 91-92.)

**9.6** The only evidence adduced at trial to support Plaintiffs' claim that apartment communities are refusing to sign with them because of their inability to advertise with PNI was testimony from Lisa East that one apartment community refused to sign with Apartment Source because Apartment Source was not able to advertise in PNI's newspapers. (4/6/99 N.T. at 82-83.) This evidence is insufficient.

## **10. The Locators' Financial Health**

### **10.1 Apartment Solutions' Losses.**

**10.1.1** Apartment Solutions has been losing money continually since its inception despite its huge amount of virtually-free advertising in PNI's newspapers. (Exhibit D-193a.)

**10.1.2** The outlook is not improving. Apartment Solutions' gross revenues are down and its losses are greater in the first quarter of 1999 as compared to 1998's first quarter.

Apartment Solutions' losses now range from \$55,000 to \$60,000 per month. (4/8/99 N.T. at 75-78.)

**10.1.3** PNI executives have discussed the possibility of exiting the apartment locator business. (4/8/99 N.T. at 102, 199.)

## **10.2 The Apartment Source's Losses**

**10.2.1** The Apartment Source is also losing money, but to a lesser extent than Apartment Solutions. Currently, Apartment Source is losing \$20,000 per month. (4/5/99 N.T. at 57.)

**10.2.2** Notably, Apartment Source of New Jersey is losing money despite the fact that it is able to advertise in the largest daily newspapers based on circulation in the three New Jersey counties in the eight-county area, i.e., the Camden Courier Post, the Burlington County Times, and the Gloucester County Times. (4/6/99 N.T. at 93-94.)

**10.2.2.1** These New Jersey newspapers have the same or greater circulation in their counties than PNI's newspapers. (4/8/99 N.T. at 85-87.)

## **10.3 Other Locators and Rental Referral Companies**

**10.3.1** Based on the sketchy record concerning Henry Berks, the Court is unable to determine whether or not Henry

Berks operates an apartment locator service within the Philadelphia Region. Consequently, the Court will not consider Henry Berks in determining whether an ALS market or submarket exists in the Philadelphia Region.

**10.3.2** Rental Options is a rental listing referral agency. It charges a fee to potential renters in exchange for a list of apartments that meet their particular needs. (4/5/99 N.T. at 156, 172.) It is thus a free source of leads for apartment communities. (4/5/99 N.T. at 156.) Because Plaintiffs maintain that Rental Options is not part of the ALS market, the Court will not consider Rental Options in determining whether an ALS market or submarket exists in the Philadelphia Region.

**10.3.3** Evidence that other geographic markets have supported locator services is not relevant to whether the Philadelphia Region can support locator services. In order for such evidence to be deemed relevant, there must be evidence in the record that the same or similar market forces exist in the Philadelphia Region and the other geographic regions. Because the record is devoid of any such evidence, reliance on such comparative evidence is not justified.

## **11. The Relevant Market**

**11.1** The parties agree that the relevant geographic market is the Philadelphia Region.

**11.2** The relevant product market is the market for apartment rentals, or the "means to find renters" market, in the Philadelphia Region. As Dr. Rapp, Defendants' expert, testified, the apartment communities, the relevant consumers, view the various "means" as reasonably interchangeable. Therefore, there is no potential for monopolistic exploitation in any smaller market. (4/7/99 N.T. at 11-12.) Dr. Hurdle, Plaintiffs' expert, admitted that locators are "[n]ot an established product market in this area." (4/8/99 N.T. at 231.)

**11.3** In concluding that the market for apartment rentals is the relevant product market, the Court relies principally on the same factors on which Dr. Rapp relied.

**11.3.1** Lisa East testified at her deposition that she rerouted some of Fountainview's advertising dollars from the Courier Post to apartment guides and locator services. (4/7/99 N.T. at 14.)

**11.3.2** Maria Jacobs, of Morgan Properties, stated that she tracks her advertising expenditures on a cost-per-lease basis, and compares the cost-per-lease of locator services to

that of apartment guides and newspapers. (4/7/99 N.T. at 15-16; Exhibit D-222.)

**11.3.3** PNI's documents, prepared in the ordinary course of business and prior to this litigation, describe an apartment advertising market of \$10 to \$12 million dollars, with various market suppliers including newspapers, apartment locators, apartment guides, and others. (4/7/99 N.T. at 29-30; Exhibits D-121, D-104, D-105.)

**11.3.4** The Haas guides refused to publish advertisements for Apartment Solutions and The Apartment Source, because Haas views locators as its competitors. (4/7/99 N.T. at 30-31.)

**11.3.5** East's own marketing document touts Apartment Source as a cost-saving mechanism, as compared to other fixed-cost advertising sources. (4/7/99 N.T. at 64.)

**11.4** Suppliers in the apartment advertising market include daily and non-daily newspapers in Philadelphia and the surrounding suburbs, various apartment guide books and magazines, apartment locator services, the Internet, billboards, and the Yellow Pages. (Exhibit D-189a; Exhibit D-104 at 68-69.) Apartment communities with 100 or more units, the consumers in this case, view all of these "means" as reasonably interchangeable.

**11.4.1** The evidence showed that apartment communities looking for renters view locator services the same way they view guidebooks and newspapers, i.e., as another way to advertise for tenants in order to fill their vacant apartments. (4/7/99 N.T. at 14, 36; 4/8/99 N.T. at 62-65.) Therefore, they are reasonably interchangeable.

**11.4.2** An owner of multiple apartment communities in the Philadelphia area confirmed that locator services are seen as one of a number of alternative means to advertise for renters. (4/7/99 N.T. at 15-16; Exhibit D-222.)

**11.4.3** Other apartment communities informed PNI's rental task force that their primary concern is to put renters into apartments as inexpensively as possible. (4/8/99 N.T. at 38.) Indeed, the reason Apartment Solutions is struggling is because its competition (in particular the Haas guides) is able to put renters into apartments for a cheaper price. (4/8/99 N.T. at 62.)

**11.4.4** East herself admitted that Fountainview took money from a less effective advertising source -- the Courier Post -- and put it into the apartment guides and locator services. (4/6/99 N.T. at 127-28.)

**11.5** The various apartment advertising media view one another as competitors.

**11.5.1** PNI's documents, which were generated in the ordinary course of business and years before this litigation began, state that PNI's newspapers compete for apartment advertising dollars with other newspapers, online ventures and apartment guidebooks, and that PNI's newspapers will compete with locator services. (Exhibit D-104 at 68-69.)

**11.5.2** The Haas guidebooks have refused to publish advertisements for The Apartment Source and Apartment Solutions because it views them as competitors. (4/6/99 N.T. at 118-19; 4/8/99 N.T. at 83.)

**11.5.3** Brownrout testified that PNI views the apartment guidebooks as the strongest competitor for its locator. (4/8/99 N.T. at 37-38, 42.)

**11.6** As Dr. Rapp testified, the differences between these market suppliers do not prevent them from being in the same market, because each acts as a price constraint on the others. (4/7/99 N.T. at 23-24.)

**11.7** There is no narrower apartment locator-only market or submarket in the Philadelphia Region.

**11.7.1** There is no separate locator market because, should the locator services try to charge monopolistic prices, reasonable substitutes are available to apartment communities. (4/7/99 N.T. at 12-13.) In other words, the apartment



communities are unexploitable by the locator services, given their realm of advertising choices. (4/7/99 N.T. at 52.)

**11.7.2** There is also no apartment locator-only submarket in the Philadelphia Region.

**11.7.2.1** Neither apartment communities nor the public recognizes locators as a separate competitive arena or a separate economic entity. (4/8/99 N.T. at 64.)

**11.7.2.2** Apartment locators do not have distinct customers. (4/8/99 N.T. at 65.)

**11.7.2.3** Although apartment locator services use a somewhat different "pricing model" than other apartment advertising media, they do not have distinct prices. (4/8/99 N.T. at 65.)

**11.7.2.4** Locator services do not have peculiar uses. (4/8/99 N.T. at 65.)

**11.7.2.5** Although locators provide matching services that distinguish them from other suppliers, such as apartment guidebooks or apartment classified, other suppliers, such as rental listing agencies (e.g., Rental Options), provide matching services as well.

**11.7.2.6** Locators do not have any unique facilities. (4/8/99 N.T. at 66.)

**11.7.2.7** Customers are sensitive to price and would take their money from locators and give it to the guidebooks or newspapers, for example, should the locator services raise their prices. (4/8/99 N.T. at 66.)

**11.7.3** The conclusion of Plaintiffs' expert, Dr. Hurdle, that locators form a separate market is unsupported by the evidence.

**11.7.3.1** Dr. Hurdle relied on the fact that locator services charge a fee only after a lease is signed, as opposed to before. (4/8/99 N.T. at 239.) But, Dr. Hurdle admitted that product differences alone do not establish separate markets. (4/8/99 N.T. at 248-49.) Contingent fees still must be paid out of finite budgets, as Dr. Rapp's testimony based on customer interviews demonstrates.

**11.7.3.2** Dr. Hurdle relied on the fact that apartment communities are willing to list with The Apartment Source, despite the fact that it is more expensive than Apartment Solutions, to conclude that customers are not sensitive to pricing differences and would not turn elsewhere should locators increase their prices. (4/8/99 N.T. at 231-32.) But Dr. Hurdle admitted he did not speak to any customers, unlike Dr. Rapp. (4/8/99 N.T. at 248.) Moreover, two times as many apartment communities have listed with Apartment Solutions, which is

substantially less expensive than The Apartment Source, showing the very price sensitivity Dr. Hurdle contends does not exist.

**11.7.3.2.1** Also, the price difference is not persuasive on this point. For example, no party contests the fact that apartment guidebooks and newspaper classified advertisements compete in the same market, and that customers advertise in both vehicles despite the fact that guidebook advertisements are cheaper than newspaper advertisements. But this does not mean that customers do not view newspapers and guidebooks as reasonable substitutes. PNI's loss of revenue to the guidebooks demonstrates that apartment communities in this area are indeed sensitive to their cost per lease and will turn to substitutes.

**11.7.3.3** Dr. Hurdle testified that newspapers do not refuse to publish locators' advertisements unless the newspapers own competing locators, leading him to conclude that classified do not compete with locators. (4/8/99 N.T. at 229.) However, he admitted to knowing only two non-locator-owning newspapers that have permitted locators to advertise. (4/8/99 N.T. at 242-43.)

**11.7.3.4** Dr. Hurdle also admitted that his testimony was based on data from outside of Philadelphia because

at best we are dealing with an emerging product market, not an established product market in this area. (4/8/99 N.T. at 231.)

**11.7.4** Plaintiffs' other evidence to support their claim that locators form a separate market is unpersuasive.

**11.7.4.1** Plaintiffs testified that the contingency fee charged by locators is not a cost because, for accounting reasons, Fountainview does not designate the contingent fees paid to a locator service as a marketing expense. Regardless of how Fountainview labels such contingent fees, they constitute costs incurred to lease an apartment. In this regard, it is significant that Maria Jacobs compares locators' costs per lease alongside the cost per lease of guides and newspapers. (Exhibit D-222.)

**11.7.4.2** Plaintiffs testified that the extra services and "pre-screening" they provide put locators in their own market. The existence of such extra services, however, does not support the finding of an ALS submarket.

**11.7.4.2.1** First, Dr. Hurdle admitted that the presence or absence of services accompanying a product is not determinative in defining a market. For example, he admitted that a cafeteria (without waiter service) and a luncheonette (with waiter service) could be competitors. (4/8/99 N.T. at 249-50.)

**11.7.4.2.2** Second, plaintiffs had no evidence that the services they provide result in a higher close ratio for their customers, the apartment communities. (4/5/99 N.T. at 66.) Plaintiffs and Apartment Solutions close only 10% of the people they refer to apartment communities. (4/8/99 N.T. at 49; 4/6/99 N.T. at 200.) There was evidence that one community closed 25% of the leads it received through a Haas guide. (Exhibit D-105 at 227.) In other words, as far as this record shows, the "extra" services are regarded as irrelevant to the customers of locator services, apartment communities, who are concerned principally about the cost of filling their apartment communities with renters. (4/5/99 N.T. at 65-66.)

**11.7.4.2.2.1** Plaintiffs presented no testimony by a customer, and no studies, regarding the value of Apartment Source's "extra" services or whether they produce higher quality leads.

**11.7.4.2.3** Third, Plaintiffs testified about the services performed by Apartment Source and their superiority to any services performed by Apartment Solutions. (4/5/99 N.T. at 46-47.) For example, while Apartment Source spends 40 minutes on the telephone with a prospective renter, Apartment Solutions spends only 10. And while Apartment Source connects the prospective renter with an apartment community via

conference call, Apartment Solutions does not. (4/6/99 N.T. at 84.) Plaintiffs' extra services tell nothing about whether apartment communities view locators in general, including Apartment Solutions, as reasonably interchangeable with newspaper advertising or guidebooks. Plaintiffs' "extra" services do not prove the presence of a separate locator market. Apartment Solutions, by reason of its ¾ less time on the telephone with the prospect, just provides less "pre-screening."

**11.7.4.2.3.1** The evidence showed that other advertising media perform "matching" services to some extent, including Rental Options. (4/5/99 N.T. at 72-73, 172; Exhibit D-205 at 19-30.)

**11.7.5** The marketing documents prepared by Plaintiffs in the ordinary course of business show that they market The Apartment Source as competitive with other apartment advertising media. (Exhibits D-97, P-7.)

**11.7.5.1** Similarly, Plaintiffs assert in the "DEFINITIONS" and "PARTIES" sections of their Complaint that apartment renter locators offer apartment communities a cost-saving alternative to placing individual advertisements in PNI's newspapers (Compl. at ¶¶ 22, 27(b).)

## **12. PNI's Market Share in the Relevant Market**

**12.1** Dr. Rapp analyzed the apartment advertising market and concluded that PNI has at most a 25% share. (Exhibit D-189a.)

**12.1.1** Dr. Rapp concluded that apartment guidebooks have a 65% market share, and that the Haas guides alone have a 47% market share. (Exhibit D-189a.)

**12.2** PNI's internal market analysis, performed in the ordinary course of business and years before this litigation, concluded that PNI's market share was roughly 25% as well. (4/8/99 N.T. at 22; Exhibit D-121 at 790.)

**12.3** Plaintiffs do not dispute these shares.

### **13. Monopoly Power in the Relevant Market.**

**13.1** Defendants do not have monopoly power in the relevant market.

**13.2** Plaintiffs do not dispute Dr. Rapp's conclusion that, if the apartment advertising market is the relevant market, then PNI does not have monopoly power. As this larger market is the correct relevant market, the Court concludes that PNI does not have monopoly power.

**13.3** In addition, this Court finds that Apartment Solutions does not have the ability to charge monopolistic prices and exploit its customers, and therefore it does not have monopoly power even if there were a narrower locator-only market.

Reasonable substitutes for locators are available, including apartment guides and newspapers.

**13.3.1** The service performed by Rental Options is free to apartment communities, and therefore acts as a constraint on the prices charged by locator services to apartment communities. (4/7/99 N.T. at 92.)

**13.3.2** There are no substantial entry barriers to becoming a locator service. Start-up costs are low, and entry requires only a telephone and a computer. This easy entry constrains the prices of locator services already in the market. (4/5/99 N.T. at 33; 4/7/99 N.T. at 42-43; Exhibit D-190a.)

**13.3.2.1** As Dr. Rapp testified, the locator business is such that even businesses outside the market can enter the market easily, such as real estate brokers who already have the licenses necessary to be apartment locators. (4/6/99 N.T. at 35; 4/7/99 N.T. at 44-45.)

**13.3.2.2** Marshall testified that he never anticipated that The Apartment Source would be the only locator in the market because others could easily jump into the market. (4/5/99 N.T. at 102.)

**13.3** Plaintiffs' evidence of monopoly power in a separate locator market is unpersuasive.



**13.3.1** Plaintiffs presented no expert testimony on the issue of monopoly power.

**13.3.2** Plaintiffs rely exclusively on Apartment Solutions' market share, and in doing so ignore important evidence.

**13.3.2.1** First, Plaintiffs ignore the possible presence of other locators in the market, such as Henry Berks.

**13.3.2.2** Second, Plaintiffs ignore the fact that their locators charge a fee of 100% of the first month's rent whereas Apartment Solutions charges a fee of 62% of the first month's rent, which can explain the differences in their market share. (4/7/99 N.T. at 52-53.)

**13.3.2.2.1** As Dr. Rapp testified, occupancy rates are quite high in the Philadelphia area, which makes it particularly difficult for higher priced competition to survive. (4/7/99 N.T. at 56.)

**13.3.2.3** Third, as Dr. Rapp testified, market share is not particularly indicative of monopoly power in this case, where Plaintiffs' business is a relatively small business in a market with head-to-head competition. (4/7/99 N.T. at 56.)

**13.3.2.4** Fourth, and most importantly, this Court finds that Plaintiffs cannot rely on market share alone to prove that Apartment Solutions has the power to control prices in the

face of its extreme financial losses. Without any expert testimony by Plaintiffs to contradict Dr. Rapp, the Court cannot, in the face of Apartment Solutions' massive losses, draw the conclusion from market share alone that there is monopoly power. If Apartment Solutions had monopoly power, it would be raising its prices to increase its profitability. (4/7/99 N.T. at 62-63.)

**13.3.2.4.1** Plaintiffs are not alleging predatory pricing by Apartment Solutions and have presented no recoupment analysis as required for such a claim. Plaintiffs presented no credible evidence to explain Apartment Solutions' massive losses. Therefore, the Court concludes from these losses that there is no monopoly power because such extreme losses are inconsistent with monopoly power. (4/7/99 N.T. at 45.)

#### **14. The Essential Facility Doctrine**

##### **14.1 Potential Advertising Vehicles Other than PNI's Newspapers.**

**14.1.1** Apartment locator services have many potential advertising vehicles other than PNI's newspapers. Plaintiffs' own documents show that an apartment locator has more than 60 potential alternative advertising vehicles in the Philadelphia Region. (Exhibit D-3.)

**14.1.2** An advertisement placed in a selection of these other vehicles would reach the same number of potential renters as an advertisement with PNI, for a comparable cost. (4/7/99 N.T. at 55.)

**14.1.2.1** As Brownrout testified, suburban newspapers charge a comparable amount for apartment advertising, proportional to their circulation. (4/8/99 N.T. at 91.) Nearly all of the eight counties included in the Philadelphia Region have a daily newspaper with circulation greater than or comparable to PNI's circulation in those counties. (4/8/99 N.T. at 85-87.)

**14.1.2.2** The Yellow Pages are also an effective advertising source for locator services, and are less expensive than PNI's newspapers. (4/8/99 N.T. at 91.)

**14.1.3** Apartment guide books, were they to permit locators to advertise with them, have the potential of being a strong and effective advertising alternative for locator services. (4/7/99 N.T. at 37.) The fact that they do not permit locators to advertise does not make PNI's newspapers an essential facility. (4/7/99 N.T. at 55-56.)

**14.1.3.1** As Dr. Rapp testified, the guide books are so strong and effective because they "are focused, they are

area wide and they have a great deal of appeal to people who are looking for apartments." (4/7/99 N.T. at 37.)

**14.1.3.2** In addition, apartment guide books are generally cheaper than PNI apartment advertising (4/8/99 N.T. at 91.)

**14.1.3.3** Some guide books would work better than others for apartment locators or for apartment communities.

**14.1.3.3.1** The Haas guides have a wide circulation, a large market share, and are a top advertising source for apartment communities, including Plaintiffs' own Fountainview. As a result, if locators were permitted to advertise with Haas, the Haas guides would have the potential of being a very effective advertising source.

**14.1.3.3.2** As compared to the Haas guides, Renter's Guide Weekly (Exhibit D-217) and For Rent Magazine (Exhibit D-212) are not major suppliers in the Philadelphia Region. (Exhibit D-189a.) As a result, they have not been a very effective advertising source for locator services. (4/6/99 N.T. at 121.) Their lack of effectiveness, however, is not evidence that the Haas guides would be similarly ineffective. (4/8/99 N.T. at 170-71.)

**14.1.3.4** Apartment Source tried to advertise in the two Haas apartment guide books, but was turned down because

they are competitors. Plaintiffs' witnesses admit that they do not know the effect this denial has had on Apartment Source's profitability. (4/5/99 N.T. at 76; 4/6/99 N.T. at 112; 4/8/99 N.T. at 178-79.)

**14.1.3.5** Plaintiffs testified that the guide books would not be as effective an advertising source for locators as PNI's newspapers because the guide books appeal to "do-it-yourselfers." (4/5/99 N.T. at 70; 4/6/99 N.T. at 185-86.) There is no evidentiary support for this conclusion. Moreover, the Court does not understand the logic underlying this conclusion because it is reasonable to assume that individuals who look at PNI's newspapers' apartment classified are no less likely to be "do-it-yourselfers" than people who read the guide books.

## **14.2 Fountainview's Experience**

**14.2.1** Plaintiffs are affiliated with and under common control with Fountainview, a 970 unit complex in Blackwood, New Jersey. (4/5/99 N.T. at 28.)

**14.2.2** Fountainview relies heavily on leads from the Apartment Guide and Apartment Shopper's Guide. (4/6/99 N.T. at 111; Exhibits D-48 to D-94.)

**14.2.3** Fountainview also advertises in For Rent Magazine, but it gets only a marginal amount of leases from there. (4/6/99 N.T. at 117.) Fountainview advertised in Renter's Guide for a short time but stopped because it did not get any leases. (4/6/99 N.T. at 114.)

**14.2.4** Fountainview advertises with many other vehicles as well, including direct mail, flyers, and the Internet. (Exhibit D-94.)

**14.2.5** Fountainview stopped advertising with The Inquirer because it was expensive and resulted in unqualified leads. (4/6/99 N.T. at 85-86.)

### **14.3 Apartment Source's Experience With PNI and Non-PNI Advertising Vehicles**

**14.3.1** Apartment Source advertises in a variety of sources and has achieved varying degrees of success from these different sources. (Exhibit D-98.)

**14.3.2** Like Fountainview, Apartment Source did not have success with its advertisement in Renter's Guide. (4/6/99 N.T. at 121.)

**14.3.2.1** Plaintiffs' argument that the poor performance of their ads in Renter's Guide somehow indicates that the Haas guides would perform poorly for a locator is not credible. The Haas guides have proven to be a much more

effective and efficient source of leads for apartment communities, including Fountainview.

**14.3.3** Apartment Source obtained no leases or revenue from its six weeks of advertising in The Inquirer. (4/6/99 N.T. at 91-92.)

**14.3.3.1** Plaintiffs' testimony that they nonetheless know that advertising with The Inquirer is essential for their survival is unsupported by the record and therefore is speculative.

**14.3.3.2** The record does not support the conclusion that, even though most apartment communities do not advertise in The Inquirer, people looking for apartments always turn to The Inquirer. (4/5/99 N.T. at 58, 61-62; 4/6/99 N.T. at 123-24; 4/8/99 N.T. at 12.) The Haas guides get almost 50% of apartment advertising dollars. (Exhibit D-189a.)

**14.3.4** Plaintiffs named only one apartment community that refused to sign up with Apartment Source because of its inability to advertise with PNI. (4/8/99 N.T. at 261; 4/6/99 N.T. at 82-83.)

#### **14.4 Apartment Solutions' Experience With PNI and Non-PNI Advertising Vehicles**

**14.4.1** Despite the availability of low-cost and free advertising with PNI's newspapers, Apartment Solutions continues

to pay retail prices to advertise with non-PNI sources.

(Exhibits P-1a to P-1j.)

**14.4.2** Apartment Solutions is steadily decreasing the amount of its paid advertising in The Inquirer, and it has stopped paying for advertisements in The Daily News. (Exhibits P-1a to P-1j.)

**14.4.3** Apartment Solutions continues to lose money. (Exhibit D-193a.)

**14.4.3.1** Although Plaintiffs argue that this is because Apartment Solutions has incompetent, inexperienced management (4/6/99 N.T. at 66-67), the record does not support such a conclusion. However, even if it were true, it would tend to prove that Apartment Solutions does not have the power to control prices.

**14.5 PNI's Newspapers Are Not Controlled By a Monopolist.**

**14.5.1** It is uncontested that The Inquirer and The Daily News do not have monopoly power and are not monopolists in the market for apartment rentals. Moreover, there was no evidence presented by the Plaintiffs that Defendants were trying to spread their alleged monopoly to another market, nor was there any evidence of inter-market dynamics.



**14.5.2** The evidence proved that PNI's decision not to publish Apartment Source's advertisements would have been made even if Apartment Solutions were not in existence. The decision was made pursuant to PNI's policy of not printing competitors' ads and PNI's recognition that apartment locators compete with apartment classified advertising and are aggregators. (4/8/99 N.T. at 96-97.)

**15. PREDATORY INTENT OR PREDATORY CONDUCT**

**15.1** Plaintiffs failed to meet their burden to prove that PNI refused their advertisements pursuant to some predatory intent and not for a lawful business reason.

**15.2** To the contrary, PNI refused to publish Plaintiffs' advertisements unilaterally and pursuant to its longstanding policy of not publishing ads for competitors and aggregators, and based on its need to stop the losses being suffered in its apartment advertising category. (4/8/99 N.T. at 96-97.)

**15.3** As Dr. Rapp testified, the desire not to sell one's services to a competitor is in fact pro-competitive, because helping a competitor generally results in money out of one's pocket. (4/7/99 N.T. at 63-64.)

**15.4** Plaintiffs' expert Dr. Hurdle admitted that publications which refuse to publish competitors' ads are acting

the way an economist would expect them to act. (4/8/99 N.T. at 244.)

**15.4.1** Dr. Hurdle could name only two newspapers that permit locators to advertise. (4/8/99 N.T. at 242-43.)

**15.5** Plaintiffs failed to meet their burden to prove predatory conduct or results.

**15.6** PNI unilaterally denied Plaintiffs access to a non-monopoly, non-essential newspaper. This is not predatory.

**15.7** PNI did not withdraw prior cooperation.

**15.8** Plaintiffs presented no evidence that PNI is driving up their costs.

**15.8.1** The evidence showed that the suburban newspapers are priced comparably to PNI's newspapers, and that guide books are cheaper. (4/8/99 N.T. at 91-92.)

**15.9** Plaintiffs presented no evidence of an unlawful tying arrangement.

**15.10** Plaintiffs presented no evidence of an unlawful boycott.

**15.11** Plaintiffs did not demonstrate the existence of any inter-market dynamics attendant to or as a result of PNI's refusal to accept advertising for Apartment Source.

**15.12** Plaintiffs presented no evidence that PNI is attempting to spread monopoly power from one market into another.

## II. DISCUSSION

### A. The Elements of Plaintiffs' Section 2 Claims

Section 2 of the Sherman Act is entitled, "Monopolizing trade a felony," and it provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony." 15 U.S.C.A. § 2. Plaintiffs allege both monopolization and attempted monopolization under Section 2.

A claim of monopoly under Section 2 of the Sherman Act 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 superior product, business acumen, or historical accident." Eastman Kodak Co. v. Image Technical Services., Inc., 504 U.S. 451, 481, 112 S. Ct. 2072, 2089 (1992) (quoting United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 1704 (1966)). The plaintiff must also prove that it suffered antitrust injury as a result of the defendant's unlawful acts. See Houser v. Fox Theaters Management Corp., 845 F.2d 1225, 1233 (3d Cir. 1988).

To prevail on their claim under Section 2 of the Sherman Act for attempted monopolization, Plaintiffs must prove that "(1)

[Defendants] engaged in predatory conduct or anticompetitive conduct with (2) specific intent to monopolize and with (3) a dangerous probability of achieving monopoly power." Ideal Dairy Farms, Inc. v. John Labatt, Ltd., 90 F.3d 737, 750 (3d Cir. 1996). See also Pennsylvania Dental Ass'n v. Medical Serv. Ass'n of Pennsylvania, 745 F.2d 248, 260 (3d Cir. 1984) (listing only two elements for attempted monopolization claim, "(1) a specific intent to monopolize; and (2) the consequent dangerous probability of success within the relevant geographic and product markets" but stating "[d]irect evidence of specific intent need not be shown; it may be inferred from predatory or exclusionary conduct") (citing inter alia Interstate Circuit, Inc. v. United States, 306 U.S. 208, 59 S. Ct. 467 (1939); United States v. Jerrold Electronics Corp., 187 F. Supp. 545, 567 (E.D. Pa. 1960)).

Evaluation of an attempted monopolization claim also involves a determination of whether there is a dangerous probability of achieving monopoly power. This determination requires an "inquiry into the relevant product and geographic market and the defendant's economic power in that market." Pastore v. Bell Tel. Co. of Pennsylvania, 24 F.3d 508, 512-14 (3d Cir. 1994)(remarking "the law directs itself to conduct which unfairly tends to destroy competition itself. . . . [Section] 2 makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so") (citation

omitted). In addition to considering the relevant product market and the defendant's market share of that relevant market, to determine whether there exists a dangerous probability of success of achieving monopoly power, the Court must also consider pricing and barriers to entry and competition. Yeager's Fuel, Inc. v. Pennsylvania Power & Light Company, 953 F. Supp. 617, 647-48 (E.D. Pa. 1997).

#### B. The Relevant Geographic and Product Markets

A common element of Plaintiffs' unlawful monopolization and unlawful attempted monopolization claims is the definition of the relevant market. A relevant antitrust market has two distinct, but related, elements: (1) a relevant product market, and (2) a relevant geographic market. Brown Shoe Co. v. United States, 370 U.S. 294, 324, 82 S. Ct. 1502, 1523 (1962). Plaintiffs contend that an ALS product market or submarket exists in the Philadelphia Region.

##### 1. Relevant Geographic Market

In Section 2 cases, the "identification of the relevant geographic market is a matter of analyzing competition." Borough of Lansdale v. Philadelphia Electric Co., 692 F.2d 307, 311 (3d Cir. 1982). In other words, the relevant "geographic" market

includes "the area in which a potential buyer may rationally look for the goods or services he or she seeks." Pennsylvania Dental Ass'n v. Medical Serv. Ass'n of Pennsylvania, 745 F.2d at 260 (citation omitted). Plaintiffs defined the relevant geographic market as the Philadelphia Region, and Defendants accepted this definition. Therefore, the Court will analyze whether a defined ALS product market exists within the Philadelphia Region.

## 2. Relevant Product Market

The definition of the relevant product market is a central issue in this case. A Section 2 claim of actual monopolization always requires proof of the relevant market. United States v. Grinnell Corp., 384 U.S. at 570, 86 S. Ct. at 1703. The same is required to prove a Section 2 claim of attempted monopolization. American Bearing Co., Inc. v. Litton Industries, Inc., 729 F.2d 943, 949 (3d Cir. 1984); Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 117 (3d Cir. 1980); Coleman Motor Co. v. Chrysler Corp., 525 F.2d 1338, 1348 & n. 17 (3d Cir. 1975).

In fact, proof of a viable relevant market is a threshold requirement for Plaintiffs' monopolization and attempted monopolization claims. Consul, Ltd. v. Transco Energy Co., 805 F.2d 490, 493 (4th Cir. 1986) ("Relevant market is the threshold for a Sherman Act § 2 claim."); Kellam Energy, Inc. v. Duncan, 668 F. Supp. 861, 888 (D.Del. 1987)(market definition is a

threshold requirement for an attempted monopolization claim). The need for a definition of the relevant market is obvious -- a defendant's market power can only be measured within the context of a defined market. As explained by the Supreme Court, "[w]ithout a definition of [the] market there is no way to measure [the defendant's] ability to lessen or destroy competition." Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 890 (1993)(quotation and citation omitted).

The Court finds that the relevant product market in this case is the market for apartment rentals. Plaintiffs have failed to prove the existence of an ALS product market or submarket in the Philadelphia Region. In their Complaint, Plaintiffs pled two alternative product markets. Plaintiffs identified the first product market as the "market for apartment rentals," which they described as the product market that offers apartment communities the "means to find renters for vacant apartment units." (Pls.' Compl. at ¶ 27(c).) Plaintiffs also alleged the existence of a distinct and identifiable market or sub-market identified as the "market for apartment renter locators" (the "ALS market"), which they described as "the market in which apartment renter locators provide services to apartment communities." (Id.) Plaintiffs abandoned the market for apartment rentals and tried their case on the theory that a distinct ALS market, or ALS submarket of the market for apartment rentals, exists in the Philadelphia Region.

Plaintiffs bear the burden of defining the relevant market. Pastore v. Bell Tel. Co. of Pennsylvania, 24 F.3d at 512. The relevant product market consists of "commodities reasonably interchangeable by consumers for the same purposes. Factors to be considered include price, use and qualities. Accordingly, the products in a relevant product market would be characterized by a cross-elasticity of demand." Fineman v. Armstrong World Indus., Inc., 980 F.2d 171, 198-99 (3d Cir. 1992) (citations omitted). See also SmithKline Corp. v. Eli Lilly & Co., 575 F.2d 1056, 1063 (3d Cir. 1978) (describing the relevant product market as "those groups of producers which, because of the similarity of their products, have the ability--actual or potential--to take significant amounts of business away from each other"); Brokerage Concepts, Inc. v. U.S. Healthcare, Inc., 140 F.3d 494, 513 (3d Cir. 1998) (The boundaries of a market "are determined by evaluating which products would be reasonably interchangeable by consumers for the same purpose."). The relevant product market can consist of services. United States v. Grinnell Corp., 384 U.S. 563, 86 S. Ct. 1698 (1966) (Section 2 case involving protective services); Weiss v. York Hospital, 745 F.2d 786 (3d Cir. 1984) (Section 2 case involving health care services).

Within the relevant market, a "submarket" may exist, "evidenced by such practical indicia as industry or public recognition of the submarket as a separate economic entity, the



product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." Pastore, 24 F.3d at 513 (citation omitted).<sup>5</sup> The above-listed indicia used to identify a relevant product submarket are "evidentiary proxies for direct proof of substitutability." Rothery Storage & Van Co. v. Atlas Van Lines, 792 F.2d 210, 218 (D.C. Cir. 1986).

The Court has analyzed the evidence adduced at trial on market definition in light of the criteria set forth in the applicable case law. The Court finds that Plaintiffs have failed to demonstrate the existence of a defined ALS product market or submarket in the Philadelphia Region. There is evidence in the trial record that the consumer at issue here, apartment communities with 100 or more units, treat apartment guide books, classified advertising in newspapers, and other advertising

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<sup>5</sup>While Pastore uses the concept of submarket, the later-decided case of Allen-Myland v. IBM Corp., 33 F.3d 194 (3d Cir. 1994), questions the efficacy of a submarket in a product market analysis. Id. at 208 n.16 ("The use of the term 'submarket' is somewhat confusing, and tends to obscure the true inquiry: whether IBM is constrained by the prices of large-scale mainframe computers when pricing its upgrades. If it is so constrained, then the relevant market consists of both mainframes and upgrades. If not, then it is simpler and more accurate to say that the relevant market itself, not some submarket of it, contains only upgrades."). Nevertheless, the Supreme Court has recognized the possibility that within a broader product market "well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes." Brown Shoe Co. v. United States, 370 U.S. at 325, 82 S. Ct. at 1524.

vehicles as substitutes to listing with an ALS. In other words, there are a wide variety of advertising vehicles that are reasonably interchangeable by apartment communities for the same purpose: securing renters to fill vacant apartments. Brokerage Concepts, 140 F.3d at 513. For example, Fountainview uses a variety of means to fill its vacant units, including listings with both Apartment Source and Apartment Solutions, as well as advertising in the apartment classified sections of a number of newspapers, in the apartment guide books, and on the Internet. Similarly, Morgan Properties utilizes a variety of means, including locator services, guide books, and classified advertising, to fill vacant units in the apartment communities that it owns.

Even though the means used by these apartment communities to secure renters may not be identical substitutes for one another, they serve the same function and are used interchangeably by the consumer as substitutes for one another. Fountainview switches dollars from one product to another based on the effectiveness and cost of the various products in placing qualified renters in vacant apartments. This type of functional interchangeableness is a hallmark of a defined product market. Kaiser Aluminum & Chem. Corp. v. F.T.C., 652 F.2d 1324, 1330 (7th Cir. 1981) ("[T]he clearest indication that products should be included in the same

market is if they are actually used by consumers in a readily interchangeable manner." ).

The Court's conclusion that Apartment Source and Apartment Solutions are properly placed in the same market as apartment guide books, apartment classifieds, and other advertising vehicles is not altered by the fact that an ALS includes a matching service, a component that is not provided by some of the other suppliers in the market. Products with certain differences can be placed in the same market if the products are used interchangeably and are substitutes for one another.

Allen-Myland v. International Business Machine Corp, 33 F.3d 194, 206 (3d Cir. 1994) (" 'Interchangeability' implies that one product is roughly equivalent to another for the use to which it is put; while there might be some degree of preference for the one over the other, either would work effectively." ). Hence, cellophane is part of the same market as other flexible wrapping materials even though there are obvious differences in the characteristics of the products. United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 76 S. Ct. 994 (1956). So too, an ALS is in the same market as apartment classifieds and guide books even though an ALS provides a matching service and the classifieds and guide books do not.

Conspicuously missing from Plaintiffs' case was any evidence that apartment communities within the Philadelphia Region

recognize apartment locator services as a separate economic reality, rather than as one of a number of available means to fill vacant units. The absence of such evidence and the existence of concrete evidence that locator services are used interchangeably with other means to fill vacant apartments underlies the Court's finding that an ALS market or submarket does not exist in the Philadelphia Region and that the broader market for apartment rentals is the relevant market.

To the extent that it can be argued that an ALS market exists at all in the Philadelphia Region, it is at most an emerging submarket within the broader, more readily apparent market for apartment rentals. As such, it has not yet fully emerged as a defined product market in the eyes of apartment communities, the consumers. Only a "well-defined" submarket can constitute a relevant market. Brown Shoe Co. v. United States, 370 U.S. at 325, 82 S. Ct. at 1524. An emerging submarket that has not yet developed into a distinct and identifiable market by definition is not "well-defined," and therefore does not constitute a relevant product market under Section 2 of the Sherman Act. In other words, the Court must determine whether an ALS market or submarket currently exists in the Philadelphia Region. The fact that an ALS market may exist in the Philadelphia Region in the future is irrelevant. The definition of the relevant market must be based on the market existing at

the time of the alleged Section 2 offense, not on a market that might possibly exist in the future. SCM Corp. v. Xerox Corp., 645 F.2d 1195, 1207-09 (2d Cir. 1981) (status of the relevant product and geographic markets at the time of the acquisition of patents is essential in assessing the validity of a Section 2 claim based on the refusal to license those patents).

For these reasons, the Court finds that the relevant product market is the market for apartment rentals, not an ALS market or submarket.

### C. Refusals to Deal

The alleged predatory conduct at issue in this case is the refusal of PNI to accept advertising from Apartment Source. As a general matter, the refusal to deal with a competitor is not a Section 2 violation. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 600, 105 S. Ct. 2847, 2856 (1985) ("even a firm with monopoly power has no general duty to engage in a joint marketing program with a competitor"). A business has the right both to select its customers and to refuse to deal with whomever it pleases; that right, however, is "neither absolute or exempt from regulation." Lorain Journal Co. v. United States, 342 U.S. 143, 155, 72 S. Ct. 181, 187 (1951). Under certain limited

circumstances, refusals to deal can subject a business to liability under Section 2.<sup>6</sup>

Courts have analyzed refusals to deal under two separate but related theories. 2 Von Kalinowski, Sullivan, & McGuirl, Antitrust Laws and Trade Regulation § 25.04[3][a] and [b](1998); ABA Antitrust Section, Antitrust Law Developments at 241 (1992). Under what is sometimes called the intent test, the focus is on the intent by the defendant "to create or maintain a monopoly." United States v. Colgate & Co., 250 U.S. 300, 307, 29 S. Ct. 465, 468 (1919). Under what is commonly referred to as the "essential facilities" doctrine, the particular type of refusal to deal involves the refusal by a monopolist that controls an essential facility to share that facility with a competitor. United States v. Terminal Railroad Ass'n of St. Louis, 224 U.S. 383, 410-11, 32 S. Ct. 507, 515-16 (1912); MCI Communications Corp. v. AT&T, 708 F.2d 1081, 1132 (7th Cir. 1983). Plaintiffs base their Section 2 claims on both of these theories.

1. Refusal to Deal Based on the Essential Facilities Doctrine

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<sup>6</sup>This case involves a unilateral refusal to deal. See Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 770, 104 S. Ct. 2731, 2741 (1984)(internally coordinated conduct of a corporation and its divisions is judged as the conduct of a single actor and does not constitute group conduct subject to antitrust analysis).

Plaintiffs contend that PNI's refusal to accept Apartment Source's advertising in PNI's newspapers deprives Apartment Source of access to PNI's newspapers, which allegedly constitute an essential facility for apartment locators. They further contend that the denial of access to PNI's newspapers is essential to their ability to compete with PNI's subsidiary, Apartment Solutions, in an ALS market or submarket.

Under the essential facilities doctrine, "a business or group of businesses which controls a scarce facility has an obligation to give competitors reasonable access to it." Byars v. Bluff City News Co., Inc., 609 F.2d 843, 856 (6th Cir. 1979). To establish the necessary elements of their essential facilities claim, Plaintiffs must show: (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. Ideal Dairy Farms, Inc. v. John Labatt, Ltd., 90 F.3d at 748.

In order to fit into the narrow essential facilities exception to the general rule that refusals to deal do not violate the antitrust laws, Plaintiffs must prove all four of the elements of their claim. Because the third and fourth elements are not in dispute, only the first and second elements are at issue in this case.

The focus of the inquiry with respect to the first element is whether a business with monopoly power in the relevant market controls an essential facility. Because the Court has determined that the relevant market is the broader market for apartment rentals, not the narrower ALS market proposed by Plaintiffs, the following two questions must be answered: whether Defendants hold monopoly power in the market for apartment rentals and whether PNI's newspapers constitute an essential facility within the market for apartment rentals.

Monopoly power is the power to "force a purchaser to do something that he would not do in a competitive market . . . . It has been defined as 'the ability of a single seller to raise price and restrict output.'" Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 464, 112 S. Ct. 2072, 2080-81 (1992) (citation omitted) (quoting Fortner Enterprises, Inc. v. U.S. Steel Corp., 394 U.S. 495, 503 (1969)). The United States Court of Appeals for the Third Circuit ("Third Circuit") has held that monopoly power requires proof of the ability to control prices and exclude competition. Fineman v. Armstrong World Industries, Inc., 908 F.2d at 201.

"[T]he size of market share is a primary determinant of whether monopoly power exists." Pennsylvania Dental Ass'n v. Medical Serv. Ass'n of Pennsylvania, 745 F.2d at 260 (citation omitted). When all of the relevant suppliers are taken into



account, the evidence establishes that PNI's newspapers share of the rental advertising market in the Philadelphia Region is no more than 25%. A market share of only 25% is insufficient as a matter of law to establish monopoly power. Yeager's Fuel, 953 F. Supp. at 651. Consequently, the Court finds that Defendants do not have monopoly power in the relevant market.<sup>7</sup>

In addition to proving that Defendants have monopoly power in the relevant market, Plaintiffs must also prove that PNI's newspapers constitute an essential facility to establish the first element of their essential facilities claim. "A facility is only essential where it is vital to competitive viability; i.e., competitors cannot effectively compete in the relevant market without it." Colonial Penn Group, Inc. v. American Ass'n of Retired Persons, 698 F. Supp. 69, 73 (E.D. Pa. 1988).

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<sup>7</sup>A court has discretion to examine other factors beyond market share in assessing monopoly power. Yeager's Fuel, 953 F. Supp. at 651. Although it is not necessary to examine other market characteristics in light of the low market share held by Defendants, the Court notes that such an examination provides additional evidence that Defendants do not have monopoly power in the relevant market. For example, the evidence demonstrates that the barriers to enter the relevant market are insignificant or nonexistent. Advo, Inc. v. Philadelphia Newspapers, Inc., 51 F.3d 1191, 1200-1202 (3d Cir. 1995) New guide books have recently entered the "means to find renters" market. In addition, there is nothing to stop established real estate agencies from entering this market. Moreover, as proven by Apartment Source and Apartment Solutions, the financial resources needed to start a locator service are relatively modest, and therefore, new locators can easily enter the market as well.

The standard for whether a facility is essential or not turns on whether the denial of access to the alleged essential facility imposes a severe handicap on competitors. Twin Laboratories, Inc. v. Weider Health & Fitness, 900 F.2d at 568. Moreover, a facility will not be deemed essential if equivalent facilities exist or where the benefits to be derived from access to the alleged essential facility can be obtained from other sources. Castelli v. Meadville Medical Center, 702 F. Supp. 1201, 1209 (W.D. Pa. 1988)(hospital could not be essential facility where there were eight other hospitals with a 40 mile radius); Soap Opera Now, Inc. v. Network Publishing Corp., 737 F. Supp. 1338, 1349 (S.D.N.Y. 1990) (advertising in a particular magazine not an essential facility because the target audience could be reached in other ways and some of plaintiff's competitors did not advertise in the magazine).

Plaintiffs have not met their burden of proving that PNI's newspapers are an essential facility -- that is, that they cannot effectively compete in the relevant market without access to The Inquirer and The Daily News. The characterization of PNI's newspapers as an essential facility is perhaps the most curious aspect of this case. Plaintiffs' witnesses testified sincerely that if they could advertise in PNI's newspapers, they could turn Apartment Source around from a losing venture to a profitable one. They argued that only PNI's newspapers could give them the

"density of leads" that they need to compete effectively with Apartment Solutions and to ensure their survival. They relied exclusively on lead data generated by Apartment Solutions for the first 10 months of 1998.

In making this argument and in relying on this data, Plaintiffs try, unsuccessfully, to explain away a number of troubling and damaging facts. First and foremost, Apartment Solutions advertises heavily in PNI's newspapers and is bleeding red ink. Second, Apartment Solutions is able to advertise heavily in PNI's newspapers because it is given a considerable amount of free advertising and can place ads at a fraction of their cost.<sup>8</sup> The retail value of Apartment Solutions advertising in PNI's newspapers for the 10 months in 1998 totaled approximately \$940,000. Plaintiffs do not maintain that they could afford to advertise to the extent that their rival advertises in PNI's newspapers. Instead, Plaintiffs argue that they would not have to advertise at the volume that Apartment Solutions does in order for Apartment Source to be profitable. They could achieve the same lead data as Apartment Solutions by placing a small 2x2 block ad in the apartment classified section of the Sunday edition of The Inquirer along with a similar ad one

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<sup>8</sup>Plaintiffs do not challenge PNI's right to give its subsidiary reduced-cost and free advertising in The Inquirer and The Daily News.

day during the week. (4/6/99 N.T. at 70-71.) There is no support in the record for Plaintiffs' position in this regard. Third, to the extent the Apartment Solutions' lead data has any relevance at all, Plaintiffs have misconstrued this data by failing to take into account, inter alia, the seasonal fluctuations in the apartment rental market.

Based on the trial record, the Court finds that Plaintiffs have failed to prove that PNI's newspapers are essential within the meaning of the essential facilities exception. Because PNI's newspapers do not have monopoly power in the relevant market and PNI's newspapers do not constitute an essential facility, Plaintiffs have not satisfied the first required element of their essential facilities claim.

With respect to the second element of their essential facilities claim, Plaintiffs have the burden of proving that an alternative to the facility is not "feasible." Twin Laboratories v. Weider Health & Fitness, 900 F.2d at 568. In this case, there are multiple feasible alternatives, including the suburban daily newspapers, the weekly newspapers, the Internet, the Yellow Pages, and direct mail. Suppliers in the apartment advertising market potentially can, and do, advertise in the 75% of the market not controlled by PNI. The Court finds that Plaintiffs have not proven the second element of their essential facilities claim.

2. Refusal to Deal Based on Intent to Create or Maintain a Monopoly

As an alternative theory of recovery under both their monopolization and attempted monopolization claims, Plaintiffs maintain that PNI's refusal to deal is sufficiently predatory to violate Section 2 of the Sherman Act. The focus of Plaintiffs' claims under this theory is whether Defendants' refusal to deal was for the purpose of creating or maintaining a monopoly within the alleged ALS market. United States v. Colgate & Co., 250 U.S. at 307. The Court, however, has found that an ALS market does not exist and that the relevant market with respect to apartment locator services is the broader market for apartment rentals. Therefore, the inquiry must shift to whether Defendants' refusal to deal was for the purpose of creating or maintaining a monopoly within the market for apartment rentals. Plaintiffs have not proven such predatory intent.

Moreover, there is no evidence of anticompetitive effect in the market for apartment rentals as a result of Defendants' refusal to deal. Under the intent test, the refusal to deal must have an anticompetitive effect. Byars v. Bluff City News Co., 609 F.2d at 855. See also Mr. Furniture Warehouse, Inc. v. Barclays America/Commercial, Inc., 919 F.2d 1517, 1522 (11th Cir. 1990) ("A monopolist's refusal to deal becomes actionable under

the antitrust laws only where the refusal is designed to have an anticompetitive effect, whether to gain greater market share, to drive up prices, or to obtain some other illegal goal." ). The purpose of antitrust policy is for "the protection of competition, not competitors." Brown Shoe Co. v. United States, 370 U.S. at 320, 82 S. Ct. at 1521. See also Environmental Action, Inc. v. Federal Energy Regulatory Commission, 939 F.2d 1057, 1061 (D.C. Cir. 1991)("is not to make competitors equal, or to avoid all forms of advantage."; Tunis Bros. Co., Inc. v. Ford Motor Co., 952 F.2d 715, 727 (3d Cir. 1991). Therefore, to prove that Defendants are liable for refusing to deal with Plaintiffs based on a theory of intent to create or maintain a monopoly, Plaintiffs must establish that the refusal to deal had an anti-competitive effect in the relevant market. The Court finds that Plaintiffs have failed to demonstrate such anticompetitive effect. In fact, the market for apartment rentals is teeming with competition, notwithstanding the refusal of PNI to allow advertising by Apartment Source.

Finally, Defendants assert as a defense to Plaintiffs' Section 2 claims that they had a valid business reason for refusing to deal with Plaintiffs. A Section 2 claim will fail if there is a valid business reason for the defendant's refusal to deal. High Technology Careers v. San Jose Mercury News, 996 F.2d 987, 991-92 (9th Cir 1993) ("If there is a valid business reason

for [the defendant's] conduct, there is no antitrust liability." ). The attempt to eliminate lost revenue is one such valid business reason. Id. PNI refused Plaintiffs access to their newspapers pursuant to their longstanding policy of denying access to competitors and for the purpose of eliminating lost revenue -- both newspaper advertising revenue and locator revenue. Therefore, the Court finds that Defendants have demonstrated a valid business reason for denying Apartment Source access to PNI's newspapers.

For these reasons, Plaintiffs' Section 2 claims based on predatory intent fail.

#### D. State Law Claims

In addition to their Sherman Act claims, Plaintiffs also bring state law claims for violation of Section 4 of the New Jersey Antitrust Act for Unlawful Attempt to Monopolize and Unlawful Monopolization (Counts IV and V) and for Tortious Refusal to Deal under the common law of Pennsylvania and New Jersey (Counts VI and VII). Plaintiffs' state law claims are analyzed identically to their Sherman Act claims. N.J. Stat. Ann. § 56:9-18 (New Jersey Antitrust Act); Grillo v. Board of Realtors of Plainfield Area, 219 A.2d 635, 649-50 (N.J. Super. 1966) (New Jersey common law); Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co., 953 F. Supp. 617, 688 (E.D. Pa. 1997)

(Pennsylvania common law). Thus, Plaintiffs' state law claims also fail.

### **III. CONCLUSIONS OF LAW**

1. The relevant geographic market is the Philadelphia Region.

2. The relevant product market in the Philadelphia Region is the market for apartment rentals, which is the market that offers apartment communities the means to find renters for vacant apartment units.

3. An ALS product market or submarket does not exist in the Philadelphia Region.

4. PNI does not have monopoly power in the relevant market.

5. Apartment Solutions does not have monopoly power in the relevant market.

6. There does not exist a dangerous probability that either PNI or Apartment Solutions will achieve monopoly power in the relevant market.

7. Defendants did not engage in predatory or anticompetitive conduct.

8. PNI's newspapers do not constitute an essential facility within the meaning of the essential facilities doctrine.



9. PNI and Apartment Solutions did not intend to create or maintain a monopoly in the relevant market. Moreover, PNI's refusal to deal with Apartment Source did not have an anticompetitive effect in the relevant market.

10. PNI had a valid business reason for refusing to accept advertising from Apartment Source.

11. PNI's refusal to deal with Apartment Source does not violate Section 2 of the Sherman Act.

12. PNI's refusal to deal with Apartment Source does not violate Section 4 of the New Jersey Antitrust Act.

13. PNI's refusal to deal with Apartment Source does not constitute a tortious refusal to deal under the common law of Pennsylvania or New Jersey.

14. Plaintiffs are not entitled to permanent injunctive relief or reasonable attorneys' fees and costs of suit because Plaintiffs have not succeeded on the merits of any of their claims.

An appropriate Order follows.

