

UNITED STATES DISTRICT COURT

STATE

CIVIL NO.:07-01234 (LAP)

Plaintiff,

v.

FUTURISTIC MULTI-PLAYER GAMING, INC.

Defendant.

JURY CHARGE

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Introduction

Good afternoon, ladies and gentlemen of the jury. Now that you have heard the evidence and the arguments, it is my duty to give you the Court's instructions as to the law applicable to this case. It is your duty as jurors to follow the law as stated in these instructions and to apply the rules of law which I give you to the facts of the case.

First let me thank you for your patience and attentiveness during the trial. You have been a splendid and cooperative jury, and we all appreciate that.

Instruction No 1. Role of Judge and Jury

Your final crucial task here is to decide and pass upon the fact issues in this case. You determine the weight of the evidence. You appraise and decide the credibility and the truthfulness of the witnesses, you draw the reasonable inferences and conclusions from the evidence, and you resolve any conflicts that there may be in the evidence.

My function here is solely to instruct you as to the law, and it is your duty to accept these instructions and apply them to the facts in the case as you find the facts to be. You are not to consider any single instruction which I give you, standing alone, as stating the law. But, rather, you must consider all of my instructions taken together as a whole.

With respect to any fact matter or any evidentiary matter, it is your recollection that controls. Anything that the lawyers may have said with respect to matters in evidence, whether during the trial in a question or an argument, or in openings or summations, is not to be substituted for your own recollection of the evidence.

So, too, anything that I might have said or may say during the course of these remarks is not to be taken in substitution for your own recollection.

Instruction No 2. Exhibits

Should you wish to see any exhibits during your deliberations, you may request those exhibits by a procedure that I will explain at the end of the charge.

Instruction No 3. Relevance of objections and attorney conduct

Please be aware that the attorneys not only have the right, but have the duty, to make objections and to press whatever legal theories they have. They are simply performing their duty when they do those things.

Any evidence as to which any objection was sustained, and any answer or remark ordered stricken, must be disregarded in its entirety. And please put out of your mind any exchanges or discussions which may have occurred between any attorney and the court.

Now, before I begin to discuss the specific claims in this case, there are certain preliminary matters that are appropriate to address at this time.

Instruction No 4. Definition of Evidence

As I told you early in the trial, "evidence" has a very specialized legal meaning. Not everything that you have seen and heard in the courtroom during this case is evidence.

The evidence in this case is the sworn testimony of the witnesses and the exhibits received in evidence.

You may not consider the arguments of the lawyers as evidence. Arguments by lawyers are not evidence because the lawyers are not witnesses. What they have said to you in their opening statements and in their summations is intended to help you understand the evidence to reach your verdict. However, if your recollection of the facts differs from the lawyers' statements, it is your recollection which controls.

In sum, it is for you alone to decide the weight, if any, to be given to the testimony you have heard and the exhibits you have seen.

Instruction No 5. Credibility

To resolve the factual disputes that exist in this case, you will have to evaluate the testimony of the witnesses who have testified at this trial. You must determine for yourselves the credibility of each witness -- that is, how much of the witness's testimony, if any, is worthy of belief. In making those judgments, you should carefully scrutinize all of the testimony of each witness, the circumstances under which each witness testified, and any other matter in evidence which may help you to decide the truth and the importance of each witness's testimony.

Let me give you some general guidance about how to evaluate testimony. There is no magic formula for evaluating testimony. You bring to this courtroom all of the experience and background of your lives in your everyday affairs. You determine for yourself every day and in a multitude of circumstances the reliability of statements which are made to you by others. The same tests that you use in your everyday matters of importance are the tests you use in your deliberations.

In essence, what you must try to do in deciding credibility is to size a person up in light of his or her demeanor, the explanations given, and all the other evidence in the case, just as you would in any important matter where you are trying to decide if a person is truthful, straightforward and accurate in his or her recollection. In deciding the question of credibility, remember that you should use your common sense, your good judgment, and your experience.

Instruction No 6. Expert Testimony

Let me say a few words about opinion testimony. You have heard testimony from certain witnesses, who are said to be experts in economics. Expert witnesses are allowed to express opinions on those matters about which they have special knowledge and training. Opinion testimony is presented to you on the theory that someone who is experienced in the field can assist you in understanding the evidence or in reaching an independent decision on the facts.

In weighing the witnesses' testimony, you may consider their qualifications, their opinions, their reasons for testifying, as well as all of the other considerations that ordinarily apply when you are deciding whether or not to believe a witness's testimony. You may give the opinion testimony whatever weight, if any, you find it deserves in light of all the evidence in this case. You should not, however, accept the testimony of these witnesses merely because they are experts. Nor should you substitute the witnesses' testimony for your own reason, judgment and common sense. The determination of the facts in this case rests solely with you.

Instruction No 7. Conflicting Expert Testimony

To the extent that you find the testimony of the experts to be in conflict, you must remember that you are the sole trier of the facts and that the experts' testimony relates to questions of fact -- so, it is your job to resolve the disagreement.

The way you resolve the conflict between experts is the same way that you decide other fact questions and the same way you decide whether to believe ordinary witnesses. In addition, because they gave expert opinions, you should consider the

soundness of each expert's opinion, the reasons for each expert's opinion, and the expert's motive, if any, for testifying.

Instruction No 8. Speculation

Under no circumstances are you permitted to speculate about the facts. Of course you bring with you to this courtroom all of the experience and background of your lives and you may rely upon the logic of common experience itself. However, you may not engage in a speculative evaluation of the merits of any of the claims of this action. Speculation and surmise are not a substitute for proof and where evidence is capable of an interpretation equally consistent with the presence or absence of liability, it must be interpreted against liability.

Instruction No 9. Burden of Proof – Preponderance

The burden is on plaintiff in a civil action, such as this, to prove every essential element of its claim by a preponderance of the evidence. To "establish by a preponderance of the evidence" means to prove that something is more likely so, than not so. In other words, a preponderance of the evidence means such evidence that, when considered and compared with evidence opposed to it, has more convincing force and produces in your minds a belief that what is sought to be proved is more likely true than not true. This rule does not, of course, require proof to an absolute certainty, because proof to an absolute certainty is seldom possible in any case.

I will now begin to discuss the specific claims in this case.

Instruction No 10. Sherman Act Section 1

The State challenges FMG's conduct under Section 1 of the Sherman Act. Section 1 of the Sherman Act prohibits contracts, combinations, and conspiracies that unreasonably restrain trade.

It is undisputed here that FMG entered into a contract with its retailers to impose minimum resale prices.

The issue for your consideration is whether that contract unreasonably restrains trade.¹

Instruction No 11. Rule of Reason - Overview

In determining whether FMG's contract with its retailers is an unreasonable restraint of trade, you must first determine whether the State has proven that the contract has resulted in a substantial harm to competition in a relevant market. If you find that the State has proven that the contract results in a substantial harm to competition, then you must consider whether the contract produces countervailing competitive benefits. If you find that it does, then you must balance the competitive harm against the competitive benefits.

The contract is illegal under Section 1 of the Sherman Act only if you find that the competitive harm substantially outweighs the competitive benefit.

I will now review the steps of this analysis in more detail.²

¹ Source: ABA Section of Antitrust Law, *Model Jury Instructions in Civil Antitrust Cases* at A-3 (2005 ed.) (hereinafter "ABA Model Instructions").

² Source: ABA Model Instructions at A-4.

Instruction No 12. Rule of Reason – Evidence of Competitive Harm and Benefits

As I mentioned, in order to prove that the FMG's contract with its retailers is unreasonable, the State must first demonstrate that the contract has resulted in substantial harm to competition in the relevant market. Although it may be relevant to the inquiry, harm that occurs merely to an individual business – such as a retailer that was terminated by FMG pursuant to the contract – is not sufficient, by itself, to demonstrate harm to competition generally. That is, harm to a single competitor or group of competitors does not necessarily mean that there has been harm to competition.

A harmful effect on competition, or competitive harm, refers to a reduction in competition in the relevant market that results in the loss of some of the benefits of competition, such as lower prices, increased output, and higher product quality.

Agreements establishing minimum resale prices can have either pro-competitive or anticompetitive effects or both. A manufacturer may use resale price maintenance for the pro-competitive purpose of encouraging retailers to invest in services or promotional efforts that aid the manufacturer's position as against rival manufacturers. On the other hand, a powerful manufacturer can use resale price maintenance for the anticompetitive purpose of giving retailers an incentive not to sell the products of smaller rivals. If FMG's contract has not substantially harmed competition in the relevant market, then you should find that FMG's contract was not unreasonable.

If you find that the State has proven that FMG's contract resulted in substantial harm to competition, then you must next determine whether the restraint also benefits

competition in other ways. If you find that the contract does result in competitive benefits, then you also must consider whether the restraint was reasonably necessary to achieve the benefits. If the State proves that the same benefits could have been readily achieved by other, reasonably available alternative means that create substantially less harm to competition, then they cannot be used to justify the contract.

In determining whether FMG's contract has produced competitive harm or benefits, you may look at the following factors: the effect of the contract on prices, output, product quality and service; the purpose and nature of the contract; the nature and structure of the market, both before and after the contract was implemented; and the number of competitors in the market and the level of competition among them, both before and after the contract was implemented.³

Instruction No 13. Rule of Reason – Balancing the Competitive Effects

If you find that FMG's contract was reasonably necessary to achieve competitive benefits, then you must balance those competitive benefits against the competitive harm resulting from the contract. If the competitive harm substantially outweighs the competitive benefits, then the contract is unreasonable. If the competitive harm does not substantially outweigh the competitive benefits, then the contract is not unreasonable. In conducting this analysis, you must consider the benefits and harm to competition and consumers, not just to a single competitor or group of competitors.⁴

³ Source: ABA Model Instructions at A-6 to A-10.

⁴ Source: ABA Model Instructions at A-12

Instruction No 14. Intrabrand vs. Interbrand Competition

You have heard some discussion about intrabrand and interbrand competition.

Intrabrand competition is competition among distributors of the same brand of product. For example, competition among two retailers of FMG video games is intrabrand competition.

Interbrand competition is competition among different brands of products. For example, competition among FMG and other suppliers of video games is interbrand competition.

FMG's contract with its retailers is a minimum resale price agreement. Minimum resale price agreements can stimulate interbrand competition – that is, competition among manufacturers selling different brands of a product – by reducing intrabrand competition – that is, competition among retailers selling the same brand.⁵

The promotion of interbrand competition is important because the primary purpose of the antitrust laws is to protect interbrand competition.⁶

Thus, the mere fact that FMG's contract may have caused a reduction in intrabrand competition is not sufficient to show that it was unreasonable. You must also consider the effect on interbrand competition in the relevant market.

⁵ Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2715 (2007).

⁶ *Id.*

Instruction No 15. Price vs. Non-Price Competition

In assessing the effect of FMG's contract on competition, you should take into account the contract's impact not only on price, but also on service, quality, and other dimensions of competition.⁷

Higher prices do not necessarily mean that competition or consumers have been harmed.⁸ For example, a manufacturer might increase the quality of its products or increase its marketing expenditures – and also increase its prices – as part of an effort to increase competition. Consumers may benefit from that conduct, despite the increase in prices. On the other hand, conduct that increases prices without any countervailing benefits to the other dimensions of competition would harm consumers.

If the State proves that FMG's contract resulted in higher resale prices, that does not necessarily mean that competition has been harmed or that the contract is unreasonable. In assessing the overall effect of FMG's contract on competition, you should also assess whether the contract is reasonably necessary to achieve a procompetitive objective. Even if FMG's contract resulted in higher prices, you may only find that the contract is unreasonable if you conclude that the contract's net effect on competition in the relevant market is substantially adverse.

⁷ See, e.g., *Valley Liquors*, 678 F.2d at 745; *Muenster Butane*, 651 F.2d at 298.

⁸ See, e.g., *Leegin*, 127 S. Ct. at 2718.

Instruction No 16. Market Power

Market power is defined as an ability profitably to raise prices above those that would be charged in a competitive market for a sustained period of time. A firm that possesses market power generally can charge higher prices for the same goods or services than a firm in the same market that does not possess market power. The ability to charge higher prices for better products or services, however, is not market power. An important factor in determining whether FMG possesses market power is FMG's market share; that is, its percentage of the products or services sold in the relevant market by all competitors. In determining whether FMG has market power, you may also consider the number of competitors in the market and the level of competition among them. If a firm does not possess a substantial market share, it is less likely that it possesses market power. If a firm does possess a substantial market share, it is more likely that it possesses market power, but even a firm with a substantial market share may not possess market power if it faces significant competition from other firms. If FMG does not possess this kind of power, then it is less likely that the challenged restraint has resulted in a substantial harmful effect on competition in the market.⁹

⁹ Source: ABA Model Instructions at A-7 to A-8.

Instruction No 17. Summary Instruction

In summary, as you deliberate to determine whether FMG's contract is an unreasonable restraint of trade, you must:

First determine whether the State has proven that the contract has resulted in a substantial harm to competition in a relevant market. In order to make this determination, you should assess whether the State has proven that there has been a reduction in competition in the video game market. You should evaluate evidence presented concerning the contract's effect on prices as well as the nature and structure of the video game market and the number of competitors and level of competition in the video game market both before and after the contract was implemented. If you find that the State has not proven a substantial harm to competition, you must return a verdict in favor of the FMG.

Second, if you find that the State has proven that the contract results in a substantial harm to competition, then you must consider whether the contract also produces sufficient countervailing competitive benefits. You should first assess whether the contract was reasonably necessary to achieve competitive benefits. If you find it was not, then you must find in favor of the State. Again, if the State proves that the same benefits could have been readily achieved by other, reasonably available alternative means that create substantially less harm to competition, then they cannot be used to justify the contract.

Third, if you find that the contract was reasonably necessary to achieve the competitive benefits, then you must balance the benefits to competition and consumers

against the competitive harm resulting from the contract. If you find that the competitive harm substantially outweighs the competitive benefits, then you must find in favor of the State. If not, you must find in favor of FMG.

Instruction No 18. Procedure

Now, let me talk briefly about the procedure to be followed from now on. A member of the Court's staff will be with you in the jury room. This would not happen in an ordinary trial and is done here only because of the abbreviated time you will have for deliberations.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement. Each of you must decide the case for himself or herself, but you should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. Discuss and weigh your respective opinions dispassionately, without regard to sympathy, without regard to prejudice or favor for either party, and adopt that conclusion which in your good conscience appears to be in accordance with the truth.

Finally, and I say this not because I believe it is necessary but because it is a tradition in this Court, I advise the jurors to be polite and respectful to each other so that in the course of your discussions in the jury room each juror may have his or her position made clear.