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

The Apartment Source of Pennsylvania, L.P., et al.	:	CIVIL ACTION
v.	:	
Philadelphia Newspapers, Inc., et al.	:	NO. 98-5472

M E M O R A N D U M

Padova, J. April 1, 1999

In this antitrust action, Plaintiffs, The Apartment Source of Pennsylvania, L.P. and The Apartment Source of New Jersey, L.P.,[1] have sued Defendants, Philadelphia Newspapers, Inc. ("PNI"), The Philadelphia Inquirer ("The Inquirer"), The Philadelphia Daily News ("The Daily News"), and Apartment Solutions,[2] because PNI has refused to publish advertising for Apartment Source in PNI's newspapers. Before the Court is Defendants' Motion for Summary Judgment. For the reasons that follow, the Court will deny Defendants' Motion.

[1]Both The Apartment Source of Pennsylvania, L.P. and The Apartment Source of New Jersey, L.P. are limited partnership real estate brokerages, licensed to do business in their respective states. They are collectively referred to herein as "Apartment Source."

[2]PNI is the parent corporation of The Inquirer, The Daily News, and Apartment Solutions.

I. UNDISPUTED FACTS

Apartment Source is an apartment locator service ("ALS") that is in the business of providing "leads" (i.e., potential renters) to apartment owners who are trying to rent their vacant apartment units. (Pls.' Opp., Ex. F, Deposition of Lisa K. East ("East Dep.") at 42.)[3] As an ALS, Apartment Source's purpose is to match potential renters with apartments that meet their specifications. (Pls.' Opp., Ex. E, Deposition of Jon A. Cummins ("Cummins Dep.") at 48.) Its customers are apartment communities that have more than 100 apartment units, and who pay for the service only if Apartment Source successfully places a renter in a vacant unit.[4] (Id. at 61, 63.) Apartment Source serves the greater Philadelphia metropolitan area, which includes the following eight counties: Camden, Gloucester, and Burlington counties in New Jersey and Bucks, Delaware, Chester, Montgomery and Philadelphia counties in Pennsylvania (hereinafter referred to as the "Philadelphia Region"). (Pls.' Compl. at ¶ 27(d).)

Apartment Source was formed to fill a perceived unmet need for apartment locator services in the Philadelphia Region.

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[3]Lisa East is employed by Amerimar Enterprises. (East Dep. at 4.) She and Jon Cummins run Apartment Source. (Id. at 6.)

[4]The Complaint alleges that an "apartment community" is a "localized collection[] of residential rental real estate units, [each of which] is operated by a single company." (Compl. at ¶ 27(a).) For the purposes of their Motion, Defendants accept this definition of the term "apartment community." (Defs.' Mot. at 5 n.2.)

(Cummins Dep. at 51; East Dep. at 45.) It began signing up apartment communities in the spring of 1997. (Pls.' Opp. Ex. J, Deposition of David G. Marshall ("Marshall Dep.") at 14.)[5] In May 1997, it began operations, and at that time, began to solicit leads. (Cummins Dep. at 103.) Apartment Source has signed up at least 200 apartment communities in the Philadelphia Region. (East Dep. at 33; Cummins Dep. at 62-63.)

In the spring of 1997, PNI also decided to start its own ALS. Its decision was prompted by large financial losses it had been experiencing because of decreasing apartment advertising revenues of $400,000 annually. (Pls.' Opp., Ex. D, Deposition of Todd Brownrout ("Brownrout Dep.") at 167-68.)[6] PNI attributes this decline in rental advertising revenues to competition from apartment guides, which are compilations of advertisements from apartment communities that are available to potential renters at no cost. (Defs.' Mot. Ex. L, Affidavit of Gordon Henry ("Henry Aff.") at ¶ 4.)[7] In June 1997, PNI's Apartment Solutions opened for business. (Id. at ¶ 2.)

The only predatory conduct alleged by Plaintiffs is that PNI

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[5]David Marshall has a controlling interest in Amerimar Enterprises and Apartment Source. (Marshall Dep. at 4-5.)

[6]Todd Brownrout is PNI's senior vice-president of sales and advertising. (Brownrout Dep. at 11.)

[7]Gordon Henry is vice-president of business development for PNI. (Id. at ¶ 1.) He oversees Apartment Solutions. (Id. at ¶ 2.)

has refused to accept advertisements from Apartment Source.[8] PNI refused to accept the advertising of Apartment Source because it viewed Apartment Source as its competitor. As Mr. Brownrout explained, “PNI does not accept the advertising of its competitors in the newspaper. And, therefore, we wouldn’t accept the ad of Apartment Source because they are a competitor of PNI.” (Brownrout Dep. at 202.)

II. LEGAL STANDARD

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). An issue is "genuine" only if there is sufficient evidence with which a reasonable jury could find for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). Furthermore, bearing in mind that all uncertainties are to be resolved in favor of the nonmoving party, a factual dispute is only "material" if it might affect the outcome of the case. Id.

A party seeking summary judgment always bears the initial

[8]Although PNI did publish one advertisement for Apartment Source of New Jersey in late June of 1997, it did so inadvertently. (Compl. at ¶¶ 51-52.)

responsibility of informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant's initial Celotex burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." Id. at 325, 106 S. Ct. at 2554. After the moving party has met its initial burden, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322, 106 S. Ct. at 2552.

III. DISCUSSION

A. Plaintiffs' Claims

In their Complaint, Apartment Source brings claims against Defendants for unlawful attempt to monopolize (Counts I and III) and unlawful monopolization (Count II), in violation of Section 2 of the Sherman Antitrust Act ("Sherman Act"), 15 U.S.C.A. § 2 (West 1997). 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).

To call Plaintiffs' Section 2 claims a work in progress would be kind. In their Opposition to Defendants' Motion for Summary Judgment, Plaintiffs abandoned the primary theory of their case based on a broader product market theory and decided to proceed on a much more limited product market as a basis for their Section 2 claims. In addition, during the course of the briefing on Defendants' Motion for Summary Judgment, Plaintiffs further refined their case by advancing, withdrawing, and modifying key aspects of their Section 2 claims, including the identification of the alleged monopolist and the alleged participants in the alleged relevant product market.[9] To compound the confusion, Defendants have adopted a legal position concerning the status of PNI vis-a-vis its wholly-owned subsidiary, Apartment Solutions, that is internally inconsistent with its position concerning the alleged business justification

[9]In their Motion for Summary Judgment, Defendants focused exclusively, with the exception of one footnote, on an analysis of Plaintiffs' Section 2 claims based on the market for rental advertising. In their Opposition to Defendants' Motion, Plaintiffs made clear that they were abandoning this market theory and instead were proceeding solely on the ALS market theory. Consequently, Defendants' moving papers were largely rendered moot. For that reason, the Court has focused its attention on the arguments made by Defendants in their Reply and subsequent letter briefs and at the March 8, 1999 hearing on their Motion. Similarly, the Court has considered the arguments made by Plaintiffs in their Opposition and subsequent letter briefs and at the hearing.

for PNI's refusal to deal with Apartment Source. All of this has taken place in the context of a refusal to deal, an area that has been described by one court as "one of the most unsettled and vexatious [issues] in the antitrust field." Byars v. Bluff City News Co., Inc., 609 F.2d 843, 856 (6th Cir. 1979).

For these reasons, before the Court can analyze the arguments raised by the parties in connection with Defendants' Motion, the Court must set forth the exact nature of Plaintiffs' claims. The Court does so in a light most favorable to Plaintiffs. According to Plaintiffs' counsel, Plaintiffs have both an unlawful monopolization claim and an unlawful attempt to monopolize claim under Section 2 of the Sherman Act. (3/8/99 Hrg. Tr. at 4.) Under each of these claims, Plaintiffs are proceeding under two distinct theories of recovery, both of which are based on PNI's refusal to deal with Apartment Source. (Id. at 5-6.) Plaintiffs maintain that Defendants are liable for antitrust violations under what is known as the "essential facilities doctrine" and under what Plaintiffs characterize as "the standard traditional improper motive, predatory intent" theory. (Id.) For both of their Section 2 claims, under both of their theories of recovery, Plaintiffs contend that the relevant product market is the ALS market, that the competitors in this

market are Apartment Source and Apartment Solutions,[10] and that Apartment Solutions has monopoly power in the ALS market. (Id.) The alleged essential facility is PNI's newspapers. The refusal to deal at issue here is the refusal to accept Apartment Source's advertisements in PNI's newspapers, accomplished by "defendant, Apartment Solutions, through its control . . . over PNI who controls the essential facility that's necessary to compete in the ALS market." (Id.)

B. Section 2 of the Sherman Act

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

[10]As discussed more fully below, 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. (Pls.' Opp. at 61 n.17)

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 allege 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 state a claim under Section 2 of the Sherman Act for attempted monopolization, Plaintiffs must allege 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 Elec. 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). See also Great Western Directories v. S.W. Bell Telephone, 63 F.3d 1378, 1385 (5th Cir. 1995)("[d]angerous probability of achieving an actual monopoly position is customarily assessed by looking at the defendant's market share. If the defendant possesses a large share, it will likely be concluded that the defendant's conduct, if undeterred, will result in an actual monopoly"). 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).

C. The Relevant Geographic and Product Markets

An element of both the 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).

1. Relevant Geographic Market

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 Service Ass'n of Pennsylvania, 745 F.2d 248, 260 (3d Cir. 1996)(citation omitted). In their Complaint, Plaintiffs allege the existence of a geographic market consisting of the Philadelphia metropolitan area, which includes the following eight counties: Camden, Gloucester, and Burlington counties in New Jersey and Bucks, Delaware, Chester, Montgomery and Philadelphia counties in Pennsylvania (hereinafter referred to as the "Philadelphia Region"). Defendants do not contest the validity of the Philadelphia Region as the relevant geographic market. (Defs.' Mot. at 22.) Therefore, for the purpose of analyzing Defendants'

Motion, the Court will assume that the relevant geographic market is the Philadelphia Region.

2. Relevant Product Market

In their Complaint, Plaintiffs pled two alternative product markets. Plaintiffs identify the first product market as the "market for apartment rentals," which they describe as the product market that offers apartment communities the "means to find renters for vacant apartment units." (Pls.' Compl. at ¶ 27(c).) In the alternative, Plaintiffs allege the existence of a "market for apartment renter locators," which they describe as "the market in which apartment renter locators provide services to apartment communities." (Id.) Plaintiffs allege that "[t]his product market is a relevant alternate market of the market for apartment rentals and constitutes a distinct and identifiable market or sub-market." The Court will refer to this market as the Apartment Locator Services ("ALS") market. Although they pled alternate product markets in their Complaint, Plaintiffs have determined, based on discovery in the case, that "the proper relevant market for analyzing defendants' refusal to deal is the ALS market, and not the much broader market for all rental advertising." (Pls.' Opp. at 9.)

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"). 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).

Defendants argue that the relevant market is the market for rental advertising and that the existence of a separate ALS market is “directly contradicted by plaintiffs’ specific allegations of facts in their complaint and by the indisputable facts.” (Defs.’ Mot. at 25 n.11.) With respect to the first

aspect of Defendants' argument, the Court finds that Defendants rely on allegations that Plaintiffs included in the Complaint to support the existence of an alternate market for apartment rentals, a market that Plaintiffs have since abandoned. Therefore, the Court finds that Defendants' argument that the ALS market does not exist because of alleged contradictions in the Complaint is without merit.

Defendants also contend that the undisputed facts establish that, as a matter of law, a separate ALS market does not exist. (Defs.' Mot. at 25 n.11; Defs.' Reply App. A at 1-4.) The Court disagrees. Typically, market definition presents a question of fact for jury resolution. Weiss v. York Hosp., 745 F.2d 786, 825 (3d Cir. 1984). A district court may resolve the question of market definition on a motion for summary judgment only if the record does not present any material factual disputes. See Town Sound and Custom Tops, Inc. v. Chrysler Motors Corp., 959 F.2d 468, 497 (3d Cir. 1992)(Sloviter J., concurring and dissenting) Similarly, whether a submarket exists presents a factual dispute for jury resolution. See Case-Swayne Co., Inc. v. Sunkist Growers, Inc., 369 F.2d 449, 456 (9th Cir. 1966), cert. denied (as to § 2 issues), 387 U.S. 932, 87 S. Ct. 2056, rev'd on other grounds, 389 U.S. 384, 88 S. Ct. 528 (1967)("there may be a well-defined submarket which constitutes the relevant market for antitrust purposes which ... is a question of fact in the

particular case").

Although Defendants dispute the existence of an ALS market, the Court finds that Plaintiffs have submitted evidence that raises a genuine issue of material fact concerning the existence of such a market. (Pls.' Opp. at 33-54.) For example, genuine issues exist as to whether the product of the apartment renter locators is reasonably interchangeable with products offered by other businesses and whether there is cross-elasticity of consumer demand between the product of apartment renter locators and the product offered by other businesses.[11]

D. Refusals to Deal

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.

[11]The Court notes that the Courts of Appeal for the Fourth and Ninth Circuits have recognized that under certain circumstances particular forms of advertising can constitute product markets that are distinct from other forms of advertising. High Technology Careers v. San Jose Mercury News, 996 F.2d 987, 990 (9th Cir. 1993); Ad-Vantage Telephone Directory Consultants, Inc. v. GTE Directories Corp., 849 F.2d 1336, 1341-42 (4th Cir. 1987).

v. United States, 342 U.S. 143, 155, 72 S. Ct. 181, 187 (1951). Under certain circumstances, refusals to deal can subject a business to liability under Section 2.

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, which the Court will address in turn, starting with the essential facilities doctrine.

1. Refusal to Deal Based on the Essential Facilities Doctrine

Plaintiffs describe their case as a "prototypical 'essential facilities' case." (Pls.' Opp. at 4.) They contend

that PNI's refusal to accept Apartment Source advertising in PNI's newspapers deprives Apartment Source of access to PNI's newspapers, which allegedly constitutes an essential facility for apartment locators services. (Pls.' Opp. at 56.) 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 the ALS market.

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 at 856. "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).

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 566, 568 (2d Cir. 1990). 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).

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.

Plaintiffs maintain that Apartment Solutions has monopoly power in the ALS market based on its alleged 87% share of leads in the ALS market in the Philadelphia Region. (Pls.' Opp. Exs. A, M, App. 1.) According to Plaintiffs, "[i]n order to effectively compete in the ALS market it is necessary for an apartment locator service ("ALS") to obtain a sufficient number of 'minimum density' of 'leads'" and it is "essential for an ALS to have access to the largest daily newspaper of general circulation -- PNI's newspapers" to generate the minimum density

of leads. (Pls.' Opp. at 4-5.) Plaintiffs support this argument with evidence that 50-70% of the leads produced by Apartment Solutions are generated through advertising in PNI's newspapers and Internet site (with the domain name "Phillynews.com"). Plaintiffs further maintain that if the denial of access to PNI's newspapers is permitted, it will be forced out of business. (Marshall Dep. at 35-36.)

Defendants advance a number of arguments in support of their contention that Plaintiffs' essential facility claim fails as a matter of law. First, they argue that to state such a claim the alleged monopoly must be the essential facility and that Plaintiffs' essential facility claim is fatally flawed because Plaintiffs maintain that "Apartment Solutions has a monopoly in a locator market, not a newspaper market." (Defs.' Reply at 5.) The first element of an essential facilities claim in this Circuit is the "control of the essential facility by a monopolist." Ideal Dairy Farms, Inc. v. John Labatt, Ltd., 90 F.3d at 748. Defendants urge the Court to read this element as requiring the control of an essential facility by a monopoly. (3/8/99 Hrg. Tr. at 22-25.) In other words, according to Defendants, the first element requires the essential facility to be a monopoly, such as the only stadium in town or the only telephone lines that are available. (Id. at 23.)

Defendants are correct that in most instances where courts

have found that an essential facility exists, the facility at issue was the only facility that was available. Nevertheless, there is precedent for recognizing a colorable essential facilities claim where the essential facility at issue was not the only facility. For example, one of the cases cited by Defendants involved the refusal to lease the Chicago Stadium to an unsuccessful bidder for purchase of the Chicago Bulls basketball franchise. Fishman v. Estate of Wirtz, 807 F.2d 520, 539 (7th Cir. 1986). The essential facility at issue in that case, the Chicago Stadium, was not the only stadium in Chicago, as Defendants assert. Rather, other venues for professional basketball existed in Chicago. The Court of Appeals for the Seventh Circuit determined that the Chicago Stadium was an essential facility. See also Colonial Penn Group, Inc. v. American Association of Retired Persons, 698 F. Supp. 69 (E.D. Pa. 1988)(claim that AARP publications constitute an essential facility sufficient to survive motion to dismiss despite the existence of other means of advertising).

The Court will not adopt Defendants' interpretation of the first element of the essential facilities test but rather will adhere to the Third Circuit's requirement that Plaintiffs must only demonstrate that a monopolist controls an essential

facility.[12] See U. S. Football League v. National Football League, 842 F.2d 1335, 1368-69 (2d Cir. 1988)(interpreting the first element of the four-part essential facilities test set forth in MCI Communications Corp. v. AT&T as only requiring that the facility be subject to the monopolist's control and explaining that this requirement is necessary "because an essential facilities claim must be brought against the party that can provide access to the facility"). The focus of the inquiry with respect to the first element, therefore, is on the market power of Apartment Solutions in the ALS market and on the essentiality of PNI's newspapers for apartment service locators. Plaintiffs argue, and have submitted evidence sufficient to raise genuine issues of fact, that Apartment Solutions has monopoly power within the ALS market and that Apartment Solutions, by virtue of its parent/subsidiary relationship with PNI, controls an essential facility for apartment locator services, Philadelphia's daily newspapers.

Although never clearly articulated by Plaintiffs, one of the underpinnings of their essential facilities claim is that

[12]Defendants' argument that the four-part essential facilities test, which was first announced in MCI Communications Corp. v. AT&T, "ultimately is dictum" and therefore can be modified by this Court is simply incorrect. (3/8/99 Hrg. Tr. at 22.) The four-part test set forth in Ideal Dairy Farms is the law in this Circuit.

Apartment Solutions and PNI are functionally equivalent entities. (Pls.' Opp. at 61 n.17) ("PNI is a competitor of Apartment Source through its' [sic] wholly-owned subsidiary, Apartment Solutions, and therefore PNI competes against Apartment Source in the ALS market.") In the context of this case, it is clear that PNI regards itself as the alter ego of its subsidiary, Apartment Solutions. This fact is evidenced by the business justification given by PNI for its refusal to accept advertisements from Apartment Source -- such refusal is in conformance with PNI's long-standing policy of refusing advertisements from competitors and that PNI and Apartment Source are competitors. As explained by Gordon Henry, "PNI has a long-standing policy of not accepting the advertising of competitors. . . . It is pursuant to this policy that PNI has refused to carry the advertising of plaintiffs." (Henry Aff. at ¶ 9.) Todd Brownrout was even more explicit in his deposition testimony: "PNI does not accept the advertising of its competitors in the newspaper. And, therefore, we wouldn't accept the ad of Apartment Source because they are a competitor of PNI." (Brownrout Dep. at 202.)

Defendants also argue that "the purpose of the essential facilities doctrine is to prevent a monopolist from trying to use a monopoly it possesses in one market to exclude competition, and thus monopolize, another market. If there is no probability of

spreading the monopoly to another market, the essential facilities doctrine cannot apply." (Defs.' Reply at 6.) They cite to number of cases to support their argument. Twin Laboratories, Inc. v. Weider Health & Fitness, 900 F.2d at 568 ("The policy behind prohibiting denial of an essential facility to a competitor, at least in part, is to prevent a monopolist in a given market . . . from using its power to inhibit competition in another market."); Fishman v. Estate of Wirtz, 807 F.2d at 539; Interface Group, Inc. v. Massachusetts Port Auth., 816 F.2d 9, 12 (1st Cir. 1987). See also Lubonski v. UIC, Inc., Civ.A.No. 90-5672, 1990 WL 175689, at *9 (E.D. Pa. Nov. 9, 1990).

Defendants are correct that Plaintiffs' essential facility claim is not based on an attempt to spread Defendants' alleged monopoly in the ALS market to another market. Instead, Plaintiffs' essential facility claim is based on the use by Defendants, alleged monopolists in the ALS market, of an essential facility that they control in another market, PNI's newspapers, to maintain their monopoly in the ALS market. Although Plaintiffs' essential facility claim does not fit the paradigm set forth in the cases cited by Defendants, the Court finds that there may exist sufficient market-to-market dynamics in this case to implicate the essential facilities doctrine. Therefore, the Court will not grant summary judgment on this ground at this stage of the proceedings. Instead, the Court will

revisit this issue after it has had the benefit of a fully developed trial record on Plaintiffs' essential facilities claim.

Defendants' final argument is that even if PNI's newspapers constitute an essential facility, summary judgment is appropriate in this case based on their defense of legitimate business justification.[13] The reason contained within Defendants' Rule 56 submissions for PNI's refusal to deal with Apartment Source is that PNI has a long-standing policy of not accepting advertising from its competitors and Apartment Source is one of its competitors. (Brownrout Dep. at 202-205; Henry Aff. at ¶ 9.)

As Plaintiffs concede, an essential facility claim will fail if the owner of an essential facility proves that it had a legitimate business reason for denying access to the facility. High Technology Careers v. San Jose Mercury News, 996 F.2d at 991-92 ("If there is a valid business reason for [the defendant's] conduct, there is no antitrust liability."). The existence of a legitimate business reason, however, is ordinarily a question of fact. Sicor Limited v. Cetus Corp., 51 F.3d 848,

[13]Although in their Motion Defendants developed in detail their argument that there are no barriers to entering the market for rental advertising, their argument with respect to entry barriers in the context of the ALS market presented at the hearing on their Motion is sketchy at best. (3/8/99 Hrg. Tr. at 41-43.) Moreover, Plaintiffs contend, based on their Rule 56 submissions, that the denial of access to PNI's newspapers precludes entry into the ALS market. Under these circumstances, the Court will not grant summary judgment on this ground because of the existence of genuine issues of material fact.

855 n.8 (9th Cir. 1995). Plaintiffs have raised a genuine issue of fact regarding the validity and sufficiency of Defendants' claimed business justification. (Pls.' Opp. Ex. H, Henry Dep. at 112.) Therefore, as the court in High Technology Careers, the Court here finds that summary judgment on the basis of Defendants' claimed business justification is not warranted.[14]

In conclusion, the Court notes that it disagrees with Plaintiffs' characterization of this case as a "prototypical" essential facilities case. Moreover, the Court believes that, based on the evidence contained in Plaintiffs' Rule 56 submissions, Plaintiffs may have difficulty in meeting their burden of proof with respect to their essential facilities claim, in light of the availability of other advertising vehicles in the Philadelphia Region. However, because Plaintiffs have demonstrated the existence of genuine issues of material fact, the Court will deny Defendants' Motion for Summary Judgment as to

[14]The Court is unpersuaded by Defendants' argument that allegations included in Plaintiffs' Complaint concerning alleged lost advertising revenues constitute admissions by Plaintiffs that establish, as a matter of law, a legitimate business justification for PNI's refusal to deal. First, the allegations referenced by Defendants were included in the Complaint to support Plaintiffs' abandoned theory concerning the existence of a market for rental advertising. As such, these allegations are now irrelevant. Second, the business justification given by PNI for its refusal to deal is not based on lost revenues, but rather is based on PNI's alleged policy of refusing advertising from competitors.

Plaintiffs' 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 argue that PNI's refusal to deal "is sufficiently predatory" to violate Section 2 of the Sherman Act. (Pls.' Opp. at 56 n.16.) According to Plaintiffs, Defendants have violated Section 2 of the Sherman Act by refusing access to PNI's newspapers "in pursuance of a purpose to monopolize." (Pls.' 3/4/99 Ltr. Br. at 6, citing Eastman Kodak Co. Of New York v. Southern Photo Materials Co., 273 U.S. 359, 47 S. Ct. 400 (1927) and Eastman Kodak v. Image Technical Services, 504 U.S. 451, 112 S. Ct. 2072 (1992).) In support of this theory of recovery, Plaintiffs argue that PNI "has destroyed and excluded competition in the ALS market by significantly increasing Apartment Source's costs of doing business." (Pls.' Opp. at 78.)

The Court recognizes that, separate and apart from the essential facilities doctrine, a plaintiff can rely on a theory of predatory intent as a basis of recovery in a refusal to deal case. The focus in this case is on 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. Under the intent test, the refusal to deal must have an anticompetitive effect. As explained by the Court of Appeals for the Sixth Circuit, "what should matter is not the monopolist's state of mind, but the overall impact of the monopolist's practices . . . [which] should be deemed 'unfair' or 'predatory' only if it is unreasonably anticompetitive." 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.").

Defendants argue that in order to recover under the intent test, Plaintiffs must fit themselves into one of the factual scenarios at issue in cases in which the Supreme Court used the intent test, such as Kodak, Lorain Journal, or Aspen Skiing. The Court will not limit the intent test as Defendants have suggested.[15] In addition, the Court finds that Plaintiffs' Rule

[15]The Court, however, agrees with Defendants that certain of the Supreme Court's decisions in this area are anomalous. For example, in Aspen Skiing, a ski lift operator refused to continue in a joint marketing effort with its smaller competitor. The Supreme Court found a Section 2 violation where the competitors had a prior history of cooperation and the end of that cooperation would have a severe impact on competition in the relevant product market. The facts of Aspen Skiing are unique, and therefore the Court is not inclined to apply Aspen Skiing in

56 submissions contain sufficient circumstantial evidence to support genuine issues of material fact on the existence of predatory intent and anticompetitive effect. For these reasons, the Court will deny Defendants' Motion for Summary Judgment as to Plaintiffs' Section 2 claims based on the intent test.

E. Plaintiffs' State Law Claims

Defendants argue that Plaintiffs' state law claims "should be analyzed identically to plaintiffs' Sherman Act claims." (Defs.' Mot. at 41.) Accordingly, because Plaintiffs' Section 2 claims survive Defendants' Motion for Summary Judgment, Plaintiffs' state law claims survive as well.

IV. CONCLUSION

For the foregoing reasons, the Court will deny Defendants' Motion for Summary Judgment.

An appropriate Order follows.

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a refusal to deal case such as this one where there is no history of cooperation between Apartment Source and Apartment Solutions. See Olympia Equipment Leasing Co. v. Western Union Telegraph Co., 797 F.2d 370, 379 (7th Cir. 1986)("If [Aspen Skiing] stands for any principle that goes beyond its unusual facts, it is that a monopolist may be guilty of monopolization if it refuses to cooperate with a competitor in circumstances where some cooperation is indispensable to effective competition").