IN THE SUPREME COURT OF FLORIDA

CASE NO. 92,881
DCA No. 97-2376

EXECU-TECH BUSINESS SYSTEMS, INC., on behalf of itself and all others similarly situated,

Petitioner,

vs.

NEW OJI PAPER COMPANY LTD. n/k/a OJI PAPER COMPANY LTD.,

Respondent.
_____/

INITIAL BRIEF OF PETITIONER ON THE MERITS

Robert C. Gilbert
ROBERT C. GILBERT, P.A.
133 Sevilla Avenue
Second Floor
Coral Gables, Florida 33134
Telephone: (305) 529-9100

Daniel E. Gustafson
Renae D. Steiner
HEINS MILLS & OLSON, P.L.C.
608 Second Avenue South
Minneapolis, Minnesota 55402
Telephone: (612) 338-4605

Joseph R. Saveri
Fabrice V. Nijhof
LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP
275 Battery Street
San Francisco, CA 94111-3339
Telephone: (415) 956-1000

Kenneth A. Wexler
MILLER FAUCHER CHERTOW CAFFERTY AND WEXLER
30 North LaSalle Street
Suite 3200
Chicago, IL 60602
Telephone: (312) 782-4880

CERTIFICATE OF INTERESTED PERSONS, ETC.

Counsel for petitioner Execu-Tech Business Systems, Inc. certifies that the following persons and entities have or may have an interest in the outcome of this case.

1. Adorno & Zeder, P.A.
   (counsel for defendant Mitsubishi)

2. Appleton Papers, Inc.
   (defendant)

3. Arnstein & Lehr
   (counsel for defendant Elof Hansson)

4. Cahill Gordon & Reindel
   (counsel for defendant Mitsubishi)

5. Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A.
   (counsel for defendant Appleton)

6. Robert L. Ciotti, Esq.
   (counsel for defendant Appleton)

7. Chris S. Coutroulis, Esq.
   (counsel for defendant Appleton)

8. Richard E. Donovan, Esq.
   (counsel for defendant/respondent New Oji and defendant Kanzaki)

9. Elof Hansson Paper & Board, Inc.
   (defendant)

10. Execu-Tech Business Systems, Inc.
    (plaintiff/petitioner)

11. Robert C. Gilbert, Esq.
    (counsel for plaintiff/petitioner)

12. Robert C. Gilbert, P.A.
    (counsel for plaintiff/petitioner)

13. Daniel E. Gustafson, Esq.
(counsel for plaintiff/petitioner)

14. Heins Mills & Olson, P.L.C.
(counsel for plaintiff/petitioner)

15. Gerald J. Houlihan, Esq.
(counsel for defendant Nippon Paper)

16. Houlihan & Partners
(counsel for defendant Nippon Paper)

17. Jenner & Block
(counsel for defendant Mitsubishi Paper Mills)

18. Kanzaki Specialty Papers, Inc.
(defendant)

19. Kelley Drye & Warren LLP
(counsel for defendant/respondent New Oji
and defendant Kanzaki)

20. Glenn S. Leon, Esq.
(counsel for defendant Appleton)

21. Lieff Cabraser Heimann & Bernstein, LLP
(counsel for plaintiff/petitioner)

22. Stanley M. Lipnick, Esq.
(counsel for defendant Elof Hansson)

23. Leslie W. Loftus, Esq.
(counsel for defendant Elof Hansson)

24. Shelley Malinowski, Esq.
(counsel for defendant Mitsubishi Paper Mills)

25. Marvin A. Miller, Esq.
(counsel for plaintiff/petitioner)

26. Miller Faucher Chertow Cafferty and Wexler
(counsel for plaintiff/petitioner)

27. Mitsubishi Corporation
(defendant)

28. Mitsubishi International Corporation
(defendant)

29. Mitsubishi Paper Mills Ltd.
(defendant)

30. Honorable Estella M. Moriarty
Broward Circuit Judge
(trial judge)

31. New Oji Paper Company
(defendant/respondent)

32. Fabrice V. Nijhof
(counsel for plaintiff/petitioner)

33. Nippon Paper Industries Co., Ltd.
(defendant)

34. Geoffrey Oliver, Esq.
(counsel for defendant Nippon Paper)

35. O'Melveny & Myers, LLP
(counsel for defendant Nippon Paper)

36. Richard G. Parker, Esq.
(counsel for defendant Nippon Paper)

37. Wesley R. Parsons, Esq.
(counsel for defendant Mitsubishi)

38. Ignacio Sanchez, Esq.
(counsel for defendant/respondent New Oji
and defendant Kanzaki)

39. Joseph R. Saveri, Esq.
(counsel for plaintiff/petitioner)

40. Sheryl Seckel, Esq.
(counsel for defendant Appleton)

41. Simpson Thacher & Bartlett
(counsel for defendant Appleton)

42. Laurence T. Sorkin, Esq.
(counsel for defendant Mitsubishi)

43. Renae D. Steiner, Esq.
(counsel for plaintiff/petitioner)

44. Kenneth A. Wexler, Esq.
(counsel for plaintiff/petitioner)

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STATEMENT OF THE CASE

Introduction.

Petitioner, Execu-Tech Business Systems, Inc. ("Execu-Tech"), seeks review of an order dismissing respondent, New Oji Paper Company Ltd. n/k/a Oji Paper Company Ltd. ("Oji"), for lack of personal jurisdiction. On appeal to the Fourth District Court of Appeal, the order of the trial court was affirmed. (SA. 1).[1] On April 1, 1998, the Fourth District certified conflict between its decision and that of the Second District Court of Appeal in Wilcox v. Stout, 637 So.2d 335 (Fla. 2nd DCA 1994). (SA. 2).

Oji is one of eight defendants in a putative class action lawsuit brought by Execu-Tech in the Circuit Court of the Seventeenth Judicial Circuit on July 10, 1996, in which Execu-Tech seeks to recover damages on behalf of all Florida consumers who purchased price-fixed thermal facsimile paper ("fax paper") from 1990 through 1992. Oji and the other seven defendants are the leading manufacturers and distributors of fax paper throughout the United States. Execu-Tech's complaint alleges that the defendants participated in a price-fixing conspiracy to illegally inflate the price of fax paper. (A. 9-11). Appleton Papers, Inc. ("Appleton") and Kanzaki Specialty Papers, Inc. ("Kanzaki Papers"), two of the

[1] References to "SA. __" are to the supplemental appendix incorporated with this brief. References to "A. __" are to the original appendix filed in the district court of appeal.

defendants that marketed and sold fax paper in the United States, were authorized to and conducted business in Florida throughout the alleged conspiracy. (A. 3-4). Other defendants, Mitsubishi Papers Mills ("Mitsubishi Mills"), New Oji (now known as Oji, and referred to herein as "Oji")[2] and Nippon Paper, Inc. ("NPI") are Japan-based manufacturers of fax paper. (A. 4-5). Rather than distribute their paper directly, these defendants utilized exclusive distributors -- referred to as "trading houses" -- to sell their products in the United States. (A. 4-5).

Oji, one of the foreign manufacturers, sold its fax paper through defendant Elof Hansson Paper & Board, Inc. ("Elof Hansson"). (A. 3). During the critical period (February 1990 through March 1992), Elof Hansson distributed over $3,000,000 of Oji's jumbo rolls throughout the United States. (A. 3).

The fax paper manufactured and/or distributed by the defendants was sold to companies -- known in the industry as "converters"[3] — that cut the jumbo rolls into smaller, finished

[2] In 1993, following the conclusion of the conspiracy, Oji and Kanzaki Manufacturing which owned and operated Kanzaki Papers, Inc, merged to form New Oji. In 1996, New Oji and another conspirator not named as a defendant, Honshu Paper Co.("Honshu"), merged to form Oji. All three companies that now form Oji (i.e., New Oji, Kanzaki and Honshu) manufactured fax paper in Japan and sold it for import to customers in the United States.

[3] One such converter, Paper Systems, Inc., has maintained a manufacturing facility in Ocala, Florida, since 1990 where it (continued...)

rolls suitable for sale by retailer customers. (A. 8-9). Execu-Tech alleges that these smaller rolls were sold during the relevant period at artificially inflated prices throughout the country -- including Florida -- and were ultimately purchased by Florida consumers including Execu-Tech and other members of the putative class. (A. 1-2, 9-12).

The Conspiracy.

Execu-Tech alleges that during the period from February 1990 through at least March 1992, Oji, together with the other defendants, engaged in a nationwide conspiracy to illegally fix the price of fax paper sold to consumers in Florida in violation of Florida's Unfair and Deceptive Trade Practices Act ("FDTPA"), Florida Statutes, § 501.201-213. (A. 9-11).

In a related criminal antitrust prosecution brought against NPI, one of the defendants in this case, the United States Court of Appeals for the First Circuit summarized the conspiracy as follows:

> [I]n 1990 NPI and [the other conspirators] held a number of meetings in Japan which culminated in an agreement to fix the price of thermal fax paper throughout North America. NPI and other manufacturers who were privy to the scheme purportedly accomplished their objective by selling the paper in Japan to unaffiliated trading houses on condition that the latter charge specified (inflated) prices

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[3](...continued)
converts jumbo rolls of fax paper. (A. 127).

> for the paper when they resold it in North America. The trading houses then shipped and sold the paper to their subsidiaries in the United States who in turn sold it to American consumers at swollen prices .... [I]n order to ensure the success of the venture, NPI monitored the paper trail and confirmed that the prices charged to end users were those it had arranged.

United States of America v. Nippon Paper Indus., Inc., 109 F.3d 1,2 (1st Cir. 1997), petition for cert. denied 1998.[4]

Execu-Tech's complaint alleges that as a result of this price-fixing conspiracy, converters, wholesalers, and retailers passed on the illegal overcharge to end-users, including Execu-Tech, which damaged Execu-Tech and other members of the class. (A. 2, 11-12).

Guilty Pleas in Federal Antitrust Proceedings.

A federal criminal investigation of this price-fixing conspiracy resulted in grand jury indictments against all of the defendants. (A. 3-6). Oji, Kanzaki Papers, Honshu (the three companies that now comprise Oji) and Elof Hansson (Oji's U.S. trading house) all pled guilty. (A. 3-5). Oji was fined $1.75 million. (A. 5). The two other companies that now form Oji --

[4] NPI contested the United States' jurisdiction over it under the Sherman Act. After the trial court granted NPI's motion to dismiss for lack of personal jurisdiction, the First Circuit reversed and remanded for future proceedings. See United States of America v. Nippon Paper Industries Co., Inc., 109 F.3d 1 (1st Cir. 1997), cert. denied (1998). The criminal charges against NPI are currently pending.

Kanzaki Papers and Honshu -- were fined a total of $4.725 million. (A. 3-4, 96-105). Elof Hansson was fined $200,000. (A. 3). The Mitsubishi Companies also pled guilty and were assessed fines totaling $1.26 million. (A. 4-5).

As part of their guilty pleas, Oji and the other defendants admitted to participating in a nationwide criminal conspiracy to fix the price of fax paper. (A. 87-105). Among other things, Oji admitted, as Execu-Tech alleges here, that the purpose and effect of the conspiracy was to artificially raise fax paper prices throughout the United States. (A. 87-88). This necessarily included raising the price of fax paper sold in the State of Florida.

The Proceedings Below.

All defendants initially sought to dismiss Execu-Tech's complaint arguing that, as an indirect purchaser, Execu-Tech lacked standing under Florida's Deceptive and Unfair Trade Practices Act, Section 501.201 et. seq., Florida Statutes (1997) ("FDUTPA") to pursue claims based on illegal price-fixing conduct.[5] On January 13, 1997, the trial court denied Defendants' motion relying on Mack v. Bristol-Myers Squibb Co., 673 So.2d 100 (Fla. 1st DCA 1996), which held that indirect purchasers are not prohibited and,

[5] In addition to the standing argument, Oji raised lack of personal jurisdiction in its motion to dismiss.

in fact, are encouraged to pursue such claims under FDUTPA. (SA. 3). Appleton and Kanzaki then answered Execu-Tech's complaint admitting personal jurisdiction, (A. 15, 26), while Oji pursued its jurisdictional challenge.[6] (A. 35-52).

In support of its motion, Oji submitted the affidavit of Mr. Tsusima made upon "information and belief" (A. 49) rather than based on personal knowledge. (A. 46-52). Although the Tsusima affidavit generally addressed Oji's lack of contacts with the State of Florida, it was totally silent with regard to Oji's admitted participation in the price-fixing activities which gave rise to this action. (A. 46-52).

In opposing Oji's motion and the supporting Tsusima affidavit, Execu-Tech filed affidavits demonstrating (1) the existence of documentary evidence of Oji's and Elof Hansson's sales of fax paper, marketing activities and other contacts with Florida (A. 106-110; 125-126), and (2) the Florida sales and marketing activities of co-conspirator Appleton, which was authorized to and conducted business in Florida during the relevant period. (A. 108-110; 127-137).

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[6] Elof Hansson also raised a personal jurisdiction defense in its answer. In September 1997, the trial court denied Elof Hansson's motion to dismiss for lack of jurisdiction. Elof Hansson's appeal of that order to the Fourth District Court of Appeal is currently pending. NPI also moved to dismiss on jurisdictional grounds; all proceedings below have been stayed against NPI pending the conclusion of its criminal case.

Execu-Tech argued the existence of jurisdiction on three bases. (A. 57-81). First, Execu-Tech argued that Oji operated, conducted, engaged in and carried out a business venture in Florida by conspiring with other defendants to raise, fix and stabilize the price of fax paper, shipping that fax paper throughout the United State and thereupon deriving economic benefit. See, Section 48.193(1)(a), Florida Statutes (1997). Second, by participating in a price-fixing conspiracy, having as its intended purpose the raising of fax paper prices in Florida, Oji committed a tortious act in this state. See, Section 48.193(1)(b), Florida Statutes (1997).

Perhaps most significantly, Execu-Tech argued that the acts of co-conspirators Kanzaki and Appleton -- over which personal jurisdiction was undisputed -- were imputed to Oji and thereby subject it to personal jurisdiction in this state. (A. 67-70).

On May 23, 1997, the trial court conducted a hearing on Oji's motion to dismiss. (A. 138-155). In response to Oji's argument, the trial court stated:

> I don't think the sale of the paper alone is enough of an overt act by an alleged co-conspirator to bring everybody in the alleged conspiracy into the State of Florida.

(A. 152).[7] The trial court granted Oji's motion to dismiss. (A. 156). An appeal was taken to the Fourth District Court of Appeal.

On January 21, 1998, after denying Execu-Tech's request for oral argument, the Fourth District affirmed the trial court's order, holding that Oji had insufficient minimum contact with the State of Florida to support personal jurisdiction. (SA. 1). In so doing, the court refused to follow the Second District's decision in Wilcox v. Stout, 637 So.2d 335 (Fla. 2nd DCA 1994). Id. Wilcox held that where **any member of a conspiracy** commits a tortious act in Florida in furtherance of the conspiracy, all of the co-conspirators are subject to Florida's long-arm jurisdiction. On April 1, 1998, the Fourth District granted Execu-Tech's motion to certify that its decision conflicted with the Second District's decision in Wilcox. These proceedings followed.

SUMMARY OF ARGUMENT

The trial court erred in dismissing Oji for lack of jurisdiction and the district court erred in affirming this decision for several reasons.

[7] Although Execu-Tech also presented evidence reflecting Elof Hansson's sales (as Oji's U.S. trading house) of Oji paper to a Florida converter, the trial court ignored this evidence. (A. 128-133; 149-150).

Under well-established Florida precedent, by conspiring to fix prices and then placing its paper in the stream of commerce, Oji conducted, engaged in, and carried on the business of selling fax paper in Florida. These allegations are sufficient under both Florida law and the United States Constitution to establish jurisdiction under Florida's long-arm statute. See Florida Statutes, § 48.193(1)(a).

Second, by participating in a nationwide price-fixing conspiracy which caused damage in Florida to Florida consumers, Oji is deemed to have subjected itself to personal jurisdiction by the courts of this state. See Florida Statutes, § 48.193(1)(b).

Third, the acts of Oji's co-conspirators Kanzaki and Appleton doing business in Florida in furtherance of the conspiracy are imputed to Oji under the well-recognized co-conspirator theory which the Fourth District refused to follow in this case. Significantly, Oji failed to refute Execu-Tech's conspiracy allegations. Therefore, those allegations were sufficient to confer jurisdiction over Oji.

The decision of the district court of appeal should be quashed with directions that the trial court deny Oji's motion to dismiss for lack of jurisdiction.

ARGUMENT

I. INTRODUCTION.

For at least 70 years, foreign nationals have been subject to the laws of the United States as a result of conspiratorial conduct. As Chief Justice Taft stated in Ford v. United States, 273 U.S. 593 (1927):

> [G]enerally the cases show that jurisdiction exists to try one who is a conspirator whenever the conspiracy is in whole or in part carried on in the court whose laws are conspired against.

273 U.S. at 621-22. That holding was adopted in United States of America v. Nippon Paper Industries Co., Inc., 109 F.3d 1, involving the same conspiracy giving rise to the civil claims brought by Execu-Tech here.

II. OJI CONDUCTED, ENGAGED IN, AND CARRIED ON BUSINESS IN FLORIDA.

Florida Statute § 48.193(1)(a) provides jurisdiction over a party where that party or its agent is found to be "conducting, engaging in, or carrying on a business or business venture in this state ...."[8] Through Elof Hansson, Oji's U.S. trading house, Oji sold millions of dollars of fax paper throughout the United States during the relevant period. By placing the paper in the stream of

[8] See Allerton v. State Dept. of Insurance, 635 So.2d 36 (Fla. 1st DCA) rev. denied 639 So.2d 975 (Fla. 1994) (noting Florida's intent to regulate the in-state effects of out-of-state tortious activity).

U.S. commerce through Elof Hansson, Oji knowingly conducted, engaged in, and carried on the business of selling fax paper in Florida; conduct sufficient under Florida law to establish jurisdiction over Oji. Florida courts have consistently found long-arm jurisdiction over foreign manufacturers that place their products into a nationwide distribution stream. See, e.g., Ford Motor Corp. v. Atwood Vacuum Machine Co., 392 So.2d 1305 (Fla. 1981).[9]

Most significantly, due to the nature of the relationship between Oji and Elof Hansson, it makes no difference whether the manufacturer places the product into the stream of commerce **directly or through a distributor** which is an unrelated business entity, a wholly or partially owned subsidiary or an "alter ego" subject to the manufacturer's dominion and control. See, e.g., Nelson v. Park Indus., Inc., 717 F.2d 1120 (7th Cir. 1983); Poyner v. Erma Werke GmbH, 618 F.2d 1186 (6th Cir. 1980); see also Warren v. Honda Motor Co., Ltd., 669 F.Supp. 365 (D.Utah 1987); DeVaney v. Rumsch, 288 So.2d 904 (Fla. 1969) (transacting business through intermediaries subjects a party to Florida's jurisdiction).

[9] Even **a single act** may subject a foreign corporation to the jurisdiction of Florida courts. JCB Inc. v. Herman, 562 So.2d 754 (Fla. 3rd DCA 1990); Law Offices of Evan I. Fetterman v. Inter-Tel, Inc., 480 So.2d 1382 (Fla. 4th DCA 1985).

In cases such as this involving a foreign manufacturer, it is sufficient if the products are intended for distribution throughout the United States and the forum state's market is not specifically excluded from the distribution system. See In re Perrier Bottled Water Litig., 754 F.Supp. 264 (D.Conn. 1990); Copiers Typewriters Calculators, Inc. v. Toshiba Corp., 576 F.Supp. 312 (D.Md. 1983). There is absolutely no evidence that Florida was specifically excluded from the nationwide distribution of Oji paper.

Indeed, in Ford Motor Corp. v. Atwood Vacuum Machine Co., 392 So.2d 1305 (Fla. 1981), this Court held a foreign component manufacturer subject to Florida jurisdiction when it sold its parts to an auto manufacturer which then distributed the final products nationwide. 392 So.2d at 1310-13. Similarly, in St Joe Paper Co. v. Superior Court, 120 Cal.App.3d 991, 175 Cal.Rptr. 94 (Cal. Ct. App. 1981), an indirect purchaser case remarkably similar to this one, a California court found jurisdiction over an out-of-state defendant who, like Oji, participated in a nationwide antitrust conspiracy to fix the prices of corrugated boxes.

In St. Joe, the plaintiff alleged that defendants, by raising prices on a nationwide basis, should have known that their boxes would be sold indirectly to California's consumers at the agreed upon inflated prices. In refusing to dismiss on jurisdictional grounds, the court stated:

> [T]he paper companies admittedly elected to indirectly serve the market in California and made sales and deliveries at artificially fixed prices that allegedly harmed California consumers. The paper companies expected an economic benefit from their deliveries in this state. As a result of their alleged price-fixing activities, they reaped an unusually high profit at the expense of California consumers. Thus, the paper companies availed themselves of the privilege of conducting activities that invoked the benefits and protections of the laws of this state ...

St. Joe, 120 Cal.App.3d at 993-94; 175 Cal.Rptr. at 95.

The California court then rejected the defendants' "foreseeability" argument, finding that:

> [I]f the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but *arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States* ....

St. Joe, 120 Cal.App.3d at 999, 175 Cal.Rptr. at 98-99 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980)) (emphasis added).

The same rationale exists for the exercise of jurisdiction over Oji in this case. Oji manufactured thermal fax paper which was sold and distributed throughout the United States and consumed in every state, including Florida. Oji's trading house, Elof Hansson, as Oji's exclusive agent, solicited sales, made sales, and

shipped Oji's paper into and throughout the United States at prices which were deliberately and illegally inflated. There is no suggestion (and certainly no competent evidence) that Florida was excluded from the sales efforts of Oji or Elof Hansson, or that no consumers in Florida purchased Oji paper. Instead, Oji asserts in conclusory form that it did not sell fax paper in Florida,[10] omitting any reference to Elof Hansson's sales of artificially priced fax paper sold in Florida on Oji's behalf.

III. OJI COMMITTED A TORT IN FLORIDA.

The trial court also erred in concluding that jurisdiction did not exist under Section 48.193(1)(b) as a result of Oji's commission of a tort which caused damage to Execu-Tech and other consumers in the State of Florida. The fact that Oji initiated its tortious act -- the price-fixing conspiracy -- outside Florida's geographic boundaries is irrelevant. "It is well-established that the commission of a tort for purposes of establishing long arm jurisdiction does not require physical entry into the state, but merely requires that the place of injury may be within Florida." International Harvester Co. v. Mann, 460 So.2d 580 (Fla. 1st DCA 1984), disapproved on other grounds, Doe v. Thompson, 620 So.2d 1004 (Fla. 1993); see also Wood v. Wall, 666 So.2d 984 (Fla. 3rd

[10] Although Oji claims that it never set foot in Florida, one of Elof Hansson's expense reports places an Oji employee at a paper trade show in Florida. (A. 106-107).

DCA 1996); Allerton, 635 So.2d at 39-40; Calder v. Jones, 465 U.S. 783 (1984) (intentional out-of-state torts sufficient to subject tortfeasors to jurisdiction).

In Hitt v. Nissan Motor Co., 399 F.Supp. 838 (S.D.Fla. 1975), the court found that Nissan Motor, the Japanese manufacturer, was subject to Florida jurisdiction even if the conspiratorial agreement was outside Florida because the injury occurred in Florida:

> [I]njury as a result of a price fixing conspiracy is incident to the transaction of sale itself. The buyer who pays higher prices due to such a conspiracy is injured at the time such sale is consummated.

Hitt, 399 F.Supp. at 847. For these same reasons, Oji is subject to personal jurisdiction in Florida for its intentional tortious conduct outside of Florida which resulted in injury to Florida consumers.

IV. ACTS OF CO-CONSPIRATORS SUBJECT OJI TO FLORIDA JURISDICTION.

Execu-Tech's complaint alleged that Oji engaged in a conspiracy with the other defendants to fix the price of fax paper sold in Florida, and that Oji and other defendants (including Kanzaki, which conceded that it is subject to Florida jurisdiction) pled guilty to participating in the conspiracy. These were **unrebutted allegations**. The Tsusima affidavit, the only evidence

submitted by Oji in support of its jurisdictional challenge, failed to address -- let alone rebut -- these allegations.

When Oji failed to controvert the allegations establishing the existence of the conspiracy and Oji's role in that conspiracy, denial of Oji's motion was required by this Court's decision in Venetian Salami Co. v. Parthenais, 554 So.2d 499 (Fla. 1989),[11] and the Second District's decision in Wilcox v. Stout, 637 So.2d 335 (Fla. 2nd DCA 1994). The Fourth District's conclusion that there were "gaps" in the complaint and Execu-Tech's affidavits which preclude jurisdiction is simply incorrect.

Wilcox is directly on point. Wilcox involved a claim for civil conspiracy brought against two non-resident defendants and one Florida resident. The trial court dismissed the non-resident defendants based on lack of personal jurisdiction. On appeal, the Second District reversed, and adopted the co-conspirator theory of jurisdiction:

> [If plaintiff] has successfully alleged a cause of action for conspiracy among respondents and [the defendant independently subject to Florida jurisdiction] to commit tortious acts toward petitioner, and if she

[11] Pursuant to Venetian Salami, a defendant must rebut well-pled jurisdictional allegations through affidavit or other competent evidence. The failure to rebut such allegations requires denial of the motion. If, and only if, the defendant controverts the allegations through affidavit or other competent evidence, the burden then shifts back to the plaintiff to come forward with sufficient proof to controvert the defendant's evidence.

> has successfully alleged that any member of that conspiracy committed tortious acts in Florida in furtherance of that conspiracy, then all of the conspirators are subject to the jurisdiction of the state of Florida ...

Wilcox, 637 So.2d at 337.

The Second District went on to explain why a Florida co-conspirator's acts subject non-resident co-conspirators to jurisdiction:

> [W]e have no hesitancy in applying the well-accepted rules applicable to the liability of co-conspirators in the criminal context. Those rules make every act and declaration of each member of the conspiracy the act and declaration of them all. Additionally, each conspirator is liable for and bound by the act and declaration of each and all of the conspirators done or made in furtherance of the conspiracy even if not present at the time. * * * We conclude that the well-established rules of criminal conspiracy comport with our application of section 48.193 in this case.

Id.

Precisely the same situation that prevailed in Wilcox exists here. Oji, as an admitted co-conspirator, is liable for and bound by the acts (selling fax paper in Florida at inflated prices) of its co-conspirators.

The Fourth District opinion under review here misconstrued Wilcox by finding that it did not contain a minimum contacts component as a requirement of constitutional long-arm jurisdiction.

SA. 2. In Wilcox, a Florida resident and two residents of New York were sued for knowingly and wilfully acting in concert (i.e., the conspiracy) to tortiously interfere with plaintiff's business relationships. The plaintiff alleged that the Florida defendant committed tortious acts in furtherance of the conspiracy in Florida. The non-resident defendants argued that they were not subject to personal jurisdiction in Florida, but failed to controvert the allegations that they engaged in a conspiracy with the Florida defendant, nor that the Florida defendant committed tortious acts in Florida in furtherance of the conspiracy.

In reversing the dismissal of the non-resident defendants for lack of personal jurisdiction, the Second District applied Section 48.193(b) (committing a tortious act within the state) as the basis for finding jurisdiction over the non-resident defendants. Wilcox v. Stout, supra., at 337. Inherent in the Second District's decision in Wilcox is the obvious conclusion that minimum contacts existed through the Florida defendant's actions here in furtherance of the conspiracy, and that the Florida defendant's actions were imputed to the non-resident co-conspirators.

In this case, the Fourth District rejected Wilcox for not containing a minimum contact component, and instead adopted the five-part test articulated by the Supreme Court of Delaware in

Instituto Bancario Italiano v. Hunter Engineering Co., 449 A.2d 210 (Del. 1981) as the standard for holding an absent conspirator subject to the jurisdiction of the forum state.[12] Execu-Tech demonstrated that Oji is subject to Florida jurisdiction not only under the Wilcox test but also under each of the five standards adopted by the Fourth District.

Cases in Florida as well as other jurisdictions have not hesitated to adopt the co-conspirator theory of jurisdiction. See, Avnet Inc. v. Nicolucci, 679 So.2d 7 (Fla. 2nd DCA 1996); Hasenfus v. Secord, 797 F.Supp. 958 (S.D.Fla. 1989) (applying Florida long arm statute and finding jurisdiction over co-conspirators); Textor v. Bd. of Regents, 711 F.2d 1387 (7th Cir. 1993); Bonavire v. Wampler, 779 F.2d 1011 (4th Cir. 1985); Ethanol Partners Accredited v. Wiener, 635 F.Supp. 15 (E.D.Pa. 1985); Dooley v. United Technologies Corp., 786 F.Supp. 65 (D.D.C. 1992); Allstate Life Ins. Co. v. Linter Group Ltd., 782 F.Supp. 215 (S.D.N.Y. 1992); Rudo v. Stubbs, 221 Ga. App. 702, 472 S.E.2d 515 (Ga. Ct. App.1996).

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[12] The five-part test is: (1) a conspiracy exists; (2) the non-resident defendant is a member of the conspiracy; (3) an act in furtherance of the conspiracy occurred in the forum state; (4) the non-resident knew or had reason to know of the act in the forum state or that acts outside the forum state would have an effect in the forum state; and (5) the act in, or effect on, the forum state was a direct and foreseeable result of conduct in furtherance of the conspiracy.

These courts have applied the co-conspirator theory of jurisdiction in cases involving far less certain allegations of conspiracy. For example, in Bonavire, plaintiffs alleged a fraudulent scheme among a number of defendants, only one of whom, Boyden, had any discernable contact with the forum state. The other defendants were merely alleged to have been part of the fraudulent scheme. Satisfied that the plaintiff had sufficiently alleged a conspiracy between Boyden and the non-resident defendants, the court concluded that jurisdiction was properly asserted over the non-residents. Bonavire, 779 F.2d at 1014.

Likewise, in Ethanol Partners, the court rejected a non-resident's motion to dismiss where plaintiffs submitted an unchallenged affidavit reciting the in-state activities of the non-residents's co-conspirators. As the court made clear:

> When co-conspirators have sufficient contacts with the forum, so that due process would not be violated, [these contacts are] imputed against the "foreign" co-conspirators who allege that there is [sic] not sufficient contacts; co-conspirators are agents for each other.

Ethanol Partners, 635 F.Supp. at 18.

In price-fixing cases, the conspiracy theory of jurisdiction is also well-established. See Maricopa County v. American Petrofina, Inc., 322 F.Supp. 467 (N.D.Ariz. 1971) ("[a] conspiracy, no matter where made, creates a destructive force which extends

into the state," and that the real and intangible forces affecting the state meet the minimum contacts standards); St. Joe Paper Co. v. Superior Court, 120 Cal.App. 3d 991, 175 Cal.Rptr. 94 (Cal. Ct. App. 1981).

The facts of this case present an even stronger basis for exercising jurisdiction over Oji than in any of the cited cases. In this case, several defendants (including Oji itself) pled guilty and admitted to their participation in an illegal price-fixing conspiracy with other defendants (Appleton and Kanzaki) who are clearly subject to jurisdiction in Florida. (A. 3-5; 87-105). In this case, the complaint specifically describes the conspiracy. (A. 10); ("defendants ... participated in telephone conversations, meetings and discussions concerning the existing and future prices of jumbo rolls sold in North America; agreed to increase prices ...; issued price increase announcements ...; directed their co-conspirator trading houses to implement price increases ...; contacted each other to maintain continued adherence to their conspiratorial agreement."). See also, United States of America v. Nippon Paper Industries Co., Inc., 109 F.3d at 2. ("NPI monitored the paper trail and confirmed the prices charged were those it had arranged."). Thus, there can be little doubt of the existence of the conspiracy, Oji's role in it, or the propriety of

finding that jurisdiction exists in Florida over Oji and the other conspiring defendants.

V. OJI'S CONTACTS WITH FLORIDA SATISFY CONSTITUTIONAL REQUIREMENTS.

Due process requires that, in order to subject a defendant to personal jurisdiction, it must have certain minimum contacts[13] with the state so that maintenance of the action does not offend "traditional notions of fair play and substantial justice." International Shoe Co. v. Washington, 326 U.S. 310 (1945). Oji has more than sufficient minimum contacts to satisfy constitutional and due process requirements:

> The Constitutional touchstone of the minimum context analysis is whether the defendant's conduct and connection with the forum state are such that they should reasonably anticipate being haled into court there.

Vacation Ventures, Inc. v. Holiday Promotions, 687 So.2d 286 (Fla. 5th DCA 1997); Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1995); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)).[14]

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[13] To the extent that jurisdiction exists over Oji due to its conspiracy with the other defendants who are already subject to the court's jurisdiction (see Section IV infra.), a separate inquiry to determine if sufficient additional minimum contacts exist need not be conducted.

[14] In Calder v. Jones, 465 U.S. 783 (1984), the Supreme Court held that intentional torts aimed at the forum state, along with knowledge that the out-of-state actions would have an impact in the forum state, and that the brunt of the actions would be felt in (continued...)

By actively controlling the prices of fax paper sold in every state, including Florida, Oji should have anticipated being subjected to jurisdiction by the courts of every state, including Florida.

Jurisdiction over Oji is consistent with notions of fair play and substantial justice. In Nelson v. Park Indus., 717 F.2d 1120 (7th Cir. 1983), the court recognized that due process concerns are not significant with respect to manufacturers and primary distributors who:

> are at the start of a distribution system and who thereby serve, directly or indirectly, and derive economic benefit from a wider market. Such manufacturers and distributors purposely conduct their activities to make their product available for purchase in as many forums as possible ...

Nelson, 717 F.2d at 1125. The court rejected the district court's narrow reading of due process stating:

> A manufacturer places a product in a stream of commerce whether it controls the distribution of the product or not. The relevant question for due process purposes in a personal jurisdiction challenge is *whether the defendant delivers its product into the stream of commerce with the expectation that they will be purchased by consumers in the forum state*.

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[14](...continued)
that state, allow the conclusion that the nonresident "must have reasonably anticipated being haled into court there." Calder, 465 U.S. at 789-90.

Nelson, 717.F.2d at 1126 n. 7 (emphasis added); see also Mack v. Bristol-Myers Squibb Co., 673 So.2d 100 (1st DCA 1996) review dismissed, 689 So.2d 1068 (Fla. 1997) ("The Florida DTPA clearly expresses the legislative policy to authorize consumers [that is, indirect purchasers] to bring actions under the Florida DTPA for price-fixing conduct."); St. Joe Paper Co. v. Superior Court, 120 Cal.App.3d 991, 999; 175 Cal.Rptr. 94, 98-99 (Cal. Ct. App. 1981) (reasonable to subject manufacturer to suit if non-resident defendant makes efforts, either direct or indirect, to serve state's consumers).

Oji put its fax paper into the stream of commerce well aware that converters would cut the jumbo rolls into consumer-sized products, and that its fax paper would ultimately be sold throughout the United States, including in Florida. Oji profited as a result. Given its intentional foray into this country's and Florida fax paper market, Oji cannot now argue that it should not be haled into Florida courts to defend itself.

CONCLUSION

Execu-Tech submits that the trial court erred in granting Oji's motion to dismiss for lack of personal jurisdiction, and that the district court erred in affirming that order. The district court's order should be quashed with directions for the trial court to deny Oji's motion to dismiss.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that true and correct copies of the foregoing have been furnished, by U.S. mail, to Ignacio Sanchez, Esq., Kelley, Drye & Warren, 201 South Biscayne Boulevard, Suite 2400, Miami, Florida 33131, and to Richard W. Donovan, Esq., Kelley, Drye & Warren, 101 Park Avenue, New York, New York 10178, this _____ day of January, 2000.

Respectfully submitted,

ROBERT C. GILBERT, P.A.
133 Sevilla Avenue
Coral Gables, FL 33134
(305) 529-9100

By:_____
Robert C. Gilbert
Florida Bar No. 561861

HEINS MILLS & OLSON, P.L.C.
Daniel E. Gustafson
Renae D. Steiner
700 Northstar East
608 Second Avenue South
Minneapolis, MN 55402
(612) 338-4605

MILLER FAUCHER CHERTOW
CAFFERTY AND WEXLER
Kenneth A. Wexler
30 North LaSalle Street
Suite 3200
Chicago, IL 60602
(312) 782-4880

LIEFF CABRASER HEIMANN
& BERNSTEIN LLP
Joseph R. Saveri
Fabrice V. Nijhof
Embarcadero Center West
275 Battery Street, 30th Floor
San Francisco, CA 94111
(415) 956-1000

Attorneys for Petitioner

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