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.
_____/

REPLY BRIEF OF PETITIONER ON THE MERITS

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CERTIFICATE OF INTERESTED PERSONS, ETC.

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27. Mitsubishi Corporation
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28. Mitsubishi International Corporation
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29. Mitsubishi Paper Mills Ltd.
(defendant)

30. Honorable Estella M. Moriarty
Broward Circuit Judge
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STATEMENT OF THE CASE

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. Because Oji's statement of the case obfuscates the flavor of this case and the central issue of this appeal, Execu-Tech summarizes its statement of the case below.

The central issue in this appeal is whether, by asserting lack of personal jurisdiction, Oji can avoid civil liability to Florida consumers for its admitted participation in a criminal price-fixing conspiracy.

From 1990 through 1992, Oji and the other defendants, which comprise the leading manufacturers and distributors of thermal facsimile paper ("fax paper") throughout the United States, participated in a criminal price-fixing conspiracy to illegally inflate the price of fax paper. (A. 9-11)[1]. At least one of these defendants, Appleton Papers, Inc. ("Appleton"), shipped its price-fixed fax paper into the State of Florida throughout the alleged conspiracy. (A. 3-4; 133-137).

Oji and most of the other defendants pled guilty to criminal price-fixing charges brought by the United States Department of

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[1] References to "A. __" are to the original appendix filed in the district court of appeal. References to "SA. __" are to the supplemental appendix incorporated with Execu-Tech's initial brief on the merits filed in this Court.

Justice. (A. 3-5). Oji and these co-defendants admitted to participating in a nationwide criminal conspiracy to fix the price of fax paper, the purpose and effect of which was to artificially raise fax paper prices throughout the United States. (A. 87-105).

On the heels of these guilty pleas and the First District's opinion in Mack v. Bristol-Myers Squibb Co.,[2] 673 So.2d 100 (Fla. 1st DCA 1996), review dismissed 689 So.2d 1068 (Fla. 1997), Execu-Tech filed this putative class action alleging that the illegal price-fixing activities of Oji and the other defendants violated Florida's Deceptive and Unfair Trade Practices Act, Fla. Stat. §§ 501.201 et. seq. ("FDUTPA"). Execu-Tech seeks to recover damages on behalf of all Florida consumers who indirectly purchased price-fixed fax paper manufactured and/or distributed by Oji and the other defendants.

Oji moved to dismiss, asserting lack of personal jurisdiction. Relying on the co-conspiracy theory of jurisdiction adopted in Wilcox v. Stout, 637 So.2d 335 (Fla. 2nd DCA 1994), Execu-Tech argued that Oji is subject to jurisdiction in Florida based on **undisputed** evidence demonstrating the Florida sales and marketing

[2] In Mack, the First District held that **indirect** purchasers can pursue claims based on illegal price-fixing conduct under Florida's Deceptive and Unfair Trade Practices Act. (SA. 3).

activities of co-conspirator Appleton[3] (A. 108-110; 127-137). Execu-Tech argued that jurisdiction also exists over Oji based on documentary evidence demonstrating Oji's contacts with the State of Florida through its exclusive U.S. distributor, co-defendant Elof Hansson Paper & Board, Inc. ("Elof Hansson").[4] (A. 106-110; 124-132).

The trial court rejected both arguments, and the Fourth District affirmed. (SA. 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). These proceedings ensued.

ARGUMENT

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

Execu-Tech argues that, by conspiring to fix prices and then placing its paper in the nationwide 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

[3] Appleton admitted that personal jurisdiction exists over it in Florida. (A. 015).

[4] On July 15, 1998, the Fourth District Court of Appeal affirmed the trial court's order **denying** Elof Hansson's motion to dismiss for lack of personal jurisdiction.

jurisdiction under Florida's long-arm statute. See Florida Statutes, § 48.193(1)(a); Initial Brief, pp. 10-14.

In its Answer Brief, Oji argues the lack of evidence to establish that Elof Hansson was Oji's agent for the sale of fax paper in the State of Florida. Answer Brief, pp. 11-12. Oji's argument misses the point.

The issue is whether Oji's placement of its fax paper into the **nationwide** stream of commerce, knowing that such paper is destined for distribution throughout the United States (as Oji concedes), constitutes doing business in Florida for purposes of satisfying the long-arm statute. Although it is true that the decision in U.S. v. Nippon Paper Industries Co., Ltd., 109 F.3d 1 (1st Cir. 1997) primarily concerns subject matter jurisdiction, the First Circuit's analysis of the ramifications on international commerce are equally applicable here despite Oji's suggestion to the contrary:

> We live in an age of international commerce, where decisions reached in one corner of the world can reverberate around the globe in less time than it takes to tell the tale. Thus, a ruling in NPI's [Nippon's} favor would create perverse incentives for those who would use nefarious means to influence markets in the United States, rewarding them for erecting as many territorial firewalls as possible between cause and effect.

Id. at 8.

Execu-Tech cites numerous cases for the proposition that jurisdiction can exist under § 48.193(1)(a) by placing a product into the stream of commerce. Initial Brief, pp. 11-13. Oji seeks to "discredit" all of these authorities, claiming that all such cases arise under other subsections of 48.193(1) and not under § 48.193(1)(a). Answer Brief, p. 12. This distinction is immaterial. Whether it is later determined that a defendant has caused injury in the state or is doing business in the state is irrelevant to the initial jurisdictional consideration – placing a product into the stream of commerce where that product ultimately finds its way into Florida.

Finally, Oji contends that there can be no jurisdiction under § 48.193(1)(a) because there is no evidence that Oji itself conducts, operates, engages in, or carries on a business venture in the state by having an office here. Answer Brief, pp. 11-12. Oji's bald contention is not an accurate statement of the law and, if true, would severely restrict the theory of jurisdiction based on the stream of commerce.

II. <u>OJI COMMITTED A TORT IN FLORIDA</u>.

Execu-Tech argues that jurisdiction also exists under Section 48.193(1)(b) as a result of Oji's admitted tortious conduct (participation in an illegal price-fixing conspiracy) which caused

damage in Florida to Execu-Tech and other Florida consumers. See Florida Statutes, § 48.193(1)(b); Initial Brief, pp. 14-15.

In its Answer Brief, Oji asserts that it cannot be subject to jurisdiction under § 48.193(1)(b) where its admittedly tortious (criminal) conduct was initiated outside of Florida even though the injury occurred within this state.[5] Answer Brief, pp. 13-14. Oji's sweeping statement of the law is incorrect.

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." Int'l 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 Calder v. Jones, 465 U.S. 783 (1984) (intentional out-of-state torts sufficient to subject tortfeasors to jurisdiction).

As pointed out in the concurrence to the very same opinion quoted by Oji in its Answer Brief:

> A number of Florida decisions have held that (1)(b) applies to conduct outside of Florida

[5] Oji ignores the word "initiated" in Execu-Tech's brief, which connotes tortious activity which began in Japan and continued to be perpetrated in the State of Florida each time its price-fixed paper was sold here.

> where resulting injury occurs within this state. See Wood v. Wall, 666 So.2d 984 (Fla. 3d DCA 1996); Allerton v. State Dept. Of Ins., 635 So.2d 36 (Fla. 1st DCA), rev. denied, 639 So.2d 975 (Fla. 1994); Int'l Harvester Co. V. Mann, 460 So.2d 580 (Fla. 1st DCA 1984). At least two federal appellate decisions have also reached the same conclusion. See Robinson v. Giamarco & Bill, P.C., 74 F.3d 253 (11th Cir. 1996); Sun Bank, N.A. v. E.F. Hutton & Co., 926 F.2d 1030 (11th Cir. 1991).

Thomas Jefferson University v. Romer, 701 So.2d 67, 70 (Fla. 4th DCA 1998).

Oji's attempt to distinguish Hitt v. Nissan Motor Co., 399 F.Supp. 838 (S.D.Fla. 1975) is equally unavailing. Answer Brief, pp. 17-18. As in Hitt, there is a great deal more in this case than an unsworn allegation that the foreign defendant was involved in a price-fixing scheme. Here, Oji pled guilty to criminal price-fixing charges involving the sale and distribution of fax paper throughout the United States. (A. 87-95). Elof Hansson, Oji's exclusive U.S. trading house, likewise admitted its participation in this nationwide price-fixing scheme. In their respective plea agreements, neither Oji nor Elof Hansson suggested that their illegal activities were limited to certain areas of the United States, or that Florida was not among the affected jurisdictions. Therefore, to suggest that evidence of Oji's participation in the price-fixing scheme is less persuasive than in Hitt is disingenuous.

For the same reasons adopted in Hitt, Oji is subject to personal jurisdiction in Florida for its intentional tortious conduct outside of Florida which resulted in injury in Florida to Execu-Tech and other Florida consumers.

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

Execu-Tech argues that Oji is subject to jurisdiction in Florida because the acts of its co-conspirators in Florida in furtherance of the conspiracy are imputed to Oji under the co-conspiracy theory adopted by the Second District in Wilcox v. Stout, 637 So.2d 335 (Fla. 2nd DCA 1994). Initial Brief, pp. 15-22. Because Oji failed to refute Execu-Tech's conspiracy allegations in the complaint and the evidence of co-conspiratorial acts submitted to the trial court in opposing Oji's motion, those allegations and evidence were alone sufficient to confer jurisdiction over Oji.

None of the arguments raised in Oji's Answer Brief in response to the co-conspiracy theory of jurisdiction has merit. Oji argues that the co-conspiracy theory of jurisdiction adopted in Wilcox has constitutional infirmities. Answer Brief, pp. 18-21. Oji's argument is unpersuasive. As discussed at length in Execu-Tech's Initial Brief, the test enunciated in Wilcox actually contains a minimum contacts component. Initial Brief, pp. 17-18. Wilcox, and the species of co-conspiracy jurisdiction it follows, imputes

minimum contacts to the non-resident defendant by virtue of the resident defendant's actions in Florida in furtherance of the conspiracy. Imputing the resident defendant's minimum contacts to the non-resident defendant makes perfect sense in the context of conduct based on a conspiracy; since commission of an illegal act in Florida by one co-conspirator in furtherance of the conspiracy is imputed to all co-conspirators in establishing liability, it follows that proof of a co-conspirator's act in this state in furtherance of the conspiracy should also be imputed to non-resident co-conspirators for purposes of satisfying the minimum contacts analysis in a jurisdictional dispute.

Oji summarizes its argument on this critical issue by claiming that Execu-Tech cannot "identify the tortious act in furtherance of the conspiracy which occurred in Florida." Answer Brief, p. 28. Oji ignores the record before this Court. As discussed above, **while the price-fixing conspiracy was initiated outside Florida, it continued and culminated in this state with each sale of price-fixed paper**. The Waddell affidavit and attached invoices filed in opposition to Oji's motion indisputably evidence co-conspirator Appleton's delivery of price-fixed paper to Paper Systems' Ocala, Florida converting facility. (A 127-137). Oji failed to refute this evidence, as well as the conspiracy allegations in Execu-Tech's complaint. Hence, this record contains unrefuted evidence

of **in-state acts** by a co-conspirator in furtherance of the conspiracy.

The importance of adopting the co-conspiracy theory of jurisdiction enunciated in Wilcox cannot be overstated. In an increasingly global business marketplace, non-resident defendants (whether from other states or other countries) who conspire to and engage in unlawful conduct affecting the citizenry of Florida will seek to escape civil liability for their misdeeds by claiming lack of minimum contacts and, hence, no personal jurisdiction. By adopting the Wilcox test of co-conspiracy jurisdiction, which imputes the minimum contacts of the Florida co-conspirator to the non-resident co-conspirator, Florida citizens will be able to seek redress against all wrongdoers in the courts of this state.

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

Oji's final argument relates to the due process analysis inherent in long-arm jurisdiction. Although this issue is fully addressed in Execu-Tech's Initial Brief, brief additional comment is warranted here. Initial Brief, pp. 22-24.

Oji asserts that the burden placed on a Japanese corporation to defend itself in this state is unfair. Answer Brief, p. 31. Though Oji may perceive it as unfair, by illegally fixing the price of fax paper sold throughout the United States, and then by

acknowledging its participation in a nationwide price-fixing conspiracy in its plea agreement, Oji surely must have anticipated being subjected to jurisdiction by the courts of every state, including Florida.

Finally, Oji suggests that Florida has no particular interest in adjudicating this dispute. Answer Brief, p. 31. Oji's suggestion is directly belied by the First District's opinion in 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."). (SA. 3).

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

CONCLUSION

Execu-Tech respectfully submits that the district court's decision 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.

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