

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JAMES CAPE & SONS COMPANY,

Plaintiff,

v.

Case No. 05-CV-00269

PCC CONSTRUCTION COMPANY (f/k/a
STREU CONSTRUCTION COMPANY),
VINTON CONSTRUCTION COMPANY,
JOHN STREU, ERNEST J. STREU, JAMES J.
MAPLES, MICHAEL J. MAPLES and DANIEL
BEAUDOIN,

Defendants.

**PLAINTIFF JAMES CAPE & SONS COMPANY'S CONSOLIDATED
BRIEF IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS**

SUMMARY OF RESPONSE

This is an extraordinary civil antitrust and racketeering case. All but one of the defendants have been convicted for participating in the criminal scheme that forms the basis of the claims: a criminal scheme to rig the public bidding system used by the Wisconsin Department of Transportation ("WisDOT") and thereby decrease competition.

Plaintiff James Cape and Sons Company ("Cape"), one of the oldest concrete paving companies in the United States (Complaint at ¶ 7), has been driven out of business. It is currently in receivership in Racine County Circuit Court, Case No. 05-CV-1125,¹ as a direct result of the defendants' criminal scheme to rig construction bids and thereby freeze Cape out of

¹ This Court can take judicial notice of Cape's receivership, as well as the sentences imposed on Vinton Co., James J. Maples, and Michael J. Maples, as all became part of the public record after the Complaint was filed in this matter. *Palay v. United States*, 349 F.3d 418, 425 n. 5 (7th Cir.

many millions of dollars in construction contracts. All of the defendants, save defendant Daniel Beaudoin, have admitted that they engaged in this criminal scheme. Complaint at ¶ 3. Three of the individual defendants (Ernest Streu, John Streu, and Michael Maples) are currently serving time in federal prison for these crimes; another, James Maples, is currently serving a year of home confinement. Complaint at ¶¶ 79-80; *see also* Exhibits A through C (judgments of Vinton Co., James J. Maples, and Michael J. Maples). All of the defendants, except Beaudoin, have also been ordered to pay restitution to the State of Wisconsin in the amount of \$1.9 million dollars for the injury that their crimes caused and an additional \$1.2 million in fines. Complaint at ¶¶ 78-81; Exhibits A through C. Yet defendants have the audacity to argue that the facts they admitted in their plea agreements and the other facts set forth in the Complaint – the vast majority of which are drawn from a sworn affidavit from a Special Agent of the Federal Bureau of Investigation – cannot in **any** circumstance form the basis for a state or federal antitrust claim because of a purported lack of antitrust injury.

An injury suffered by a company that results from an agreement among competitors to exclude such company from the market is precisely the type of injury that the antitrust laws were intended to prevent. *Infra* at 7. Here defendants engaged in a conspiracy to corner the highway construction market in Wisconsin. Cape was not a participant in that conspiracy. Complaint at ¶¶ 1, 14, 36-75. Cape's employee, defendant Beaudoin, was recruited and corrupted by two of Cape's competitors so that they could prevent Cape from getting contracts, thus advancing the bid-rigging scheme and furthering the criminal conspiracy. *Id.* The Complaint specifically describes why defendants did this – to benefit defendants, **not** Cape:

2003) (“in resolving a motion to dismiss, the district court is entitled to take judicial notice of matters in the public record”).

In particular, defendants engaged in a scheme to submit rigged, noncompetitive bids for at least 26 street, highway, and airport construction projects awarded by the Wisconsin Department of Transportation (“WisDOT”), other public bidding authorities, and, upon information and belief, private owners. This scheme – which lasted over several years and resulted in criminal convictions of several defendants for violations of the Sherman Antitrust Act (15 U.S.C. § 1) – injured Cape in that such scheme deprived Cape of being awarded multi-million dollar public and private construction contracts which would have resulted in substantial profits to Cape. **The defendants conspired to take work from Cape for the defendants’ benefit and to Cape’s detriment.**

Complaint at ¶ 1 (emphasis added).

Cape neither authorized nor was aware of Beaudoin’s illegal activity up until early 2003, when another Cape employee began to suspect that Beaudoin was stealing bid information and giving it to the conspirators to facilitate their bid-rigging. *See* Complaint at ¶¶ 33-37. Cape reported these suspicions to the United States Attorney’s Office for the Eastern District of Wisconsin and cooperated with the Federal Bureau of Investigation, resulting in the arrest of Beaudoin and the other defendants. *Id.*

Cape was not a participant in the conspiracy. In order to undermine Cape’s efforts to obtain contracts that the conspirators sought to allocate between defendants Vinton Construction Company (“Vinton Co.”) and Streu Construction Company (“Streu Co.”), defendants enlisted Beaudoin to steal and manipulate Cape’s bid information. This enabled the conspirators to surgically undercut Cape on any business that they wanted. Complaint at ¶¶ 1, 25-75. Any “lower” price offered by Vinton Co. and Streu Co. thus was not a competitive price or the result of competition. It was a necessary device to implement the exclusion of Cape so as to realize the bid-rigging scheme.

Defendants ignore all this and argue that, so long as any of the bids in question were lower than Cape’s, as a matter of law there can be no antitrust injury to Cape. This is so, according to them, even if the lower bid resulted not from competition but rather from the use of

information **stolen** from Cape to ensure that paving work would go only to the conspirators. They also believe this would be true even if the “lower” bid was only lower because a corrupt employee wrongfully raised the injured company’s bid so that the successful “lower” bid is only lower in the relative sense. In other words, defendants’ contend that even if the “lower” bid only came to be because a crooked employee made the “higher” bid higher also allowing defendants to inflate the “lower” bid, there can be no antitrust injury. This is an unreasonable statement of law, supported by no authority, and contradicted by the facts and law in this case.

Defendants’ argument must be viewed with even greater skepticism given that their motions are to dismiss. Consequently this Court and defendants are **required** to accept the allegations as true for purposes of these motions. *Phillips Getschow Co. v. Green Bay Brown County Professional Football Stadium Dist.*, 270 F.Supp.2d 1043, 1045 (E.D. Wis. 2003); *Zinermon v. Burch*, 494 U.S. 113, 118 (1990). Defendants James J. Maples, Michael J. Maples, and Vinton Construction Company (“Maple/Vinton defendants”) did not do this. Instead, they pled their own “facts,” alleging that the conspiracy involved “three road construction companies” and that Cape, through its “agent,” was the third active participant in the conspiracy. Docket No. 21 at 2.

These unsworn allegations are untrue and are certainly not contained in the Complaint or any of the documents referred to by defendants.² Beaudoin was **not** Cape’s agent and acted without Cape’s knowledge or authority. He acted for his own benefit. Further, while Cape was not a party to the cartel, the irony is that even a criminal cartel member can suffer antitrust injury when the cartel inflicts losses on it as punishment for attempting to compete. Here, Cape had a

² To Cape’s knowledge, defendants’ purported unsworn “details” were never mentioned in any of the public filings in the criminal matters before this Court. The only reference found in the publicly available documents to Cape is in the various objections filed by defendants to the

corrupt employee who was recruited by bid-riggers to steal and manipulate information to facilitate their conspiracy. These actions drove Cape out of business. Defendants can hardly argue that Cape has fewer rights to relief under the antitrust laws than it would have were it a participant in the bid-rigging rather than an innocent bystander whose information brought the conspirators to justice.

The Maples/Vinton defendants also state that there is “significant debate whether the conspiracy succeeded in its objectives or whether it affected competition as a whole.” Docket No. 21 at 2. One finds no such “debate” present in the plea agreements. There, defendants (save Beaudoin) admitted that their actions harmed competition and that, in fact, they successfully rigged bids. *See, e.g.*, Complaint at Exhibits B through G; *cf. United States v. Mendoza*, 464 U.S. 154, 158, 104 S.Ct. 568, 571 (1984) (once a court has decided an issue of fact or law necessary to its judgment, that decision is conclusive in a subsequent suit based upon a different cause of action involving a party to the prior litigation). The fact that their scheme was successful and did harm competition is borne out by the fact that all of the defendants, save Beaudoin, paid large fines and restitution to the state. Complaint at ¶¶ 78-80; *see also* Exhibits A through C. By suggesting otherwise in their brief, defendants arguably have violated the terms of their plea agreements, which required them to admit to the facts alleged. Complaint at Exhibits B through G.

Defendants’ antitrust injury argument ultimately fails because their bid-rigging conspiracy gave them market power (“the power to control prices or exclude competitors”) which is “the evil at which the antitrust laws are aimed,”³ and the very same market power that

Presentence Reports confidentially filed with the Court. Suffice it to say that Cape has no access to any of the PSRs or other records that are subject to the protective order in the criminal case.

³ *Blackburn v. Sweeney*, 53 F.3d 825, 830 (7th Cir. 1995).

injured the State injured Cape. Because both harms resulted from the anticompetitive effect of the bid-rigging conspiracy, both constitute antitrust injury.

Equally baseless is defendants' argument that their criminal manipulation of the core function of the WisDOT, the public bidding process, cannot in any circumstance constitute sufficient "control" of the WisDOT so as to satisfy the requirements of the Racketeer Influenced and Corrupt Organizations Act ("RICO") and the Wisconsin Organized Crime Control Act ("WOCCA"). The admittedly criminal scheme employed by defendants was designed to and did allow defendants to manipulate, and thereby control, the State mandated bidding process. Not only is defendants' bid rigging conspiracy, which went on for many years, an association-in-fact enterprise in and of itself within the meaning of these statutes, but their manipulation of the WisDOT constitutes sufficient control so as to subject the defendants to civil liability under both RICO and WOCCA. *See, e.g., Lockheed Martin Corp. v. Boeing Co.*, 357 F. Supp. 2d 1350 (M.D. Fla. 2005).

The purposes of the antitrust laws and RICO are served by insuring the viability of the private cause of action. The private action is an ever-present threat to deter anyone contemplating criminal business behavior. *Perma Mufflers v. Int'l. Parts Corp.*, 392 U.S. 134 (1968), *overruled on other grounds*. Cape, which was driven out of business by the criminal conduct of people who are in prison and who paid large amounts in restitution to the State, should be permitted discovery to garner and present facts to support the clear claims of antitrust injury and racketeering control that have been made in this case. The motions to dismiss should be denied.

ARGUMENT

I. Cape has more than adequately pled sufficient antitrust injury to survive a motion to dismiss.

The antitrust laws were enacted to protect competition. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). Defendants admit that they rigged WisDOT's bidding process in large part by using stolen and manipulated bid information from Beaudoin, thus preventing Cape from competing. This conduct violates the Sherman Act. Yet defendants argue that this Court must dismiss this case because of a purported lack of antitrust injury. Defendants' argument is that all bid-rigging schemes, no matter how they are implemented, cannot cause antitrust injury to a competitor because the criminal bid is lower than the bid of the injured party driven out of business. This argument is baseless.

An important threshold issue is that the existence of antitrust injury is not typically resolved through motions to dismiss. *Brader v. Alleghany General Hospital*, 64 F.3d 869, 876 (3d. Cir. 1995); *Biovail Corp. Int'l. v. Hoechst Aktiengesellschaft*, 49 F.Supp.2d 750, 773 (D.N.J. 1999); *Coors Brewing Co. v. Miller Brewing Co.*, 889 F. Supp. 1394, 1402 (D.Col. 1995). Pleading antitrust violations does not require more than notice pleading requires of other claims. *South Austin Coalition Community Council v. SBC Communications, Inc.*, 274 F.3d 1168, 1171 (7th Cir. 2001) ("Courts must follow the norm that a complaint is sufficient if any state of the world consistent with the complaint *could* support relief." (emphasis in original)). As such, an antitrust complaint must stand if it asserts factual allegations that, if proven, tend to establish an injury that flows from a threatened or actual restraint on competition. This is for good reason – discovery may bear out the existence of an injury that is only generally alleged in the complaint.

For example, in *Coors Brewing Co.*, Coors alleged "less than clear" antitrust violations, based in part on an existing contract between Coors and Molson which gave Molson some

control over Coors' brands. The court nonetheless found that Coors alleged sufficient potential antitrust injury to entitle it to "marshal the facts" necessary to support its claim through discovery:

While Coors' theory in this regard is less than clear, I find Coors has pleaded sufficient factual allegations to survive the present motion to dismiss. . . . At this stage of the proceedings, Coors' ability to marshal the necessary facts to support its theory of antitrust injury has not been tested and dismissal is inappropriate. If Coors is unable during discovery to marshal those facts, defendants no doubt will renew their challenge to the sufficiency of Coors' claims and the issue will be revisited on a motion for summary judgment.

Coors, 889 F. Supp. at 1402. Here, unlike Coors, Cape's antitrust injuries are quite clear.

While this Court did dismiss an antitrust case based on plaintiff's failure to allege antitrust injury in *Phillips Getschow*, *supra*, it did so based on facts radically different from those in this case. In *Phillips Getschow*, the single alleged bidding impropriety was that **the customer** – the Green Bay Brown County Professional Football Stadium District – asked that more bids be submitted in connection with renovating Lambeau Field. Such a request by a customer indisputably led to greater participation in the bidding process (*i.e.* **increased** competition). The Court correctly acknowledged that in different circumstances, such as those in *United States v. Portsmouth Paving Corp.*, 694 F.2d 312 (4th Cir. 1982), it would be possible for antitrust injuries to result from a bid rigging scheme that **restricted** competition:

Moreover, the bid rigging scheme in *Portsmouth Paving Corp.*, was horizontal between competitors and had the undisputed effect of forcing the government purchasers of roadway construction and surface paving to pay more for those services than had there been free competition. *See id.* at 317, 319. Thus, even if antitrust injury had been required **it would have been found**, as competition was being restricted and as a result the consumer plaintiff was paying higher prices for the services it was purchasing.

Phillips Getschow, 270 F.Supp.2d at 1049 (emphasis added).

Ultimately, an injury is an “antitrust injury” if it is attributable to the anticompetitive aspect of a business act under scrutiny. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990). Collusion among competitors to exclude another competitor from the market and to fix prices is precisely the type of injury the antitrust laws were intended to prevent. *Biovail*, 49 F.Supp.2d at 772. Defendants’ bid rigging conspiracy did just that.

Because Cape was not a participant in the conspiracy (Complaint at ¶¶ 1, 14, 33-37), it had to be prevented from winning the projects that Vinton Co. and Streu Co. had conspired to allocate among themselves. Complaint at ¶¶ 1, 27-32, 91 (“The defendants, through their bid rigging conspiracy, prevented Cape from winning bids that the defendants had allocated to themselves, by revealing to Streu Co. and Vinton Co., in advance, the bid Cape was going to submit, so that one of them could undercut it by a small amount and win the bid with certainty whenever they chose to do so.”).

The method for excluding Cape was Beaudoin. Beaudoin manipulated bid prices and stole Cape’s bid totals. He gave this information to the other the conspirators, which enabled them to undercut Cape by a miniscule amount on any business that they wanted. Complaint at ¶¶ 33-75. For example, in April of 1999 – after the conspiracy began – Vinton Co. underbid Cape by approximately \$43,000 on a \$1.5 million project and \$1,500 on a \$650,000 project after Beaudoin conveyed Cape’s bidding information to the other defendants. Complaint at ¶¶ 41-45. Thus, the “winning bid” offered was not the result of competition; it was the strategic device necessary to prevent Cape’s bids from upsetting the bid-riggers’ apple cart.

Defendants’ arguments totally ignore the significance of defendant Beaudoin’s participation in the conspiracy. Beaudoin’s participation gave the conspirators the absolute discretion to exclude Cape from winning any bid award they wanted to win. Thus, where Cape

was “underbid,” Cape lost the business through collusion – not competition. Further, Cape has reason to believe that Beaudoin inflated some of Cape’s “bids,” and that “bids” by defendants were inflated to come just under Cape. Cape thus suffered antitrust injury when it lost business as a result of reduced, not increased, competition. Cape is certainly entitled to discovery and trial on this issue.

Defendants counter by alleging that Cape was part of the conspiracy. This allegation in the form of unsworn statements is not in the Complaint, not supported by the documents referenced by defendants, and is false. The irony of this argument is that, in any event, even a **member** of a price-fixing cartel can suffer antitrust injury if the cartel punishes it for attempting to compete by inflicting losses on that cartel member. *Blackburn v. Sweeney*, 53 F.3d 825, 830 (7th Cir. 1995), *Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774, 782-783 (7th Cir. 1994) (and cases cited therein). In *Hammes*, in discussing an alleged customer allocation scheme, Judge Posner wrote as follows:

If the complaint showed that [Plaintiff’s] only gripe was that it had been expelled from a cartel and thereby deprived of cartel profits, it could not recover those lost profits as antitrust damages. . . . That [Plaintiff] is seeking lost cartel profits is only one possible interpretation of the complaint, however, and any ambiguities must be left to further proceedings to resolve. Another interpretation is that [Plaintiff] wanted to compete by underselling the other dealers, thus weakening or breaking the cartel, and that it was ejected from the advertising pool in order to prevent it from, or punish it for, doing this. Losses inflicted by a cartel in retaliation for an attempt by one member to compete with the others are certainly compensable under the antitrust laws [citations deleted].

Hammes, 33 F.3d at 782-783. Cape was never a cartel member and was not being punished for cheating on the cartel agreement. Cape was, however, “punished” for being a competitor. Because independent bidding by a non-member of the conspiracy would undermine the conspiracy, something had to be done about Cape. What the conspirators did about Cape was to steal and manipulate information that enabled them to replace the competitive process with their

own collusive process. Cape was driven out of business as a result. Clearly that is antitrust injury, injury resulting from “the evil at which the antitrust laws are aimed.” *Blackburn v. Sweeney*, 53 F.3d at 830.

Cape’s claim for damages does not seek a share of the cartel’s profits; it seeks damages for being excluded from bid awards through the defendants’ collusive bid-rigging. In *Blackburn v. Sweeney*, *supra*, the Seventh Circuit stated:

Plaintiffs correctly argue that a cartel participant may suffer an antitrust injury. ‘Losses inflicted by a cartel in retaliation for an attempt by one person to compete with the others is certainly compensable under the antitrust laws’ [citation to *Hammes*]. However, the defecting member suffers an antitrust injury in that circumstance because the remaining cartel’s ability to retaliate depends on its power in the market. **That market power, resulting from the collusion among the remaining members, is the evil at which the antitrust laws are aimed.** Therefore, because the harm suffered by a consumer forced to pay inflated prices, and the harm inflicted on an excluded competitor and one-time cohort (e.g., through predatory pricing) both result from the anti-competitive effect of the cartel agreement, they are both antitrust injuries.

Id. (emphasis added).

Cape’s antitrust injuries are thus completely different from those alleged by the plaintiffs in *Brunswick* and *Atlantic Richfield Co.* In those cases, competition was **increased** by the defendants’ actions. In *Brunswick* – after two trials and ten years of litigation – the United States Supreme Court dismissed the Pueblo Bowl-O-Mat’s claims due to a lack of an antitrust injury. Pueblo had alleged it was injured because Brunswick purchased failing bowling alleys against which Pueblo was forced to compete. In other words, Pueblo was arguing that the antitrust laws entitled it to the benefits it would have received had there been less competition. But the facts here are materially different. Cape was injured not because of **increased** competition, but because the defendant bid riggers had replaced competition with a market allocation scheme that they controlled. Cape’s injury, therefore, is manifestly antitrust injury.

Atlantic Richfield is also inapplicable. That case did not involve a horizontal conspiracy aimed at overcharging customers. It involved a vertical marketing strategy under which a refiner instructed its dealers to charge lower prices in order to increase their business. Competing dealers lost business to the discounters and sued under the antitrust laws. There was obviously no antitrust injury because the overall effect of the challenged conduct was lower prices for consumers. Here, the defendants have pled guilty to felonies and admitted that the overall effect of their conduct was higher prices for consumers, namely WisDOT and Wisconsin tax payers. The same anticompetitive conduct – the operation of the bid-rigging conspiracy – injured Cape. Cape’s injury therefore constitutes antitrust injury.

The Complaint in this matter more than adequately alleges that Cape’s damages resulted not from increased competition but from the complete displacement of competition by the defendants’ conspiracy. Cape’s claim should be allowed to stand.

II. Cape has alleged sufficient control of the enterprise under federal and state RICO statutes because defendants controlled a core function of the WisDOT through its bid-rigging scheme.

Defendants’ argument that Cape failed to sufficiently plead federal and state civil racketeering claims is equally flawed because it ignores important allegations showing that defendants controlled the WisDOT through a pattern of racketeering activity. Defendants do not and cannot contest that certain of the key allegations of the RICO claims have been properly pled – the existence of an enterprise and a pattern of racketeering activity. Rather, they argue that Cape has not alleged that defendants exerted the requisite level of control over the enterprise, the first of the four RICO elements. This argument is baseless because defendants exercised control not only over their own associated-in-fact enterprise, but also over the public highway bidding process that is a core function of the WisDOT.

In order to conduct the affairs of an enterprise, one must exert some level of control over the enterprise itself. The requisite level of control was first articulated in *Reves v. Ernst & Young*, 507 U.S. 170, 179 (1993), and is commonly referred to as the “operation or management” test. The test in *Reves* states that in order to participate, directly or indirectly, in the conduct of an enterprise’s affairs, one must have some part in directing those affairs. *Id.* This direction does not have to come from an employee or insider of the enterprise. The Supreme Court in *Reves* held that an enterprise might also be operated or managed by an outsider associated with the enterprise who exerts some sort of control over it, citing bribery as one, but not the only, example. *Id.* Indeed, an outsider can control a public bidding process by stealing a competitor’s bid information in order to control the order of bids.

The Seventh Circuit recently elaborated on what circumstances might constitute adequate control by an outsider so as to satisfy *Reves* in *United States v. Cummings*, 395 F.3d 392 (7th Cir. 2005). In *Cummings* the alleged enterprise was the Illinois Department of Employment Security (“IDES”). The defendants were low-level employees of the IDES and an outside debt collector, known as a “skip tracer,” who paid the defendants to provide him with confidential contact information from the IDES database to help him collect on bad debts. The Seventh Circuit held that these bribes were not sufficient to establish that the outsider “skip tracer” operated or managed the affairs of the IDES under *Reves*, as the bribes were not paid to exert control over the “core functions” of the IDES. *Id.* In making this finding, however, the court stated that the analysis would be “an entirely different ball game” if the bribes were paid to facilitate payments of unemployment benefits to unqualified recipients or to falsify payment premiums by employers – the “core functions” of the IDES. *Id.* at 399. In other words, if the outsider acted in such a

manner so as to implicate the core functions of the enterprise, the “control” requirement of the RICO Act and WOCCA would be satisfied.

The situation here is the “entirely different ball game” conceived of by the Seventh Circuit. Defendants exerted control over one of the WisDOT’s core functions – the award of public highway construction contracts – through their pattern of racketeering activity. Complaint at ¶¶ 26-75. The bidding process in Wisconsin for highway construction projects is highly regulated with the WisDOT being **required** to award highway construction contracts to the “lowest competent and responsible bidder as determined by the department.” Wis. Stat. § 84.06; *see also* Complaint at ¶¶ 20-24. The purpose of this and other public bidding statutes is to prevent collusion. By submitting rigged or noncompetitive bids, and lying in affidavits to the WisDOT stating that the bids were not the product of collusion, defendants controlled the selection process by “fixing” its outcome – *i.e.* predetermining who would be the lowest bidder and thereby controlling the statutorily-mandated bidding process which limits the discretion of the awarding authority. *See, e.g.*, Complaint at ¶¶ 3, 104 (“Throughout this entire period, defendants utilized the bidding mechanisms set up by the WisDOT for the letting of public construction projects in order to implement and further their scheme. By submitting rigged bids, defendants participated in the conduct of the enterprise – *i.e.* the bidding processes established by the WisDOT.”). Such fixing constitutes sufficient control of a core function of WisDOT so as to satisfy the requirements of civil RICO and WOCCA.

This conclusion is buttressed by a recent holding that the *Reves* test can be satisfied where a government agency’s bidding process was affected by an outsider who stole another company’s bidding information, *Lockheed Martin Corp. v. Boeing Company*, 357 F.Supp.2d. 1350 (M.D. Fla. 2005). Both Boeing and Lockheed Martin were bidding to obtain projects with

NASA. According to plaintiffs, Boeing employees stole confidential information on Lockheed Martin's bidding plans. Boeing then used the misappropriated information to underbid Lockheed Martin. The court held that the Boeing employees' racketeering activity "substantially impacted the decisions of those who had principle decision-making authority" at NASA, such that conduct fell within the bounds of the "operation or management" test. *Id.* at 1359-60.

Lockheed Martin's allegations of "control" bear a strong resemblance to the facts in [*United States v. Castro*], 89 F.3d 1443 (11th Cir. 1996)]. In this case, the Boeing Defendants were not primarily responsible for determining which companies received launch contracts. Yet, like the defendants in *Castro*, they are alleged to have engaged in illegal activity which substantially impacted the decisions of those who did have principal decision-making authority. The only difference in this case is that the decision-makers were neither aware of, nor complicit in, the alleged scheme. This is a distinction, however, that is irrelevant to the question of whether the Boeing Defendants controlled the alleged legitimate enterprises through their illegal conduct.

Id. at 1359-1360. In any case, the defendants here exercised control over the WisDOT just as the Boeing defendants exercised control over NASA, thus subjecting them to RICO liability.

The facts alleged are thus unlike those alleged in *Goren v. New Vision Int'l Inc.*, 156 F.3d 721 (7th Cir. 1998), in which the defendants merely provided services to an allegedly illicit enterprise, services which did not constitute control over any of the affairs of the enterprise. *Id.* at 727-728. It is also unlike the scenario presented in the other cases cited by defendants – *Stone v. Kirk*, 8 F.3d 1079 (6th Cir. 1993) and *University of Md. v. Peat Marwick Main & Co.*, 996 F.2d 1534 (3d Cir. 1993) – which also involve service providers to enterprises that did not act inappropriately in obtaining or performing services for the enterprise. Here, the defendants came to perform services for the WisDOT by hijacking a core function of such enterprise; by doing so they operated and managed the enterprise so as to implicate RICO and WOCCA.

III. Cape’s state law antitrust and WOCCA claims are similarly well pled, and in any event should not be dismissed with prejudice.

Cape has more than adequately pled antitrust injury for its federal antitrust claim, and sufficient “control” of the enterprise for purposes of RICO. It thus follows that it has more than adequately pled state law antitrust and racketeering claims. But to the extent there is any question of this, this Court should allow a state court to decide whether Cape has stated a claim under state law because Wisconsin’s statutes vary in significant ways from federal law. *Van Harken v. City of Chicago*, 103 F.3d 1346, 1354 (7th Cir. 1997) (reversing district court’s decision to dismiss with prejudice a supplemental state law claim because the Illinois constitution is not conterminous with the federal constitution; while plaintiff was unlikely to succeed, “it is not so unlikely that the plaintiffs should be denied an opportunity to try to persuade them.”).

If there is any question as to the sufficiency of the allegations as to the federal and state claims (which Cape contends there is not), the claims certainly should not be dismissed with prejudice as defendants request. Cape should be afforded the opportunity to amend its Complaint so as to describe in even greater detail the damages it suffered as a result of defendants’ Sherman Act violations and how another enterprise – an association-in-fact enterprise consisting of defendants and others – existed and was utilized by defendants to perpetrate their scheme. Fed. R. Civ. P. 15 (leave to amend “shall be freely given when justice so requires”).

CONCLUSION

Cape’s Complaint sets forth in detail facts sufficient to support claims under the Clayton Act, RICO Act, Wis. Stat. § 133, and WOCCA. The Complaint describes an indisputably criminal scheme to rig bids and thereby decrease competition. It describes how this scheme

resulted in injury both to the market and to Cape. It describes that a purpose of the scheme was to control a core function of the WisDOT – the bidding process – and how this was accomplished through a pattern of fraud which was indisputably pled with specificity. This Complaint is legally sound, and Cape should be allowed to pursue the claims therein immediately and aggressively.

Dated this 9th day of June, 2005

MATTHEW J. FLYNN
CRISTINA D. HERNANDEZ-MALABY
ADRIENNE OLSON

s/Matthew J. Flynn

QUARLES & BRADY LLP
411 East Wisconsin Avenue
Suite 2040
Milwaukee, WI 53202-4497

Attorneys for plaintiff
James Cape & Sons Company