IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 95-1032

SYSTEMCARE, INC.,

Plaintiff-Appellant,

v.

WANG LABORATORIES, INC.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

BRIEF FOR AMICUS CURIAE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANT

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STATEMENT OF INTEREST OF THE UNITED STATES

The United States is principally responsible for the enforcement of the Sherman Act, 15 U.S.C. 1 and 2. It accordingly has a strong interest in the proper interpretation of those laws. This district court's erroneous interpretation of this Court's decisions in City of Chanute v. Williams Natural Gas Co., 955 F.2d 641 (10th Cir.), cert. denied, 113 S. Ct. 96 (1992), and McKenzie v. Mercy Hospital of Independence, Kansas, 854 F.2d 365 (10th Cir. 1988), threatens both public and private enforcement of Section 1 of the Sherman Act. Accordingly, the United States has a strong interest in the proper determination of this appeal.

STATEMENT OF ISSUES

Whether a contract between a customer and the seller in an alleged tying scheme can be a "contract . . . in restraint of trade or commerce" that is unlawful under Section 1 of the Sherman Act.

STATEMENT OF THE CASE

Nature of the case. This is a civil action for damages and injunctive relief for alleged violations of Section 1 of the Sherman Act, 15 U.S.C. 1.

Course of proceedings and disposition. The complaint was filed on November 11, 1989, in the United States District Court for the District of Colorado. On March 13, 1992, the court, the Honorable Lewis T. Babcock, granted summary judgment for the defendant on plaintiff's Section 1 claim. On May 4, 1992, the court, pursuant to Rule 54(b), Fed. R. Civ. P., directed entry of final judgment in favor of the defendant on the Section 1 claim. Subsequent proceedings were delayed by the defendant's bankruptcy. On December 15, 1994, the court ordered the matter reinstated in the court's active docket and denied plaintiff's motion for reconsideration.

STATEMENT OF FACTS

1. Wang Laboratories, Inc. ("Wang") is a computer manufacturer, whose products include "VS" minicomputers.[1] Wang holds copyrights on certain important software for VS computers, and is therefore the only source of this software and of certain support services related to it, including technical support and software updates. (Memorandum Opinion and Order, March 13, 1992 ("Op.") 2, Aplt. App. at 56.) Wang also provides support services, including maintenance and repairs, for VS computer hardware.

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[1]We recite the facts as they stood in 1992, when the district court granted summary judgment.

In 1985, Wang began selling hardware and software support services separately. A VS computer user could therefore buy software support from Wang and hardware support from another company. Wang sold software support services in two different ways. It sold software service contracts that covered all software support services for a one or two year period for a fixed fee. And it sold software support services on a "per incident" basis, under which the customer is separately charged each time a service is provided. However, Wang sold fixed fee service contracts only to customers who also contracted with Wang for hardware maintenance.

Systemcare, Inc. ("Systemcare") competes with Wang in providing hardware support services for VS computers, but it does not provide VS software support services in competition with Wang. In 1989, Systemcare brought this antitrust suit against Wang, alleging that Wang, by refusing to sell software services on a contract rather than a per incident basis unless the buyer also buys hardware maintenance services, unlawfully tied "the sale of its Software Support Services (the tying product) to the purchase of its Hardware Support Services (the tied product)," Complaint ¶ 7, Aplt. App. at 3, in violation of Section 1 of the Sherman Act.[2]

2. Wang moved for summary judgment. In its memorandum in support of its motion, Wang argued that there was a "complete failure of proof with respect to two independently dispositive issues: (1) Wang does not tie the sale of software support to hardware maintenance, and (2) Wang lacks the requisite market power to compel acceptance of its hardware maintenance services." (Doc. 134 at 8.) In support of the first point, Wang contended that substantial percentages of its software support customers purchase some or all of their software support on a per incident basis (id. at 12), which, as noted above, does not require

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[2]Wang counterclaimed against Systemcare and its President, Michael Wright, alleging trademark infringement and other claims. These claims are not now before the Court, and so we do not address them.

purchase of Wang hardware services. Wang also argued that the record evidence did not show that any customers had been "forced to buy hardware maintenance from Wang because of the alleged tie." (Id. at 18.) In support of the second point, Wang argued that the relevant product market was the market for minicomputer systems, and in that market it had only a 3% market share, too little to confer market power. (Id. at 27-28.)

In response, Systemcare contended that Wang's entire argument rested on hotly contested facts. In particular, Systemcare maintained that per incident service was a "lower-quality, more-expensive service [than contract service] that is unacceptable to many customers" (Doc. 139 at 4), so that for many customers there is no reasonable substitute for contract service, resulting in a tie; that appreciable numbers of customers claim to have been forced to purchase their hardware maintenance from Wang (id. at 6); and that the relevant product markets were the markets for software support for Wang minicomputers (in which, obviously, Wang had a very substantial share) and the market for hardware maintenance for Wang minicomputers, rather than the market for minicomputer systems (id. at 5).

3. In granting summary judgment for Wang, the district court addressed none of the arguments raised by the parties.[3] The court instead held that under this Court's then-recent decision in City of Chanute v. Williams Natural Gas Co., 955 F.2d 641 (10th Cir.) ("Chanute IV"),[4] cert. denied, 113 S. Ct. 96 (1992), Systemcare had failed to show there was a genuine issue of fact as to the critical Section 1 element of concerted action. (Op. 4, Aplt. App. at 58.)

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[3]In our view, both we and the Court would be well-served by permitting the district court to address these issues for the first time on remand.

[4]In referring to the various Chanute opinions, we follow this Court's numbering scheme. See City of Chanute v. Williams Natural Gas Co., 1995-1 Trade Cas. ¶70,890, at 73,905 n.1 (10th Cir. Sept. 8, 1994) ("Chanute VI"). We refer to the litigation in general as "Chanute."

The court observed that this Court "now holds that a tying arrangement imposed by a single entity is not proscribed by Section 1 of the Sherman Act," Op. 4, Aplt. App. at 58, citing Chanute IV and McKenzie v. Mercy Hospital of Independence, Kansas, 854 F.2d 365 (10th Cir. 1988), and said that "there is no evidence that Wang allied itself with any other party in forcing WSS [i.e., contract software support] customers to accept its hardware services." Op. 4-5, Aplt. App. at 58-59.

The court recognized that Systemcare "contends that a conspiracy exists between the WSS customers and Wang because the WSS customers acquiesce to the alleged tying arrangement even though they know that the WSS contract may illegally restrain trade." Op. 5, Aplt. App. at 59. But it held that "[a] contract between a customer and the seller in an alleged tying scheme does not establish a Section 1 conspiracy" under Chanute IV. Op. 5, Aplt. App. at 59

The court was plainly troubled by this result. In its view, "[b]y requiring proof of the archetypical conspiracy to maintain a Section 1 claim, Chanute [IV] and McKenzie seemingly erase the words 'contract' and 'combination in the form of trust or otherwise' from Section 1." Id. at 6, Aplt. App. at 60. Nevertheless, the court felt itself bound by its interpretation of this Court's cases and granted summary judgment for Wang.

SUMMARY OF ARGUMENT

The district court's holding that a tying contract between a buyer and a seller cannot violate Section 1 of the Sherman Act flies in the face of the clear statutory language and consistent Supreme Court precedent spanning nearly a century. The district court believed that its holding was required by this Court's decisions in Chanute IV and McKenzie. But those decisions do not compel any such startling and erroneous interpretation of the Sherman Act.

ARGUMENT

THE DISTRICT COURT ERRED IN HOLDING THAT A CONTRACT BETWEEN A BUYER AND A SELLER DOES NOT CONSTITUTE CONCERTED ACTION FOR PURPOSES OF SECTION 1 OF THE SHERMAN ACT

A. The Sherman Act's Proscription of "Every Contract . . . in Restraint of Trade or Commerce Among the Several States" Does Not Except Tying Contracts Between Buyer and Seller

The first sentence of the Sherman Act broadly provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. 1. The Supreme Court long ago concluded that Congress intended only to proscribe arrangements that restrain trade unreasonably, Standard Oil Co. v. United States, 221 U.S. 1, 59-60 (1911), else the statute would "outlaw the entire body of private contract law," National Society of Professional Engineers v. United States, 435 U.S. 679, 687-88 (1978). But, subject to that qualification, the statutory language is "broad enough to embrace every conceivable contract . . . which could be made concerning trade or commerce or the subjects of such commerce." Standard Oil, 221 U.S. at 60.

Certain contracts between buyer and seller, such as tying contracts and requirements contracts, may unreasonably restrain trade, see, e.g., Standard Oil Co. v. United States, 337 U.S. 293, 305-07 (1949) ("Standard Stations"), for they may foreclose access to the market by the seller's competitors. Thus, the Supreme Court repeatedly has found tying contracts between buyer and seller that unreasonably restrained trade in violation of Section 1 of the Sherman Act. For example, when International Salt Co. distributed its machines under leases that required the lessor to purchase from the company all the salt the machines used, the Court affirmed the district court's imposition of liability under Section 1 of the Sherman Act (as well as Section 3 of

the Clayton Act). International Salt Co. v. United States, 332 U.S. 392 (1947). Section 1 liability was based on the restraint in the contract between lessor and lessee. Id. at 396-98. Similarly, in Northern Pacific Railway Co. v. United States, 356 U.S. 1 (1958), the Court concluded that sales contracts and leases for land that required the buyer or the lessee to ship the products of the land over the seller's railroad lines were tying contracts that violated Section 1 of the Sherman Act. And in United States v. Loew's Inc., 371 U.S. 38 (1962), the court held that several motion picture distributors had individually violated Section 1 of the Sherman Act by means of contracts that licensed one or more feature films to television stations on condition that the stations license other films -- that is, by entering into tying contracts with the buyers of films.

In other cases involving alleged tying contracts, the Supreme Court has found no violation of Section 1 of the Sherman Act because the Court concluded after elaborate market analysis that the contracts did not unreasonably restrain trade. In these cases, the Court could have disposed of the matter more simply had it held that contracts between buyer and seller are not proscribed by Section 1. Thus, for example, in Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 601 (1953), the district court had held that certain contracts between a newspaper and its customers for advertising space were tying contracts that violated Section 1 of the Sherman Act. The Supreme Court reversed, concluding after extensive discussion that there was no unlawful tie because the defendant lacked the requisite market power and because the allegedly tied products were more properly viewed as a single product. Id. at 610-14. It also considered whether the contracts between buyer and seller were unlawful "under the Sherman Act's general prohibition on unreasonable restraints of trade," id. at 614,[5] concluding after a twelve-page discussion of a

[5]Many tying arrangements are treated as unreasonable per se, see Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 9-18 (1984), while most other arrangements between buyer and seller are evaluated under the Rule of Reason.

record "replete with relevant statistical data" (id. at 615), that they were not. Id. at 615-26.[6] None of this discussion would have been necessary to the Court's conclusion that the contracts did not violate Section 1 of the Sherman Act if, as the district court held in this case, contracts between buyer and seller are insufficient as a matter of law to establish a concert of action for purposes of that section.[7]

To be sure, in none of its tying decisions did the Supreme Court squarely hold that a tying contract between buyer and seller is sufficient to establish the element of concerted action for purposes of Section 1. As this Court observed concerning Loew's, the issue "was not presented to the Supreme Court." Chanute IV, 955 F.2d at 650 n.10. There was no reason for it to be presented, for the statute by its terms reaches "[e]very contract, combination in the form of trust or otherwise, or conspiracy" that unreasonably restrains trade, and the Supreme Court in 1911 confirmed that understanding. See Standard Oil, 221 U.S. at 59-60. Far from indicating that the issue is open, the absence of discussion in more recent cases reflects the clarity of the law.

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[6]Some of this analysis also supported the Court's brief analysis of liability under Section 2 of the Sherman Act. Times-Picayune, 345 U.S. at 626-27.

[7]Similarly, in United States Steel Corp. v. Fortner Enterprises, 429 U.S. 610 (1977), the Court reversed a finding that U.S. Steel's tied sale of prefabricated houses and credit to Fortner was per se unlawful under Section 1 of the Sherman Act. It did so because it found that U.S. Steel had not been shown to have sufficient economic power in the tying product market to establish a per se violation. Id. at 622. It would have been simpler to reverse on the ground that a tying contract between a buyer and a seller does not implicate Section 1.

B. This Court's Decisions Do Not Create An Exception to Section 1 For Tying Contracts Between Buyer and Seller

The district court's sole reason for holding that Section 1 of the Sherman Act is inapplicable, as a matter of law, to a contract between buyer and seller was its belief that this Court had so held in McKenzie and Chanute IV. But those cases, neither of which involved a tying contract between buyer and seller, do not compel such an erroneous result.

1. McKenzie

Mercy Hospital revoked Dr. McKenzie's staff privileges. Dr. McKenzie responded with a lawsuit alleging, among other things, that "the bylaws, rules, and regulations of Mercy Hospital tied the market for physician services (the tied product) to the market for hospital facilities and services (the tying product)," in violation of Section 1 of the Sherman Act. McKenzie, 854 F.2d at 366. The district court "noted that Dr. McKenzie had named only Mercy Hospital as a defendant and had 'showed no evidence of any concerted action with any other persons to unreasonably restrain trade,'" id. at 366-67 (citation omitted), and granted summary judgment for the hospital on the Section 1 claim.

This Court affirmed. In doing so, it noted that Dr. McKenzie had failed to make a showing of more than unilateral conduct, a showing that "two or more parties have knowingly participated in a common scheme or design to accomplish an anticompetitive purpose." Id. at 367. In fact, the Court noted, "[t]he record before us lacks not only evidence of an unlawful tying arrangement, but also any allegation that Mercy Hospital has allied itself with any other 'individual' to tie a patient's choice of a physician in [the relevant geographic market] to the

patient's choice among the medical facilities available there." Id. at 367-78.[8] In other words, no tying contract between buyer and seller was shown in the record, or even alleged. Defendant Mercy Hospital, the Court concluded, did not enter into an agreement with anyone. Thus, dismissal of the Section 1 claim was "proper as a matter of law." Id. at 368.

The Court went on to discuss and reject, in language that apparently confused the district court here, Dr. McKenzie's attempt to extend Section 1 to reach unilateral conduct. Dr. McKenzie argued "that '[m]ulti-party action' is unnecessary to trigger a cause of action for unlawful tying. . . . All that is needed, he contends, 'is simply an arrangement which links two separate and distinct product markets together.'" Id. (citations omitted). This Court responded that:

> Though he proposes a simplistic definition of an unlawful tying arrangement, Dr. McKenzie is correct in his assertion that a single entity can establish one. See, e.g., Sargent-Welch Scientific Co. v. Ventron Corp., 567 F.2d 701, 711-13 (7th Cir. 1977), cert. denied, 439 U.S. 822 . . . (197[9]). His argument is not persuasive, though, because it misses the point at issue in this appeal. Here, we are not concerned with the legal possibility of a single entity imposing a tying arrangement on its customers. The question before the court -- and to which we have replied in the negative -- is whether such an arrangement is proscribed by Section 1 of the Sherman Act.

Id. (footnote omitted). As we understand that passage, the Court was acknowledging that unilateral conduct -- including unilateral insistence on particular terms of sale -- may in certain circumstances constitute monopolization or attempted monopolization in violation of Section 2 of

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[8]Compare Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. at 4-5 (relying on an exclusive contract between a hospital and firm of anesthesiologists as the unlawful concerted activity that allegedly tied surgical services and anesthesiological services purchased by the hospital's patients).

the Sherman Act, 15 U.S.C. 2. But, the Court noted, the question before it was limited to Section 1 of the Sherman Act, which requires concerted action.[9]

The Court's reference to Sargent-Welch Scientific Co. v. Ventron Corp., 567 F.2d 701 (7th Cir. 1977), cert. denied, 439 U.S. 822 (1979), confirms that reading. In that case, a terminated dealer in electronic microbalances, Sargent-Welch, sued the manufacturer of these devices, Ventron, alleging violations of Sections 1 and 2 of the Sherman Act. One of the Section 1 contentions was that Ventron had conditioned sales of its microbalances on an agreement to purchase its millibalances. 567 F.2d at 708-09. But the district court found no proof that Ventron required its dealers to handle millibalances as well as microbalances. It found no Section 1 tying violation, and the court of appeals affirmed because "the essential element of agreement or understanding" was missing. 567 F.2d at 709. In other words, there could be no Section 1 tying violation because there was no agreement with anyone.

This Court's reference in McKenzie was not to the Sargent-Welch panel's discussion of Section 1, but to its discussion of Section 2 of the Sherman Act, in which the court noted that the district court had "found that Sargent-Welch's 'refusal to handle the millibalances may have been one reason why defendant terminated' the dealership." 567 F.2d at 712. Based on that finding, the court of appeals concluded that liability under Section 2 of the Sherman Act for "misuse[of] monopoly power" had not been excluded. Id. at 713.

Thus, McKenzie stands only for the proposition that Section 1 of the Sherman Act, unlike Section 2, requires concerted action. It does not hold, or even suggest, that contracts between buyer and seller are excluded from the reach of the statute.

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[9]Dr. McKenzie's Section 2 claim, which also failed, rested on entirely different conduct, the hospital's termination of his staff privileges. McKenzie, 854 F.2d at 366, 368-71.

2. Chanute IV

The Court's holding in Chanute IV that contracts between a natural gas pipeline and its customers did not violate Section 1 of the Sherman Act (Chanute IV, 955 F.2d at 650-51) did not rest on the proposition that a contract between buyer and seller may never constitute concerted action, as the district court believed. Rather, the Court's holding reflects two conclusions: (1) that the conduct that allegedly injured the plaintiffs was unilateral conduct by the pipeline; and (2) that the contracts between the pipeline and its customers were not in the nature of tying agreements or otherwise in unreasonable restraint of trade.

The facts of the Chanute litigation are somewhat complicated. The plaintiff Oklahoma cities (the "Cities") had entered into requirements contracts for natural gas with defendant Williams Natural Gas Company ("Williams"), which operated a pipeline. Under these contracts, the Cities were required to purchase all their natural gas from Williams, and Williams agreed to have enough natural gas available to meet the Cities' demands. Chanute IV, 955 F.2d at 646. Williams obtained gas from producers in various locations, transported it over its interstate pipeline, and delivered it to the Cities. City of Chanute v. Williams Natural Gas Co., 678 F. Supp. 1517, 1519 (D. Kan. 1988) ("Chanute I"). So far as we can determine from the various opinions, Williams sold delivered gas, and did not separately offer to transport gas. See Chanute IV, 955 F.2d at 646 ("At the time, under the full requirements contracts, Williams only transported its own gas over the pipeline.").[10]

[10]In any event, that was the traditional manner of business of interstate gas pipelines. See Associated Gas Distributors v. FERC, 824 F.2d 981, 993 (D.C. Cir. 1987), cert. denied, 485 U.S. 1006 (1988).

Substantial legislative and regulatory changes led to radical changes in the way natural gas companies did business.[11] In particular, FERC adopted regulations contemplating the "'unbundl[ing of]' the pipelines' transportation and merchant roles." Associated Gas Distributors v. FERC, 824 F.2d 981, 994 (D.C. Cir. 1987), cert. denied, 485 U.S. 1006 (1988). Williams then sought approval from the Federal Energy Regulatory Commission ("FERC") to transport gas for third parties "on a permanent basis." Chanute IV, 955 F.2d at 646 & n.2. FERC approval was not instantaneous, and in the meantime, Williams established a "temporary program to transport third party gas for the Cities." Id. at 646 & n.2.[12]

The Cities took advantage of the temporary program and waiver to purchase gas, to be transported by Williams, from third party sources. Chanute I, 678 F. Supp. at 1520-21. Williams, however, found that the economics of the temporary program worked to its disadvantage, id. at 1520; Chanute IV, 955 F.2d at 646, and it terminated the program. Chanute IV, 955 F.2d at 646. This effectively shut the Williams pipeline to gas from the suppliers with whom the Cities had contracted or entered into negotiations. Id.; Chanute I, 678 F. Supp. at 1521.

Williams' action did not shut the pipeline to transportation of all gas from third-party sources, because "FERC regulation obligated Williams to transport certain third party gas ('approved third party suppliers') that was still available to the Cities." Chanute IV, 955 F.2d at

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[11]Congress adopted the Natural Gas Policy Act, 15 U.S.C. §§ 3301 et seq., in 1982. In 1985, the Federal Energy Regulatory Commission ("FERC") adopted Order No. 436, 50 Fed. Reg. 42,408 (1985), which "envisage[d] a complete restructuring of the natural gas industry." Associated Gas Distributors, 824 F.2d at 993.

[12]The full requirements contracts required the Cities to purchase all their gas from Williams. To permit the Cities to purchase gas from third parties, gas that Williams would then transport, Williams obtained FERC approval for a temporary waiver of the requirement that the Cities purchase all their gas from Williams. Chanute IV, 955 F.2d at 646, 653.

646; see also City of Chanute v. Williams Natural Gas Co., 1990-1 Trade Cas. ¶ 68,967, at 63,204-05 (D. Kan. 1990) ("Chanute II"), aff'd, Chanute IV, 955 F.2d 641 (10th Cir. 1992). The Cities, however, did not avail themselves of the opportunity to purchase this third-party gas during the period the pipeline was closed. Chanute IV, 955 F.2d at 648; Chanute II, 1990-1 Trade Cas. at 63,205. FERC subsequently approved Williams's permanent plan to open the pipeline to third-party gas, Chanute IV, 955 F.2d at 646, and the Cities began buying all their gas from third-party suppliers, Chanute II, 1990-1 Trade Cas. at 63,195.

Shortly after Williams closed the pipeline, the Cities brought suit against it, alleging violations of Sections 1 and 2 of the Sherman Act. In particular, the cities alleged that Williams had violated Section 1 by tying the transportation and sale of gas. The district court granted summary judgment for Williams and this Court affirmed.

The district court, in rejecting the Section 1 tying claim, found that the Cities' allegation "that Williams, by its unilateral conduct in reversing its open access policy, caused them injury, and that as a result of Williams unilateral conduct, they had to purchase gas from Williams" did not show any agreement that fell within Section 1. Chanute II, 1990-1 Trade Cas. at 63,204 (emphasis in original). That conduct was unilateral, rather than concerted.

The district court was aware, of course, that Williams had entered into requirements contracts with the Cities. But because there was third party gas available to the Cities even during the period the pipeline was closed, and because Williams would have been required to transport that gas, the district court also found that "the cities cannot establish that purchases of the tied product (natural gas sales) were conditioned upon the purchases of the tying product

(natural gas transportation)." Id.[13] In other words, there were agreements, but not tying agreements.

The Cities argued to this Court on appeal that "the district court erred by not finding the existence of the necessary agreement between parties because the requirements contracts between Williams and the Cities constitute the necessary agreement." Chanute IV, 955 F.2d at 650. The Court rejected this argument without detailed explanation. It noted that under McKenzie, "a tying arrangement imposed by a single entity is not proscribed by § 1 of the Sherman Act," and that the "Cities have only brought evidence that establishes Williams tied its natural gas to its transportation facilities. The Cities have not shown Williams acted in concert with any other entity." Id. The reference to McKenzie makes clear that this Court was referring to the district court's determination that Williams's conduct in closing the pipeline and establishing the terms on which it would deal was unilateral in nature.

The Court recognized, as the district court had, that the Cities were relying on the requirements contracts to establish concerted action. Those contracts, it said, were insufficient to "make the requisite preliminary showing of a conspiracy to go forth with [the Cities'] tying claims under § 1." Id. at 650-51. The Court did not explain that conclusion, but the most reasonable interpretation is that it referred to the district court's conclusion that the requirements contracts did not constitute tying agreements.[14]

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[13]The district court's wording is unfortunate. The court obviously meant that the Cities could not establish that purchases of the tying product were conditioned on purchase of the tied product, for that is the way conditioning works in a tying claim. In the immediately preceding paragraph, the court quoted a passage from Fox Motors, Inc. v. Mazda Distributors (Gulf), 806 F.2d 953, 957 (10th Cir. 1986), that gets the relationship right.

[14]Judge Seymour's concurrence emphasized the absence of proof of coercion or "forcing" as the reason the Section 1 tying claim failed. See Chanute IV, 955 F.2d at 658-59 (Seymour, J., concurring).

This reading is confirmed by the next section of the Court's opinion, in which it explained why the original full requirements contracts were not in unreasonable restraint of trade. Id. at 651. It concluded that they were not per se unlawful and that the Cities had failed to show them to be unlawful under the Rule of Reason, because the "Cities did not produce evidence of the effect the contracts had on competition." Id. at 652. The Cities' failure to show an effect on competition would have been irrelevant, however, if sales contracts between buyer and seller could never constitute concerted action for purposes of Section 1 of the Sherman Act.

Thus, Chanute IV, like McKenzie, stands for the proposition that there can be no Section 1 tying violation without a tying agreement involving two or more parties. Although there were agreements between the Cities and Williams, the requirements contracts, those agreements were not tying contracts. Nothing in Chanute IV suggests that this Court would have held there to be no tying violation of Section 1 of the Sherman Act had the Cities been able to establish an agreement between the pipeline and the Cities providing that "purchases of the tied product (natural gas sales) were conditioned upon the purchases of the tying product (natural gas transportation)." Chanute II, 1990-1 Trade Cas. at 63,204.

Accordingly, this Court's precedent provides no basis for the district court's holding in this case. Contracts between buyer and seller are contracts within the meaning of Section 1 of the Sherman Act and satisfy its requirement of concerted action.

CONCLUSION

Because the district court based its grant of summary judgment solely on its erroneous interpretation of Section 1 of the Sherman Act, its judgment should be vacated and the case should be remanded for further proceedings.

Respectfully submitted.

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CERTIFICATE OF SERVICE

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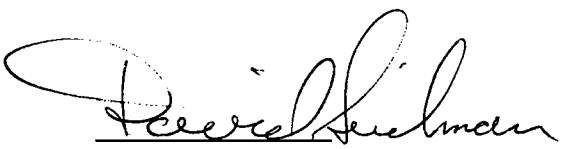

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