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involves the internal affairs of the corporation. To the contrary, for the Fourth Circuit this corporation's cancellation of stock options is a question of pure contract interpretation, turning on an examination of the provisions of the stock options themselves, the terms of the stock option plan, and the law of the state in which the contract was made binding.

This decision is in accord with the Eight Circuit's decision in *Freeze v. American Home Products Corp.*⁵⁸⁹ In *Freeze* a corporation cancelled the stock options of a former employee who accepted employment with a competitor of the issuing corporation. The *Freeze* court applied the law of the state where the corporation administered the plan and where award decisions were made.⁵⁹⁰ Cases in other jurisdictions which have dealt with the cancellation of stock options by former employers do not involve the specific issue of subsequent employment of the former employee by a competitor of the issuing corporation.⁵⁹¹

P. MONOPOLIES

Service & Training, Inc. v. Data General Corp.

963 F.2d 680 (4th Cir. 1992)

Section 1 of the Sherman Act prohibits "contract[s], combination[s] . . . , or conspirac[ies] in restraint of trade."⁵⁹² Section 1 thus prohibits tying arrangements that stifle trade by conditioning the purchase of one product upon purchase of another product.⁵⁹³ To establish the existence of an

589. 839 F.2d 415 (8th Cir. 1988).

590. *Freeze v. American Home Prods. Corp.*, 839 F.2d 415, 417 (8th Cir. 1988). The *Freeze* court considered the validity of a forfeiture provision in a management incentive plan. *Id.* The provision stated that an employee would forfeit the undelivered portion of the bonus plan if the employee became an officer, director, employee, owner or partner of a competitor. The court held that the laws of New York state, where the plan was administered and where the award decisions were made, controlled and that the provision was enforceable. *Id.* at 418.

591. *See Weir v. Anaconda Co.*, 773 F.2d 1073, 1083-84 (10th Cir. 1985) (supporting decision of corporation finding employee dismissed for "cause" sufficient to prohibit exercise of stock options, such options being subject to condition precedent and therefore not wages recoverable by discharged employee); *Hainline v. General Motors Corp.*, 444 F.2d 1250, 1256 (6th Cir. 1971) (reversing summary judgment for defendant and remanding for further proceedings in case determining right of former employee to unexercised stock options, specifically questioning power of corporation to cancel such options); *Carlson v. Viacom Int'l Inc.*, 566 F. Supp. 289, 290-92 (S.D.N.Y. 1983) (supporting corporation's refusal to allow exercise of stock options by terminated employee, in option agreement requiring current employment for exercise of options); *Harrison v. Jack Eckerd Corp.*, 342 F. Supp. 348, 350 (M.D. Fla.), *aff'd*, 468 F.2d 951 (5th Cir. 1972) (supporting denial of exercise of stock options by former employee); *Fredricks v. Georgia-Pac. Corp.*, 331 F. Supp. 422, 423, 427-28 (E.D. Pa. 1971), *appeal dismissed*, 474 F.2d 1338 (3rd Cir. 1972) (finding forfeiture clause in stock bonus trust may be unenforceable, but rights to unexercised stock options could be terminated, if employee was induced to resign through harassment and humiliation).

592. 15 U.S.C. § 1 (1988).

593. *See, e.g., International Salt Co. v. United States*, 332 U.S. 392 (1947) (holding tying arrangement violative of 15 U.S.C. § 1).

unlawful tying arrangement, a plaintiff must show the existence of two separate products, an agreement conditioning purchase of the tying product upon purchase of the tied product (or at least upon an agreement not to purchase the tied product from another party), the seller's possession of sufficient economic power in the tying product market to restrain competition, and a substantial impact on interstate commerce.⁵⁹⁴ In order to withstand a motion for summary judgment, a plaintiff must show a genuine issue of material fact in regard to each of these elements.⁵⁹⁵

In *Service & Training, Inc. v. Data General Corp.*⁵⁹⁶ the United States Court of Appeals for the Fourth Circuit addressed the issue of whether an unlawful tying arrangement exists where, in the absence of an express agreement, a seller licenses its product exclusively to parties that do not purchase services from the seller's competitors. In addition, the Fourth Circuit reviewed the district court's grant of a preliminary injunction for the defendant on the defendant's copyright infringement claim.

In *Data General*, the plaintiff, Service & Training, Inc. (STI), maintained and repaired computer systems built by the defendant, Data General Corporation. Data General had developed and copyrighted a software program called "MV/ADEX" for use in diagnosing malfunctions in its computers. STI sought access to MV/ADEX for its own servicing of Data General computer systems. In 1989 STI filed suit in the United States District Court for the District of Maryland asserting that Data General had violated section 1 of the Sherman Act. STI claimed that Data General licensed MV/ADEX only to customers who did not purchase support services from Data General's competitors. STI claimed that this arrangement unlawfully tied MV/ADEX licenses to purchases of Data General's repair services. Data General then instituted a copyright infringement action based on STI's unauthorized use of MV/ADEX.

The district court granted summary judgment for Data General on the tying claim on the ground that STI had failed to establish a question of material fact in regard to whether MV/ADEX and Data General's support services comprised "separate products." In addition, the district court granted Data General a preliminary injunction on its copyright infringement claim.

The Fourth Circuit rejected the district court's conclusion that MV/ADEX and Data General's repair services were not separate products. The court stressed that the inquiry into the question of separate products should focus not on the functional relation of the products, but on the character of the demand for the products. The court found that MV/ADEX and Data General's repair services were separate products because demand for

594. *Service & Training, Inc. v. Data Gen. Corp.*, 963 F.2d 680, 683 (4th Cir. 1992).

595. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-87 (1986) (requiring plaintiff to show genuine issue of material fact regarding injurious conspiracy to survive motion for summary judgment).

596. 963 F.2d 680 (4th Cir. 1992).

the use of MV/ADEX existed independently from demand for Data General's repair services. Data General licensed MV/ADEX to cooperative maintenance organizations (CMOs), which do their own servicing, without also selling them Data General's repair services. In addition, Data General provided repair services to customers to whom it did not license MV/ADEX.

Although the Fourth Circuit rejected the district court's rationale, it affirmed summary judgment for Data General because of the absence of any evidence of agreements between Data General and its customers. The court emphasized that an unlawful tying arrangement exists only where two or more parties agree that the seller will sell a certain product only on condition that the buyer(s) will also purchase a second product, or on condition that the buyer(s) will not purchase a similar second product from the seller's competitors. The Fourth Circuit found that STI had produced no evidence that Data General had such an agreement with its customers.

STI argued that a tying arrangement existed even in the absence of such evidence because Data General licensed MV/ADEX exclusively to CMOs, customers who, by definition, do not purchase repair services from any of Data General's competitors. In support of its argument, STI relied on the decision of the United States Court of Appeals for the Ninth Circuit in *Image Technical Services, Inc. v. Eastman Kodak Co.*⁵⁹⁷ In *Eastman Kodak* a copier equipment manufacturer agreed to sell parts only to customers who serviced their own equipment. The manufacturer's written sales terms explicitly stipulated this condition. The Ninth Circuit found a material issue of fact as to whether an unlawful tying arrangement existed. The Ninth Circuit rejected the argument that the condition arose from an independent action of the manufacturer. Rather, the court concluded that if this type of conduct were deemed independent, then virtually all tying arrangements would fall outside the reach of Section 1.

The Fourth Circuit not only refused to apply the Ninth Circuit's reasoning to the case at bar, but also rejected outright the Ninth Circuit's holding. The Fourth Circuit stated that it would not find an unlawful tying arrangement even if Data General had explicitly stated in its licensing agreements that it would license MV/ADEX only to customers who did their own repair work. The court explained that a seller's unilateral decision to sell its products only to a certain type of customer was an independent action outside the reach of Section 1. The court emphasized that in order to establish a claim under Section 1, a plaintiff would have to show an affirmative agreement between the buyer and the seller to stifle competition.

Applying this reasoning to *Data General*, the Fourth Circuit found that the evidence showed only a unilateral decision by Data General to license its product to certain types of customers. The court examined situations in which Data General licensed MV/ADEX to CMOs as well as situations in which Data General sold its own repair services. The court found no evidence that Data General had agreed to license MV/ADEX to CMOs exclusively

597. 903 F.2d 612 (9th Cir. 1990), *aff'd*, 112 S. Ct. 2072 (1992).

on the condition that the CMOs not purchase repair services from Data General's competitors. In response to STI's claim that no such evidence was necessary because CMOs by definition do not purchase repair services, the court stated that that fact was at least as consistent with the absence of an illegal arrangement as with the existence of one.

Similarly, the Fourth Circuit found no evidence of tying arrangements in regard to Data General's repair service customers. Data General did not license MV/ADEX to its service customers at all. STI argued that the court should consider access to MV/ADEX, as well as licensing of MV/ADEX, as a product unlawfully tied to Data General's repair services. The court rejected this argument because it found that mere access to MV/ADEX, without licensing for independent use, was indistinguishable from the repair services and therefore separate products did not exist. Furthermore, the court found no evidence of actual agreements between Data General and its repair service customers.

Finally, the Fourth Circuit considered several corollary issues relating to the district court's grant of a preliminary injunction against STI on Data General's copyright infringement claim. The court found that Data General had a prima facie copyright infringement claim on the basis of its certificates of copyright registration for MV/ADEX coupled with evidence of unauthorized use of MV/ADEX by STI. STI claimed that a 1976 settlement agreement between the parties gave STI the right to use confidential Data General material for purposes of maintaining and installing Data General computers. The court determined that the agreement did not require Data General to turn over newly created confidential software, such as MV/ADEX, to STI. The court then summarily rejected STI's equitable estoppel and copyright misuse defenses and affirmed the preliminary injunction.

In *Data General* the Fourth Circuit openly disputed the holding of the Ninth Circuit in *Eastman Kodak*.⁵⁹⁸ In *Eastman Kodak* the Ninth Circuit found evidence of an unlawful tying arrangement where the seller's written sales terms excluded potential buyers who purchased services from the seller's competitors. In *Data General* the Fourth Circuit found no evidence of an unlawful tying arrangement where the seller sold licenses only to buyers who did not purchase services from the seller's competitors, but where the seller had no written terms stating that policy. In dicta, the Fourth Circuit stated its conviction that *Eastman Kodak* was wrongly decided. The Fourth Circuit explained that it would not have found an unlawful tying arrangement even if Data General's sales agreements had contained an explicit statement of its exclusive sales policy.

The Fourth Circuit's conclusions regarding *Eastman Kodak* may be suspect. The United States Supreme Court affirmed the *Eastman Kodak* decision, but it did not directly address the issue presented here.⁵⁹⁹ Kodak

598. *Image Technical Serv., Inc. v. Eastman Kodak Co.*, 903 F.2d 612 (9th Cir. 1990), *aff'd*, 112 S. Ct. 2072 (1992).

599. *Eastman Kodak Co. v. Image Technical Serv.*, 112 S. Ct. 2072 (1992).