

TUESDAY WEDNESDAY THURSDAY FRIDAY **TODAY**

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Unfair Competition V Defense

For the plaintiff:  
Joseph M. Alioto, Sr.  
Russell F. Brasso  
Zane D. Negrych  
For the defendant:  
Robert H. Bunzel  
Michael D. Abraham  
John F. McLean  
Lisa D. Wright  
Sloan C. Bailey  
Gary A. Sloboda

USDC Northern  
Hon. James Ware

**RESULT DATE:** Oct. 28, 2010

Advanced Microtherm Inc. v. Norman Wright Mechanical Equipment Corporation, F.W. Spencer & Son Inc. (5:04-cv-02266-JW) 10-JV\_2289

**FURTHER DESCRIPTION:** Attempt to Monopolize a Market

**VERDICT:** Defense

**ATTORNEY:** Plaintiff - Joseph M. Alioto, Sr. (Alioto Law Firm, San Francisco); Russell F. Brasso (Foreman & Brasso, San Francisco); Zane D. Negrych (Zane D. Negrych, Attorney at Law, San Jose). Defendant - Robert H. Bunzel, Michael D. Abraham, John F. McLean (Bartko, Zankel, Tarrant & Miller, San Francisco) for Norman Wright; Lisa D. Wright (Norman S. Wright Mechanical Equipment Co., Brisbane) for Norman Wright; Sloan C. Bailey, Gary A. Sloboda (Flynn Williams LLP, San Rafael) for F.W. Spencer & Son Inc..

**TECHNICAL:** Plaintiff - Steven R. Burns, industry and engineering, Nordland, Wash.; Stephen S. Degnan, CPA, accounting, San Ramon; Victor A. Neuman, engineering and ethics, Haverhill, Mass.; Richard J. Sexton, market share, Davis. Defendant - Michael P. Akemann, market share and market power, Emeryville; Joseph T. Anastasi, CPA, accounting, San Francisco; William P. Henry, ethics, Sequim, Wash..

**FACTS:** Between 1998 and 2006, Advanced Microtherm Inc. and HVAC Sales Inc. competed unsuccessfully as manufacturer representatives against Norman Wright Mechanical Equipment Corporation (Norman Wright) in the Northern California market for the sale of heating, ventilation, and air conditioning (HVAC) products installed at UCSF, Moscone Center, BART, SFO, the De Young Museum, and other large institutional projects.

Norman Wright was sued by the two failed competitor plaintiffs in April of 2002 in state court on antitrust and related theories, and the action was removed to federal court. Most of the originally named defendants (competitor, contractor, and engineering firms) settled before trial, leaving Norman Wright and co-defendant William Spencer & Sons, Inc. (Spencer), a mechanical contracting firm, as defendants at trial.

The claims tried to the jury were attempted monopolization and conspiracy under section 2 of the Sherman Act (15 U.S.C. section 2), commercial bribery under section 2(c) and 2(a) of the Robinson-Patman Act (15 U.S.C. section 13(c)), exclusive dealing under either section 3 of the Clayton Act (15 U.S.C. section 14) or section 16727 of the California Business & Professions Code, commercial bribery under California Business & Professions Code section 17045, and interference with business or contractual relations.

**CONTENTIONS: PLAINTIFFS' CONTENTIONS:** Plaintiffs contended that Norman Wright allegedly influenced prominent design engineers and other officials to specify its represented products in the plans and specifications, by anticompetitive means including alleged bribery, and that it bundled its products to the mechanical contractors with the alleged effect of excluding competition and increasing price.

**DEFENDANTS' CONTENTIONS:** Defendants contended that Norman Wright succeeded due to technical

savvy, service, and understanding new technologies and applications, not antitrust violations. Defendants further contended that the alleged bribery complained of (entertainment, factory trips, e.g.) and packaging (bundling) of products are common in the industry, and not anticompetitive.

Defendants claimed that the relevant product and geographic markets involved several multi-billion dollar competitors, such that there was no dangerous probability of Norman Wright becoming a monopolist, and there was insufficient evidence of raised prices.

**DAMAGES:** Plaintiffs presented a \$19-34 million damages calculation to the jury at trial based on a multiple of plaintiffs' alleged lost gross profits as projected.

The defense countered that plaintiffs had never been profitable, and failed due to their own practices in the market.

**JURY TRIAL:** Length, 7.5 weeks; Deliberation, 3.75 hours

**SETTLEMENT DISCUSSIONS:** According to plaintiffs, NSW offered approximately \$3.8 million to settle before expert witness depositions; and \$1 million immediately prior to trial. Both of these offers were rejected by plaintiffs.

According to plaintiffs, F. W. Spencer & Son, Inc. offered to settle for between \$100,000 and \$400,000 at various times before trial.

**RESULT:** Spencer's motion for judgment in its favor on all claims was granted after the end of plaintiffs' case.

At the end of all evidence, the court also granted judgment before verdict to Norman Wright on only antitrust conspiracy and exclusive dealing via manufacturer agreements.

The attempted monopolization, bundling, commercial bribery, unfair trade practices, and interference claims went to the jury for determination, resulting in a unanimous defense verdict that there was no liability of Norman Wright on any claim.

**OTHER INFORMATION:** The jury deliberated for approximately 1 hour on October 27, 2010, and they deliberated between 9:00 a.m. and 11:45 a.m. on the second day.

The judge afforded the two defendants 10 peremptory challenges, but he afforded the two plaintiffs five peremptory challenges.

