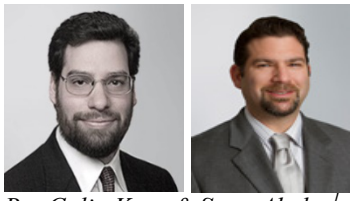
TRIAL GRAPHICS AND YOUR ANTITRUST STORY



By: Colin Kass & Scott Abeles[1]

In September and October of 2016, we had the rare opportunity to try an antitrust case to jury verdict, one made rarer still as the case was brought under the infrequently-invoked Robinson-Patman Act of 1936. In brief, the plaintiff, Mathew Enterprises Inc. (known as "Stevens Creek") is a franchised auto dealer for FCA US LLC (known until recently as "Chrysler"). In 2012, Chrysler appointed a new dealer in Fremont, less than 20 miles away from Stevens Creek's location in San Jose, CA. That appointment supposedly cut into the sales it would otherwise have garnered, which in turn made it more difficult for it to earn incentive payments under Chrysler's "Volume Growth Program" (VGP).

Under the VGP, Chrysler set incumbent dealers' volume objectives formulaically by taking each one's historic sales in a given month or year and multiplying it by a growth factor. Stevens Creek alleged that its relatively high historic sales were not a fair barometer for its potential, given Fremont's entry. In Stevens Creek's view, this warranted a downward adjustment to its objectives, which it sought from Chrysler, but did not receive. In the year following Fremont's entry, Stevens Creek missed its objectives, and so earned no incentives, while Fremont (whose objectives were set first via a proxy metric, as it had no historic sales), earned such payments every month during the same period. The difference in these payments, claimed Stevens Creek, caused Stevens Creek to pay lower "effective" prices to Chrysler for the same vehicles, violating the RPA's prohibition against price discrimination.

Chrysler (our client) prevailed after one day of deliberation by the eight-person jury. The jury found that Stevens Creek had not shown that the incentive payments were "functionally unavailable" to it; that is, Stevens Creek did not demonstrate that it could not have hit its objectives had it used commercially reasonable efforts to achieve them.

After discharge, members of the jury suggested that our graphical presentation during closing provided us with a lift, so we present a sampling of those slides here.

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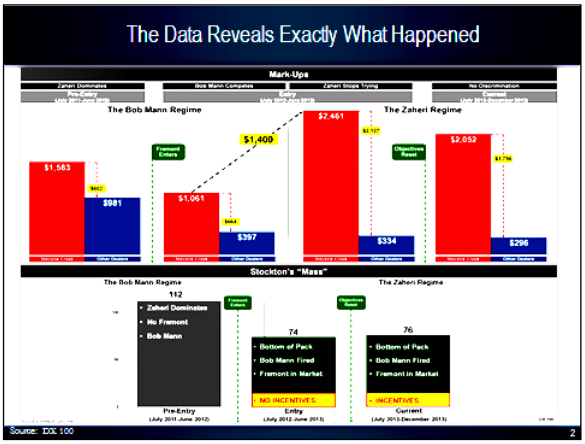
The Opening of the Closing: Encapsulating the Key Trial Theme from the Get-Go with a Quote

As an antitrust defendant, it was important for us to reframe the jury's attention onto the plaintiff's conduct. The quote on this slide – from hockey icon Wayne Gretzky – first arose during cross examination of plaintiff's economist and crystalized our case message, that Stevens Creek did not try hard enough to earn the incentives Chrysler offered. We therefore led our closing with it. Because the opening slide in any presentation can linger while the lawyers switch places or set up, or while the jurors, court staff, and public situates itself after a break, devoting extra time to the cover slide offers manifold repayment.

An Omnipresent Storyboard: Making the Data Come Alive and Ingraining it in the Jury's Mind

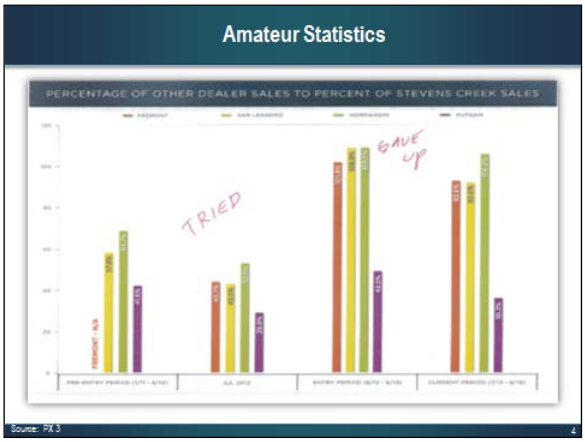


By the time of closing, the jury had seen a variation of this slide many times. We transformed this slide into a large foam board and placed it on an easel for use during direct and cross exams of nearly every witness. During the opening, we told the story around this slide, "building" each part of the board as we went, and showing how the data backed up our view of the facts. The board, for example, shows how Stevens Creek's prices (in red) compared to surrounding dealers' (in blue), and how Stevens Creek raised prices in pursuit of higher margins, even as the other surrounding dealers were lowering prices in response to increased competition.

Ultimately, this slide brought to life the most compelling fact of the case: Stevens Creek jacked up prices by more than $2,000/vehicle as compared to its competitors. But the slide did even more. In addition to the comparison of local market prices in the top half, the bottom half focused on the flaw in plaintiffs' damages calculations. It contains what we dubbed "The Mountain and Two Hills," which show that Stevens Creek's sales were essentially identical during the first year following Fremont's entry (when it was supposed to be a victim of price discrimination) and the second year (when all agreed there was no discrimination) – these two years are the "Two Hills" in the graphic.

We spent many hours ensuring that this slide had the "right" information: pertinent and unassailable. We made an effort to use some aspect of this board with every witness, constantly reminding the jury of its presence, usefulness, and importance. By the end of the trial, even opposing counsel was pointing to the board, validating it even as he sought to take a few pot shots.

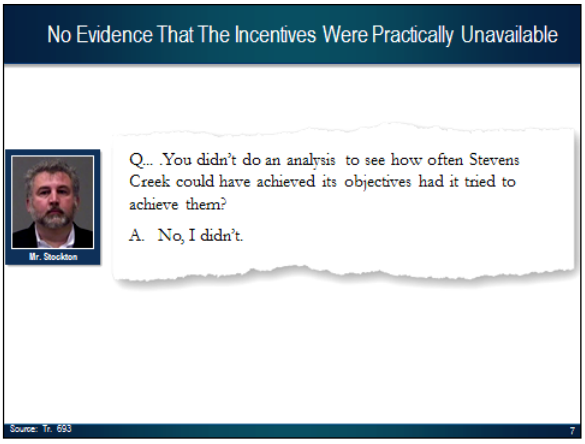
Capturing the Flag: Using the Elmo to Swat Away Plaintiff's Core Statistics



Stevens Creek responded to our statistics with statistics of its own. The chart above was the most compelling of its attempts: it shows that Stevens Creek performed worse, while other nearby dealers performed better, after Fremont entered the market. Plaintiff claimed that this established the effect of the incentives.

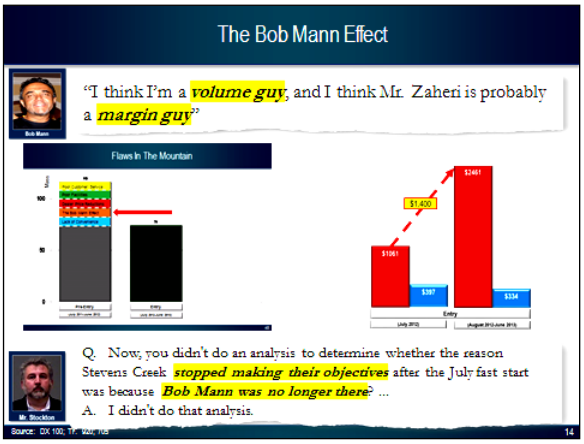
During our expert's examination, we placed this chart on the Elmo, and asked him what he thought about it. He gave a short, intuitive explanation. Stevens Creek, when operating with prior management, had tried hard to sell cars, lowering price to do so. When it changed management, which happened to coincide with Fremont's entry, Stevens Creek stopped trying to hit its objectives, preferring exorbitant margins on few cars over low margins on many.

Sometimes a Simple Quote Says So Much



The construction of a closing is a balancing act between bringing back all key facts and hammering home the best of them. The slide above falls into the latter camp, with an important admission from Stevens Creek's economist. It stands in relief to the "Super-slide" a couple bullets down used to maximize information transference.

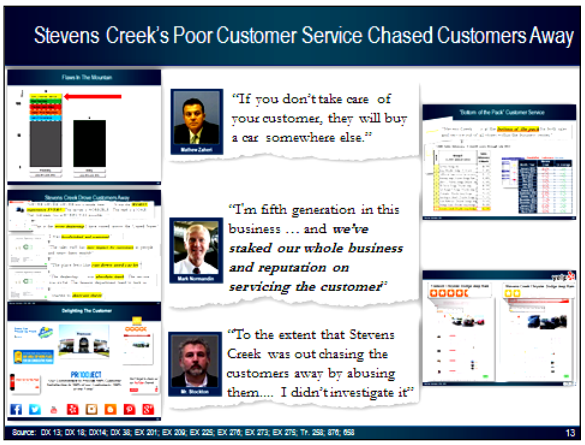
Personalizing the "Alternative Cause" Defense



Going into trial, we had a problem. Stevens Creek had an easy story to tell, one that struck an emotional chord: all it wanted was to be treated fairly, and because it wasn't, it couldn't compete. We knew this wasn't true. But we needed a way to claim the moral high ground. Enter "the Bob Mann Effect."

"The Bob Mann Effect" was the name we gave to the impact a dynamic Bay Area sales executive had on various dealerships during his career. As it happened, Mr. Mann was terminated by Stevens Creek just before the damages period. The jury heard about "the Bob Mann effect" from opening statements forward; witnesses, whether ours *or* plaintiff's, uniformly spoke of Mr. Mann's sales prowess in glowing terms. When it was his turn to testify, Mr. Mann boiled down the differences in his management style versus Stevens Creek's owner's (who replaced him at "the desk") in one easy, and brutal sentence.

A Summary "Super-Slide" that Encapsulates Together Days of Testimony



Claiming the moral high-ground on pricing was only part of the challenge. The other was to explain why Stevens Creek's sales fell after Fremont entered, while those of other neighboring dealers' increased. To do this, we focused on another "alternative" cause: Stevens Creek's customer service.

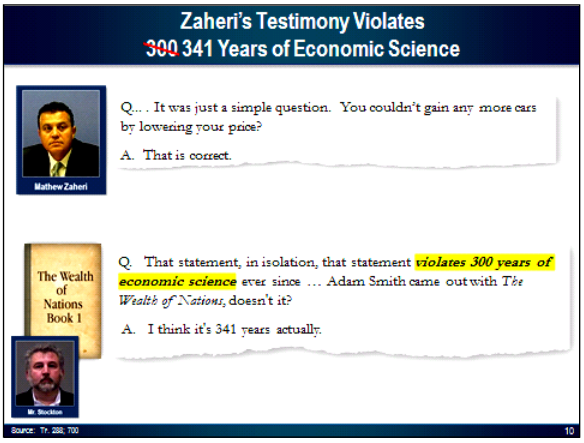
Evidence that Fremont's customer service surpassed Stevens Creek's was essentially unrebutted. The social media and third-party survey firms presented us with colorful quotes galore, enough to show any juror what type of dealership Stevens Creek was.

By the time of closing, there was no need to repeat every statistic or Yelp review on the subject. Indeed, we wanted to maintain the moral high ground by not piling on. So we constructed an amalgamation of five slides used during trial on this point with quotes from three witnesses to remind the jury, not of any particular piece of evidence, but of the overwhelming and one-sided nature of it.

Juxtaposing: The Facts from a Credible Witness to Impeach the Biased Speculation of Another

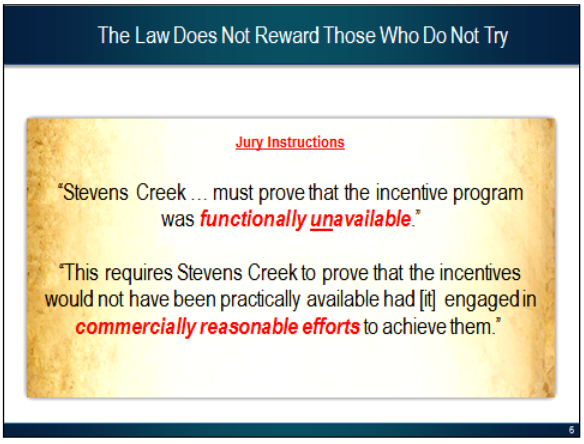
Mr. Mann's uncommon charisma lent itself to creative graphics. It came out during his exam that after arriving in a small town known as "The Garlic Capital of the world," Gilroy, California, Mr. Mann took that dealership to number one in the state. He was able to do this, he explained, through "conquest" selling, the industry term for converting customers of other brands (like GM or Toyota) into new Chrysler customers. We were able to set this fact off against Stevens Creek's contention that, in the highly-populated Silicon Valley containing his dealership, he could not sell as many cars as Mr. Mann could sell in sleepy Gilroy.

Juxtaposing: Impeaching One Witness's "Excuse" With Plaintiff's Own Expert Testimony



As noted, the functional availability doctrine focuses on whether Stevens Creek could have sold more cars, and thus, hit its sales objectives, if it tried to do so. Stevens Creek said this was impossible. But the key fact – that it was charging $2,000 more than other dealers – suggested that it could have lowered prices if it wanted, and that this would have caused it to sell more cars. During cross-examination, Stevens Creek's owner, Mr. Zaheri, testified that lowering prices would not have increased his sales. We printed an excerpt from this trial testimony, and asked plaintiff's economist, Mr. Stockton, whether Mr. Zaheri's testimony violated 300 years of post-Adam Smith economic theory. Mr. Stockton responded that, actually, it was 341 years. Besides being humorous, the exchange further cemented our lack-of-trying defense.

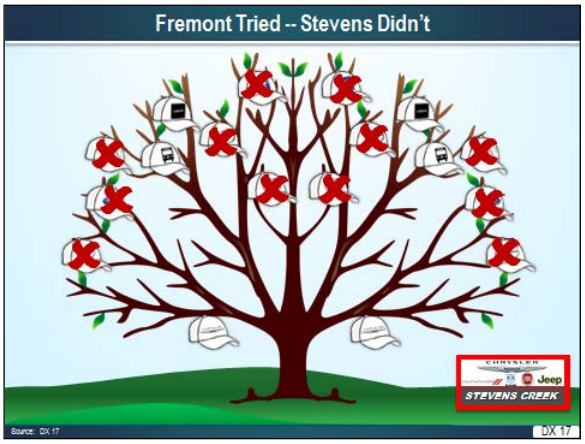
Structuring the Closing Around the Jury Instructions



None of this evidence would have mattered unless the jury instructions showed that it mattered. We highlighted the key

instruction and point of law here, all within a frame that the RPA provides no salve to dealers who lose business because of a lack of effort.

Using the Elmo to Create a Fresh Mock Up of a Closing Slide



We wrapped our closing in the same place we completed our witness exams, on a graphic first introduced during the opening that is peculiar out of context, but precise in context. Over the course of trial, the Chrysler dealerships' legacy customer base – customers in a dealer's "draw area" who already owned Chrysler cars – were described as "low hanging fruit," while the much greater number of non-Chrysler owners in a given area were "high hanging fruit" that dealers typically needed to exert additional effort to convert (or "conquest") to Chrysler.

Stevens Creek testified that it did not compete for customers of interbrand competitors, while Mr. Mann and the General Managers of the surrounding dealerships testified that they did compete for such customers.

The issue came to head when Stevens Creek called its owner, Mr. Zaheri, as its sole rebuttal witness. During his direct exam Mr. Zaheri explained how customers first chose a car model, and then negotiate prices with multiple dealers of the same brand. On cross, we allowed him to continue making this point, knowing he was digging his own grave. We then put this chart on the Elmo (minus the red X's). Asked whether he competed for customers that like GM or Ford or any other mode of transportation, he said no. We then placed an X through each customer his shop blew off. Because the other surrounding dealers all testified that they competed for these customers, this put the nail in the coffin, and we closed both the testimony and the closing with a devastating slide plaintiff's lead witness "co-authored" with us.

* * *

Antitrust is a notoriously complex area of the law, while the Robinson-Patman Act has been famously derided as "bogged in a dense undergrowth of confusion, ambiguity, controversy and babel."[2] That does not mean that trial under these laws must lead to complex or confused jury presentations. The use of graphics to slice through the "babel" and illustrate and cement core concepts and themes can be the sharpest arrow in the trial lawyer's quiver.

[2] Corwin D. Edwards, *The Price Discrimination Law: A Review of Experience*, 55 Nw. U.L. Rev. 653 (1960).