APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed: May 31, 2018]

Case Nos. 16-2065/17-1429

ENCANA OIL & GAS (USA) INC.,
a Delaware corporation,

Plaintiff-Appellant / Cross-Appellee,

v.

ZAREMBA FAMILY FARMS, INC.,
a Michigan corporation; ZAREMBA GROUP, LLC,
a Michigan limited liability corporation;
WALTER ZAREMBA, an individual,

Defendants-Appellees / Cross-Appellants.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN

BEFORE: MOORE, THAPAR, and BUSH, Circuit Judges.

THAPAR, Circuit Judge. At least for a while, the fracking boom came to Michigan. Oil companies started drilling wells, and the going rate for mineral rights went through the roof. Eventually, however, the bubble burst. This case arises from the fallout.

I.

The Zaremba family held the mineral rights to a large amount of drillable land in Michigan.[1] So when the drilling boom began, oil-company suitors began lining up at their door. The Zarembas entered negotiations with two such companies: Encana Oil & Gas ("Encana") and Chesapeake Energy ("Chesapeake"). Eventually, the Zarembas neared a deal with Chesapeake. But that deal fell apart over a dispute about how Chesapeake and the Zarembas would allocate costs.

After the Chesapeake deal unraveled, the Zarembas signed a letter of intent with Encana. The Zarembas and Encana agreed to negotiate a binding lease agreement, and Encana paid the Zarembas $2 million in earnest money. But the letter of intent also said that if the parties did *not* go through with the agreement—for whatever reason—the Zarembas would return $1.8 million of that money to Encana.

The Zarembas and Encana never reached a binding deal. About two weeks after the parties signed the letter of intent, Encana decided to walk away. And that meant the Zarembas had to return the $1.8 million. Yet after Encana walked, an Encana employee mistakenly told the Zarembas they could *keep* the whole $2 million. So when Encana later asked for the $1.8 million back, the Zarembas refused. Encana promptly sued the Zarembas for breach of contract. The Zarembas counterclaimed, arguing that Encana

---

[1] For convenience, this opinion refers to "the Zarembas" collectively. That moniker refers to all three of the defendant-appellees/cross-appellants: Zaremba Family Farms, the Zaremba Group, and Walter Zaremba.

was liable for fraud and fraudulent inducement (among other things not relevant here).

Then, a surprise. About eight months after Encana sued, explosive allegations emerged in the press: Encana and Chesapeake had purportedly colluded to suppress lease prices in Michigan. Reuters published emails in which the two companies' top executives discussed how they might find a way to avoid "bidding each other up" in Michigan. R. 39, Pg. ID 211. These revelations prompted the Zarembas to lodge a counter-claim against Encana for violations of the Sherman Antitrust Act and the Michigan Antitrust Reform Act.

After several years of litigation, the district court granted Encana summary judgment on the Zarembas' antitrust claims. But Encana's breach-of-contract claim and the Zarembas' fraud claims went to trial. The jury ultimately determined that Encana had waived its right to recoup the $1.8 million, but that the Zarembas had failed to prove their fraud counterclaims.

Both parties now appeal. The Zarembas claim the district court erred in dismissing their Sherman Act claim on summary judgment. They also claim that they were entitled to judgment as a matter of law on their fraud counterclaims, and that the district court should have granted their motion for a new trial because Encana's expert witness misled the jury. For its part, Encana claims it was entitled to judgment as a matter of law on its breach-of-contract claim, and that the district court wrongly instructed the jury on that claim.

II.

We turn first to the Zarembas' antitrust claims. The Sherman Act outlaws agreements that "unreasonably" restrain trade. *United States v. Joint-Traffic Ass'n*,

171 U.S. 505, 559 (1898) (interpreting 15 U.S.C. § 1). Whether a restraint is reasonable typically depends on the aptly named "rule of reason," which necessitates an "elaborate inquiry" into the restraint's effect on competition in the relevant market. *Arizona v. Maricopa Cty. Med. Soc'y*, 457 U.S. 332, 343 (1982). But the rule of reason has limits. Some kinds of agreements are so likely to have a "pernicious effect on competition" that they are "conclusively presumed to be unreasonable." *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958). For instance, sellers of "sanitary pottery" (*i.e.*, toilets) cannot get together and decide that they will sell their wares only for a given amount. *United States v. Trenton Potteries Co.*, 273 U.S. 392, 394, 397–98 (1927). Price fixing of that kind is "per se" unlawful. *N. Pac.*, 356 U.S. at 5.

The Clayton Act creates a private cause of action for violations of the antitrust laws. *See* 15 U.S.C. § 15. The claimant must prove that his opponent entered into an agreement that is per se unlawful, and that the agreement in fact caused the claimant to suffer an "antitrust injury." *See Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 344–45 (1990). An antitrust injury is an injury that is "of the type the antitrust laws were intended to prevent and . . . flows from that which makes defendants' acts unlawful." *Id.* at 334 (quoting *Brunswick Corp. v. Pueblo Bowl-OMat, Inc.*, 429 U.S. 477, 489 (1977)).

Here, the Zarembas allege Encana engaged in two kinds of per se unlawful conduct. First, they argue that Encana and Chesapeake engaged in an unlawful "bid rigging" scheme whereby the two companies agreed not to outbid each other for the Zarembas' leases. *See United States v. Portsmouth Paving Corp.*, 694 F.2d 312, 325 (4th Cir. 1982) (defining "bid

rigging" as "[a]ny agreement between competitors pursuant to which contract offers are to be submitted to or withheld from a third party"); *see also United States v. Green*, 592 F.3d 1057, 1068 (9th Cir. 2010) (holding that "bid rigging" is per se illegal and citing cases from the Fifth and Tenth Circuits in agreement). Second, the Zarembas argue that Encana and Chesapeake engaged in illegal "market allocation" by dividing up the Michigan mineral-rights market, rather than competing with each other for it. *See Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49–50 (1990) (per curiam) (holding that "agree[ments] to allocate markets" are per se unlawful). To prevail, the Zarembas have to show that Encana entered into one or both of these agreements and that they suffered a resulting "antitrust injury." *Atl. Richfield*, 495 U.S. at 344–45. The question at summary judgment, of course, is whether the Zarembas produced sufficient evidence for a reasonable juror to reach that conclusion. *See Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). Because "antitrust law limits the range of permissible inferences from ambiguous evidence," they must point to evidence that "'tends to exclude the possibility' that the alleged conspirators acted independently" if they are to succeed. *Id.* (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)). Here, the Zarembas advance three distinct theories.

Theory One: The Poison Pill.[2] The Zarembas first argue that just as they were preparing to finalize their deal with Chesapeake, Encana and Chesapeake agreed to rig the bidding. So, they claim, Chesapeake

---

[2] Not to be confused with the poison pill of Delaware lore. *See, e.g., Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361 (Del. 1995).

tanked the Zaremba deal by inserting a "poison pill," forcing the Zarembas to sign with Encana instead.

In support of this theory, the Zarembas point to the following evidence. Emails between top Encana and Chesapeake executives show that at the same time they were negotiating with the Zarembas, the two companies were indeed interested in colluding. At one point, Chesapeake's CEO suggested that the companies "throw in 50/50 together" instead of "bash[ing] each other's brains out on lease buying." R. 379-13, Pg. ID 7118. Encana's CEO responded that he was "open to any ideas to reduce costs." *Id.*, Pg. ID 7115. Later, an Encana executive wrote to Encana's CEO that the company "appear[ed] to have agreed" to a "division of work" with Chesapeake. R. 379-18, Pg. ID 7130. And the companies subsequently haggled over a draft "Area of Mutual Interest" agreement. R. 379-21, Pg. ID 7140–45. That agreement contemplated a scheme whereby the companies would "agree not to compete against one another" in designated geographic areas. *Id.*, Pg. ID 7141.

Troubling stuff. But what does that evidence have to do with the Zarembas? Well, email records confirm that at the same time the companies were contemplating collusion, each was also negotiating for the Zarembas' mineral-rights leases. The Zarembas claim these negotiations eventually resulted in an agreement in principle between the Zarembas and Chesapeake. In support, they point to an email in which Chesapeake's CEO instructed an employee to "sign [the Zarembas] up I guess." R. 379-10, Pg. ID 7104. But then, on the day Chesapeake and the Zarembas had planned to close their deal, two high-level executives at Chesapeake and Encana had what the Zarembas believe was a crucial phone call. During that

call, those executives discussed their potential non-compete agreement. And the Zarembas say that, as a result, Chesapeake agreed to tank the Chesapeake-Zaremba deal by reneging on an earlier assurance that Chesapeake would bear all the "post-production costs" from the Zaremba wells. In the end, the Zarembas claim that Chesapeake's production-costs "poison pill" forced them to walk away from the Chesapeake deal and instead sign the letter of intent with Encana, which set out "far inferior" lease terms. Second Br. 24.

From all this, the Zarembas argue that a reasonable juror could conclude that Encana and Chesapeake struck a deal in which they agreed that Chesapeake would walk away from negotiations with the Zarembas, forcing them into Encana's arms. But, the Zarembas' evidence does not "tend[] to exclude the possibility" that Encana and Chesapeake had not yet reached an anti-competitive agreement and were continuing to try to outbid each other. *Matsushita*, 475 U.S. at 588 (internal quotations and citation omitted). First, for all their troubling emails, the evidence shows that Encana and Chesapeake did *not* agree to tank the Zaremba deal. True, one Encana executive said the companies "appeared" to have reached an agreement before Chesapeake's deal with the Zarembas fell apart. R. 379-18, Pg. ID 7130. But appearances can be deceiving. The evidence shows that after that executive sent his email, Encana and Chesapeake continued to compete vigorously for the Zaremba leases. Encana's initial offer for those leases was $2,000 per acre, but the amount contemplated in the ultimate letter of intent was $2,900 per acre—a *twenty-three million dollar increase* in the deal's total value. And that increase was brought on by competition from Chesapeake, as evidenced by a series of emails showing that the companies were "bidding each other

up" even as they separately tried to work out their mutual-interest agreement. R. 362-8, Pg. ID 5338–39. Indeed, just days before the Zaremba-Chesapeake deal fell apart, Chesapeake's CEO said of the Zaremba deal: "[Encana] won't share, let's win." R. 362-51, Pg. ID 5657. And this all happened *after* Encana circulated its draft mutual-interest agreement to Chesapeake and the Encana executive said the companies appeared to have agreed on an arrangement. There is only one way to read this evidence: Encana and Chesapeake certainly talked about a mutual-interest agreement as they were negotiating with the Zarembas, but they were simultaneously engaged in a bidding war and never reached a collusive truce. This is "conduct [] consistent with permissible competition," *Matsushita*, 475 U.S. at 588, and therefore cannot sustain an inference of an anti-competitive agreement.

That just leaves the infamous Encana-Chesapeake phone call. As the Zarembas point out, the emails indicating that the companies were "bidding each other up" were sent a few days *before* the Zaremba-Chesapeake deal fell apart. But on the day Chesapeake purportedly tanked the deal with its poison pill, Encana and Chesapeake executives talked about their companies' potential agreement in a phone call. Accordingly, the Zarembas suggest that the executives may have finally struck their agreement that very morning. But the inference the Zarembas seek to draw is firmly rebutted by the record evidence. The Encana executive's contemporaneous notes about that call do not say anything about the Zarembas—and in fact reflect that the companies still had *not* reached an agreement.[3] *See* R. 379-9, Pg. ID 7102 (noting that

[3] The Zarembas argue that a juror could draw an adverse inference from the fact that, when asked about the call under

Encana and Chesapeake's arrangement was "subject only to definitive agreement," that the draft agreement "needs work to get to where [Chesapeake] thinks we're headed," and that Chesapeake was "on the side of quality versus timing"). In addition, in a post-call email to colleagues, that same Encana executive said he "continue[d] to feel" that Chesapeake was "not really motivated to enter an [agreement]." R. 362-10, Pg. ID 5351. All this evidence says, in no uncertain terms, exactly the opposite of what the Zarembas would have a jury conclude. Although we view the evidence in the light most favorable to the Zarembas, there is a limit to the inferences we can draw in their favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251–52 (1986) (summary judgment is appropriate where evidence is "so one-sided" that no "fair-minded jury could return a verdict for the plaintiff"). "When opposing parties tell two different stories, one of which is blatantly contradicted by the record . . . a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380 (2007). So it is here.

Finally, the Zarembas make no attempt to show how their poison-pill theory makes sense in light of the parties' later behavior. Two days after the Zarembas signed with Encana, Chesapeake notified the Zarembas that Chesapeake's offer *had not yet expired*. That same day, a Chesapeake manager wrote to Chesapeake's CEO about Encana's "unwillingness to end the compe-

---

oath, the executives involved invoked their Fifth Amendment right against self-incrimination. But the Encana executive involved in the call later revoked his Fifth Amendment invocation and testified that the executives did not speak about the Zarembas and that they did not reach a deal with Chesapeake on that call.

tition," and expressed doubt that continuing to pursue a mutual-interest agreement with Encana was even worth it. R. 362-48, Pg. ID 5650. Chesapeake's CEO responded that the manager should "freeze [Encana] for another 10 days or so," because it was "probably still better for us for them to believe we'll do a deal with them." *Id.*, Pg. ID 5649. These messages show that not only had Encana and Chesapeake failed to reach an agreement before Chesapeake purportedly tanked the Zaremba deal, but that their negotiations had been going so poorly Chesapeake was considering bowing out. Again, in light of this evidence, there is simply no way a reasonable juror could believe the Zarembas' poison-pill theory. So, if they are to succeed, it must be on a different one.

Theory Two: The Freeze Out. The Zarembas' next theory is that Chesapeake and Encana agreed to simultaneously walk away from any binding deal with the Zarembas after Encana and the Zarembas entered into the letter of intent. Since the evidence discussed above shows that the companies had not reached any collusive agreement *before* the Zarembas signed with Encana, the Zarembas' freeze-out theory can succeed only if they can show that the companies did so *afterward*. Here again, the evidence belies the Zarembas' position. Chesapeake emails show that it learned about Encana's decision to walk away from the Zaremba deal not from Encana—its alleged partner-in-crime—but from an anonymous participant in an online natural-gas discussion forum. And when an employee forwarded that post to Chesapeake's CEO, he reacted with surprise and said that Encana's decision made him "nervous." R. 383-4, Pg. ID 7558. He then emailed an Encana executive, asking whether Encana's sudden exit meant that it had "no more interest in joining forces down the road." R. 362-35,

Pg. ID 5573. After ignoring him for a few days, the Encana executive responded, curtly, that Encana had "decided to discontinue further leasing," and would "reassess [its] position after the summer." *Id.* Yet again, this evidence does not "tend[] to exclude the possibility" that Encana and Chesapeake were acting independently. *Matsushita*, 475 U.S. at 588 (internal quotations and citation omitted). Encana kept Chesapeake in the dark about its decision to walk away from the Zaremba deal, and it was not interested in playing nice even when Chesapeake's CEO tried to mend the fence. These emails contradict the Zarembas' freeze-out theory, and the Zarembas have failed to point to any evidence to the contrary. So this theory must fail too. *See Scott*, 550 U.S. at 380.

Theory Three: Ongoing Price Depression. The Zarembas' final theory is that after the companies tanked the Zaremba deal, they succeeded in decreasing the going rate for mineral-rights leases across northern Michigan. The Zarembas thus argue that they not only lost the opportunity to do a deal with Encana or Chesapeake, but also the opportunity to do so at a fair price on the open market with some other player. In support, they point to evidence suggesting that the companies reached an agreement several months after they stopped negotiating with the Zarembas. For instance, in one Encana executive's notes from a later phone call with Chesapeake, he wrote that the "principles" of Encana and Chesapeake's potential agreement were "non compete," "share data," and "save billions." R. 379-14, Pg. ID 7121. And in a later email, another Encana executive identified an area of land up for auction as "a [Chesapeake] area [where] we will not be bidding." R. 379-28, Pg. ID 7170.

This evidence "tends to exclude the possibility" that Encana and Chesapeake acted independently. *Matsushita*, 475 U.S. at 588 (internal quotations and citation omitted). But the Zarembas cannot win under this theory: It fails to connect the companies' alleged collusion to any harm that the Zarembas suffered. A reasonable juror could credit the Zarembas' evidence that the companies eventually formed a collusive agreement, but the Zarembas nevertheless fail to point to evidence suggesting that they even considered leasing their rights after their last communication with Chesapeake in July 2010. They claim they did so in their briefing, but appellate briefing is not summary-judgment evidence. As the Supreme Court has held, antitrust plaintiffs are required to show "that the conspiracy caused *them* an injury for which the antitrust laws provide relief," not just that the defendant was up to no good. *Atl. Richfield*, 495 U.S. at 344 (quoting *Matsushita*, 475 U.S. at 584 n.7). So, since the Zarembas have not pointed to any competent summary judgment evidence from which a reasonable juror could infer that they suffered an injury in the months after the companies walked away from their deal, their price-depression theory fails. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986) (holding that moving party may discharge its burden on summary judgment by pointing out the absence of evidence to support the non-moving party's case).

III.

After Encana sued the Zarembas for breach of contract, the Zarembas counterclaimed that Encana was liable for fraud and fraudulent inducement. Both Encana's breach-of-contract claim and the Zarembas' fraud claims went to trial. At the close of proofs, both

sides made motions for judgment as a matter of law, which the district court denied.

We review the denial of a motion for judgment as a matter of law de novo. *Mich. First Credit Union v. CUMIS Ins. Soc., Inc.*, 641 F.3d 240, 245 (6th Cir. 2011). Where federal courts sit in diversity, as the district court did here, they apply the standard for judgment as a matter of law used by the courts of the state whose substantive law governs the action. *Id.* In Michigan, judgment as a matter of law may be granted only where "reasonable minds could not differ as to the conclusions to be drawn from the evidence." *Id.* (quoting *Ridgway v. Ford Dealer Comput. Servs., Inc.*, 114 F.3d 94, 97 (6th Cir. 1997)). Just like at summary judgment, we view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in its favor. *Id.*

A.

Encana argues that the district court erred by denying its motion for judgment as a matter of law on its breach-of-contract claim. Specifically, Encana takes issue with the court's treatment of the Zarembas' waiver defense. At trial, the Zarembas admitted that they had failed to comply with the letter of intent's terms by refusing to return the $1.8 million. Instead, they mounted a waiver defense, relying on Encana's agent's assurance that they could keep the entire $2 million after Encana decided to walk away from the deal. Encana argues that Michigan law required the Zarembas to provide consideration for Encana's waiver. The district court held that Michigan law did not require the Zarembas to provide consideration and instructed the jury accordingly. The jury ultimately found that Encana had waived its right to recoup the earnest money.

The district court erred: Michigan law requires consideration for a waiver to be effective. The Michigan Model Civil Jury Instructions explicitly state that "[a] waiver of a substantial [contract] right requires consideration." *See* M Civ. JI 142.41. And the instructions cite *Babcock v. Public Bank*, in which the Michigan Supreme Court said just that: "waiver of a substantial right . . . is a matter of contract which requires a consideration." 114 N.W.2d 159, 164 (Mich. 1962). The Zarembas do not contest that the right to collect $1.8 million qualifies as a "substantial right." And since the Zarembas made no attempt to prove consideration at trial, Michigan law dictates that Encana's waiver was not effective. *Id.*; *cf. Lee v. Macomb Cty.*, 284 N.W. 892, 893 (Mich. 1939) ("Waiver being contractual in its nature can be no more effective as a bar than an express agreement or contract . . . .").

The Zarembas have not pointed to any intervening Michigan authority that questions *Babcock*'s validity. In fact, as Encana points out, Michigan courts continue to cite *Babcock* with some regularity. *See Brown v. Northwoods Animal Shelter*, No. 299361, 2011 WL 5072600, at *2 (Mich. Ct. App. Oct. 25, 2011) (per curiam) (citing *Babcock* for the proposition that "[a] release must be supported by sufficient consideration to be considered valid"); *Jack v. Hastings Mut. Ins. Co.*, No. 278109, 2008 WL 4958787, at *3 (Mich. Ct. App. Nov. 20, 2008) (per curiam) (same); *Davis v. Meade Grp.*, No. 262190, 2006 WL 142527, at *1 (Mich. Ct. App. Jan. 19, 2006) (per curiam) (same); *Karapetian v. Pontiac Osteopathic Hosp.*, No. 187077, 1996 WL 33358118, at *1 (Mich. Ct. App. Sept. 20, 1996) (per curiam) (same). Instead, the Zarembas point to *McCarty v. Mercury Metalcraft Co.*, 127 N.W.2d 340, 344 (Mich. 1964), in which the Michigan Supreme Court held that proof of consideration is not required to enforce a

contract *modification*. But modification and waiver are different. Waiver occurs when one party unilaterally surrenders its right to object to a counterparty's failure to perform a contract obligation. In contrast, modification occurs when parties mutually agree to change the terms of an agreement. This is a waiver case. So *McCarty* is inapposite.

The Zarembas next argue that "the vast majority of courts"—*i.e.*, courts in states other than Michigan—require no consideration for waiver. And indeed, *Williston on Contracts* says as much. 13 *Williston on Contracts* § 39:25 (4th ed.). But the Michigan Supreme Court says what the law is in Michigan. And as a federal court sitting in diversity, "we are bound by what we believe Michigan courts would do." *J.C. Wyckoff & Assocs. v. Standard Fire Ins. Co.*, 936 F.2d 1474, 1485 (6th Cir. 1991) (quoting *Diggs v. Pepsi-Cola Metro. Bottling Co.*, 861 F.2d 914, 927 (6th Cir. 1988)). The Zarembas cannot circumvent Michigan law by pointing out that Michigan has adopted a minority position.

With their consideration arguments exhausted, the Zarembas try one more avenue. Under Michigan law, an agreement made to discharge a contractual obligation "shall not be invalid because of the absence of consideration" if that agreement is "in writing and signed by the party against whom it is sought to enforce the change." Mich. Comp. Laws § 566.1. So even though *Babcock* requires consideration for waiver of substantial contract rights, Michigan law *also* suggests that a waiver lacking in consideration may be enforceable if it is set out in a signed writing. *Id.* The Zarembas thus argue that, regardless whether they failed to prove consideration, the jury could have

found that Encana's waiver was enforceable because it was in fact set out in such a writing.[4]

The Zarembas point to two such writings. First, an email chain in which Encana employees discussed the potential consequences of backing out of the Zaremba deal. Those emails noted that "[w]alking on Zaremba" could cause Encana to "lose $2MM in earnest money." R. 375-3, Pg. ID 6530. Second, a copy of a 1099-MISC tax form that Encana sent to the Zarembas after it submitted that form to the IRS, in which Encana noted that it had paid the Zarembas $2 million. But neither an *internal* Encana email nor a tax form constitutes an "*agreement* . . . in writing" between Encana and the Zarembas. Mich. Comp. Laws § 566.1 (emphasis added). Moreover, the tax form was not signed. *Id.* (an agreement discharging a contract obligation "shall not be valid or binding unless it shall be in writing *and signed* by the party against whom it is sought to enforce") (emphasis added). So neither of these documents can serve as a consideration substitute under MCL § 566.1.

In sum, the district court was incorrect that (1) waiver of a substantial contractual right does not require consideration under Michigan law and (2) the Zarembas' proffered writings were sufficient to satisfy

---

[4] The Zarembas take a curious position in interpreting § 566.1. At one point, they rely on § 566.1 to argue that consideration is *never* required for a waiver. But this argument is contrary to the provision's plain text, which indicates that an agreement discharging an obligation is not invalid absent consideration *if* there is a signed writing. Elsewhere, the Zarembas reverse course, suggesting that § 566.1 does not apply to waivers *at all*. We will assume to the Zarembas' benefit, however, that § 566.1 does apply and that absent consideration, the Zarembas could enforce Encana's waiver by pointing to a signed writing.

§ 566.1. Thus, since the Zarembas did not argue that Encana's purported waiver was in fact supported by consideration, no reasonable juror could lawfully find that they had succeeded on their waiver defense. The district court should have granted Encana's motion for judgment as a matter of law.[5]

B.

The Zarembas appeal the district court's denial of their motion for judgment as a matter of law on their fraud counterclaims.[6] The Zarembas claim that Encana made false representations that led them to sign the letter of intent and forgo the opportunity to strike a deal with Chesapeake. They argue that the evidence on this claim was so one-sided that they were entitled to judgment as a matter of law.

To prevail on their fraud claims, the Zarembas had to show that (1) Encana made a material representation, (2) that was false, (3) that Encana knew the representation was false when it was made (or made it recklessly), (4) that Encana made the representation with the intent that the Zarembas rely on it, (5) that the Zarembas did in fact rely on it, and (6) that the Zarembas were injured as a result of that reliance. *U.S. Fidelity & Guaranty Co. v. Black*, 313 N.W.2d 77, 82 (Mich. 1981) (quoting *Hi-Way Motor Co. v. Int'l*

---

[5] Given that Encana was entitled to judgment as a matter of law at the close of proofs, we need not reach its claim that the district court improperly instructed the jury on the Zarembas' waiver defense.

[6] Before the case was submitted to the jury, Walter Zaremba and the Zaremba Group voluntarily dismissed their counterclaims in recognition of the fact that damages accruing from those claims accrued to Zaremba Family Farms. For continuity, this section will continue to refer to "the Zarembas."

Harvester Co., 247 N.W.2d 813, 816 (Mich. 1976)). The Zarembas base their fraud theory on a single email from an Encana representative informing the Zarembas that she had "confirmed with [Encana's] VP" that Encana included the "non-binding language" in the letter of intent because it had to "observe Encana's Corporate protocol for Board approval of the deal." R. 598-1, Pg. ID 12789. The representative then assured the Zarembas that she "ha[d] authority and budget to enter into the deal in good faith." *Id.* The Zarembas argue that the jury was required to view these statements as knowing or reckless misrepresentations because Encana's management had not yet issued a final approval authorizing a binding lease of the Zarembas' rights.

The Zarembas' argument hinges on the idea that the only way to understand Encana representative's reference to the "deal" was as a reference to the final acquisition. There was ample evidence, however, that the "deal" referred to was the signing of the non-binding letter of intent and the transfer of the $2 million in earnest money, which Encana's representatives did in fact have the "authority and budget" to carry out. At trial, the head of Encana's land-negotiations team testified that management had authorized her to offer the Zarembas up to $2 million without seeking further approval. She also testified that the Encana vice president who signed the letter of intent had the authority to agree to the letter on Encana's behalf. Moreover, the Encana representative who sent the disputed email testified that she intended "deal" to mean "letter of intent." And *the Zarembas' own representative* testified unequivocally that he "knew that the deal [Encana's representative] was referring to was [the letter of intent]." R. 606-3, Pg. ID 13031. Indeed, the letter of intent itself made

clear that (1) the final purchase agreement would be a document separate from the letter of intent that would not be finalized for at least a few more weeks, and (2) a final purchase might *never* be completed. This was more than enough evidence for the jury to conclude that the Encana representative did not make a misrepresentation of fact, much less an intentional or reckless one. And so the district court correctly held that the Zarembas were not entitled to judgment as a matter of law.

IV.

The final dispute on appeal is over the Zarembas' motion for a new trial. At trial, Encana called an attorney with knowledge about oil-and-gas industry contracting practices as an expert witness. During his testimony, the district court repeatedly sustained the Zarembas' objections to the expert's attempts to testify as to improper legal conclusions. Afterward, the district court issued a curative instruction that the jury should "disregard any opinion" given by the expert about "what the law does or does not require." R. 625, Pg. ID 16323. The court then reminded the jurors that he, the trial judge, was "the sole judge of the law," and would be "giving [the jury] instructions about the law to be applied" during deliberations. *Id.* The Zarembas later made a motion for a new trial, arguing that the expert's testimony had tainted the jury. The district court denied that motion.

We review the denial of a motion for a new trial for abuse of discretion. *Clarksville-Montgomery Cty. Sch. Sys. v. U.S. Gypsum Co.*, 925 F.2d 993, 1002–03 (6th Cir. 1991) ("The authority to grant a new trial . . . is confided almost entirely to the exercise of discretion on the part of the trial court." (quoting in parenthetical *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36

(1980) (per curiam))). Where the district court admitted allegedly improper evidence but later issued a curative instruction, we will reverse only if (1) there is an "overwhelming probability" that the jury did not or could not follow the instruction and (2) a strong likelihood that the effect of the evidence was "devastating" to the moving party. *See Holmes v. City of Massillon*, 78 F.3d 1041, 1047 (6th Cir. 1996) (quoting in parenthetical *Greer v. Miller*, 483 U.S. 756, 766 n.8 (1987)). The burden of showing this likelihood of prejudice is on the party seeking the new trial. *See Clarksville*, 925 F.2d at 1002.

The Zarembas cannot clear this very high bar for several reasons. First, they have not established an "overwhelming probability" that the jury could not follow the district court's curative instruction. They seem to rely instead on the generalized notion that one cannot "unring the bell" once improper trial testimony has been heard by the jury. But that argument cannot itself win the day. If it could, there would be no need for the "overwhelming probability" standard— we would simply reverse every time jurors were exposed to improper testimony. That is not the law. *See Clarksville*, 925 F.2d at 1002 (explaining that when "prejudice is cured by instructions of the court, the motion for a new trial should be denied").

Second, the Zarembas fail to show a strong likelihood that the expert's testimony was "devastating" to their case. The testimony the Zarembas challenge related to the appropriate measure of *damages* for the alleged fraud, *not* to the Zarembas' attempt to prove fraud *liability*. Since the verdict form showed that the jury rejected the Zarembas' claim on liability, it is difficult to see how the challenged testimony could have had a "devastating" impact here. Therefore, the

district court did not abuse its discretion in denying the Zarembas' motion for a new trial.

V.

For these reasons, we AFFIRM the district court's decisions to (1) grant Encana's motion for summary judgment on the Zarembas' antitrust claims, (2) deny the Zarembas' motion for judgment as a matter of law on their fraud claims, and (3) deny the Zarembas' motion for a new trial. We REVERSE the district court's denial of Encana's motion for judgment as a matter of law on its breach of contract claim, VACATE the corresponding judgment, and REMAND with instructions to enter judgment for Encana.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 17-1429/16-2065

ENCANA OIL & GAS (USA) INC.,
a Delaware corporation,

Plaintiff-Appellant Cross-Appellee,

v.

ZAREMBA FAMILY FARMS, INC., a Michigan corporation; ZAREMBA GROUP, LLC, a Michigan limited liability company; WALTER ZAREMBA, an individual,

Defendants-Appellees Cross-Appellants.

ORDER

BEFORE: MOORE, THAPAR, and BUSH, Circuit Judges;

Upon consideration of the petition for rehearing filed by the appellee cross-appellant, It is ORDERED that the petition for rehearing be, and it hereby is, DENIED.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

/s/ Deborah S. Hunt

Issued: June 18, 2018

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed 10/16/15]

No. 1:12-cv-369

ENCANA OIL & GAS, INC.,

Plaintiff,

-v-

ZAREMBA FAMILY FARMS, INC.,
ZAREMBA GROUP, LLC, and WALTER ZAREMBA,

Defendants.

HONORABLE PAUL L. MALONEY

OPINION AND ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT and OPINION AND ORDER GRANTING IN PART AND DENYING IN PART ENCANA'S MOTION FOR SUMMARY JUDGMENT ON COUNTERCLAIM

This lawsuit arises from a breakdown in the negotiations to lease the oil and gas rights to some 18,000 acres in Antrim and Charlevoix counties in Michigan. Defendants Zaremba Family Farms, Zaremba Group, and Walter Zaremba (collectively Defendants) own the rights to the land. Plaintiff Encana Oil & Gas (Plaintiff) was acquiring the oil and gas rights to land in those counties to access the potential fossil fuels located in the Collingwood shale formation. On June 29, 2010, the parties executed a Letter of Intent, which

expressed an interest in reaching a future agreement. The Letter of Intent obligated Plaintiff to wire $2,000,000.00, as earnest money, to a bank account controlled by one or more of Defendants. In the event that no final agreement was reached, the Letter of Intent specified that Defendants would return ninety percent of the earnest money. No final agreement was reached and Plaintiff demanded the money be returned as specified in the Letter of Intent. Defendants did not return the money. This lawsuit ensued. Defendants have filed counterclaims.

The Second Amended Counterclaim ("Counterclaim) (ECF No. 149) raises ten claims: (1) violation of the Sherman Act Section 1, (2) violation of the Michigan Antitrust Reform Act, (3) breach of contract, (4) breach of contract (covenant of good faith and fair dealing), (5) fraud, (6) fraudulent inducement, (7) silent fraud, (8) promissory estoppel, (9) tortious interference with business expectancy, and (10) civil conspiracy. Plaintiff previously filed a motion to dismiss the counterclaims, which this Court granted in part and denied in part (ECF No. 181). The Court dismissed the counterclaims for breach of contract and for silent fraud. All of the other counterclaims remain.

Defendants' filed a motion for summary judgment, addressing only their counterclaim for antitrust violations. (ECF No. 358 - Redacted; ECF No. 456 - Under Seal.) Plaintiff filed a response. (ECF Nos. 381 and 382 - Redacted; ECF No. 383 - Under Seal.) Defendants filed a reply. (ECF No. 386 - Redacted; ECF No. 387 - Under Seal.)

Plaintiff's motion for summary judgment addresses the remaining counterclaims. (ECF No. 360 - Redacted; ECF No. 362 - Under Seal) Defendants filed a

response. (ECF No. 378 - Redacted; ECF No. 379 - Under Seal.) Plaintiff filed a reply. (ECF No. 389.)

Having reviewed the motion and briefs, the motions will be resolved without a hearing. W.D. Mich. LCivR 7.2(d).

I.

Summary judgment is appropriate only if the pleadings, depositions, answers to interrogatories and admissions, together with the affidavits, show there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(a) and (c); *Payne v. Novartis Pharms. Corp.*, 767 F.3d 526, 530 (6th Cir. 2014). The burden is on the moving party to show that no genuine issue of material fact exists, but that burden may be discharged by pointing out the absence of evidence to support the nonmoving party's case. Fed. R. Civ. P. 56(c)(1); *Holis v. Chestnut Bend Homeowners Ass'n*, 760 F.3d 531, 543 (6th Cir. 2014). The facts, and the inferences drawn from them, must be viewed in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (quoting *Matsushita Elec. Indust. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). Once the moving party has carried its burden, the nonmoving party must set forth specific facts in the record showing there is a genuine issue for trial. *Matsushita*, 475 U.S. at 574; *Jakubowski v. Christ Hosp., Inc.*, 627 F.3d 195, 200 (6th Cir. 2010) ("After the moving party has met its burden, the burden shifts to the nonmoving party, who must present some 'specific facts showing that there is a genuine issue for trial.'") (quoting *Anderson*, 477 U.S. at 248). In resolving a motion for summary judgment, the court does not weigh the evidence and

determine the truth of the matter; the court determines only if there exists a genuine issue for trial. *Tolan v. Cotton*, –U.S.–; 134 S.Ct. 1861, 1866 (2014) (quoting *Anderson*, 477 U.S. at 249). The question is "whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-252.

II.

The Sherman Antitrust Act prohibits contracts that unreasonably restrain trade or commerce. To establish a claim under § 1 of the Sherman Act, a claimant must prove (1) an agreement (2) that unreasonably restrains trade in the relevant market. *Realcomp II, Ltd. v. Fed. Trade Comm'n*, 635 F.3d 815, 824 (6th Cir. 2011). The first element, an agreement, may be established by either direct evidence of an agreement between the conspirators or by circumstantial evidence of conduct that would negate or undermine the likelihood of independent action and raise an inference of coordination. *Erie Cty., Ohio v. Morton Salt, Inc.*, 702 F.3d 860, 867-68 (6th Cir. 2012) (citing *Brown v. Pro Football, Inc.*, 518 U.S. 231, 241 (1996) and *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984)). The opinion in *Erie County* explained the claimant's burden for the first element. Evidence of parallel conduct will not establish a violation of the Sherman Act, even though such behavior would be admissible as circumstantial evidence, "'it falls short of conclusively establishing agreement or itself constituting a Sherman Act offense.'" *Id.* at 868 (quoting *Twombly*, 550 U.S. at 553-54). "'To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence that tends to exclude the possibility

that the alleged conspirators acted independently.'" *Id.* (quoting *Matsushita Elec.*, 475 U.S. at 588).

The Sixth Circuit has discussed, in more detail, the evidence necessary to establish an agreement for the purpose of an antitrust claim. The court explained that "[t]he Supreme Court has limited the inferences that can be drawn from ambiguous evidence in Sherman Act section 1 cases." *Riverview Investments v. Ottawa Cmty. Improvement Corp.*, 899 F.2d 474, 483 (6th Cir. 1990). The antitrust claimant has the burden of presenting evidence that "'tends to exclude the possibility' that the alleged conspirators were acting independently, rather than in concert pursuant to an agreement." *Id.* (quoting *Spray-Right*, 465 U.S. at 764.) Where the evidence is ambiguous, evidence of parallel conduct and the opportunity to conspire, combined with a lack of evidence of independent action is simply not sufficient for a claimant to meet the burden imposed because the evidence does not exclude the possibility of independent action. *Id.* at 485. Although ambiguous evidence may be "*consistent* with conspiratorial conduct," the circumstantial evidence is "not sufficient to allow an inference of a conspiracy absent some evidence which tends to exclude the possibility that conduct is independent." *Id.* (italics in original); *see Super Sulky, Inc. v. United States Trotting Ass'n*, 174 F.3d 733, 739 (6th Cir. 1999).

Both parties have moved for summary judgment on the antitrust claim, and this Court must address each motion viewing the evidence in the light most favorable to the non-moving party.

In 2010, energy companies began leasing the oil and gas rights to land in Michigan. The companies believed that they could exploit fossil fuels from deep shale formations in what is known as the Utica-Collingwood

formation. The State of Michigan sold the oil and gas rights to some 118,000 acres of public land at an auction in May 2010. At that auction, Plaintiff and Chesapeake Energy Corporation purchased the rights to more than seventy percent of the land offered in Charlevoix, Cheboygan, and Emmet counties, with Chesapeake purchasing more than sixty percent of the land. (ECF No. 456-2 Ex. 5A to Kneuper Report at 70 Page ID 9290.)[1]

In the weeks following the May auction, individuals with Plaintiff and Chesapeake began exchanging emails expressing an interest in working together, including emails between Aubrey McClendon and Randy Eresman, respectively the then chief executive officer of Chesapeake and the then president of Plaintiff's parent company. (*E.g,* ECF No. 456-9 Email Page ID 9329.)[2] Internal emails shows that by the middle of June, Plaintiff believed it had reached a verbal agreement with Chesapeake regarding fee leasing in Michigan. (ECF No. 456-12 Page ID 9337.)[3] At the same time, Plaintiff and Chesapeake were both negotiating with Defendants, and internal emails acknowledged that the two energy companies were bidding each other up while simultaneously trying to reach an agreement on fee leasing with each other. (ECF No. 456-13 June 16 Chesapeake Email Page ID 9341; ECF No. 456-15 June 25 Encana Email Page ID 3950.) [4] A document dated June 21, 2010, show Plaintiff and Chesapeake had drafted a document that would divide counties in Michigan between the two

---

[1] Filed under seal.

[2] Filed under seal.

[3] Filed under seal.

[4] Both documents filed under seal.

companies. (ECF No. 456-14 Area of Mutual Interest Page ID 9343-48.)

Defendants received a revised offer from Plaintiff on June 25, 2010. (ECF No. 456-7 Page June 25 Akers Email Page ID 9322).[5] About the same time, Defendants also received an offer from Chesapeake. (ECF No. 456-8 Page ID 9324-27.)[6] On June 29, Walter Zaremba met with Chesapeake to sign with that company. (ECF No. 358-13 Dzierwa Dep. at 271 Page ID 4858.) He did not sign an agreement with Chesapeake, however, because Chesapeake wanted Defendants to share post-production costs. Later that day, Defendants contacted Plaintiff and asked if the prior offer could be reinstated. Plaintiff agreed to reinstate its prior offer, but that it would expire at the end of the day. (ECF No. 358-14 June 29 Email Page ID 4860.) Defendants agreed and signed the Letter of Intent with Plaintiff. (ECF No. 10-1 Letter of Intent Page ID 47-52.)

The Letter of Intent anticipated that Plaintiff and Defendants would negotiate a binding agreement in which Plaintiff would lease from Defendants approximately 18,900 acres of land. (Letter of Intent at 1 Page ID 47.) Approximately two weeks later, on July 15, 2010, Plaintiff informed Defendants that its Board of Directors would not approve the transaction anticipated in the Letter of Intent and that it was ceasing efforts to negotiate a definitive agreement. (ECF No. 10-2 Page ID 54.)

---

[5] Filed under seal.

[6] Filed under seal.

A. Defendants' Motion for Summary Judgment on its Antitrust Counterclaim

Defendants argue they are entitled to summary judgment on the Sherman Act claim. Defendants contend that the evidence in the record establishes, without dispute, that Plaintiff and Chesapeake reached an agreement that unreasonably restrained trade and competition. Specifically, Plaintiff and Chesapeake divided the counties in Michigan between them so that they would not bid up the lease prices.

Defendants are not entitled to summary judgment. To be entitled to summary judgment on the antitrust claim, Defendants' proof must establish, without dispute, that an agreement existed. Proving that Plaintiff and Chesapeake were negotiating an agreement is not sufficient on this record. Taking the evidence in the light most favorable to Plaintiff, Defendants have not met their burden. Defendants evidence establishes that in May and June 2010, Plaintiff and Chesapeake were engaged in negotiations to reach an agreement of some sort which very well could have constituted a Sherman Act violation if consummated. In fact, the two companies even exchanged a draft of an agreement. However, the record also shows that on a separate track, Plaintiff and Chesapeake were competitively bidding on Defendants' land, with both parties submitting offers in late June 2010. The evidence of escalating bids is inconsistent with the inference that any anticompetitive agreement was reached. Indeed, one of Plaintiff's internal emails dated June 25 acknowledged that Defendants were one of two groups that might require "special attention" before any agreement with Chesapeake could be reached. (ECF

No. 362-9 Page ID 5346.)[7] In the same email chain, Plaintiff discussed a conversation with Chesapeake in which Chesapeake indicated that it would continue to pursue Defendants' land *until* Plaintiff and Chesapeake reached some agreement. (*Id.* Page ID 5345.) The same day, Chesapeake had an internal email discussion in which it wanted to reach some agreement with Plaintiff so that Chesapeake would get Defendants' land and Plaintiff would get the land of some other party. (ECF No. 362-6 Page ID 5328-29.)[8] In another Chesapeake email chain several hours later, in which Defendants were discussed, Mr. McClendon stated that Plaintiff "won't share, let's win." (ECF No. 362-51 Page ID 5657.) When Defendants rejected Chesapeake's offer on June 29, Defendants were able to convince Plaintiff to reinstate its last offer, fully and without changes. In other words, there is no evidence of any agreement between Plaintiff and Chesapeake up to June 29, as both parties continued to pursue Defendants' land. The evidence undermines any inference of an anticompetitive agreement that might arise from the earlier email exchanges between the two energy companies.

Defendants speculate that Plaintiff and Chesapeake reached an agreement on June 29. Defendants point to evidence that Plaintiff and Chesapeake had a telephone call on June 29. (ECF No. 387-7 Handwritten Note Page ID 7754.)[9] Taking the evidence in the light most favorable to Plaintiff, the note is simply evidence of continuing negotiations. Defendants' theory that Chesapeake intentionally added post-production costs

---

[7] Filed under seal.

[8] Filed under seal.

[9] Filed under seal.

at the June 29 meeting is undermined by evidence in the record. Defendants assert, without evidence, that Chesapeake added post-production costs in an attempt to sabotage an agreement between Chesapeake and Defendants because Chesapeake and Plaintiff had reached some anticompetitive agreement. Internal emails from Chesapeake discusses caving to Defendants' demand for no sharing of post-production costs. (ECF No. 379-10 Page ID 7104-05.) But, Chesapeake continued discussing Defendants' request for no post-production costs on June 28, indicating that it had not yet agreed to omit post-production costs from any offer to Defendants. (ECF No. 383-13 Page ID 7645-46.)[10] Without dispute, Defendants were able to enter into an agreement with Plaintiff based on the same terms Plaintiff had offered four days earlier. Finally, internal emails from Chesapeake establish that the two energy companies had still not reached any agreement by the first week of July. (ECF No. 383-3 Page ID 7530-31.)[11]

Defendants have not presented the quantum of evidence necessary to establish an agreement between Plaintiff and Chesapeake that caused Plaintiff to cease good faith negotiations to pursue a more definitive agreement, as anticipated by the Letter of Intent. Internal emails from Chesapeake dated July 16 indicates that Chesapeake did not know why Plaintiff ceased leasing efforts. (ECF No. 383-4 Page ID 7558-63.) [12] Chesapeake appears to have learned about Plaintiff's decision from an on-line discussion group. (*Id.*) In the email chain, Chesapeake contemplates

---

[10] Filed under seal.

[11] Filed under seal.

[12] Filed under seal.

making an offer to Defendants. (*Id.* Page ID 7557.) In a separate Chesapeake email chain earlier that same day, the "rumor" that Plaintiff stopped leasing efforts is repeated and Mr. McClendon states that Chesapeake's offer to Defendants should be reduced as a result. (ECF No. 362-39 Page ID 5613-14.) The record also contains evidence which would explain Plaintiff's conduct unrelated to any agreement with Chesapeake. On July 7, Plaintiff learned that Michigan would make available approximately 500,000 acres of public land at an auction to be held in October 2010. (ECF No. 362-33 Page ID 5569.)[13]

Finally, any evidence that Plaintiff and Chesapeake reached some agreement prior to the October 2010 auction of Michigan public lands does not establish an agreement between the two energy companies that would implicate Defendants' land. Plaintiff had ceased negotiating with Defendants by July 15.

B. Plaintiff's Motion for Summary Judgment (on the Antitrust Claim)

Plaintiff argues it is entitled to summary judgment on the antitrust claim. Plaintiff believes the evidence establishes, without dispute, that no agreement was reached between it and Chesapeake.

The Court agrees. Taking the same evidence in the light most favorable to Defendants, there is no genuine issue of material fact that Plaintiff and Chesapeake did not reach any anticompetitive agreement implicating Defendants' land. At best, there is evidence that Plaintiff and Chesapeake tried to reach an agreement. And there is also evidence of parallel behavior after

[13] Filed under seal. The email also indicates that Chesapeake and Plaintiff were still ironing out the terms of a potential agreement.

July 15 from which one could infer an anticompetitive agreement. But other contemporaneous evidence excludes the possibility that an agreement was reached prior to July 15. The Cheseapeake emails from the first week of July establish that no agreement had been reached at that point in time. The July 16 Chesapeake email chain establishes that Chesapeake learned about Plaintiff's decision to stop leasing from third parties, not from Plaintiff and not through any agreement between the two energy companies. Here, Defendants have not put forth sufficient evidence to create a genuine issue of material fact on the existence of any agreement. Simply put, the evidence does not exclude, as required by case law, independent action as the logical explanation for Plaintiff's behavior.

III.

The Court applies Michigan law to Defendants' state-law counterclaims. *See Super Sulky*, 174 F.3d at 741.

The same portions of the record are relevant to all of the state-law counterclaims. In early June 2010, both Plaintiff and Chesapeake had made offers to Defendants about leasing Defendants' land. Chesapeake made multiple offers, increasing the price per acre each time. (ECF No. 362-18 June 16 McGuire Email Page ID 5374; ECF No. 362-20 June 23 McGuire Email Page ID 5383; ECF No. 360-29 June 25 McGuire Email page ID 5030.)[14] Plaintiff also made several offers. (ECF No. 379-5 June 3 Akers Email Page ID 7085; ECF No. 379-6 June 24 Akers Email (Proposed Letter of Intent) Page ID 7088-89; ECF No. 378-10 June 25

[14] Documents ECF No. 362-18 and ECF No. 362-20 are filed under seal.

Akers Email Page ID 6709.)[15] On June 29, Walter Zaremba met with Chesapeake with the intention of entering into an agreement with Chesapeake. (ECF No. 378-13 Dzierwa Dep. at 271 Page ID 6714.) At the meeting, Chesapeake's offer included post-production cost sharing. (ECF No. 360-35 J. Zaremba Dep. at 54 Page ID 5042.) Chesapeake's offer included more money up front and more money per acre, but the sharing of post-production costs made the offer less favorable. (*Id.* at 53 Page ID 5042.)

Because the meeting with Chesapeake did not go as expected, that same day Defendants called Plaintiff and asked Plaintiff if the previous offer from June 25 was still a possibility. Plaintiff indicated that it would open the offer for that day only, June 29. (ECF No. 378-16 June 29 Akers Email Page ID 6718.) Defendants inquired about the non-binding language in the Letter of Intent. Kit Akers, Plaintiff's representative with whom Defendants were negotiating, explained that the language was corporate protocol, it was necessary for approval of the deal, and that "[w]e have [the] authority and budget to enter into the deal in good faith." (ECF No. 378-7 June 29 Akers Email Page ID 6720.) Despite this assurance, approximately two weeks later, Plaintiff sent Defendant a letter stating that the Board of Directors would not approve any agreement contemplated by the Letter of Intent. (ECF No. 378-34 Page ID 6761.)

Plaintiff moves for summary judgment on the remaining counterclaims. (ECF No. 360 - Redacted; ECF Nos. 362 and 363 - Under Seal.)

---

[15] Documents ECF No. 379-5 and ECF No. 379-6 are filed under seal.

A. Tortious Interference with Business Expectancy

Plaintiff argues it is entitled to summary judgment on the tortious interference claim. Plaintiff contends the record establishes a lack of evidence to support a valid business expectancy and a lack of evidence to support unlawful interference.

Under Michigan law, the elements of a claim for tortious interference with a business expectancy include (1) the existence of a valid business relationship or expectancy, (2) knowledge of the relationship by the opposing party, (3) intentional interference by the opposing party to induce or cause a breach or termination of the relationship or expectancy, and (4) resulting damages to the claimant. *Wausau Underwriters Ins. Co. v. Vulcan Dev.*, 323 F.3d 396, 404 (6th Cir. 2003); *Cedroni Assoc., Inc. v. Tomblinson, Harburn Assocs., Architects & Planners, Inc.*, 821 N.W.2d 1, 3 (Mich. 2012).

The evidence in the record establishes a genuine dispute about the first element, the existence of a valid business relationship or expectancy. The record establishes that both Plaintiff and Chesapeake were attempting to lease Defendants' land. The question is whether Defendants had a business relationship or the expectation of a business relationship with Chesapeake. Plaintiff identifies evidence in the record showing that Chespeake added post-production costs to it offer, which made Defendants reluctant to agree to any deal with Chesapeake. (ECF No. 360-36 W. Zaremba Dep. at 276-77 Page ID 5049-50.) But the record also contains evidence that, but for Akers' assurances that the a deal would be struck with Encana beyond the Letter of Intent, Defendants would have signed an agreement with Chesapeake even with

the post-production costs. [16] (ECF No. 378-18 W. Zaremba Dep. at 367 Page ID 6726.)

The evidence in the record also establishes a genuine issue of material fact about the third element, an intentional interference by the opposing party to induce or cause a termination of the business expectancy. The intentional interference must be a per se wrongful act or a lawful act performed with malice and unjustified in the law for the purpose of interfering with another's business relationship. *Wausau Underwriters*, 323 F.3d at 404; *Michigan Podiatric Med. Ass'n v. Nat'l Foot Care Program, Inc.*, 438 N.W.2d 349, 354-55 (Mich. Ct. App. 1989). Had Plaintiff not intentionally misled Defendants about their willingness to finalize a deal beyond the Letter of Intent, Defendants would have entered into an agreement with Chesapeake. Plaintiff cannot prevail on this claim simply because Defendants restarted the negotiations on June 29. The allegedly fraudulent statements occurred during those renewed negotiations. The same evidence that establishes a genuine issue of material fact about the fraud defense and the fraud claims, which are discussed more fully below, is applicable here.

Finally, contrary to what Plaintiff alleges, the finder of fact does not need to make inconsistent findings to find in favor of Defendants on the tortious interference claim. A jury could find that Defendants had a valid business expectation with Chesapeake based on the offer which included post-production costs. A jury could further find that Plaintiff induced Defendants to

---

[16] In its reply brief, Plaintiff argues Chesapeake resisted Defendants efforts to include favorable post-production cost terms in the agreement. But that evidence merely reinforces the conclusion that a genuine issue of material fact exists.

reject that offer by intentionally misleading Defendants about the nature of the Letter of Intent.

B. Fraud and Fraudulent Inducement

Plaintiff argues it is entitled to summary judgment on the fraud claims. Plaintiff insists the record does not contain sufficient evidence to support an actionable misrepresentation or reliance by Defendants on a misrepresentation.

In Michigan, a fraud claim requires the moving party to prove (1) a material representation was made, (2) the representation was false, (3) when the material representation was made, the party making the representation knew the representation was false or that the representation was made recklessly and without any knowledge of its truth, (4) the representation was made with the intent that the claimant should act on it, (5) the claimant acted in reliance on the representation, and (6) the claimant suffered injury because of the reliance on the representation. *Hord v. Envt'l Research Inst. of Michigan*, 617 N.W.2d 543, 546 (Mich. 2000). "[A]n unfulfilled promise to perform in the future is actionable when there is evidence that it was made with a present undisclosed intent not to perform." *Foreman v. Foreman*, 701 N.W.2d 167, 175 (Mich. Ct. App. 2005) (citation omitted). Fraud and fraudulent intent may be established by inferences from the actions of the parties and other circumstances. *Id.* Ordinarily, a claim for fraud is based on a statement relating to a past or existing fact, while a claim for fraud in the inducement arises when a party materially misrepresents future conduct. *Samuel D. Bergola Servs., Inc. v. Wild Bros.*, 534 N.W.2d 217, 219 (Mich. Ct. App. 1995). Defendants have put forth sufficient evidence to create a genuine issue of material fact on the question of whether the contract was

induced by a fraudulent statement. Upon Defendants' inquiry, Plaintiff reinstated a previous offer that was memorialized by the Letter of Intent. Defendants expressed concern about the language in the Letter of Intent stating that it was not binding. Plaintiff's agent assured Defendants that the language was protocol for Board approval, and that the budget and the authority to do the deal was in place. (ECF No. 371-5 Dzeirwa Dep. at 280-81 Page ID 6280-81; ECF No. 371-8 Akers Email Page ID 6296.) As a result of all the assurances, Defendants signed the Letter of Intent and stopped negotiating with Chesapeake. (ECF No. 371-10 J. Zaremba Dep. at 195 Page ID 6302.) Plaintiff, however, did not pursue a second agreement as anticipated by the Earnest Money provision. On this record, a genuine issue of material fact exists whether Plaintiff fraudulently induced Defendants to enter into an agreement which would entitle Plaintiff to a refund of $1,800,000 if a future agreement was not reached. Plaintiff insists that Defendants have not put forth evidence that Akers' statements were fraudulent. But Akers' statements led Defendants to believe the subsequent agreement identified in the Earnest Money provision was a foregone conclusion. *See Sullivan v. Ulrich*, 40 N.W.2d 126, 131-32 (Mich. 1949) (citing *Groening v. Opsata*, 34 N.W.2d 560 (Mich. 1948)). A subsequent agreement was not pursued or reached. Fraudulent misrepresentations can be inferred from circumstances. Additionally, a July 14 internal email indicates that Plaintiff would exceed its budgeted expenditures if it pursued the deal with Defendants and another lease it was negotiating. (ECF No. 379-35.) [17] Generally, Plaintiff operated within the approved budget, and would have had to

[17] Filed under seal.

seek additional authority to exceed the budget by more than ten percent. (ECF No. 389-9 M. Brittenham Dep. at 29-31 Page ID 7942-43.) Based on the record, a genuine issue of material fact exists whether these statements were false and were intentionally misleading.

The record contains sufficient evidence establishing that Defendants relied on the misrepresentations. As mentioned above, Walter Zaremba testified that, had Plaintiff not made the assurances, he would have ultimately accepted the Chesapeake offer even with the post-production costs included.

C. Promissory Estoppel

Plaintiff argues it is entitled to summary judgment on Defendants' counterclaim for promissory estoppel. Plaintiff maintains that any promise made was encompassed by the terms of the Letter of Intent.

Under Michigan law, a party establishes a claim for promissory estoppel by showing (1) a promise, (2) that the promissor should reasonably have expected to induce action of a definite and substantial character on the part of the promissee, (3) that, in fact, produced reliance or forbearance of that nature, (4) in circumstances requiring enforcement of the promise to avoid injustice. *Zaremba Equip., Inc. v. Harco Nat'l Ins. Co.*, 761 N.W.2d 151, 166 (Mich. Ct. App. 2008) (citation omitted). Where a written contract expressly contradicts the oral promise or assurance, a promissory estoppel claim will not lie. *Novak v. Nationwide Mut. Ins. Co.*, 599 N.W.2d 546, 552 (Mich. Ct. App. 1999).

Defendants have presented sufficient evidence to create a genuine issue of material fact on their promissory estoppel claim. Plaintiff insists that the plain language of the Letter of Intent, which expressly

states that it is not binding, contradicts the oral promise allegedly made. Not so. Defendants do not claim that Plaintiff promised the Letter of Intent was binding. Rather, Defendants point to assurances by Plaintiff that the non-binding language was merely a formality, that the language was necessary for corporate protocols, and that Plaintiff was financially prepared to go forward and negotiate an agreement. The evidence about the oral representations made to Defendants create a genuine issue of material fact sufficient to avoid summary judgment.

IV.

Having examined the evidence, the Court concludes that Plaintiff Encana is entitled to summary judgment and dismissal of the antitrust counterclaims. The record establishes that Encana and Chesapeake began to work out some leasing agreement between them as early as May 2010. The evidence also establishes that they had not reached any agreement by the first week of July. Finally, the evidence excludes the possibility that Encana and Chesapeake reached any agreement about the Defendants Zarembas' land as Chesapeake learned that Encana was walking away from lease negotiations through online forums, and not from Encana itself. The record also establishes genuine issues of material fact about the other counterclaims. Viewed in the light most favorable to Defendants, the representations made by Encana prior to the signing of the Letter of Intent are sufficient to avoid dismissal of those claims.

ORDER

For the reasons provided in the accompanying Opinion, Defendants Zarembas' motion for summary judgment (ECF Nos. 358 and 456) is DENIED.

Plaintiff Encana's motion for summary judgment (ECF Nos. 360 and 362) is GRANTED IN PART and DENIED IN PART. The antitrust claims in the counterclaim are DISMISSED. IT IS SO ORDERED.

Date: October 16, 2015

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed 04/15/16]

No. 1:12-cv-369

ENCANA OIL & GAS (USA), INC.,

Plaintiff,

-v-

ZAREMBA FAMILY FARMS, INC., ZAREMBA GROUP, L.L.C., and WALTER ZAREMBA,

Defendants.

HONORABLE PAUL L. MALONEY

ORDER DENYING MOTION FOR RECONSIDERATION AND OTHER MOTIONS RELATED TO THE ANTITRUST COUNTERCLAIM

This lawsuit was filed after negotiations to lease the oil and gas rights to thousands of acres of land broke down. Plaintiff Encana Oil and Gas (Encana) filed this lawsuit claiming breach of contract. Defendants Zaremba Family Farms, Zaremba Group LLC, and Walter Zaremba (collectively Zarembas) then filed counterclaims alleging a number of state law claims and an antitrust claim under the Sherman Act. The parties eventually filed cross motions for summary judgment over the antitrust claim. This Court granted

Encana's motion, denied the Zarembas' motion, and dismissed the antitrust claim. (ECF No. 462.)

Several motions have since been filed relevant to the antitrust claim. First, the Zaremabas filed a motion to reconsider. (ECF No. 486.) Second, the Zarembas filed a motion seeking leave to exceed the page limits for a non-dispositive motion, their motion for reconsideration. (ECF No. 482.) Third, the Zarembas filed a motion to file under seal confidential exhibits in support of their motion for reconsideration. (ECF No. 484.) Fourth, Encana filed a motion in limine to exclude from trial evidence of the dismissed antitrust claims. (ECF No. 442.) Fifth, Encana filed a motion in limine to exclude from trial the testimony of Robert Kneuper and Michael Quinn, the Zarembas' experts for their antitrust claims. (ECF No. 446.) With the motion to exclude Kneuper and Quinn's testimony, Encana filed a motion to seal confidential documents. (ECF No. 458.) Finally, the Zarembas filed a similar motion to seal documents attached to their response to the motion to exclude Kneuper and Quinn's testimony. (ECF No. 469.)

I. ECF No. 482 - Motion for Leave to Exceed Page Limitation

The Zarembas request leave to exceed the ten-page limit for non-dispositive motions. *See* W.D. Mich. LCivR 7.3(c). Although Encana did not concur with the request (*see* ECF No. 483 PageID.9698), it has not filed any response.

In light of the numerous claims of error raised in the motion, and in the absence of any response by Encana, the Zarembas' motion to exceed page limits (ECF No. 482) is GRANTED.

II. ECF No. 484 - Motion to File Under Seal Confidential Exhibits to Motion for Reconsideration

The Zarembas request leave to file under seal the confidential exhibits to their motion for reconsideration. Although the Zarembas informed the Court that Encana had declined to concur with the motion (ECF No. 485 PageID.9705), Encana filed a response clarifying that it did not oppose the motion as all of the exhibits were marked as confidential (ECF No. 494 PageID.10135-36.)

Based on the response by Encana, the Zarembas' motion for leave to file under seal (ECF No. 484) is GRANTED.

III. ECF No. 486 - Motion for Reconsideration

The Zarembas request this Court reconsider the October 16, 2015, Opinion and Order granting Encana's motion for summary judgment and denying the Zarembas' motion for summary judgment and dismissing the Zarembas' antitrust counterclaim. The Zarembas allege seven errors. Encana has not filed any response as the Local Rules do not allow a response unless ordered by the Court. *See* W.D. Mich. LCiv R. 7.4(b).

Under the Local Rule of Civil Procedure for the Western District of Michigan, a court may grant a motion for reconsideration when the moving party demonstrates both a "palpable defect" by which the Court and parties have been misled and a showing that a different disposition of the case must result from the correction of the mistake. W.D. Mich. LCivR. 7.4(a). The decision to grant or deny a motion for reconsideration under this Local Rule falls within the district court's discretion. *See Evanston Ins. Co. v. Cogswell Props., LLC*, 683 F.3d 684, 691 (6th Cir. 2012) (citation omitted). The "palpable defect"

standard does not expand the authority of the district court to reconsider an earlier order; it is merely consistent with a district court's inherent authority. *See Tiedel v. Northwestern Michigan Coll.*, 865 F.2d 88, 91 (6th Cir. 1988).

Parties aggrieved by an order that is not final and appealable do have recourse and may file a motion for reconsideration. The Sixth Circuit Court of Appeals has noted that the Federal Rules "do not explicitly address motions for reconsideration of interlocutory orders." *Rodriguez v. Tennessee Laborers Health & Welfare Fund*, 89 F.App'x 949, 959 (6th Cir. 2004). The Sixth Circuit has held that "'[d]istrict courts have inherent power to reconsider interlocutory orders and reopen any part of a case before entry of final judgment.'" *In re Saffady*, 524 F.3d 799, 803 (6th Cir. 2008) (quoting *Mallory v. Eyrich*, 922 F.2d 1273, 1282 (6th Cir. 1991) (citing *Marconi Wireless Tel. Co. v. United States*, 320 U.S. 1, 47-48 (1943))). A party seeking reconsideration of an interlocutory order must show (1) an intervening change in the controlling law, (2) new evidence previously not available, or (3) a need to correct error to prevent manifest injustice. *Louisville/Jefferson Cty. Metro Gov't v. Hotels.com, L.P.*, 590 F.3d 381, 389 (6th Cir. 2009) (citing *Rodriguez*, 89 F.App'x at 959); *see Carter v. Robinson*, 211 F.R.D. 549, 550 (E.D. Mich. 2003) (citing *NL Indus., Inc. v. Commercial Union Ins. Co.*, 65 F.3d 314, 324 n.8 (3d Cir. 1995)). The decision to grant or deny a motion for reconsideration of an interlocutory order falls within the discretion of the district court. *Rodriguez*, 89 F.App'x at 952 (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 12 (1983)).

A. Error #1

"It was error to disregard evidence of Encana and Chesapeake's collusive activities of October 2010, because those activities cause the market price for land in the Collingwood shale, including the Zarembas', to drop." (ECF No. 486 PageID.9716.)

The Zarembas argue that, even if the Court concludes no collusion occurred until after July 15, their anticompetition claim should not be dismissed. The Zarembas contend that, as a result of collusion between Encana and Chesapeake at the October 2010 auction of public lands, the value of their land plummeted.

The Zarembas have not established a palpable error such that correction is necessary to prevent manifest injustice. As this Court noted in its October 15, 2015, Opinion, the negotiations to lease the Zarembas land had ended. (ECF No. 462 PageID. 9470.) Even if the value of the leases fell, the Zarembas have not alleged, nor have they put forth an evidence to show, that after mid-July 2010 any company wanted to lease their land for the purpose of exploiting the Collingwood shale formation. Accordingly, the Zarembas cannot establish an antitrust injury arising from an alleged collusion between Encana and Chesapeake concerning the October 2010 auction of leases for public land.

B. Error # 2

"It was error to disregard the applicable case law that holds that tacit agreements are impermissible under the Sherman Act." (ECF No. 486 PageID.9717.)

The Zarembas argue that, in the October 16, 2015, Opinion and Order, the Court ignored applicable case law which holds that tacit agreements may be

unreasonable under the Sherman Act. The Zarembas acknowledge that the Court discussed the applicable law in its September 18, 2015, Order Denying Motion to Exclude Testimony of Dr. Robert Kneuper. (ECF No. 418.) In that Order, the Court concluded that the "email exchanges between Encana and Chesapeake about dividing up the market and smoking a peace pipe would be sufficient evidence to establish an illegal agreement in light of post-email behavior." (*Id.* PageID.8483.) In the motion for reconsideration, the Zarembas include numerous excerpts from emails exchanged between Encana and Chesapeake, which they allege provide a basis for concluding that there is evidence of a tacit agreement between the two companies.

The Zarembas have not established a palpable error such that correction is necessary to prevent manifest injustice. The Court's statement in the September 18 Order must be put in context. The motion was one to exclude an expert's testimony, and Encana had argued that Dr. Kneuper's testimony was not relevant because he could not distinguish between legal and illegal agreements. As part of this line of argument, Encana pointed to portions of Dr. Kneuper's deposition testimony, and insisted that Dr. Kneuper could not distinguish between explicit collusion and tacit collusion, the latter being independent, but parallel, behavior. The Court rejected Encana's argument, finding that Dr. Kneuper's testimony was relevant because he was able to distinguish between legal and illegal agreements.

> When Dr. Kneuper was asked about "tacit" collusion, his answers reflected that he understood the question to be about an unstated agreement rather than an expressed

> one. That meaning of "tacit" is different from the meaning of "tacit" in *Ohio ex rel. Montgomery* and *Brooke Group*, where "tacit" was used to describe parallel pricing that maximized profits. The discussion in the First Circuit's opinion in *R.M. Packer* would apply here. The email exchanges between Encana and Chesapeake about dividing up the market and smoking a peace pipe would be sufficient evidence to establish an illegal agreement in light of post-email behavior.

(ECF No. 418 PageID.8483.) The Court needed to explain that Encana relied on different definitions of the word "tacit," which caused Dr. Kneuper to respond to deposition questions in a manner that Encana exploited for its motion. The Court concluded that tacit agreements could be illegal and that Dr. Kneuper's testimony was relevant on that issue. When viewed in the proper context, the Court was not concluding that the evidence in the record established a tacit, illegal agreement between Encana and Chespeake.

In the cross motions for summary judgment, the Court viewed the evidence in the record in a different context, determining whether a genuine issue of material fact existed on the question of whether an illegal agreement existed. The Court concluded that the email exchanges and other actions by Encana and Chesapeake prior to July 15 did not support an inference of the existence of an anticompetitive agreement at that point in time. (ECF No. 462 PageID.9468.) Even viewed in the light most favorable to the Zarembas, the emails were evidence of on-going negotiations to reach what might have been an illegal agreement. Furthermore, in their motion for summary judgment, the Zarembas did not argue that the

evidence supported the conclusion that Encana and Chesapeake had reached a tacit agreement. (ECF No. 456.) A motion for reconsideration is not an opportunity to present new arguments that could have been presented before the court issued its ruling, but an opportunity for the court to *re*consider those arguments already presented. *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998); *see Evanston Ins.*, 683 F.3d at 692 (reviewing the district court's application of the palpable defect standard and upholding the denial of the motion for reconsideration because the arguments advanced in the motion were not raised during the prior proceedings). Neither is a motion for reconsideration an second opportunity for a party to present "new explanations, legal theories, or proofs." *Jinks v. AlliedSignal, Inc.*, 250 F.3d 381, 385 (6th Cir. 2001).

C. Error # 3

"Ruling that the Zarembas were required to exclude independent action as a logical explanation for Encana's behavior was palpable error." (ECF No. 486 PageID.9720.)

The Zarembas argue the Court committed a palpable error because they presented "abundant direct evidence of a conspiracy[.]" (PageID.9723.) The Zarembas reason that they did not need to exclude the possibility of independent action because they presented direct evidence of an antitrust conspiracy.

The Zarembas have not established a palpable error such that correction is necessary to prevent manifest injustice. This is the same evidence and same argument advanced in the motion for summary judgment. The Court disagrees that any of the evidence identified by the Zarembas is direct evidence of a conspiracy.

When *all* the evidence is considered, it establishes that Encana and Chesapeake were engaged in negotiations to reach an agreement. (ECF No. 462 PageID.9467-69.) The June 2010 email specifically referred to in the motion for reconsideration is not direct evidence of a collusive agreement.[1] As the Court stated in the Opinion and Order, the email shows that "Encana believed it had reached a verbal agreement with Chesapeake[.]" But that email does not allow the inference that Chesapeake had reached the same conclusion. And the draft of the Area of Mutual Interest Agreement dated June 21, 2010, (ECF No. 456-14), is an offer only (PageID.9346 46), not an agreement between the parties. Finally, the evidence is *not* circumstantial evidence that an agreement was reached. Evidence that the parties were engaged in negotiations does not allow for the inference that the parties reached an agreement. This is particularly true here, where there is evidence that Encana and Chesapeake competed with each other for the Zarembas' land through the last week of June 2010. (ECF No. 462 PageID.9466.) Under these circumstances, the Court did not err in concluding that "the evidence does not exclude, as required by case law, independent action as the logical explanation for Plaintiff's behavior." (*Id.* PageID.9470.)

---

[1] In the motion for reconsideration, the Zarembas refer to an email dated June 21, 2010, which was identified in the Court's Opinion and Order at PageID.9465. (ECF No. 486 PageID.9723.) The final entry in the document cited in the Court's Opinion and Order has a June 15 date, not June 21. (ECF No. 456-12 PageID.9337.)

D. Error # 4

"It was error to treat evidence that tends to indicate no collusion as dispositive where there is clear evidence of concealment." (ECF No. 486 PageID.9723.)

The Zarembas argue the record contains evidence that Encana and Chesapeake concealed their collusion. The Zarembas point to a business calendar entry dated August 31, 2010 (ECF No. 456-21 PageID.9410) and an email dated October 8, 2010 (ECF No. 358-32 PageID.4897.)

The Zarembas have not established a palpable error such that correction is necessary to prevent manifest injustice. Neither of these two documents allows the inference that Encana and Chespeake conspired with regard to the Zaremabas' land. Both documents are dated well after the deal between Encana and the Zarembas fell apart. The email considers whether Encana and Chesapeake might be participating in a civil conspiracy by working together for the purposes of acquiring state land, not private land. (ECF No. 358-32 PageID.4897.)

E. Error # 5

"It was error to find that Encana learned of the October State auction of the 500,000 acres in July 2010 where the evidence shows that Encana knew of it in June 2010." (ECF No. 486 PageID.9725.)

The Zarembas argue that Encana knew of the October auction as early as June 3, 2010, citing ECF No. 488-11 PageID.10047.[2] The Zarembas reason that a change in Encana's behavior between June 29 and

[2] The Zarembas made the same argument in their reply brief and referred to the same document. (ECF No. 387-13 PageID.7779.)

July 15 could not be explained by knowledge that it had in early June. The Zarembas conclude that the Court erred in finding that the information provides an explanation for Encana's change in behavior unrelated to any agreement with Chesapeake.

The Zarembas have not established a palpable error such that correction is necessary to prevent manifest injustice. The paragraph in which the alleged error occurs begins by concluding that Chesapeake did not know why Encana stopped its leasing efforts. (ECF No. 462 PageID.9469.) That conclusion is not affected by this alleged error. That conclusion, that Chesapeake did not know why Encana stopped its leasing efforts, supported the conclusion that Encana and Chesapeake did not reach an agreement and did not cause Encana to cease its good faith negotiations with the Zarembas, as anticipated by the Letter of Intent.

In addition, the document does not establish that Encana knew in June that Michigan would offer more than 500,000 acres of public land at the October 2010 auction. Although the top of the page includes a June 3, 2010, date, the document was not signed by the relevant parties until August, as was discussed at Dr. Kneuper's deposition. (ECF No. 373-1 Kneuper Dep. at 228 PageID.6464.) At the very end of his deposition, Dr. Kneuper was asked whether the document supported the conclusion that Encana knew that more than 500,000 acres would be offered at auction by Michigan in October 2010. (*Id.* at 257 PageID.6472.) Dr. Kneuper said the dates were confusing, but if the document was created on June 3, then the answer would be yes. (*Id.*) And Dr. Kneuper did not know how a document dated June 3 could have included a statement that leasing activities have ceased as of late July. (*Id.* at 256 PageID.6471; *see* ECF No. 488-11

PageID.10047.) Accordingly, the document itself contains information indicating that it was revised before it was signed, even if the document was first created on June 3.

Finally, the Court notes that the Michigan Department of Natural Resources (DNR) has developed administrative regulations for leasing the oil and gas rights to public lands. *See* Mich. Admin. Code R299.8101, *et seq.* The public auctions are currently held twice a year in May and again in October.[3] Any party may submit an application requesting that certain lands be leased. Mich. Admin. Code R299.8102(1). The DNR also identifies lands for leasing. Mich. Admin. Code R299.8102(1). The DNR then publishes notice of the lands that have been nominated by parties or recommended by the DNR for leasing. *Id.* R299.8102(4) and R299.8103(1). None of the parties have filed the notices indicating when the State of Michigan identified the land that would be auctioned in October 2010.

There are two Encana email chains that contain information from which the Court can infer that the DNR published the required notice in the first week of July 2010. In the October 16 Opinion and Order, the Court identified an email from Jeff Wojahn to Randy Eresman dated July 7 where Wojahn writes "I just came from a meeting with the team and found out that they believe that approximately 500,000 acres of land from the state of Michigan will be published soon for the October landsale." (ECF No. 362-33 PageID.5569.)

---

[3] Michigan Department of Natural Resources Oil and Gas Leases Frequently Asked Questions. Https://www.michigan.gov/documents/dnr/OG_FAQ_FINAL_401997_7.pdf (last visited on April 13, 2016) ("MDNR FAQ.")

Contained in the record is a second email from John Schopp to Eresman dated July 8 where Schopp writes "Michigan State just published plans to auction >500,000 on October 26th which represents the majority of future land they can sell on the play." (ECF No. 363-2 PageID.6047.)

F. Error # 6

"It was error to find that there was no evidence that Chesapeake inserted a post-production cost 'poison pill' in its June 29 Draft Agreement." (ECF No. 486 PageID.9726.)

The Zarembas argue that the record contains substantial evidence of the poison pill, and it was error for the Court to conclude otherwise.

Again, the Court's statement must be viewed in context. The findings to which the Zarembas object are included in the following paragraph.

> Defendants speculate that Plaintiff and Chesapeake reached an agreement on June 29. Defendants point to evidence that Plaintiff and Chesapeake had a telephone call on June 29. (ECF No. 387-7 Handwritten Note PageID.7754.) Taking the evidence in the light most favorable to Plaintiff, the note is simply evidence of continuing negotiations. Defendants' theory that Chesapeake intentionally added post-production costs at the June 29 meeting is undermined by evidence in the record. Defendants assert, without evidence, that Chesapeake added post-production costs in an attempt to sabotage an agreement between Chesapeake and Defendants because Chesapeake and Plaintiff had reached some anticompetitive agreement.

> Internal emails from Chesapeake discusses [sic] caving to Defendants' demand for no sharing of post-production costs. (ECF No. 379-10 PageID.7104-05.) But, Chesapeake continued discussing Defendants' request for no post-production costs on June 28, indicating that they had not yet agreed to omit post-production costs from any offer to Defendants. (ECF No. 383-13 PageID.7645-46.) Without dispute, Defendants were able to enter into an agreement with Plaintiff based on the same terms Plaintiff had offered four days earlier. Finally, internal emails from Chesapeake establish that the two energy companies had still not reached any agreement by the first week of July. (ECF No. 383-3 PageID.7530-31.)

(ECF No. 462 PageID.4968-69.)

The Zarembas have not established a palpable error such that correction is necessary to prevent manifest injustice. The Zarembas are correct that there is evidence in the record about post-production costs. The Zarembas are simply incorrect that there is any evidence in the record to support the conclusion that Chesapeake, at the June 29 meeting, added post-production costs to sabotage any agreement. In the paragraph quoted above, the Court concludes that the record does not support the conclusion that Encana and Chesapeake reached an illegal, collusive agreement on June 29. The Court found that the evidence on which the Zarembas relied did not support their conclusion. Even if there is a factual dispute about what occurred at the meeting between Walter Zaremba and Chesapeake on June 29, there is still no evidence in the record that Encana and Chesapeake

reached an illegal agreement on the morning of June 29 and there is evidence in the record suggesting that the two companies did not reach an agreement on the morning of June 29.

The Court also concluded that the evidence did not support the conclusion that Chesapeake inserted a poison pill post-production cost provision to a proposed agreement when it met with Walter Zaremba June 29. The Court acknowledged that Walter Zaremba wanted a no post-production cost provision and that Chesapeake considered that provision and even initially offered that provision. However, the details of the paragraph for no post-production costs were still being ironed out on June 28. (ECF No. 383-13 PageID.7645-46.) The two sides were negotiating how to calculate the Zarembas' royalty interests (ORRI); the Zarembas did not want transportation costs and treating fees for wells to be included in the calculation and Chesapeake's proposed language did not include that exclusion from the calculation. (*Id.* PageID.7646.) The Zarembas ignore this email chain in their motion for reconsideration. The Zarembas focus on bullet point summaries contained in emails exchange three days earlier. The Zarembas then jump to Walter Zaremba's deposition testimony where he was asked to tell what happened at the June 29 meeting.

> "It was the post-production costs, and I said, 'I won't sign this. We've got a deal, Dwain – or Dave.'"
>
> . . .
>
> "'Get that out,' you know. "Scratch that. We've got a deal.'"

(ECF No. 486-23 W. Zaremba Dep. at 276 PageID. 9860.)[4] In light of the June 28 emails which highlight a disagreement between the parties regarding the paragraph in which the post-production cost language was included, the Court cannot infer from Walter Zaremba's ambiguous deposition testimony that Chesapeake inserted post-production costs into the proposed agreement on June 29. The parties *already* had a disagreement about the language for the paragraph containing the discussion of post-production costs.

G. Error # 7

"It was error to find that the telephone call between the executives of Encana and Chesapeake on the morning of June 29 was merely evidence of continuing negotiations." (ECF No. 486 pageID.9728.)

The Zarembas argue that the Court erred in finding that Encana and Chesapeake did not reach an agreement during the June 29 telephone call. The Zarembas argue that the Court was misled by Encana, which cited evidence relating to a June 25 telephone call, not evidence about the June 29 telephone call. The Zarembas argue that the two people who spoke with each other on June 29, Schopp and Jacobson, exercised their Fifth Amendment privilege and would not answer questions about their conversations.

The Zarembas have not established a palpable error such that correction is necessary to prevent manifest injustice. The reference to the June 29 telephone call occurs in the paragraph quoted above as part of the discussion of alleged Error # 6. The Court concluded that Schopp's handwritten note summarizing the June

[4] The exhibit was previously made part of the record

29 telephone call was evidence that Encana and Chesapeake were still negotiating an agreement. The note includes several phrases from which the Court inferred that negotiations were on-going, including "subject only to a definitive agreement," "needs work to get to where he thinks we're headed," and "I think we still do want a deal[.]." (ECF No. 387-7 ageID.7754.)

The Court was not misled; the note is a summary of Schopp's June 29 telephone call with Jacobson. In the pages of Schopp's deposition referenced in the motion for reconsideration, Schopp states that Exhibit 254 (the handwritten note) is a summary of a "subsequent conversation," and not the conversation that occurred on June 25. (ECF No. 398-2 Schopp Dep. at 226 PageID.7910.) Schopp stated that there were no notes in his Day-Timer about the June 25 conversation. (*Id.* at 227 28 PageID.7910.) Later, Schopp was asked questions about the handwritten note as a summary of the June 29 conversation. (*Id.* at 232-40 PageID. 7912-14.) Finally, the record includes an email from Schopp dated June 29 at 8:50 a.m. (ECF No. 362-64 PageID.5962.) In the email, he states he "just spend [sic] 30 minutes on phone with . . . Jacobson, regarding the LOI process. They have reviewed our June 21st draft document and plan to have a CHK version sent back to use by the end of this week." (*Id.*) The email is further evidence that Encana and Chesapeake did not reach an agreement during the June 29 telephone call. The Court cannot infer that an agreement was reached from the fact that the phone conversation occurred. From that fact, the Court cannot infer anything about the content of the conversation. Rather, the Court infers that no agreement was reached from the other evidence in the record, like the notes about the phone call, the fact that the Zarembas signed the Letter of

Intent with Encana after the phone call, and internal Chesapeake emails after the phone call, which were all cited in the October 16, 2015, Opinion and Order.

IV. ECF No. 442 - Motion in Limine to Exclude Evidence of or Reference to Dismissed Antitrust Claim

Encana requests the Court exclude from trial any evidence of the dismissed antitrust claims. (ECF No. 442 "Dismissed Antitrust Claim" motion in limine.)[5] Encana's request extends to post-mid July 2010 evidence regarding the October 2010 auction of leases for public lands. Encana argues the evidence is not relevant, its introduction at trial would be unfairly prejudicial, and its introduction at trial would require a trial-within-a-trial.

Encana's Dismissed Antitrust Claim Motion in Limine (ECF No. 442) is DENIED WITHOUT PREJUDICE. Initially, Encana has not established that all of the evidence that might have been used to support the Zarembas antitrust claim is not relevant to the claims remaining in this lawsuit. The Court generally agrees with Encana that "evidence that is relevant only to [the] dismissed claims" is not relevant and should be excluded. *Andazola v. Logan's Roadhouse, Inc.*, No. CV-10-S-316-NW, 2013 WL 1834308, at *8 (N.D. Ala. Apr. 29, 2013); *see Asanjarani v. New York*, No. 09 Civ. 7493(JCF), 2011 WL 6811027, at *1 (S.D.N.Y. Dec. 27, 2011) ("Thus, evidence relating exclusively to claims previously dismissed is generally inadmissible.") But the fact that a particular piece of evidence was used by the Zarembas at some point in the litigation to support their antitrust claim is not

[5] The brief in support is located at ECF No. 443. The Zarembas' response brief is located at ECF No. 491.

sufficient for that evidence to be excluded from trial. To be excluded from trial, the evidence must not be relevant to any of the remaining claims. Being relevant to the dismissed claim, by itself, is not sufficient to exclude the evidence.

At this point, the Court does not have sufficient information about all the evidence the Zarembas might seek to introduce at trial or how that evidence might be relevant to their remaining claims. For the same reason, the Court cannot, at this point, determine that the unfair prejudice from the evidence would substantially outweigh the probative value of the evidence. By way of guidance, the Court finds, generally, that there is little danger of juror confusion or the need for a trial-within-atrial. The Zarembas unequivocally state that they "will not use the words 'antitrust' or attempt to argue that Encana should be liable for 'antitrust injury.'" (ECF No. 491 PageID.10076.) In the absence of such argument or characterization of the evidence, there is little danger that the jury might make a decision about the remaining claims based on an improper basis. Where necessary, Encana may request the Court provide a limiting instruction to the jury.

V. ECF No. 458 - Motion to File Under Seal Confidential Materials and ECF No. 469 - Motion to File Under Seal Confidential Exhibits

Encana requests the Court permit it to file confidential materials under seal. (ECF No. 458.) The documents are exhibits attached to Encana's motion in limine to exclude the testimony of Robert Kneuper and Michael Quinn. The Zarembas filed a similar motion for exhibits attached to their response to the motion in limine. (ECF No. 469.)

Both motions to seal (ECF Nos. 458 and 469) are GRANTED. The materials identified were marked as confidential by one party or the other as allowed by the stipulated protective order.

VI. ECF No. 446 - Motion in Limine to Exclude Testimony of Robert Kneuper and Michael Quinn

Encana requests the Court exclude from trial the testimony and expert reports from Robert Kneuper and Michael Quinn. (ECF No. 446 "Expert Reports" motion.)[6] Encana argues that the two experts offered opinions that were relevant only to the Zarembas' antitrust claim. Because the antitrust claim has been dismissed, Encana reasons that the experts should not be allowed to testify. Encana also argues that allowing the experts to testify would be unfairly prejudicial and would confuse the jury.

Encana's Expert Reports Motion in Limine (ECF No. 446) is DENIED WITHOUT PREJUDICE. The Zarembas have identified opinions offered by the experts that are relevant to their remaining state law claims. For example, both experts have opined whether the reasons offered by Encana for backing out of the Letter of Intent make economic sense. Those opinions might be relevant if Encana asserts any of those reasons as its defense to the fraud claim. Other portions of the reports, however, might not be relevant to any of the remaining claims. At this point, the Court does not have sufficient information to determine whether other portions of the reports are relevant. The risk of unfair prejudice is minimal. The Zarembas have unequivocally stated that the reports should

[6] The brief in support is located at ECF No. 447. The Zarembas' response is located at ECF No. 470.

have any references to antitrust or the Sherman Act redacted before being presented at trial. (ECF No. 470 PageID.9501 and 9506.)

VII.

For the reasons provided in each section above,

1. Zarembas' motion for leave to exceed page limits (ECF No. 482) is GRANTED;

2. Zarembas' motion to file under seal (ECF No. 484) is GRANTED;

3. Zarembas' motion for reconsideration (ECF No. 486) is DENIED;

4. Encana's Dismissed Antitrust Claim motion in limine (ECF No. 442) is DENIED WITHOUT PREJUDICE;

5. Encana's motion to file under seal (ECF No. 458) is GRANTED;

6. Zarembas' motion to file under seal (ECF No. 469) is GRANTED;

7. Encana's Expert Reports motion in limine (ECF No. 446) is DENIED WITHOUT PREJUDICE.

IT IS SO ORDERED.

Date: April 15, 2016

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed 04/22/16]

No. 1:12-cv-369

ENCANA OIL & GAS (USA), INC.,

Plaintiff,

-v-

ZAREMBA FAMILY FARMS, INC., ZAREMBA GROUP, L.L.C., and WALTER ZAREMBA,

Defendants.

HONORABLE PAUL L. MALONEY

ORDER DENYING MOTION FOR RECONSIDERATION

Zaremba Family Farms, Zaremba Group, and Walter Zaremba (collectively Zarembas) filed this motion for reconsideration of the order denying their prior motion for reconsideration. (ECF No. 506.)

In their counterclaims, the Zarembas allege Encana and Chesapeake colluded with each other in violation of the Sherman Act. The Zarembas and Encana filed cross-motions for summary judgment on the antitrust counterclaim. On October 16, 2015, this Court granted Encana's motion and denied the Zarembas' motion, concluding that the evidence in the record established

that the two companies were negotiating an agreement, that the two companies tried to reach an agreement, but ultimately did not reach any agreement, at least through mid-July 2010. (ECF No. 462.) Convinced that the Court did not properly interpret the evidence, and convinced that the Court erred in its application of antitrust law, the Zarembas filed a motion for reconsideration of the denial of its motion for summary judgment. (ECF No. 486.) The Zarembas identified specific legal and factual conclusions in the opinion resolving the motions for summary judgment, and explained why they felt the Court erred. The Court carefully considered their arguments, but ultimately denied the motion for reconsideration. (ECF No. 503.)

In this new motion for reconsideration, the Zarembas are simply reasserting the same arguments and relying on the same evidence that the Court previously considered in the cross motions for summary judgment and in the prior motion for reconsideration. A motion for reconsideration will be denied where the issues raised by the moving party have already been raised and ruled upon by the court, either expressly or by reasonable implication. *Estate of Graham v. County of Washtenaw*, 358 F.3d 377, 385 (6th Cir. 2004). To the extent this new motion for reconsideration identifies new alleged errors in the summary judgment opinion, the arguments are improper because they should have been raised in the prior motion for reconsideration. A motion for reconsideration is not an opportunity to present new arguments that could have been presented before the court issued its ruling, but an opportunity for the court to reconsider those arguments already presented. *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998).

For these reasons, the motion for reconsideration (ECF No. 506) is DENIED. IT IS SO ORDERED.

Date: April 22, 2016

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge

APPENDIX F

United States Code Annotated
Title 15. Commerce and Trade
Chapter 1. Monopolies and Combinations in Restraint of Trade (Refs & Annos)
§ 15. Suits by persons injured

Currentness

Notes of Decisions for 15 USCA § 15 are displayed in two separate documents. Notes of Decisions for subdivisions I to VII are contained in this document. For Notes of Decisions for subdivisions VIII to end, see second document for 15 USCA § 15.

15 U.S.C. § 15. Suits by persons injured

(a) Amount of recovery; prejudgment interest

Except as provided in subsection (b), any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

(b) Amount of damages payable to foreign states and instrumentalities of foreign states

(1) Except as provided in paragraph (2), any person who is a foreign state may not recover under subsection (a) an amount in excess of the actual damages sustained by it and the cost of suit, including a reasonable attorney's fee.

(2) Paragraph (1) shall not apply to a foreign state if—

(A) such foreign state would be denied, under section 1605(a)(2) of Title 28, immunity in a case in which the action is based upon a commercial activity, or an act, that is the subject matter of its claim under this section;

(B) such foreign state waives all defenses based upon or arising out of its status as a foreign state, to any claims brought against it in the same action;

(C) such foreign state engages primarily in commercial activities; and

(D) such foreign state does not function, with respect to the commercial activity, or the act, that is the subject matter of its claim under this section as a procurement entity for itself or for another foreign state.

(c) Definitions

For purposes of this section—

(1) the term "commercial activity" shall have the meaning given it in section 1603(d) of Title 28, and

(2) the term "foreign state" shall have the meaning given it in section 1603(a) of Title 28.

Additional material from this filing is available in the Clerk's Office.