ORIGINAL

In the

Supreme Court of the United States

The Vendo Company

Petitioner,

v.

Lektro-Vend Corporation, Et Al.,

Respondents.

No. 76-156

C. 1.

Washington, D. C.
January 19, 1977

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HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

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THE VENDO COMPANY, Petitioner,	:	
v.	:	No. 76-156
LEKTRO-VEND CORPORATION, ET AL., Respondents.	:	

Washington, D. C.

Wednesday, January 19, 1977

The above-entitled matter came on for argument at 10:59 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN P. STEVENS, Associate Justice

APPEARANCES:

EARL E. POLLOCK, ESQ., 800 Sears Tower,
Chicago, Illinois 60606, for the Petitioner.

BARNABAS F. SEARS, ESQ., One IBM Plaza,
Chicago, Illinois 60611, for the Respondents.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 76-156, Vendo Company against Lektro-Vend Corporation.

Mr. Pollock.

ORAL ARGUMENT OF EARL E. POLLOCK, ESQ.

ON BEHALF OF THE PETITIONER

MR. POLLOCK: Mr. Chief Justice, and may it please the Court:

This case involves a preliminary injunction against an on-going state court proceeding, but more specifically the injunction enjoins a state court proceeding to collect final state court judgments in the amount of $7½ million, final state court judgments resulting after ten years of litigation in the Illinois courts, final judgments fully reviewed by the Illinois Supreme Court and unanimously affirmed by that court in a very thorough opinion by Judge Walter Schaefer, and final judgments which this Court declined to review on petition for certiorari.

Furthermore, the preliminary injunction was issued by the District Court on precisely the same federal grounds which the state defendants had specifically raised by formal pleading in the state proceeding as a defense, a defense which the state courts, indeed, the Illinois Appellate Court, specifically ruled was within the jurisdiction of the Illinois courts to adjudicate. A defense, however, which when the case

was then remanded for trial on that defense in the state trial court, the state defendants immediately before trial moved to withdraw the Federal anti-trust defense -- that was in 1971 -- and never again reasserted that federal defense in the state proceeding.

QUESTION: There is no significance if they withdrew it without prejudice?

MR. POLLOCK: I don't think so, Your Honor. Certainly not -- that could have no effect on the -- either the Section 2283 question, which we are dealing with today, or comity and federalism questions, because obviously any litigant cannot determine for himself by removing a defense or claim without prejudice whether that shall affect the application of principles of comity and federalism.

I think that so far as this case is concerned, regardless of what may have been the right of the state defendants at some later date in the state proceeding to again raise the Federal defense, the withdrawal of that defense without prejudice in 1971 can have no effect, for the reason that during the next four years of the state court proceeding the state defendants never chose to reassert that federal defense.

QUESTION: Mr. Pollock, it was pending in the federal court all this period, wasn't it? For some time prior to withdrawal, they had been asserting their Federal

antitrust theory, had they not?

MR. POLLOCK: Yes, in a trouble-damage action which is still pending and which, indeed, will be going to trial.

QUESTION: Which was more or less set on the back burners -- a phrase we used to use -- while the state proceeding was completed, isn't that true?

MR. POLLOCK: It was set on the back burner over the objection of my client, Vendo.

We have set forth in a supplement to our brief, Supplement B, a full statement of the various continuances obtained by the state defendants in the federal case with respect to the trouble-damage claim.

I would also point out, Mr. Justice Stevens, that throughout the ten-year period of the state court proceeding, from 1965 to 1975, at no time was there ever any intimation that at the conclusion of the state case the state defendants in their federal case which they had filed after the state proceeding was initiated -- there was never any intimation that the state defendants or the federal plaintiffs would ever seek to enjoin the results of the state litigation, but instead every statement by the state defendants or the federal plaintiffs in the federal case was to the effect that if the -- if Vendo is successful in its state proceeding to recover judgments as it did, then the state defendants would seek

damages -- would seek damages based in part on the state court proceeding.

But not until January 1975 was there ever the slightest intimation, even one word in the record, about obtaining a preliminary injunction against the state court proceeding.

QUESTION: They didn't need it until then, did they?

You don't rely on this as a waiver.

They didn't have any need for an injunction as long as they were willing to try out the state issues in the state court.

MR. POLLOCK: Mr. Justice Stevens, we are not arguing waiver. For example, we are not contending that the federal plaintiffs are barred from proceeding with their trouble-damage action.

QUESTION: You are really just relying on the anti-injunction statute, as I understand it.

MR. POLLOCK: We are relying on the anti-injunction statute and, in addition, Your Honor, the principles of comity and federalism, in this context where you have a final state judgment.

QUESTION: What I am suggesting is the issues would be exactly the same if the problem arose ten years ago instead of today -- the legal issues.

MR. POLLOCK: With respect to Section 2283, I think that is correct, but the additional issues presented in our petition relating to the application of fundamental principles of federal-state relations are affected very substantially by the fact that here you have state court defendants who specifically raised a federal defense and then went all the way up to the Illinois Appellate Court, insisting that they had the right to have the state court determine that issue.

They persuaded the Illinois Appellate Court that they did -- that the Illinois courts did have jurisdiction.

Having persuaded the Illinois courts that the Illinois courts had such jurisdiction -- and that opinion of the Illinois Appellate Court is at pages 77 to 79 of the Appendix -- when the case was remanded for trial, so that they could have the opportunity that they pleaded they wanted to have --

QUESTION: They then decided they would rather try those issues in the federal court.

MR. POLLOCK: That's right, and withdrew the federal defense, and for the next four years -- the last four years of this marathon ten-year proceeding -- there was never any reference on their part to the federal defense.

What they did was take the federal defense, stick it in their back pocket where it could be used possibly at a later date in the event the judgment was entered against

them.

And we say the circumstances here, the withdrawal of the defense and the failure to reassert it and, in addition, the clear entitlement of these judgments to full faith and credit and, in addition, the basic principles set forth perhaps most clearly in this Court's decision in the Rooker case, that state court litigants cannot obtain rehearing or appeal by going to a federal district court as distinguished from --

QUESTION: I don't understand them to be seeking any rehearing or appeal of any state issue decided in the state proceeding. They are claiming that this whole thing is illegal as a matter of federal law.

But that's not a review of the state -- Is that a review of any issue decided by the state court?

MR. POLLOCK: Yes, it is, Your Honor, in the sense that what they have done is to nullify --

QUESTION: The total result. I understand that.

MR. POLLOCK: -- the total result. And not only to nullify the state judgment, not only to nullify the pending state proceedings in the Illinois trial court, supplementary proceedings which had been initiated before the motion for injunction was filed to enforce the judgments, but they have nullified to that extent these fundamental policies of the State of Illinois concerning the fiduciary duties of corporate

officers and directors.

Now --

QUESTION: Suppose it is true that the defendant in the state suit, your opponents, could not have gotten any relief, antitrust relief, in the state court. There might have been a defense but they could not have gotten a judgment.

MR. POLLOCK: It is for that reason, Your Honor, that we are not saying that they are precluded --

QUESTION: Yes or no? That's true, isn't it?

MR. POLLOCK: The relief -- You are right. They could not have obtained a --

QUESTION: Let's suppose that in the --

MR. POLLOCK: -- The relief they could have obtained, Your Honor, would be to prevent the judgment --

QUESTION: I understand that. I understand that.

Now, how about in the federal court? When was the federal suit filed?

MR. POLLOCK: The federal suit was filed two months after the state proceeding was filed in 1965.

QUESTION: Did the federal judge, in that suit, indicate that he wouldn't go ahead as long as the federal defense was pending in the state court?

MR. POLLOCK: No. There were several federal judges who were involved. One of the federal judges insisted that the case proceed. Counsel for the federal plaintiffs urged

the federal court, pleaded with the federal court, to defer any action in the federal case until the state court proceeding had been concluded. And, at least on two occasions as set forth verbatim --

QUESTION: The federal plaintiff urged the federal court judge.

MR. POLLOCK: Yes, as set forth in Supplement B to our brief, where we quote exactly what transpired with these various status reports.

On at least two occasions, counsel for Vendo protested the delay of the trouble-damage case and urged the court to go ahead.

In those instances, at that time, the federal judge accepted the entreaties of the federal plaintiff to defer any action, in large part, on the theory that -- in fact, at one point, on the ground that the federal antitrust defense would be adjudicated in the state courts.

Almost within the following few months counsel for the federal plaintiff went into the state court and withdrew that defense so that it could never be --

QUESTION: I suppose he did have a choice between -- there was a choice to be made as to whether to submit the antitrust defense in the state court or not, because if it were decided against him there he could never have any relief only in the federal court and the federal court was --

MR. POLLOCK: No, no. I think that is incorrect.

QUESTION: No collateral estoppel?

MR. POLLOCK: There would be a collateral estoppel effect with respect to issues which were actually litigated there.

QUESTION: Yes.

MR. POLLOCK: There would not be a res judicata effect with respect to the claim of the federal plaintiff under the federal trouble-damage actions.

A number of decisions have pointed out the significant difference.

QUESTION: I don't think there would be any res judicata, but there would be collateral estoppel.

MR. POLLOCK: There would be collateral estoppel.

The decision --

QUESTION: And those issues could not be retried in the federal courts.

MR. POLLOCK: That's right. We are not suggesting now that in the trouble damage case which is proceeding ahead in the district court that there is a res judicata bar, nor can there be a collateral estoppel bar with respect to issues directly concerning the federal antitrust defense, since that was withdrawn.

So they are free to proceed and they have assured the district court, even just within the last month, that

they -- that regardless of what this Court decides with respect to the injunction, that they are proceeding ahead with their trouble-damage action.

As I have indicated, we don't believe that there is, either an appropriate res judicata bar to their doing so, nor do we think there can be a collateral estoppel issue except as to matters which were actually litigated.

QUESTION: Nothing was litigated there with respect to an antitrust defense because it was withdrawn.

MR. POLLOCK: The problem there, Your Honor, is that --

QUESTION: Some of the facts on your affirmative case are the same ones involved in the antitrust --

MR. POLLOCK: That's not quite accurate for the reason that as their amended complaint shows -- which they filed in January of 1975 -- many of their allegations concerning alleged improper conduct on the part of Vendo, concerning various pleadings which Vendo filed in the state proceeding, claimed bad faith, for example, that at one point in the litigation there was a trade secret theory which was rejected by the Illinois courts.

So that, to that extent, on the basis of their very complaint which goes into almost archeological detail concerning the state proceeding, they have made much of the state proceeding an integral part of the federal case.

This is not, I would point out to Mr. Justice Stevens, in further answer to his question earlier, that this is not a case in which a federal action is alleged to be, say, one part of a sweeping panorama which might be appropriate for -- as evidence in a large scale antitrust case.

If one looks at the allegations of the amended complaint filed by these gentlemen in January 1975, you will find an almost item by item objection to certain decisions which were made by the state courts in the state proceeding and conduct of the -- with respect to the filing of pleadings, the making of arguments, the timing of motions, in the state proceeding.

QUESTION: May I ask you: Would you be here making the same argument if there had never been any antitrust defense filed and withdrawn?

MR. POLLOCK: I would be making the Section 2283 argument which, of course, is an absolute and categorical prohibition.

We still would have that problem because, as this Court has repeatedly --

QUESTION: You wouldn't be arguing that he should have, and didn't, present his antitrust defense in the state court?

MR. POLLOCK: No, Your Honor.

My argument would have to be more limited. That's

why this case is an extreme case, calling for, I believe, appropriate relief from this Court.

QUESTION: And if there had been no antitrust defense filed and none withdrawn and then he went to court alleging that the state proceeding, in itself, and the collection of the judgment would violate the antitrust laws, you would be back to 2283 argument?

MR. POLLOCK: We would be back on 2283, Your Honor, and you would have a more difficult comity federalism issue because then you would have the situation where a defense had actually been presented and presumably rejected if the judgments were, nevertheless, entered.

It would be a more difficult case.

But, in the situation here, given the finality of the judgment, the deliberate rejection -- not a failure to avail themselves of a federal defense, but the deliberate rejection of a full and fair opportunity to have this adjudicated -- this case is really beyond the pale.

QUESTION: Let me get it clear.

Suppose no antitrust defense in the state court and then withdrawn and the federal antitrust suit filed, would you make a motion in that federal antitrust case for the federal court to hold its hand or to abstain and let the federal defenses be presented in the state court?

MR. POLLOCK: No, Your Honor, I would not.

QUESTION: You are not saying it's again -- would be any Younger situation at all?

MR. POLLOCK: I would not, Your Honor, urge the stay of the federal case and, indeed, at least two circuits, the Second Circuit in the Lyons case and the Ninth Circuit in Mach-Tronics, have held that in such circumstances trouble-damage action in the federal court should not be stayed.

That is not our argument.

I would point out that in the Lyons case, at the same time that Judge Hand held that a stay of the federal case was inappropriate, that in that same case where an attempt was made to enjoin the state judgment, the Second Circuit held no, that was entirely improper. They held it was barred by Section 2283.

QUESTION: Thank you.

MR. POLLOCK: Now, just so that we understand what the factual situation is, during the period 1959 to 1964, Mr. Harry Stoner was both a director and officer of Vendo, receiving a salary of $50,000 a year.

The Illinois Supreme Court held that at that very time, while he was on the payroll of Vendo, serving as a director and officer, that Stoner had violated his fiduciary duties through misconduct of the most flagrant sort, by secretly organizing and financing another vending machine

manufacturer, by secretly developing a new type of machine which Vendo itself had been vainly trying to develop, by deceitfully misrepresenting Stoner's relationship with the new company and by misappropriating a corporate opportunity rightfully belonging to Vendo.

The Illinois Supreme Court, in its opinion by Judge Schaefer, affirmed the judgments on the basis of those violations of fiduciary duties quite apart, it should be noted, quite apart, and regardless of, the court said, of any liability that might be imposed, based on the non-competition covenants.

After the Illinois Supreme Court denied rehearing, this Court denied certiorari in 1975.

Now, in 1975, these judgments were clearly final. They clearly were entitled to full faith and credit, and they were, if anything, overripe for collection.

Toward that end, Vendo had commenced supplementary proceedings in the state court to collect these judgments.

Now, in an effort to stop those proceedings, the state defendants sought stays from the Illinois Supreme Court, the Illinois Trial Court, the Illinois Appellate Court, and then, Mr. Justice Rehnquist, as Circuit Justice.

All these stays were denied. Then, at that point, the state defendants turned to the federal district court and obtained the preliminary injunction here in issue.

The injunction prohibits taking any further steps to enforce or collect or attempt to enforce or collect the final state judgments, and it specifically refers to these supplementary proceedings pending in the state courts.

The preliminary injunction was sought on two grounds. One ground was that the respondent had allegedly been denied due process in the state proceeding. The other, as I mentioned, was this antitrust issue which had been specifically raised in the state court, specifically held by the Illinois courts to be within their jurisdiction, and then, specifically, withdrawn before trial by the state defendants.

In its decision, the district court held that it lacked jurisdiction to consider the due process issue on the ground that only this Court has jurisdiction to review a final stay judgment.

Nevertheless, the district court granted the injunction on the antitrust claim on the ground that the Illinois Supreme Court had not passed on the antitrust issue, notwithstanding the fact that the only reason the Illinois Supreme Court had not passed on the issue was because the state defendants had deliberately withdrawn that issue and refused to reassert it at any time thereafter.

Now, I have emphasized very briefly, if it please the Court, what I think the principal issues are, and we have

canvased those issues in our brief.

I would like to briefly state, so that there can be no confusion on this -- I would like to briefly state what I think are not the issues that are presented here.

To begin with, there is no issue here as to personal liberty or civil rights. There is no issue as to the jurisdiction of the state courts to enter the judgments in question. There can be no issue as to due process or the fairness of the state proceeding. In fact, the district judge so held.

There can be no issue as to the constitutionality of the Illinois common law concerning the fiduciary duties of corporate directors and officers.

There can be no doubt as to Stoner's guilt of the most egregious violations of those rules.

There can be no issue as to the meritorious nature of Vendo's claims in the state proceeding. There is nothing baseless or sham about those claims. All five courts in the Illinois system that dealt with this upheld the guilt.

QUESTION: Mr. Pollock, isn't it also equally true that there is no issue before us as to the validity of the district court's finding that there is a probability of success for your opponents on the antitrust issues?

MR. POLLOCK: I think that is correct, Your Honor, the only reason being that it seemed to me, as an advocate,

appropriate that we narrow the issues --

QUESTION: I understand your tactics and it makes a lot of sense, but I just want to be clear.

MR. POLLOCK: But we do not in the slightest --

QUESTION: You don't admit your truth, or anything like that.

MR. POLLOCK: No.

And furthermore, as we point out in our reply brief, the district court issued this caveat in its opinion. The court said the findings here are interlocutory in nature, based on incomplete records and, of course, a complete trial directed to the issues might produce evidence requiring a different or more limited result.

QUESTION: But we just don't need to get into that in order to reach the issues you do want us to decide.

MR. POLLOCK: Absolutely correct, Your Honor.

There can also be no question of the opportunity provided by the Illinois state courts for adjudication of the federal antitrust defense, and there can be no question that the state defendants deliberately rejected that opportunity.

QUESTION: It sounds as though the submission of the defense, and then its withdrawal after the appeal, is a rather critical part of your case.

MR. POLLOCK: Only with respect to the non-2283 issues. We don't even think you have to reach that, Your

Honor, because this injunction, we think, is clearly barred by Section 2283. It does not fall within the expressly authorized exception or the innative jurisdiction and, indeed, as we argue in our brief, the --

QUESTION: But, aside from 2283, though, again assume there had been no filing of the defense and no withdrawal, and then after the judgment was entered, this district court did exactly what it did here? You wouldn't say it didn't have jurisdiction to do it or that it was a violation of Younger v. Harris, or anything like that. You would just say that 2283 would be your only point.

MR. POLLOCK: I think that is right, Your Honor, except that, in the context of 1983 actions and habeas corpus actions, questions under comity in federalism may arise where there has been an adjudication in the state courts of a federal defense, but we don't have to get into that.

QUESTION: I agree.

But if there hadn't been the filing and the withdrawal, 2283 would be your sole point.

MR. POLLOCK: And the final judgment, yes.

Now, I would just conclude by stating -- leaving some time for rebuttal -- that for nearly two years this injunction has not only nullified a decision of the Illinois Supreme Court and nullified the state proceedings to enforce that judgment in the Illinois trial court, but it has, I

repeat, nullified to that extent these important state policies with respect to fiduciary conduct.

As a result --

MR. CHIEF JUSTICE BURGER: You are well into your rebuttal time, Mr. Pollock.

MR. POLLOCK: I would just say, finally, Your Honor, that what -- as a result of what has happened here, the respondents have managed so far to avoid their adjudicated liability for incontestable violations of state law duties.

Thank you.

QUESTION: Mr. Pollock, let me ask you a question on the Court's time, if I may.

MR. POLLOCK: Of course.

QUESTION: Do you make any claim here that because of the final nature of the judgment of the Illinois court, the federal courts are required to accord full faith and credit to it?

MR. POLLOCK: Oh, yes, precisely.

QUESTION: Now that's different than a 2283 claim, isn't it?

MR. POLLOCK: Yes. It is based, instead, on the governing Statute 1738 of the Judicial Code.

We know of no reason why, in fact, this whole case could not be disposed of on the basis of full faith and credit.

I am utterly unaware -- and certainly the respondents' brief does not help us in this regard -- I am utterly unaware of any reason why this, why the full faith and credit statute is not completely dispositive here. I know of no exception to the applicability of full faith and credit here.

QUESTION: And that would apply even if the Clayton Act is an exception to 2283, wouldn't it, because of the finality of the state court --

MR. POLLOCK: Absolutely. It would not even be necessary to reach the questions of 2283 or comity of federalism, the --

QUESTION: Mr. Pollock, doesn't the full faith and credit clause only apply to the state?

MR. POLLOCK: Oh, no.

QUESTION: It is the statute you are talking about.

MR. POLLOCK: Section 1738 of the Judicial Code specifically provides that federal courts shall give full faith and credit to state court judgments in precisely the same way that other state courts shall.

And there has been no indication, so far as we are aware, of any conceivable exception to the full faith and credit requirement.

MR. CHIEF JUSTICE BURGER: Mr. Sears.

ORAL ARGUMENT OF BARNABAS F. SEARS, ESQ.

FOR THE RESPONDENTS

MR. SEARS: Mr. Chief Justice, and may it please the Court:

If you will pardon me a moment --

There are a few matters that I would like to get clarified, having listened to the argument of my distinguished friend. And one was his representation that just last -- a few months ago, before His Honor Judge Will, that we had admitted before him that regardless of what this Court decides, it doesn't make any difference.

Now, for some reason or other, he left out a very important passage that appeared in the transcript of the case. I have the transcript here, and what he left out was the statement that I made immediately following the statement that Mr. Baker said, "That's right," I said, "they do. They say they are not trying to interfere with the prosecution of this case. All they are doing is trying to keep us from getting an injunction to keep this case alive. That's all it amounts to."

And I have some question with respect to -- with all deference again to my distinguished friend -- the propriety of quoting a record like that.

Now, they've got two supplements in this reply brief of theirs. One is Supplement A, which is the statement

of Stoner's given to the Commission. All that was before His Honor Judge McLaren. That is supposed to be dispositive of something. I don't know what, but it was all before Judge McLaren.

Now, Supplement B is a supplement to their reply brief the thrust of which is that we thwarted the prosecution of this case by our dilatory tactics.

Now, we had in our brief what His Honor Judge McLaren said and what they assured the court, and we had before the Circuit Court of Appeals a supplement, and I have it here, which sets forth the entire history of the case.

Now, if they desired a supplement to their reply brief, it certainly seems to me that they should have appended the supplement that we appended. And what do we find in that supplement, if the Court will pardon me for reading it?

Now, this is Mr. Ochsenschlager's statement to the trial court on February 10, 1971: "We do want to get it tried as soon as possible. There is a federal case that they seem to be able to move ahead on. I realize it is a motion. It isn't like a trial, but they have a crew. That one firm is handling it. It seems like they are all in it of record, but they are able to move ahead on that, but not this one."

Now, again, with all deference, it seems to me perfectly obvious that what His Honor Judge McLaren said in this record, with respect to the fact that the parties had

agreed that the federal case would await the final determination of the state proceedings, and that was evidenced by the proceedings before him. They agreed to a standby order so he could pass upon the propriety of our application for a preliminary injunction.

QUESTION: If I understand your opponent, Mr. Sears, it was at your suggestion that the judge thought the federal case ought to await the outcome of the state case.

MR. SEARS: I think it was in part, Your Honor. I believe that's correct, and the parties agreed to it. I think that's correct.

But, however one states the case, in its present frame of reference, the bald fact is that petitioner is claiming the fruits of a successful consummation of an illegal objective.

This would seem startling enough were this purely private litigation, but it is not. It is litigation so deeply impressed with the public interest in the enforcement of the Sherman Act that private persons are endowed with de facto official powers as private attorneys general to insure the enforcement of that salutary and overriding public federal policy so vital to the economic welfare of the Republic.

In its present frame of reference, the question is whether the federal antitrust laws can be enforced against a Sherman Act violator.

I say the present frame --

QUESTION: Well, your suit can go right ahead, Mr. Sears.

MR. SEARS: I beg your pardon.

QUESTION: Your suit can go right ahead, can't it?

MR. SEARS: Well, it can go right ahead without the benefit of a preliminary injunction which, if we don't get it, will completely destroy it. It will completely --

QUESTION: But if the state court judgment is enforced, the federal plaintiff will be without resources to carry it out; is that it?

MR. SEARS: Well, as a matter of fact, two of the federal plaintiffs, Lektro-Vend Corporation and Stoner Investments, who have separate and distinct claims under the Sherman Act, will be completely denied a federal courtroom.

I can't express it any better than His Honor Judge McLaren expressed it in his opinion.

Now, with respect to the third claim, he found that Stoner, himself, would be severely crippled in the prosecution of the case and, therefore, he held with respect to the question, there was no case or controversy if that occurred, and it was necessary --

QUESTION: Well, what if the judgment -- What if the state court judgment was -- against your client was on some completely unrelated matter and it was a very large

judgment and if it was collected your clients would be wiped out and couldn't go forward in federal court? That would be no excuse for an injunction, I don't suppose, would it?

MR. SEARS: I don't think it would.

QUESTION: But it is critical for you to say that the state suit itself and the collection of the judgment is part of the antitrust violation.

MR. SEARS: Exactly. That's precisely what the court found.

QUESTION: Well, now, was it or was it not an alternate ground in the state court that your clients were -- wholly aside from the contract, wholly aside from the no-competition agreement were violating their fiduciary obligations?

MR. SEARS: That is correct.

QUESTION: Is that a completely separate alternate ground in the state court?

MR. SEARS: Well, it is the separate, completely alternate ground they refused to pass on. They held that Stoner had violated his fiduciary duty and that he had seized a corporate opportunity.

QUESTION: Yes, I understand. I understand that.

Now, would you be here making the same argument if there had never been a no-competition agreement?

MR. SEARS: No, I wouldn't, because the question

of the breach of the fiduciary duty, as Judge McLaren pointed out in his opinion, was inextricably interwoven with the anti-competitive characters of the agreements that they sewed on in the state court.

QUESTION: And you say those are indivisible, so there couldn't be an alternate ground --

MR. SEARS: That's correct.

QUESTION: -- state ground.

MR. SEARS: If I understand Your Honor's inquiry, that's absolutely correct. And that's what McLaren held because Stoner never would have become a director apart from the covenants, and the evidence is replete with -- the record is replete with evidence indicating the intent of Vendo in procuring those anti-competitive covenants.

One of the reasons why they made him a director, he was to serve as a director without pay, and it is interesting to know that we examined this record in this case. Based --

The court didn't upset any ruling of Justice Schaefer. He examined those proceedings for the purpose of determining whether or not Vendo prosecuted them as a part of an anti-competitive scheme.

And when you examine the record, and we are not seeking now to impeach that record in the slightest, but when you do examine that record, you will find that the evidence upon which he based -- the record on which he based the

statement that Stoner violated his fiduciary duty because Vendo didn't have a genuine opportunity to purchase the Lektro-Vend machine, was completely without support in that state court record. That state court record didn't mention at all the fact that Stoner had warned Vendo that their failure to purchase the Lektro-Vend machine was a serious mistake, and add to which in the record before Judge McLaren, when the federal depositions came in, it became even more conclusive that at no time did Vendo ever want to purchase the Lektro-Vend machine. At all times, they thought that Lektro-Vend machine was completely too expensive to operate.

QUESTION: I may be confused on one factual matter, Mr. Sears.

You said when he was director, without compensation, were not some of these alleged breaches of fiduciary duty, some that were found, events that occurred at a period when he was receiving $50,000 as a consulting engineer or consultant?

MR. SEARS: Well, I made a mistake, Your Honor. I should have said that he was to serve as the director without additional compensation. That's what I should have said.

QUESTION: And his consulting fee was a separate factor.

MR. SEARS: Well, they never consulted him about anything. I mean it was a pure sham from the outset.

QUESTION: But he was receiving $50,000.

MR. SEARS: He was, indeed, Your Honor.

He was receiving $50,000 a year, but it was a pure sham. And Judge McLaren, five days of hearing, now, we had. We had the records of the two state trials and examining that record carefully, Mr. Stoner was a witness; Vendo had an opportunity to present whatever evidence they desired to present. Examining that record, carefully examining that record, he found that Section 1 was violated by those non-competitive agreements. Those contracts violated Section 1 of the Sherman Act, and he found evidence tending to show that they violated Section 2.

Now, there was plenty of evidence to support that. My dear friend talks about a ten-year marathon. We had a ten-year marathon, indeed. We had the first case where they served to enforce those covenants which violated the Sherman Act, so they were engaging then in an illegal objective, but we had more than that. We had a claim asserted that Stoner had stolen a trade secret belonging to Vendo, and the appellate court reversed that on the ground that there wasn't any evidence at all to support that charge.

And in the Statement of Facts that they give, that particular finding they conveniently overlook, if I may be

permitted to say so.

So, that was part of the ten-year marathon. And so we continue with this ten-year marathon, and the second time we are confronted with the proposition that he was responsible for the fact that they didn't have that FIFO machine.

Now, if there is anything more conclusive in this record that there was absolutely no evidence upon which to base that claim and that they knew or should have known, certainly at the time they filed the lawsuit back in 1965, whether that charge was true, they should have asserted all charges they had against him.

And, this evidence shows also that this isn't the first time they used the judicial process for purposes other than what I consider, at least, to be a legitimate purpose.

QUESTION: Mr. Sears, could I interrupt for just a moment?

Two questions. It seems to me you are arguing, in effect, that they did commit an antitrust violation.

I should observe that they did refer to the trade secret claim in Footnote 7 to their brief. They didn't conveniently omit that.

But, the question I had is: What is your theory of what happens to the state court judgment if you win? Their last point rested on full faith and credit. What will happen

to the state court judgment if you prevail in the antitrust litigation? Will it be collectible or not or will it be multiplied by three and you get three times the value?

MR. SEARS: Well, I don't think it would be collectible, Your Honor.

QUESTION: Well, what do you say about this statutory requirement of full faith and credit to the state court judgment?

MR. SEARS: Well, I say this about that. Full faith and credit, I can't say that any better than I think Mr. Justice Stewart said it in a specially concurring opinion in Younger.

They argue, "It is difficult to conceive of a state interest more significant than the jurisdiction of its court, the finality and integrity of their judgments and the enforcement of state law rules as to fiduciary conduct."

Now, sure, in a different context -- and I am aware of the fact that a word is not crystal-clear and unchanged, it is the skin of a living thought and may vary greatly in content and meaning depending upon the circumstances and time of its utterance, as Justice Holmes reminded us years ago. I am mindful of that, but here is what Mr. Justice Stewart said in the Younger case: "In such circumstances, the reasons of policy for deferring to state adjudication are

outweighed by the injury flowing from the very beginning of the state proceeding, by the perversion of the very process that is supposed to provide vindication and by the need for speedy and effective action to protect federal rights."

Now, we quoted that on page 74. So, what Vendo is saying is that it may pervert the processes of a state court and notwithstanding comity or full faith and credit requires that the state court judgment obtained by such means is entitled to full faith and credit.

QUESTION: Mr. Sears, I see why you referred to Justice Holmes' aphorism before referring to Justice Stewart's concurrence in Younger, because Younger wasn't dealing with any final judgments of a state court, was it? It was just dealing with the inception of a state proceeding.

MR. SEARS: That's correct.

QUESTION: Do you think that reasoning would necessarily carry over to a final judgment that was presumably protected by the full faith and credit clause?

MR. SEARS: Well, that is, of course, assuming now that the judgment is protected by the full faith and credit clause.

I mean this is a federal statutory provision, and the full faith and credit -- Are you going to give full faith and credit to a judgment procured in violation of federal law? Are you going to give full faith and credit to a

judgment which was part and parcel of a scheme to violate the federal laws?

QUESTION: Well, what's the scope of this exception that you think is implied in the full faith and credit statute, where you don't have to give full faith and credit the way the statute says?

MR. SEARS: Well, I don't think the full faith and credit statute applies at all.

QUESTION: Why not?

MR. SEARS: Well, for the very reason that I stated. I mean isn't it reductio ad absurdum to give full faith and credit to a judgment in a federal court that was procured as part and parcel of a violation of the federal law? You give that full faith and credit in a federal court? I don't believe you do, with all deference.

QUESTION: Does that mean, Mr. Sears, that the threshold question in a claim for full faith and credit being asserted, that the court to which that claim is presented must relitigate the case and decide whether it is really entitled to full faith and credit?

MR. SEARS: Well, you know -- I think that there are a lot of statutory rules that say that a case within the letter but without the spirit of the statute is without the statute. And a case without the letter but within the spirit is within the statute.

Now, I think that is a sort of a casual or thumb-nail statement, but I think there is substantial law to support that proposition.

QUESTION: Was the full faith and credit issue presented to Judge McLaren?

MR. SEARS: No, it was not presented to Judge McLaren.

QUESTION: Only 2283?

MR. SEARS: 2283 --

QUESTION: That was presented but not the full faith and credit?

MR. SEARS: No, and it wasn't even argued, hardly, in the circuit court of appeals, as I recall it.

QUESTION: But it wasn't presented to Judge McLaren?

MR. SEARS: No, it was not, indeed.

QUESTION: Did the court of appeals address it?

MR. SEARS: I don't think so. I am sure the court of appeals didn't address it. I shouldn't be dogmatic. God knows -- pardon me -- I've lived long enough to know I shouldn't be dogmatic about anything.

QUESTION: Mr. Sears, what worries me is aren't you asking for the exact same relief you would have asked this Court on a cert?

MR. SEARS: Oh, no, indeed.

QUESTION: The difference?

MR. SEARS: Well, the difference is, Your Honor, that there weren't any federal questions -- I mean there weren't any federal questions, as such, except due process. There were no federal antitrust questions involved in the petition for cert. They involved due process.

QUESTION: But the fundamental relief you want is to upset the judgment. In quotes, "to reverse it."

MR. SEARS: No, we want it stayed, Your Honor.

I don't mean to say that --

QUESTION: How long would the stay be?

MR. SEARS: Well, it will stay pen denti laeti, the only issue that's before the court. It will stay pen denti laeti. Now, what the ultimate fate of that judgment might be is a question to be decided upon a record where that question is an issue.

With respect to that, I say, well, sufficient unto the day is the evil thereof. We don't really have that issue before us.

Now, I've about exhausted my time. I want to speak briefly to 2283.

We quoted Gittlin, an opinion by Judge Friendly, to support the doctrine of Mitchum v. Foster. They applied the doctrine of Mitchum v. Foster in Studebaker v. Gittlin, and you gentlemen are as familiar with that case as I am, if not

more so.

They came back and they relegated Studebaker v. Gittlin to a footnote, both in their original brief and in their reply brief, and they quoted -- I guess -- The white light says I have a few more minutes -- Thank you. They quoted three cases, Vernitron, Jennings and Glenn W. Turner, as contrary to the issuance of the injunction here.

Each one of those cases, completely dissimilar on the facts, none involved violation of the federal antitrust laws, but the interesting thing about those three cases is the fact that each one of them recognized the doctrine, recognized Studebaker v. Gittlin, which they relegated to a footnote and said that was just by way of dictum.

So I don't see how they can be contrary to what we are arguing here when they expressly recognize a case upon which we rely.

And that's what the District Court -- The District Court did the same thing. For example, in Jennings which is procedurally a very similar case to ours, Judge Alderset, for the Third Circuit, said, "Certainly, Studebaker qualified under the test subsequently set forth in Mitchum v. Foster, whether an act of Congress clearly creating a federal right or remedy enforceable in a federal court of equity could be given its intended scope only by a stay in the state court proceedings."

Now, our case is stronger than the Securities Act case for the very simple reason that the Securities Act does not provide federal damages, nor does it, except in some rare cases, as I understand the law, and I am not absolutely certain of this -- It does provide to some cases for the assessment of damages against the defendant.

Now, briefly, on comity in federalism, I've quoted the separately concurring opinion of Mr. Justice Stewart with respect to that question. And I think that Judge McLaren -- the late Judge McLaren -- I am perfectly content to rely on his very carefully written opinion affirmed by the Court of Appeals with respect to that question.

QUESTION: Mr. Sears, did the judge, the late judge, consider the Supreme Court of Illinois as holding that the directors had violated their fiduciary relationship?

MR. SEARS: Indeed, he did.

QUESTION: What did he say about it?

MR. SEARS: He said that this was part and parcel of the anti-competitive covenants and they couldn't be snipped apart. He specifically said that in answer to their argument.

QUESTION: Do you think that was a very -- I'll put it to you this way. If you read the Supreme Court of Illinois' opinion, you get the impression that Judge Schaefer was sustaining the judgment on the alternate ground of breach of

fiduciary relationship, and just the same as saying even if there were never any contracts here the judgment would stand.

MR. SEARS: But that's entirely ignoring the facts of the case from an antitrust standpoint, which issue wasn't before him.

I mean the fact that he breached the fiduciary relationship, assuming that he did, and the record of this case, before Judge McLaren, will show no such --

QUESTION: Go ahead, I'm sorry.

MR. SEARS: No, I'm sorry, sir.

QUESTION: Assuming that the judgment was sustainable under the Illinois law on the completely independent ground of breach of fiduciary duty, what business did a federal court and antitrust court have enjoining the collection of the judgment?

MR. SEARS: Well, the point about it was that it was not sustainable on a purely --

QUESTION: Well, that depends on how you read Justice Schaefer's opinion.

MR. SEARS: It depends on whether you read it -- we've stated what the record showed. Your Honors can draw your own conclusions about what the state of the record was with respect to --

QUESTION: Let's just suppose that we disagreed with whatever Judge McLaren said about their being intertwined.

Suppose we read the opinion of the Illinois Supreme Court as saying this judgment is sustainable on the wholly independent ground; would this injunction stand, or not?

MR. SEARS: Yes, this injunction would certainly stand. If I understand --

QUESTION: Why? Why would it? There would be nothing violating the antitrust laws in suing for breach of fiduciary duty.

MR. SEARS: How can you -- I misunderstood Your Honor's question. How is it possible for a court to say that this judgment can stand insofar as the antitrust laws are concerned? This is what we are talking about. We are talking about a case that was prosecuted as part and parcel of a scheme to violate the antitrust laws.

Now, if this was prosecuted as a part of a scheme to violate the antitrust laws, it doesn't make any difference whether the means employed were lawful or unlawful. It doesn't make a bit of difference whether there was a successful consummation of a scheme which had an illegal objective. They mention that --

QUESTION: Are you saying that even if there hadn't been any anti-competitive contracts involved, you could still allege and you had hoped to prove that the suit for breach of fiduciary duty was part of an illegal scheme?

MR. SEARS: Of course, it was. Of course it was bound up with it, and so McLaren held, and we think that finding is binding on Judge McLaren --

MR. CHIEF JUSTICE BURGER: I think we will terminate here.

MR. SEARS: I'll terminate, too, Your Honor.

I want to thank you very much and I've enjoyed the honor of appearing.

(Whereupon, at 12:01 o'clock, p.m., oral argument in the above-entitled matter was suspended for luncheon recess, to be resumed at 1:00 o'clock, p.m., the same day.)

AFTERNOON SESSION

(1:01 p.m.)

MR. CHIEF JUSTICE BURGER: Mr. Pollock, you may complete your rebuttal. You have three minutes, as you know.

REBUTTAL ORAL ARGUMENT OF EARL E. POLLOCK, ESQ.

ON BEHALF OF THE PETITIONER

MR. POLLOCK: Thank you, Mr. Chief Justice.

In those three minutes, I would like to make three very brief points.

First of all, with respect to the trouble-damage suit which is proceeding ahead in the trial court, Mr. Sears, once again, raises the specter that Vendo, if allowed to collect these judgments, will obtain control of these two corporations which Stoner controlled, Lektro-Vend and Stoner Investments.

At the District Court, at the Court of Appeals and now in the Supreme Court of the United States, we wish to make clear that Vendo will not obtain control, and, indeed, consent judgments to that effect were offered in the District Court.

So far as taking control of those two companies so that somehow there would be loss of Article 3 jurisdiction by virtue of case or controversy, there simply is no issue. It is at most a red herring which obscures the fact

that the respondents do have their trouble-damage remedy, they are proceeding ahead, there is no danger that those two companies will be taken over by Vendo. Vendo does not wish to have those two companies and they have that very adequate remedy. Indeed, their claim has been that in the trouble-damage case they will be able to recover three times the amount of the judgment, whether collected or not.

We, of course, do not acquiesce in that position.

Second, I would like to very tersely amplify my answer to a series of questions that Mr. Justice White directed to me.

After talking with my colleagues, it appears that I may have not answered all aspects of Mr. Justice White's question.

Mr. Justice White asked whether there would be any question, other than 2283, if the respondents had not withdrawn their federal antitrust defense and had actually litigated it, and I think I replied that there would, indeed, be a significant comity-federalism issue in terms of collateral estoppel and what the impact of that adjudication would be in the federal proceeding, furthermore, if they had never raised the defense in the state proceeding and simply had ignored it.

There would be a significant question, Your Honor, under the Hoffman case, with respect to the propriety of

a

an injunction against the state court proceeding, if it is true that there is an adequate opportunity to have presented that question in the state proceeding.

On the other hand, if there was no opportunity --

QUESTION: They couldn't present their affirmative claim in the state proceeding.

MR. POLLOCK: Well, there is no dispute here, Your Honor, that -- No one is attempting to deprive them of the right to present their trouble-damage claim.

QUESTION: I know, but under Hoffman, you dismiss the case.

MR. POLLOCK: Well, because Hoffman was seeking only injunctive relief.

QUESTION: Well, you dismissed the case.

MR. POLLOCK: Yes. Well, in this instance, we are talking only about a comity-federalism bar to an injunction. We are not, in any sense, taking the position that they are precluded from maintaining their trouble-damage remedy.

And, finally, the third point. One of the really key issues here, the threshold issue, I think, is the 2283 issue. We have not had an opportunity to review that issue as fully as we should. We urge review of our brief, particularly with respect to what we believe to be the utter distortion of the Mitchum decision and the fact that

adoption of the decision below, with respect to the expressly authorized exception, would apply to literally dozens of federal statutes which we have set forth at pages 10 and 11 of our reply brief, which are, in every respect, identical to Section 16 of the Clayton Act, for purposes of obtaining injunctive relief.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 1:05 o'clock, p.m., the case in the above-entitled matter was submitted.)