IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

KAZEM KAZEMZADEH, *et al*.,	)	
	)	Case No. 2006 CA 9077 B
Plaintiffs,	)	
	)	Judge Maurice Ross
	)	
v.	)	Next Event: Status Hearing
	)	Date: October 18, 2013
EASTERN PETROLEUM CORPORATION, *et al*.,	)	
	)	
Defendants.	)	
	)	

MOTION OF THE DISTRICT OF COLUMBIA FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN OPPOSITION TO THE PARTIES' JOINT MOTION TO VACATE OMNIBUS ORDER

The District of Columbia ("District"), through its Office of the Attorney General, respectfully moves this Court for leave to file, as *amicus curiae*, the attached brief in opposition to the parties' joint motion to vacate Judge Holeman's August 19, 2010 Omnibus Order ("Omnibus Order"). As explained in the proposed amicus brief, vacatur of the Omnibus Order is not justified now that the parties have settled the case.

In granting a partial summary judgment for Plaintiffs, the Omnibus Order considered the text and legislative history of the District's Retail Service Station Act ("RSSA"), D.C. Code § 36-301 *et seq*., and held that the exclusive dealing arrangements challenged by Plaintiffs were unlawful under the RSSA.

Pursuant to its statutory authority to enforce the District's antitrust law, the Office of the Attorney General recently investigated gasoline pricing in the District of Columbia. Based on this investigation, the Office has concluded that the public interest is served by the elimination of unlawful restraints on wholesale gasoline competition,

including the kind of exclusive dealing arrangement that was determined by the Omnibus Order to violate the RSSA.

The attached brief discusses the equitable remedy of vacatur and explains why the remedy would not be appropriate here and would be contrary to the public interest. The District respectfully requests that the Court grant the District of Columbia leave to file the attached brief. A proposed Order is attached.

Respectfully submitted,

IRVIN B. NATHAN
Attorney General for the District of Columbia

ELLEN A. EFROS
Deputy Attorney General, Public Interest Division

/s/ Bennett Rushkoff
BENNETT RUSHKOFF (Bar #386925)
Chief, Public Advocacy Section

/s/ Catherine A. Jackson
CATHERINE A. JACKSON (Bar #1005415)
Assistant Attorney General

/s/ Nicholas A. Bush
NICHOLAS A. BUSH (Bar #1011001)
Assistant Attorney General
Office of the Attorney General
441 Fourth Street, N.W., Suite 600-S
Washington, DC 20001
(202) 727-5173
bennett.rushkoff@dc.gov

Dated: June 4, 2013 Attorneys for the District of Columbia

Rule 12-I(a) Certification

Undersigned counsel contacted counsel for all the parties in this case on May 23 to obtain their consent to the relief sought by this Motion. Defendant BP Products North

America, Inc. informed undersigned counsel that it does not consent or object. Plaintiffs 2801 Alabama Avenue, LLC; C and W Services, Inc.; 1535 Kenilworth, LLC; Wahla Brothers-Sargohda, Inc.; 4101 Alabama Avenue, LLC; Fort Dupont, Inc.; 1231 New York Avenue, NE, LLC; and Sohone, Inc. informed undersigned counsel that they do not consent. Counsel for the remaining parties in this action have not informed undersigned counsel whether they consent or object.

Dated: June 4, 2013 */s/ Nicholas A. Bush*
NICHOLAS A. BUSH (Bar #1011001)

Points and Authorities

1. The Attorney General has the statutory authority (i) "to intervene in legal proceedings on behalf of the public interest," D.C. Code § 1-301.81(a); (ii) to enforce the District's Antitrust Act, including suing for monetary damages on behalf of District of Columbia residents who are harmed by antitrust violations, D.C. Code § 28-4507; and (iii) to "perform other functions and duties which are consistent with the purposes or provisions of [the District's general consumer protection law], and with the [Attorney General's] role as *parens patriae* [and] which may be necessary or appropriate to protect and promote the welfare of consumers," D.C. Code § 28-3910(5).

2. Amicus participation "should normally be allowed . . . when the *amicus* has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *Jin v. Ministry of State Security*, 557 F. Supp. 2d 131, 137 (D.D.C. 2008) (*quoting Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1064 (7th Cir. 1997)). An amicus brief is particularly appropriate when it provides

insight and assistance to the Court in a case implicating the public interest. *See Miller-Wohl Co., Inc. v. Comm'r of Labor and Indus. State of Montana*, 694 F.2d 203, 204 (9th Cir. 1982); *U.S. v. Gotti*, 755 F. Supp. 1157, 1158 (E.D.N.Y. 1991).

/s/ Bennett Rushkoff
BENNETT RUSHKOFF (Bar #386925)

Certificate of Service

I hereby certify that on June 4, 2013, copies of the foregoing Motion, the attached amicus brief, and the attached proposed Order were served by the Court's electronic service on all counsel of record.

/s/ Nicholas A. Bush
NICHOLAS A. BUSH (Bar #1011001)

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

KAZEM KAZEMZADEH, *et al*.,	)	
	)	Case No. 2006 CA 9077 B
Plaintiffs,	)	
	)	Judge Maurice Ross
	)	
v.	)	
	)	
EASTERN PETROLEUM CORPORATION, *et al*.,	)	
	)	
Defendants.	)	
	)	

BRIEF OF DISTRICT OF COLUMBIA AS AMICUS CURIAE IN OPPOSITION TO PARTIES' JOINT MOTION TO VACATE OMNIBUS ORDER

I. INTRODUCTION

The District of Columbia ("District"), through its Office of the Attorney General ("Attorney General"), respectfully submits this amicus brief in opposition to the May 20, 2013 joint motion of the parties to this matter ("Parties") seeking to vacate the Court's August 19, 2010 Omnibus Order (Holeman, J.). The Omnibus Order granted partial summary judgment to the Plaintiffs, holding that Defendants' exclusive gasoline supply arrangements violate the District's Retail Service Station Act ("RSSA" or "Act"), D.C. Code § 36-301 *et seq*. The Parties are seeking the equitable remedy of vacatur; however, vacatur is not appropriate when, as in this case, the matter has been settled in its entirety and rendered moot. Moreover, vacating the Omnibus Order would be against the public interest, eliminating a significant judicial decision interpreting and applying the RSSA. The Court should therefore deny the Parties' motion to vacate the Omnibus Order.

II. FACTUAL SUMMARY

The central issue in this case is whether a contract making a distributor the exclusive supplier of gasoline to a retail dealer is enforceable in the District of Columbia ("D.C.").

Defendant BP Products North America, Inc. ("BP") is engaged in the business of selling, supplying, and distributing gasoline and petroleum products. BP has granted Defendant Eastern Petroleum Corporation ("Eastern") the exclusive right to supply BP-branded gasoline to Plaintiffs, the owners and operators of retail gasoline stations in D.C. that sell BP-branded gasoline.

Plaintiffs alleged, *inter alia*, that Defendants' exclusive supply agreements are unlawful under the RSSA because they absolutely prohibit Plaintiffs from purchasing or reselling any BP-branded gasoline not supplied by Eastern. In addressing this legal issue, for which judicial precedent was lacking, the Court initially denied Defendants' motion to dismiss the case. Then, in the Omnibus Order, the Court granted the Plaintiffs' motion for partial summary judgment, ruling that Defendants' exclusive supply agreements violated the RSSA.

The Parties have since settled this action in its entirety. Their pending motion seeks to vacate the Omnibus Order.

III. INTEREST OF AMICUS

The Attorney General may sue for injunctive relief on behalf of the public under a general *parens patriae* power. *See Hawaii v. Standard Oil Co. of California*, 405 U.S. 251, 257-60 (1972). The Attorney General's *parens patriae* authority is intended to protect the general well-being of D.C. residents by providing a means of enjoining

unlawful conduct impacting D.C. The Attorney General is authorized by statute to enforce the District's antitrust laws. D.C. Code § 28-4507. In particular, the District's Antitrust Act authorizes the Attorney General to sue for monetary damages on behalf of "any individual residing in the District of Columbia," D.C. Code § 28-4507(b), and federal antitrust law allows the Attorney General to bring an action for damages as *parens patriae* on behalf of all "natural persons residing" in the District of Columbia. 15 U.S.C. § 15c.

In early 2011, using its antitrust investigatory powers under D.C. Code § 28-4505, the Office of the Attorney General commenced an investigation into retail gasoline pricing in D.C. The investigation included the collection and analysis of extensive pricing data for the local wholesale and retail gasoline markets.

The lesson learned from this investigation is that restraints on wholesale gasoline competition can result in higher retail gasoline prices, even if the restraints apply only to portions of the city. Consumers cannot rely on competitive conditions across the city or metropolitan area as a whole to ensure that gasoline is competitively priced in each D.C. neighborhood. For this reason, the public interest is served by eliminating unlawful restraints on wholesale gasoline competition, even if the restraints affect gasoline stations in some city neighborhoods only.

The Office of the Attorney General is particularly interested in this case because the relief requested, by removing important judicial guidance interpreting the RSSA's prohibition on exclusive dealing arrangements, could encourage use of the kind of exclusive supply agreements found to be unlawful by the Court, and possibly result in higher gasoline prices in parts of D.C. Granting the Parties' motion to vacate this Order

would be contrary to the public interest in preserving this legal decision on the proper application of the RSSA.

IV. ARGUMENT

A. The Parties Are Not Entitled to Vacatur

The Court should deny the Parties' motion to vacate because the equitable remedy of vacatur is not appropriate when a case becomes moot as a result of settlement. The D.C. Court of Appeals has held that vacatur at the trial-level is governed by the standard articulated by the Supreme Court in *U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership*: vacatur is unavailable when a case has become moot due to settlement. *Udebiuwa v. District of Columbia Bd. of Medicine*, 818 A.2d 160 (D.C. 2003); *see also U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994). It would be contrary to the Court of Appeals' holding to vacate the Omnibus Order as requested by the Parties.

Courts have generally confined their use of the "extraordinary" equitable remedy of vacatur to cases that have been mooted for reasons outside the control of the "losing party." The "losing party" for purposes of vacatur analysis is the party "seeking relief from the status quo of the . . . judgment." *Bonner Mall*, 513 U.S. at 26. If the party against whom the judgment was issued has no opportunity to appeal or otherwise seek review of the judgment, it may be inequitable for that party to be adversely affected by that judgment in future litigation. Whether it be through the "vagaries of circumstance" or through the unilateral action of the prevailing party, the equitable concerns that support vacatur present themselves almost exclusively where a party seeks vacatur of an adverse decision it has had no opportunity to appeal. *Id*. at 25.

However, where mootness results from the parties' settlement of a case, the parties have voluntarily forfeited their rights to reconsideration or appellate review and, thus, are not entitled to vacatur.[1] *Id*. In *Bonner Mall*, the Supreme Court addressed a joint request by the parties to vacate an appellate court decision following settlement of the case post-certiorari. In declining to vacate the lower court's decision, the Court pointed out the crucial difference between mootness through happenstance and mootness following settlement – namely, that the losing party in a settlement has *voluntarily* forfeited its right to have the adverse decision reviewed. *Id*. In the Court's view, the fact that mootness resulted from settlement meant that the parties were not entitled to vacatur; their voluntary action in settling did not leave a party in an inequitable position. *Id*. The fact that all parties request vacatur does not change this equitable analysis. *Id*. at 26.

District law fully embraces the rationale of *Bonner Mall* and expressly applies the *Bonner Mall* standard to requests for vacatur at the trial-level. In *Udebiuwa*, the D.C. Court of Appeals held that trial-level requests for vacatur are governed by the *Bonner Mall* standard, and thus are generally inappropriate if the case is mooted because of settlement. In that case, the defendant had been sued for medical malpractice, and – following an adverse judgment – had settled with the plaintiff in lieu of appealing the judgment. 818 A.2d at 161-62. Following settlement, the trial court took no action on the parties' joint request that the judgment be vacated as of right. *Id*. at 162. In its opinion, the D.C. Court of Appeals rejected the parties' argument that they were entitled to vacatur as of right. The Court of Appeals held that if the trial court had addressed the issue, the *Bonner Mall* standard would have applied, and the parties would not have been

[1] District law holds that the settlement of all contested issues in a case moots the action. *Milar Elevator Co. v. District of Columbia Dept. of Employment*, 704 A.2d 291, 292 (D.C. 1997).

entitled to vacatur because the settlement had made the case moot. *Id*. at 162. The losing party was not entitled to vacatur of the judgment entered against him because, by settling, he had voluntarily relinquished his right to appeal. *Id*. at 162-163. The Court of Appeals also held, consistent with *Bonner Mall*, that the analysis did not depend on whether settlement was contingent on vacatur. *Id*.

Not only does District law apply the *Bonner Mall* standard to trial-level actions, but relevant federal case law uses the *Bonner Mall* analysis to address requests to vacate non-final orders following mootness as a result of settlement. *See Amaefule v. Exxonmobil Oil Corp.*, 630 F. Supp. 2d 42 (D.D.C. 2009) (refusing to vacate a prior oral summary judgment ruling based on *Bonner Mall* standard); *Major League Baseball Properties, Inc. v. Pacific Trading Cards, Inc.*, 150 F.3d 149 (2d Cir. 1998) (applying *Bonner Mall* analysis to order denying preliminary injunction); *In re General Motors Corp.*, No. 94-2435, 1995 WL 940063 (4th Cir. 1995) (applying *Bonner Mall* analysis to discovery order).

The pending motion is a trial-level request to vacate an order after the case has been rendered moot by a settlement between the parties. Defendants admit in the motion that the purpose of the settlement is to "obviate the need for further litigation, including appealing from the [Omnibus] Order." Mot. at 2. This factual situation has been held by *Udebiuwa* and *Bonner Mall* to be insufficient to justify vacatur, and the Parties' motion does not cite any authority to the contrary. Defendants, by settling this action instead of appealing it, have voluntarily waived their right to further reconsideration or appeal, and are not entitled to the "extraordinary" equitable remedy of vacatur.

B. Vacatur is Against the Public Interest

Moreover, public interest considerations weigh against granting vacatur in cases mooted by settlement. The D.C. Court of Appeals has held that a party seeking vacatur must make an "exceptional" showing to overcome the public interest supporting denial of vacatur requested by settling parties. *Udebiuwa*, 818 A.2d at 163.

As judicial decisions are presumptively correct and create order where there was none, they are valuable to the legal community. *Bonner Mall*, 513 U.S. at 26. Furthermore, since public resources must be expended in creating judicial decisions, the decisions are not merely the property of the private parties – to be bargained away in settlement – but belong to the public as a whole. *Id*. Post-settlement vacatur also improperly by-passes the normal process of judicial review:

> Congress has prescribed a primary route, by appeal as of right and certiorari, through which parties may seek relief from the legal consequences of judicial judgments. To allow a party who steps off the statutory path to employ the secondary remedy of vacatur as a refined form of collateral attack on the judgment would—quite apart from any considerations of fairness to the parties—disturb the orderly operation of the federal judicial system…[T]he public interest is best served by granting [vacatur] relief when the demands of "orderly procedure" . . . cannot be honored; we think conversely that the public interest requires those demands to be honored when they can.

Id. at 27 (citations omitted).

The D.C. Court of Appeals, applying *Bonner Mall*'s analysis of the public interest, held that "the equities ordinarily disfavor vacatur even if the losing party bargained for it, because the public interest typically outweighs the private interests involved." *Udebiuwa*, 818 A.2d at 162. The public interest in preserving judicial decisions requires courts to consider the interests of future litigants:

> The interests of litigants in general, however, lie with the orderly operation of a system of justice, one in which the conclusions of litigation are recorded and thus preserved for the future, one in which slightly higher costs in today's case may reduce the trouble encountered by litigants and judges tomorrow.

Id. at 163 (quoting *In re Mem'l Hosp. of Iowa County, Inc.*, 862 F.2d 1299, 1303 (7th Cir. 1988)). The Court of Appeals also noted that the public interest is served by encouraging parties to settle before an issue is decided, rather than "roll the dice" on a trial or hearing knowing that post-settlement vacatur is available. *Id*. at 163 (citing *Bonner Mall*, 513 U.S. at 28).

The Court of Appeals thus held that "exceptional circumstances" that outweigh the public interest must be shown in order to grant a post-settlement request for vacatur. In *Udebiuwa*, no such circumstances existed, as the defendant sought to vacate the judgment against him to avoid its use as collateral estoppel against him. The Court of Appeals held this "was a reason to deny vacatur, not grant it." *Id*. at 163.

Cases granting vacatur show the types of truly unusual situations that may constitute "exceptional circumstances," which go beyond a mere preference for settlement over continued litigation. For instance, in *In re General Motors, Inc.*, the trial court ordered the defendant to produce certain documents to the plaintiffs *in camera*. 1995 WL 940063, at *1. The defendant, believing the documents to be confidential under the attorney-client privilege, petitioned the Fourth Circuit Court of Appeals for a writ of mandamus directing the trial court to vacate its order. *Id*. The Fourth Circuit stayed the trial court's order pending the outcome of the petition, but while that petition was still pending before the appeals court, the parties settled the matter. *Id*. Despite the settlement, an attorney for the plaintiffs attempted to have the trial court's order enforced

against the defendant in another case. *Id*. Finding that exceptional circumstances were present as required by *Bonner Mall*, the Fourth Circuit vacated the trial court order since the appellate court believed that (i) contrary to the trial court's order, the documentation was in fact protected by the attorney-client privilege and (ii) it would be inequitable for the stayed order to survive the settlement and bind the losing party in a different action.[2] *Id*. By contrast, this Court has made no determination – or even suggestion – that its Omnibus Order incorrectly decided any issue of fact or law.

In this case, not only is vacatur not justified on equitable grounds, but public interest considerations strongly disfavor vacating the Omnibus Order. As discussed in *Udebiuwa*, judicial decisions are valuable to the legal community, and thus the Omnibus Order is not the Parties' to bargain away. This case is an especially clear example of the public interest in judicial decisions, since the Omnibus Order is one of the few instances where the RSSA, the District's law governing how its retail service stations may operate and do business, is interpreted.[3] The public benefits from legal rulings that interpret District laws. Vacating the Omnibus Order would remove the Court's interpretation of the RSSA, possibly requiring further litigation of legal issues resolved in this case.

Moreover, the Omnibus Order sets forth this Court's determination, on a factual and legal record at the summary judgment stage, that exclusive dealing agreements like those between BP and Eastern violate the RSSA. The RSSA prohibits exclusive dealing in the gasoline markets that has the potential to restrain competition. The Attorney

[2] Other cases where exceptional circumstances were found to be present involved similarly unusual fact patterns. *See also Alvarez v. Smith*, 558 U.S. 87 (2009) (where the underlying actions were settled in six different state court proceedings, rendering the federal constitutional claim moot despite the desire of all the parties to continue the federal case); *MLB Properties, Inc*., 150 F.3d 149 (2d Cir. 1998) (where defendant would have been financially ruined waiting for appeals process and plaintiff could not settle absent vacatur of the trial court order).

[3] In fact, the D.C. Official Code, 2011 edition, lists Judge Alprin's order from this case denying Defendants' motion to dismiss as the sole decision of note for several of the RSSA's provisions.

General's investigation indicated that restraints on competition in D.C.'s wholesale gasoline market have the potential to result in higher retail gasoline prices for D.C. consumers. The public has an interest in preserving the Omnibus Order's ruling that such agreements violate the RSSA.

V. CONCLUSION

Wherefore, because the Parties are not entitled to vacatur and the public interest strongly disfavors such relief, the District of Columbia respectfully requests that the Court deny the Parties' motion to vacate the Omnibus Order.

Respectfully submitted,

IRVIN B. NATHAN
Attorney General for the District of Columbia

ELLEN A. EFROS
Deputy Attorney General, Public Interest Division

/s/ Bennett Rushkoff
BENNETT RUSHKOFF (Bar #386925)
Chief, Public Advocacy Section

/s/ Catherine A. Jackson
CATHERINE A. JACKSON (Bar #1005415)
Assistant Attorney General

/s/ Nicholas A. Bush
NICHOLAS A. BUSH (Bar #1011001)
Assistant Attorney General
Office of the Attorney General
441 Fourth Street, N.W., Suite 600-S
Washington, DC 20001
(202) 727-5173
bennett.rushkoff@dc.gov

Dated: June 4, 2013 Attorneys for the District of Columbia

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

KAZEM KAZEMZADEH, *et al*.,	)	
	)	Case No. 2006 CA 9077 B
Plaintiffs,	)	
	)	Judge Maurice Ross
	)	
v.	)	
	)	
EASTERN PETROLEUM CORPORATION, *et al*.,	)	
	)	
Defendants.	)	
	)	

ORDER

The District of Columbia having moved, in order to provide the views of its Office of the Attorney General on a matter implicating the public interest, for leave to file its brief as *amicus curiae*, it is hereby ORDERED that the motion is GRANTED and the brief attached to the motion is hereby deemed to be filed.

MAURICE ROSS
Superior Court Judge

Dated: _____

Copies to:

Bennett Rushkoff, Esq.
Nicholas A. Bush, Esq.
Catherine Jackson, Esq.
Jeffrey L. Leiter, Esq.
William L. Taylor, Esq.
Jaime W. Luse, Esq.
John E. Petite, Esq.
Harry C. Storm, Esq.