

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

DAVRIC MAINE CORPORATION,)	
)	
<i>Plaintiff</i>)	
)	
v.)	Civil No. 98-238-P-H
)	
CRAIG J. RANCOURT, et al.,)	
)	
<i>Defendants</i>)	

**MEMORANDUM DECISION ON DEFENDANTS’ MOTION TO STRIKE AND
PLAINTIFF’S MOTION TO SUPPLEMENT STATEMENT OF FACTS AND
RECOMMENDED DECISION ON DEFENDANTS’
MOTIONS FOR SUMMARY JUDGMENT**

Davric Maine Corporation (“Davric”), the owner and operator of Scarborough Downs racetrack, filed the instant suit on June 24, 1998 against Craig J. Rancourt, Ival R. Cianchette, Joseph M. Molnar, William Faucher and Kenneth Ronco alleging that the defendants acted jointly to cause Scarborough Downs to lose its license and/or its regular race dates with the goal of taking it over or opening a replacement track. Complaint and Demand for Jury Trial (“Complaint”) (Docket No. 1) at 1 & ¶¶ 3, 9.¹ The Complaint alleges that all five defendants violated federal and state antitrust law (Counts I and II) and tortiously interfered with Davric’s contracts and advantageous relationships

¹Faucher’s name is incorrectly spelled “Foucher” in the Complaint. Complaint at 1; Answer of Defendant William Faucher (Docket No. 10) at 1.

(Counts III and IV). *Id.* ¶¶ 48-67. It charges in addition that certain defendants committed the following torts: Cianchette, unfair competition (Count V); Rancourt and Ronco, malicious prosecution and abuse of process (Count VI); and Rancourt and Molnar, commercial defamation (Count VII). *Id.* ¶¶ 68-80.

Each defendant now moves for summary judgment as to all counts against him. Defendant William Faucher's Motion for Summary Judgment ("Faucher Motion") (Docket No. 27); Defendant Ival R. Cianchette's Motion for Summary Judgment, etc. (Docket No. 29); Defendant's [Motion and] Memorandum in Support of Motion for Summary Judgment ("Rancourt Motion") (Docket No. 31);² Motion for Summary Judgment of Defendants Joseph M. Molnar and Kenneth Ronco, etc. ("Molnar/Ronco Motion") (Docket No. 34). Davric also moves to supplement its statement of material facts, which the defendants move to strike in its entirety. Motion To Supplement Statement of Material Facts in Dispute ("Motion To Supplement") (Docket No. 65); Defendants' Joint Motion To Strike Davric Maine Corporation's Statement of Material Facts in Dispute, etc. ("Motion To Strike") (Docket No. 75). For the reasons that follow, I deny both the Motion To Supplement and the Motion To Strike, and recommend that the defendants' motions for summary judgment be granted.

I. Summary Judgment Standards

Summary judgment is appropriate only if the record shows "that there is no genuine issue as

²Davric takes the view that because the Rancourt memorandum is styled merely as a "memorandum" and is unaccompanied by a separate motion, Rancourt should not be treated as having filed a motion for summary judgment. Memorandum in Opposition to Defendant Craig J. Rancourt's Memorandum Seeking Summary Judgment ("Rancourt Opposition") (Docket No. 47) at 1-2. Rancourt states within his memorandum that he "moves this Court for summary judgment in his favor dismissing Plaintiff's claims." Rancourt Motion at 4. The memorandum accordingly will be treated as a motion for summary judgment with incorporated memorandum.

to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party’” *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997).

II. Motions To Supplement, Strike Statement of Facts

I address, as a preliminary matter, the Motion To Supplement and Motion To Strike. Davric seeks to add four sentences to paragraph 35 of its statement of material facts concerning Rancourt’s representation of Cianchette against Davric in a 1995 matter, highlighting both the connection between the two defendants and their alleged concealment at deposition of that connection. Motion To Supplement at 1-2. Rancourt opposes the motion, asserting that Davric offers no reasonable justification for its failure to include the additional facts in its original statement. Defendant Craig Rancourt’s Memorandum in Opposition to Plaintiff’s Motion, etc. (Docket No. 81) at 2.

The proffered supplementation is based on letters “discovered just days after the filing of the summary judgment response.” Motion To Supplement at 2. However, the correspondence in question appears to have been in the possession of Davric’s attorneys since at least August 1995.

See Affidavit of Edward S. MacColl (Docket No. 66) & attachments thereto. Davric does not attempt to explain why it did not “discover” this correspondence sooner. Consideration of the new material, moreover, would not alter the outcome on summary judgment. The proffered facts relate to Davric’s allegations of conspiracy. For the reasons discussed below, I find that the defendants are entitled to immunity as a matter of law with respect to certain elements of the conspiracy charge and that the evidence falls well short of implicating them in actionable conduct with respect to the remainder. I therefore deny the Motion To Supplement.

The defendants jointly seek to strike Davric’s entire statement of material facts on the ground of non-compliance with Local Rule 56. *See generally* Motion To Strike. The defendants acknowledge that Davric’s statement was filed on April 30, 1999, the day before substantial revisions to Local Rule 56 took effect. *Id.* at 1 n.1. In the defendants’ view, the Davric statement nonetheless fails to adhere to former Local Rule 56 inasmuch as it (i) omits to provide record citations to admissible evidence (relying instead primarily on conclusory allegations and legal arguments) and (ii) neglects to respond directly to the defendants’ own separate statements of material fact, such that “it is virtually impossible to tell from Davric’s Rule 56 Statement what specific facts Davric contends are in dispute.” *Id.* at 3-6.

I am unpersuaded to strike the entire statement. Davric is not alone in its failure under former Local Rule 56 to respond point-by-point to a moving party’s statement of material facts. That precise failing was widespread enough to have precipitated the recent revision to the rule. In addition, Davric does provide record citations. *See generally* Statement of Material Facts in Dispute, etc. (“Davric SMF”) (Docket No. 49). To the extent that any of Davric’s individual statements are unsupported by citations to the record, are in the nature of legal conclusions or consist merely of

conclusory allegations, I have taken those flaws into consideration in addressing the defendants' motions for summary judgment. *See Shorette v. Rite Aid of Maine, Inc.*, 155 F.3d 8, 12 (1st Cir. 1998) (non-movant may not rely on "conclusory allegations, improbable inferences, and unsupported speculation" to defeat motion for summary judgment) (citation and internal quotation marks omitted). The Motion To Strike accordingly is denied.

III. Analysis

A. Counts I and II: Antitrust Violations

Davric alleges in Count I of its Complaint that the defendants engaged in a "combination . . . or conspiracy in restraint of trade and commerce" in violation of section 1 of the Sherman Act and in Count II that the defendants engaged in a combination or conspiracy in restraint of trade or commerce in violation of 10 M.R.S.A. § 1102.³ Complaint ¶¶ 49-50, 58.

In making these parallel claims Davric relies heavily on the affidavit of Lou Guiliano. *See generally* Davric SMF. Guiliano asserts that Faucher solicited him to join a group that "intended to get Joe Ricci and . . . take him down and take over his business." Affidavit of Lou Guiliano,

³Faucher points out that section 1101 forbids conspiracies in restraint of trade while section 1102 forbids monopolization or attempted monopolization. Defendant William Faucher's Memorandum in Support of His Motion, etc. (Docket No. 27) at 16 n.5; 10 M.R.S.A. §§ 1101-02. In response, Davric clarifies that it asserts a claim for attempted monopolization based on section 1102 in addition to a claim for restraint of trade based on section 1101. Memorandum in Opposition to Defendant William Faucher's Motion for Summary Judgment ("Faucher Opposition") (Docket No. 46) at 3. To succeed on a claim of attempted monopolization, Davric would have to prove that the defendants had engaged in predatory or anticompetitive conduct with a specific intent to monopolize and a dangerous probability of achieving monopoly power. *Benjamin v. Aroostook Med. Ctr.*, 937 F. Supp. 957, 967 (D. Me. 1996), *aff'd*, 113 F.3d 1 (1st Cir. 1997). Davric's statement of material facts is devoid of the type of economic evidence that could establish the defendants' intent or ability to influence competition. *See Benjamin*, 937 F. Supp. at 966-67; *Onat v. Penobscot Bay Med. Ctr.*, 574 A.2d 872, 875 (Me. 1990); *see generally* Davric SMF. Its claim of attempted monopolization hence fails.

Davric Maine Corp. v. Rancourt (Me. Super. Ct.) (“Guiliano Aff.”), attached as Exh. 3 to Deposition of Louis J. Guiliano, attached as Exh. 4 to Statement of Material Facts, etc. (“Molnar/Ronco SMF”) (Docket No. 35), ¶ 2. Joseph Ricci is the sole stockholder of the holding company that owns Davric, which in turn owns Scarborough Downs. Affidavit of Joseph J. Ricci (“Ricci Aff.”) (Docket No. 59) ¶ 2. Scarborough Downs is a licensed racetrack that for decades has been the principal extended racing meet in the State of Maine. *Id.* ¶ 7. Of the \$18 million wagered on live racing in Maine in 1993, \$10.8 million was wagered at Scarborough Downs. *Id.* Guiliano avers that the group of conspirators included Faucher, Cianchette and Rancourt. *Guiliano Aff.* ¶¶ 2, 5. Cianchette, described as the leader of the conspiracy, *id.* ¶ 2, is president of, and a stockholder in, Bangor Historic Track, Inc., which operates Bangor Raceway, Deposition of Ival R. Cianchette (“Cianchette Dep.”), attached as Exh. 6 to Molnar/Ronco SMF, at 12-13, 15. Faucher was director of operations at Foxboro Park from January 1993 through February 1995 and a “starter” for meets held in Bangor in 1996 and 1997. Deposition of William H. Faucher (“Faucher Dep.”), attached as Exh. 2 to Molnar/Ronco SMF, at 13, 23-24. Rancourt, a Maine attorney, was retained in December 1994 to acts as general counsel to the Maine Harness Horsemen’s Association (“MHHA”). Affidavit of Craig J. Rancourt (“Rancourt Aff.”) (Docket No. 33) ¶¶ 1-2.

According to Giuliano, the conspirators devised four means through which they could achieve the goal of ousting Davric/Ricci from Scarborough Downs: (i) to cause Ricci’s banker, with whom Cianchette had connections, to foreclose on a delinquent mortgage, (ii) to cause Ricci to lose his license at hearings before the state’s racing commissioners, two of whom had “inside relations” with Cianchette, (iii) to “bury [Ricci] in the Legislature,” and (iv) to elicit the assistance of the MHHA, with whom Cianchette also had connections, and the New England Harness Horsemen’s

Association (“NEHHA”) in cutting off the supply of horses to Scarborough Downs. *Guiliano Aff.* ¶¶ 2-4, 6. *Guiliano*, who was president of the NEHHA, was considered an “important ingredient” in the plan because of the conspirators’ desire to block Scarborough Downs’ access to horses from southern New England. *Id.* ¶¶ 1, 6.

Two of the conspirators’ purported vehicles — the race-date hearings and the legislature — involved the act of petitioning a public body for redress or change. To the extent that conspirators seek to harm a competitor through legislative, administrative or judicial conduits, such conduct is immune from antitrust liability unless it can be shown to have constituted a “sham.” *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 56 (1993).⁴ The Supreme Court has defined a “sham,” in the context of litigation, as a lawsuit that is “objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits.” *Id.* at 60. A winning lawsuit is “by definition a reasonable effort at petitioning for redress and therefore not a sham.” *Id.* at 60 n.5. A losing lawsuit is not necessarily objectively baseless; however, even if the suit is determined to have been so, a court must go on to examine whether “the baseless lawsuit conceals an attempt to interfere *directly* with the business relationships of a competitor . . . through the use [of] the governmental *process* — as opposed to the *outcome* of that process — as an anticompetitive weapon . . .” *Id.* at 60-61 (citations and internal quotation marks omitted; emphasis in original). Conspirators’ motives in pressing their petition for redress are otherwise irrelevant; even a sole avowed purpose to destroy a competitor (*e.g.*, “bury” Ricci in the legislature) would not

⁴*Columbia Pictures* refines the so-called *Noerr-Pennington* doctrine, named for two landmark decisions that first enunciated exemption from antitrust liability for conduct amounting to petition to the government for redress. *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

vitiating *Noerr-Pennington* antitrust immunity. *Noerr*, 365 U.S. at 138-39.

Davric attempts to invoke the “sham” exception, identifying several assertedly unprotected activities that one can trace to the race-date hearings: (i) *ex parte* communications with a racing commissioner, Phil Tarr, (ii) an attempt to intimidate Guiliano from testifying at the hearings, (iii) the giving of knowingly false testimony before the commission, and (iv) Rancourt’s vigorous advocacy at the hearings of a position that Scarborough Downs be denied a license by arguing *de minimis* matters to promote a personal agenda. Rancourt Opposition at 4; Memorandum in Opposition to Defendant Ival R. Cianchette’s Motion for Summary Judgment (“Cianchette Opposition”) (Docket No. 45) at 7-8. Assuming *arguendo* the truth of these incidents, none demonstrates that Rancourt’s advocacy before the commission was objectively baseless. The record evidence is to the contrary. To the extent that Rancourt advocated against Davric/Ricci at the race-date hearings, his efforts were at least partially successful. The Maine Harness Racing Commission granted Davric a license for 1995 racing dates only after Ricci voluntarily removed himself from the management of the track and agreed to stay away from the track for a period of one year and to appoint a new board of directors. Rancourt Aff. ¶ 5. To the extent that the alleged conspirators lobbied for passage of legislation, *see* Rancourt Opposition at 3-4, they also eventually succeeded in part, *see* Deposition of Craig J. Rancourt (“Rancourt Dep.”), attached as Exh. 5 to Molnar/Ronco SMF, at 197 (three of four legislative changes recommended by Rancourt enacted into law). Neither the administrative nor legislative efforts accordingly can be classified as “objectively baseless” — and there the analysis ends.⁵ The defendants accordingly are entitled to immunity as to those

⁵The alleged *ex parte* communications have no bearing; even were the commissioner alleged to have been a co-conspirator, that fact alone would not strip the alleged conspirators’ lobbying (continued...)

portions of Counts I and II that allege conspiracy based on their alleged legislative and racing-commission agendas.⁶

The remaining conspiracy allegations, concerning plans to effectuate a mortgage foreclosure and a boycott at Scarborough Downs, falter on different grounds. Guiliano's allegations "are not alone sufficient to establish . . . the existence of [a] conspiracy and the participation therein of the declarant and the party against whom the statement is offered" Fed. R. Evid. 801(d)(2)(E). As the First Circuit has construed this rule:

Statements of coconspirators are admissible under Rule 801(d)(2)(E) only if the trial court finds it "more likely than not that the declarant and the defendant were members of a conspiracy . . . and that the statement was in furtherance of the conspiracy." *United States v. Petrozziello*, 548 F.2d 20, 23 (1st Cir. 1977). . . . While a trial court may consider the contents of the statements at issue as evidence of the elements of a *Petrozziello* determination, the determination must rest at least in part on corroborating evidence beyond that contained in the statements at issue.

United States v. Portela, 167 F.3d 687, 702-03 (1st Cir. 1999).⁷

I do not find by a preponderance of the evidence that the defendants committed the two conspiratorial acts in question. With respect to the mortgage scheme, Guiliano states that Faucher

⁵(...continued)

efforts of *Noerr-Pennington* immunity. *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 382-83 (1991) (declining to recognize exception to *Noerr-Pennington* immunity for conspiracies between private, public actors). Nor does the alleged false testimony, *id.* at 383-84 (deliberate deception of public officials in context of legislative campaign of no consequence so far as Sherman Act is concerned) or the purported intimidation of Guiliano, *Noerr*, 365 U.S. at 140-41 (Sherman Act does not regulate unethical conduct in the context of political activity).

⁶The *Noerr-Pennington* doctrine applies with equal force to Davric's claims predicated on Maine's antitrust law. The First Circuit has recognized that the doctrine has "First Amendment overtones" that arguably broaden its applicability beyond the context of federal antitrust statutes. *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25, 29 n.4 (1st Cir. 1970).

⁷The *Petrozziello* analysis applies in civil as well as criminal cases. *Earle v. Benoit*, 850 F.2d 836, 841 n.6 (1st Cir. 1988).

initially told him that “Cianchette knew Ricci’s banker (a Mr. Hutchinson) and knew that Ricci was delinquent on his mortgage payment for the track.” Guiliano Aff. ¶ 2. Faucher allegedly later told Guiliano that “he and his associates had been unable to obtain the property by using Ricci’s banker and had a new direction of attack.” *Id.* ¶ 3. The independent evidence, rather than corroborating these vague suggestions, tends to refute them. Cianchette denies ever discussing Scarborough Downs or Ricci with Key Bank personnel. Cianchette Dep. at 208. There is neither evidence that any bank foreclosed on a Davric or Ricci mortgage nor any testimony from bank personnel. Ricci acknowledged at deposition that he had not approached anyone at Key Bank to verify whether the alleged attempt was made. Rule 30(b)(6) Deposition of Davric Maine Corporation by Joseph J. Ricci (“Ricci Dep.”), attached as Exh. 1 to Molnar/Ronco SMF, at 65-66.

Turning to the alleged boycott attempt, Faucher purportedly told Guiliano in 1994 that Cianchette had Rancourt “under his thumb and he could control the MHHA in this way.” Guiliano Aff. ¶¶ 4, 6. The conspirators allegedly elicited the help of the MHHA in exhorting its members to refrain from supplying horses to Scarborough Downs. *Id.* ¶ 6. Davric does adduce evidence that in late June 1996 certain MHHA members (none of them defendants in this case) urged other horsemen and women to refrain from racing their horses at Scarborough Downs. *See, e.g.*, Affidavit of Richard H. Howard (“Howard Aff.”) (Docket No. 52) ¶ 2; Affidavit of George Wentworth (“Wentworth Aff.”) (Docket No. 55) ¶¶ 2-3, 5, 7-8; Affidavit of Diane Emery (Docket No. 58) ¶¶ 3-4; Affidavit of Cynthia Wallingford (Docket No. 62) ¶ 1. There was a notable decline in the number of horses entered at Scarborough Downs for the race dates of July 3-6, 1996. Affidavit of Paul Verrette (Docket No. 54) ¶¶ 3, 6, 8, 10. However, no races were cancelled. Ricci Dep. at 226.

Evidence tying any of the defendants to these incidents is slim. Richard H. Howard, a

horseman in Maine for the past forty-seven years, states that after distributing a letter critical of the boycott attempt he was approached by Rancourt and MHHA Director Stanley Whittemore, “who told [him] that they felt [he] was a traitor to the organization and that [he] should stick with the organization in their boycott efforts.” Howard Aff. ¶¶ 1-4. He adds that he “believe[s] Mr. Molnar and Mr. Ronco were well aware of the boycott activities” *Id.* ¶ 5.⁸ George Wentworth, a trainer of horses at Scarborough Downs since 1973, states that Rancourt and, he believes, Ronco and Molnar were in the paddock area during the time period of the boycott. Wentworth Aff. ¶¶ 1, 10-11. Rancourt, Molnar and Ronco deny any involvement. Rancourt Aff. ¶ 17; Molnar Dep. at 74; Ronco Aff. ¶ 12.

The evidence against Molnar and Ronco is sheer speculation: that one horseman believed Molnar and Ronco knew of the boycott activities and another believed they were in the paddock area at the relevant time. Molnar and Ronco are never even named in the Guiliano affidavit. *See generally* Guiliano Aff. The Howard and Wentworth testimony could permit the inference that Rancourt was involved in the failed boycott attempt (an allegation that Rancourt flatly denies). However, this at most could prove that Rancourt conspired with other non-defendant members of the MHHA. There is no evidence (apart from the Guiliano affidavit) that Rancourt conspired with any of the other defendants to effectuate the purported boycott.

Davric finally points to a host of other independent events that it asserts shore up the proposition that the defendants were engaged in a conspiracy against it. These include (i) an August

⁸Ronco is executive secretary of the MHHA. Affidavit of Kenneth Ronco (“Ronco Aff.”), attached as Exh. 9 to Molnar/Ronco SMF, ¶ 2. Molnar was president of the MHHA during 1996 and part of 1997. Deposition of Joseph M. Molnar (“Molnar Dep.”), attached as Exh. 8 to Molnar/Ronco SMF, at 17.

1994 proposal supported by Cianchette to lease the Cumberland Fairgrounds for an extended racing meet, Cianchette Dep. at 236, 239-40, 256, (ii) a newspaper report in December 1994 that if a license were denied to Scarborough Downs, Cianchette planned to seek increased race days for Bangor Raceway and/or run an extended meet in southern Maine, possibly in Cumberland, Jay Burns, *Cianchette plans depend on uncertain fate of the Downs*, Maine Sunday Telegram, Dec. 11, 1994 at 13D, attached as Exh. 2 to Cianchette Dep., (iii) *ex parte* contact between Cianchette and racing commissioner Philip Tarr regarding possible additional dates for Bangor Raceway or racing dates in Cumberland were Scarborough Downs to be denied a license, Affidavit of Peter Martin, attached as Exh. 4 to Cianchette Dep., ¶ 5, (iv) social and business connections between Cianchette and Rancourt, Rancourt Dep. at 35, 80-81, 90-92, (v) business connections between Cianchette and Faucher, Faucher Dep. at 15, 23, 61, (vi) social and business connections between Cianchette's son and Molnar, Molnar Dep. at 27-28, 31, 127, (vii) the alleged oddness of Faucher's presence at the 1994-95 race-date hearings inasmuch as he was not a usual player at such hearings, Deposition of Edward S. MacColl, attached as Exh. 3 to Molnar/Ronco SMF, at 190, (viii) the unusual adversarial arrangement of the hearing-room at the 1994-95 race-date hearings, with members of the MHHA and commission at one table and Davric representatives at another, *id.* at 191-92, (ix) a statement by Cianchette that a decision of Bangor Raceway to bar Guiliano's horse from racing there was influenced by the fact that certain horsemen had hostile feelings toward Guiliano for offering to supply horses to Scarborough Downs, Affidavit of Sharon Terry (Docket No. 60), (x) the formation of an MHHA steering committee in 1997 that included Molnar, Faucher and one of Cianchette's sons for the purpose of examining racing options in Maine, Rancourt Dep. at 98; Molnar Dep. at 125, (xi) the appearance of Rancourt on a radio talk show to discuss the steering committee, during which

he encouraged creation of a new racetrack in southern Maine, Rancourt Dep. at 241-43, (xii) lobbying by Rancourt, Cianchette and Ronco in favor of legislation that would have facilitated the formation of a new racetrack, Ricci Dep. at 79-81, 230-31, (xiii) the publication of allegedly false and misleading statements against Scarborough Downs by Rancourt, Molnar and Ronco, Ricci Aff. ¶¶ 17, 19, and (xiv) the prosecution of an allegedly baseless lawsuit by Rancourt on behalf of Ronco against Davric and three of its employees, *id.* ¶ 16.

These myriad incidents, many of which concern unilateral activities by certain defendants, do not paint a convincing portrait of a conspiracy among the defendants to take over Scarborough Downs. To the extent that Davric demonstrates links between or among certain defendants, such as social and business dealings, lobbying for certain legislation and participation on the MHHA steering committee, the evidence tends to show merely co-participation in legitimate activities, from which an inference of sinister design simply is too great a leap. To the extent that Davric alleges participation in wrongful activities (filing of a frivolous lawsuit and publication of defamatory statements), I am not persuaded, for the reasons discussed below, that it has proven either the groundlessness of the lawsuit in question or the publication of any actionable defamatory statements.

To summarize, I determine that Davric has failed to demonstrate by a preponderance of the evidence that the defendants engaged in a conspiracy to effectuate either a foreclosure of Davric's or Ricci's mortgage or to boycott Scarborough Downs. Accordingly, statements allegedly made to Guiliano are inadmissible to prove the existence of such conspiracies. Davric presents insufficient evidence to survive summary judgment as to those portions of Counts I and II concerning the alleged

mortgage and boycott conspiracies.⁹

B. Counts III and IV: Tortious Interference

Davric alleges in Counts III and IV that the defendants tortiously interfered with contractual relations and with prospective advantageous relations through fraud or intimidation. Complaint ¶¶ 62-63, 66-67. “Interference with an advantageous relationship requires the existence of a valid contract or prospective economic advantage, interference with that contract or advantage through fraud or intimidation, and damages proximately caused by the interference.” *Barnes v. Zappia*, 658 A.2d 1086, 1090 (Me. 1995). A plaintiff must demonstrate intent to interfere with the plaintiff’s business relationships. *James v. MacDonald*, 712 A.2d 1054, 1058 (Me. 1998).

In its papers opposing summary judgment, Davric identifies the following as having contracts or other relationships with Davric with which the defendants allegedly interfered: (i) the MHHA, (ii) the horsemen and women who supplied horses to Scarborough Downs, (iii) the Maine Harness Racing Commission, (iv) the NEHHA and (v) the Maine Alliance. Faucher Opposition at 5-6; Cianchette Opposition at 11-12; Memorandum in Opposition to Defendants Joseph M. Molnar and Ken Ronco’s Motion for Summary Judgment (“Molnar/Ronco Opposition”) (Docket No. 48) at 2-3. Davric, however, fails to illuminate how the defendants’ conduct harmed these relationships.¹⁰ *Id.*

⁹This court previously has noted that 10 M.R.S.A. § 1102 parallels section 2 of the Sherman Act, granting summary judgment as to a state antitrust claim when the plaintiff “offered no argument why there should be liability under state law in the event that the federal law provides no relief . . .” *Tri-State Rubbish, Inc. v. Waste Management, Inc.*, 875 F. Supp. 8, 14 (D. Me. 1994). Likewise, 10 M.R.S.A. § 1101 parallels section 1 of the Sherman Act, and Davric has made no showing that there should be liability under state law in the event federal law provides no relief.

¹⁰To the extent that Davric suggests that the conspiracy among the defendants (in particular the alleged boycott) deterred horsemen from racing, *see, e.g.*, Cianchette Opposition at 11-12, I have determined that Davric presents insufficient evidence that such a conspiracy existed.

see also Davric SMF ¶ 49. In essence, it offers up conclusory allegations that these relationships suffered harm. Such allegations form an insufficient basis on which to withstand summary judgment. *See, e.g., Shorette*, 155 F.3d at 12.

C. Count V: Unfair Competition

Davric contends in Count V that Cianchette, a competitor of Davric through part ownership in Bangor Raceway, breached a common-law duty to compete with Davric only in accordance with the rules of fair play. Complaint ¶ 70. The Law Court has clarified that:

The underlying element in all (definitions of unfair competition) is that no person shall be permitted to palm off his own goods or products as the goods or products of another. . . . The grounds of the action is fraud. The prohibition is confined to cases where the wrongdoer has resorted to some form of deception. The complaining party must prove such circumstances as will show wrongful intent in fact, or justify that inference from the inevitable consequences of the act complained of. . . . The converse is also true. If the defendant, although a sharp and vigorous competitor, so conducts his business as not to palm off his products as those of the plaintiff, the action fails. He has kept within his legal rights.

Hubbard v. Nisbet, 193 A.2d 850, 851 (Me. 1963) (citations and internal quotation marks omitted).

Davric adduces no evidence that Cianchette (or non-party Bangor Raceway, for that matter) attempted to palm off his or its “product” as that of anyone else. Davric cites a variety of sources in an attempt to establish that the analytical framework for a common-law claim of unfair competition is something other than that outlined in *Hubbard*. Cianchette Opposition at 12-13. None, however, purports to set forth the law of the State of Maine. The applicable law is that set forth in *Hubbard*, pursuant to which Davric falls short of making out a colorable claim against Cianchette.

D. Count VI: Malicious Prosecution and Abuse of Process

In Count VI, Davric charges Rancourt and Ronco with having committed the torts of

malicious prosecution, abuse of process and malicious use of process against Davric. Complaint ¶ 73. These claims implicate two distinct causes of action under Maine law: those for wrongful use of civil proceedings and for abuse of process.¹¹

A claim for wrongful use of civil process arises when “(1) one initiates, continues, or procures civil proceedings without probable cause, (2) with a primary purpose other than that of securing the proper adjudication of the claim upon which the proceedings are based, and (3) the proceedings have terminated in favor of the person against whom they are brought.” *Palmer*, 723 A.2d at 883 (quoting Restatement (Second) of Torts § 674 (1977)). The third element, favorable termination, is an essential element of the claim. *Id.*

By contrast, a claim for abuse of process is predicated upon improper use of process. *Nadeau v. State*, 395 A.2d 107, 117 (Me. 1978). A plaintiff must demonstrate “(1) a use of the process in a manner not proper in the regular conduct of the proceedings and 2) the existence of an ulterior motive.” *Id.*

Davric grounds its claims on one of three counts in a lawsuit filed in Cumberland County Superior Court by Rancourt on behalf of Ronco and other plaintiffs against Davric and certain of its employees. *See* Rancourt Aff. ¶ 8; Rancourt Opposition at 5-6. The complaint stated that on or about March 15, 1997 Davric’s chief of security, Scott Bassett, delivered a letter informing Ronco that he was no longer allowed on track grounds. Complaint Pursuant to 14 M.R.S.A. § 6014, *Maine Harness Horsemen’s Ass’n v. Davric Maine Corp.*, Civil No. 97-175 (Me. Super. Ct.), attached as

¹¹The tort of “malicious prosecution” applies to criminal proceedings. *Palmer Dev. Corp. v. Gordon*, 723 A.2d 881, 882 n.2 (Me. 1999). “Malicious use of process” appears to have been an earlier name for the tort of wrongful use of civil proceedings. *See Saliem v. Glovsky*, 172 A. 4, 6 (Me. 1934).

Exh. A to Rancourt Aff., ¶ 7. After delivery of the letter Bassett allegedly ordered Ronco to vacate the MHHA headquarters at the track or face arrest. *Id.* ¶ 8. The complaint in Count II pled a cause of action for assault, alleging that these actions “were intended to cause and did cause Plaintiffs apprehension of battery and/or to cause battery itself.” *Id.* ¶ 13. Count II remains pending in Cumberland County Superior Court, while the two remaining counts (for wrongful eviction and conversion) were submitted to arbitration. Rancourt Aff. ¶¶ 9-10. An arbitrator ruled in the plaintiffs’ favor on those two counts, a ruling from which Davric has appealed. *Id.* ¶ 9.

Davric asserts that the assault claim is frivolous inasmuch as the only action taken by Davric or its officials against Ronco was the service upon him of a letter. Rancourt Opposition at 5; Molnar/Ronco Opposition at 3. Davric urges that “in view of the absolute frivolousness of the pleading, the Court should determine that it would inevitably be dismissed or should defer a ruling on this matter until the case is dismissed in the pending State Court proceeding.” Rancourt Opposition at 6. I decline to do so. It is clear under Maine law that termination favorable to the plaintiff is an essential element in a claim for wrongful use of civil process. Davric has not proven this element.¹²

Davric’s claim for abuse of process likewise is readily dismissed. Davric focuses on Ronco’s and Rancourt’s alleged ulterior motives in bringing suit but fails to identify any use of process in a manner not proper in the regular conduct of state-court proceedings. *See* Rancourt Opposition at 5-6; Molnar/Ronco Opposition at 3. Davric thus fails to allege, let alone establish, an essential element

¹²Nor am I inclined to recommend that the court defer a ruling pending the final outcome of the state-court case. Because Davric chose to bring its claim without waiting for the state litigation to play out, it faced the risk that the litigation would remain pending at such time as the defendants in the instant case moved for summary judgment.

of its claim.

E. Count VII: Commercial Defamation

Davric alleges in Count VII that Rancourt and Molnar “have engaged in a series of false, defamatory and public allegations against Davric.” Complaint ¶ 76. Davric refers to twenty documents that are the subject of a defamation claim in a pending state-court action filed by Davric and Ricci against the MHHA. Ricci Dep. at 500-01; Rancourt Aff. ¶¶ 14, 19 & Affidavit of Joseph Ricci, *Davric Maine Corp. v. Maine Harness Horsemen’s Ass’n*, Civ. No. 97-166 (Me. Super. Ct.) (“Ricci State Aff.”), attached as Exh. C to Rancourt Aff., ¶ 6 at 4-14. In an opinion dated March 29, 1999 the Superior Court granted summary judgment in favor of the MHHA with respect to all twenty documents.¹³ Rancourt Aff. ¶ 19 & Decision and Order, *Davric Maine Corp. v. Maine Harness Horsemen’s Ass’n*, Civ. No. 97-166 (Me. Super. Ct. Mar. 29, 1999) (“Superior Court Opinion”), attached as Exh. G to Rancourt Aff., at 3-19. The Superior Court employed a two-tier analysis pursuant to which it first determined whether the claims could withstand summary judgment under a common-law negligence standard; as to those few that did, it then determined whether they could survive the “actual malice” test applicable to public figures such as Davric and Ricci. Superior Court Opinion at 3-19. The court found that they could not. *Id.* at 18-19.

Rancourt and Molnar argue, and Davric does not contest, that Davric’s claim as to most of the twenty documents (Nos. 1-4, 7-8, 11-17) is barred in the instant action by the applicable two-year statute of limitations, 14 M.R.S.A. § 753.¹⁴ Rancourt Motion at 21-27; Molnar/Ronco Motion at 18;

¹³Davric represents that this decision has not yet become a final judgment and that, when it does, it will be appealed. Molnar/Ronco Opposition at 7.

¹⁴In addition, Davric clarifies that the only documents at issue with respect to Molnar are Nos. (continued...)

Rancourt Opposition at 6-7; Molnar/Ronco Opposition at 4-7. As to the remaining documents (Nos. 5-6, 9-10 and 18-20) I agree with and find dispositive the Superior Court’s finding that Davric is a “public figure” for purposes of the defamation claims at issue.¹⁵ See Superior Court Opinion at 17-18.¹⁶ Those considered “public figures” typically

have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

Ramirez v. Rogers, 540 A.2d 475, 477 (Me. 1988) (citation and internal quotation marks omitted).

Public figures “usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy.” *True v. Ladner*, 513 A.2d 257, 264 (Me. 1986) (citation and internal quotation marks omitted).

I have little trouble concluding that, at least with respect to the documents at issue, Davric

¹⁴(...continued)
5-6, 9-10, 18 and 20. Molnar/Ronco Opposition at 4.

¹⁵Molnar argues that Davric should not be permitted to relitigate the defamatory nature of the same documents in a second proceeding, arguing that Davric is attempting to repair its failure to join all necessary parties in the state-court action. Molnar/Ronco Motion at 18-19. Maine Rule of Civil Procedure 19 provides that a person subject to service of process must be joined as a party only if “(1) in the person’s absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action” There is no indication that, in the absence of Molnar and Rancourt, complete relief could not have been accorded among the parties to the state-court action. Nor is there any indication that either Molnar or Rancourt claimed an interest relating to the subject matter of the action.

¹⁶A corporation, although not automatically presumed to be a “public figure,” can qualify as a “public figure” for purposes of defamation claims. See *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 589-90 (1st Cir. 1980).

is a public figure with greater access to the media than private individuals normally enjoy. Davric owns Scarborough Downs. Ricci Aff. ¶ 2. For decades, Scarborough Downs has been the principal extended racing meet in the State of Maine. *Id.* ¶ 7. Over the past several years scores of articles have been published in Maine and Massachusetts newspapers and national racing publications concerning Scarborough Downs. Affidavit of Roger Smith, Jr., *Davric Maine Corp. v. Maine Harness Horsemen's Ass'n*, Civ. No. 97-166 (Me. Super. Ct.), attached as Exh. 6 to Affidavit of Craig J. Rancourt (“Second Rancourt Aff.”), attached as Exh. 18 to Molnar/Ronco SMF, ¶ 7. These articles address such subjects as legislation, conflicts between the MHHA and Scarborough Downs, and Ricci’s behavior. *See* list attached to *id.* The non-time-barred documents complained of by Davric, most of which are MHHA press releases or newsletters, touch on similar subjects. *See* Molnar/Ronco Opposition at 4-7; Exhs. 5-6, 9-10 and 18-20 to Ricci State Aff.

A public figure must prove not only the falsity of alleged defamatory statements but also, by clear and convincing evidence, that they were made with “actual malice” — knowledge of their falsity or reckless disregard as to their truth or falsity. *Beal v. Bangor Publ’g Co.*, 714 A.2d 805, 808 (Me. 1998). Davric’s Statement of Material Facts presents only conclusory allegations that Rancourt or Molnar published false statements. Davric SMF ¶¶ 8, 47-48. The Molnar/Ronco Opposition, which is incorporated by reference in the Davric SMF, adverts in addition to materials submitted by Davric in connection with the state-court case. *See* Molnar/Ronco Opposition at 4, 7; Affidavit of John S. Campbell (“Campbell Aff.”) (Docket No. 51) & attachments thereto.

Davric argued in the state-court case that it had raised a genuine issue of material fact concerning the presence of actual malice by virtue of (i) an affidavit of Sharon Terry stating in paragraph 4(b) that officials of the MHHA had admitted that they never made statements they were

quoted as having made in MHHA newsletters, (ii) the sheer numerosity of false and defamatory statements, (iii) an admission by the MHHA (in paragraph 58 of a Ronco affidavit) that it alone had prepared documents that it had held out as having been jointly prepared with other organizations, and (iv) the conspiracy alleged in the Guiliano affidavit. Plaintiffs' Memorandum of Law in Opposition to the MHHA's Motion for Summary Judgment, *Davric Maine Corp. v. Maine Harness Horsemen's Ass'n*, Civ. No. 97-166 (Me. Super. Ct.), attached as Exh. A to Campbell Aff., at 10.

The cited portion of the Terry affidavit refers only to Document No. 8, as to which Davric's claim is time-barred in the instant case. See Affidavit of Sharon Terry, *Davric Maine Corp. v. Maine Harness Horsemen's Ass'n*, Civ. No. 97-166 (Me. Super. Ct.), attached as Exh. D to Campbell Aff., ¶ 4(b). Reference to the sheer numerosity of defamatory statements is in the nature of a legal argument rather than a fact. The cited portion of the Ronco affidavit does not support the proposition for which it is offered. Ronco merely states that he "participated" in drafting a summary of legislative documents. See Affidavit of Kenneth Ronco, *Davric Maine Corp. v. Maine Harness Horsemen's Ass'n*, Civ. No. 97-166 (Me. Super. Ct.), attached as Exh. 3 to Second Rancourt Aff., ¶ 58. Finally, for the reasons stated above, I have not found the evidence of existence of a conspiracy, including the Guiliano affidavit, compelling.

Davric thus presents no evidence that the Rancourt and Molnar statements, even if false, were made with actual malice. Rancourt and Molnar accordingly are entitled to summary judgment with respect to the claims contained in Count VII.¹⁷

¹⁷In the Molnar/Ronco Opposition, filed on April 30, 1999, Davric requested additional time for further supplementation of the record based on a pending motion relating to Molnar's deposition. Molnar/Ronco Opposition at 4. By order dated March 29, 1999 I denied Davric's request to continue Molnar's oral deposition but permitted it to complete that deposition by way of written (continued...)

IV. Conclusion

For the foregoing reasons, I **DENY** Davric's motion to supplement its statement of material facts and the defendants' motion to strike Davric's statement of material facts, and recommend that the defendants' motions for summary judgment be **GRANTED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 4th day of August, 1999.

*David M. Cohen
United States Magistrate Judge*

¹⁷(...continued)
interrogatories. Order on Discovery Dispute (Docket No. 24). On April 9, 1999 Davric filed an objection to this order, which was overruled on May 5, 1999. Objection, etc. (Docket No. 40) & endorsement thereon. In his reply, filed on May 18, 1999, Molnar represented that Davric had not as of that time served him with any written deposition questions. Reply Memorandum of Law, etc. (Docket No. 73) at 7 n.5. The request to supplement the record accordingly is denied.