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JOURNAL PUBLISHING COMPANY, INC. v.
THE HARTFORD COURANT COMPANY
(SC 16677)

Sullivan, C. J., and Borden, Katz, Vertefeuille and Zarella, Js.

Argued April 16—officially released September 17, 2002

William M. Rubenstein, with whom were *Michelle H. Seagull* and, on the brief, *Chad A. Landmon*, for the appellant (defendant).

Richard P. Weinstein, with whom was *Nathan A. Schatz*, for the appellee (plaintiff).

Opinion

SULLIVAN, C. J. The plaintiff, Journal Publishing Company, Inc., filed this petition for a bill of discovery pursuant to General Statutes § 52-156a (a),¹ seeking discovery of certain information from the defendant, The Hartford Courant Company. Following a court trial, the trial court determined that there was probable cause to believe that the plaintiff had a cause of action against the defendant for: (1) tortious interference with a contract; (2) antitrust violations; and (3) violations of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq. Accordingly, the trial court granted the petition in part and ordered the defendant to provide certain information to the plaintiff. This appeal followed. We conclude that the plaintiff has not established probable cause to support any of the causes of action found by the trial court and, accordingly, reverse the judgment.

The record reveals the following relevant facts and procedural history. On September 5, 2000, the plaintiff filed a petition to perpetuate testimony, to conduct depositions and to order production of documents before action. The plaintiff claimed in its petition that there was probable cause to believe that the defendant wrongfully had excluded the plaintiff from the market for Sunday comic strips in violation of General Statutes §§ 35-26² and 35-28 (b)³ and (d) and had engaged in an unfair method of competition and an unfair act or practice in the conduct of the trade or commerce of selling or distributing newspapers in violation of General Statutes § 42-110b.⁴ Accordingly, the plaintiff sought to examine all documents between the defendant and certain national syndicators of the comic strips regarding the distribution of the Sunday comics, and to conduct a deposition of a representative of the defendant's newspaper regarding the same issue.

On March 2, 2001, the trial court held a hearing on the plaintiff's petition. Elizabeth Ellis gave the following testimony on behalf of the plaintiff. The plaintiff pub-

lishes a newspaper, the Journal Inquirer, which is circulated in seventeen towns in Connecticut and Massachusetts. Ellis has been the newspaper's publisher for thirty years. The defendant publishes a newspaper, the Hartford Courant, which also is circulated in those seventeen towns. The Journal Inquirer is published on Monday through Friday in the afternoon and on Saturday in the morning and contains three pages of nationally syndicated comic strips. The Hartford Courant is published seven days a week and contains eleven syndicated comic strips that are published also by the Journal Inquirer. Ellis testified, on the basis of her knowledge of the newspaper business, that newspapers that publish comic strips have written agreements with the syndicators of the comic strips.

The Journal Inquirer receives its comic strips from the syndicators on a daily basis. Each comic strip is printed with a release, or expected publication, date. The Journal Inquirer considers itself contractually bound to honor those dates.

Over the course of a number of years prior to the year 2000, Ellis made several unsuccessful attempts on behalf of the plaintiff to acquire from certain syndicators the right to publish the Sunday edition of their comics. The plaintiff intended to publish the Sunday comics either in a Sunday newspaper or in a "weekend edition" that would be published on Saturday morning and would have certain features of a Sunday newspaper.

At some point in the year 2000, the Hartford Courant ran an advertisement indicating that the Sunday edition of that newspaper soon would be available on Saturdays. When Ellis became aware of that fact, she called the syndicators of certain comic strips in another attempt to obtain the right to publish the Sunday comics. When she was unable to do so, she wrote a letter to the defendant requesting that it release the exclusivity provisions of its contracts with the syndicators of nine Sunday comic editions and permit the syndicators to distribute the comics to the plaintiff.⁵ The defendant's parent corporation acknowledged receipt of the letter and indicated that it would respond after it had had an opportunity to look into the matter. The plaintiff received no further response to Ellis' letter.

Ellis also telephoned Walter Mahoney, the vice president of one of the syndicators, Tribune Media, to inquire why the Journal Inquirer was restricted from publishing the Sunday comics on Saturday when the Hartford Courant was permitted to do so. Ellis was not successful in her attempt to persuade Mahoney to allow the plaintiff to publish the Sunday comics.

On the day before the hearing on the plaintiff's petition, Ellis telephoned the publisher of the Hartford Courant, Jack Davis, to ask why the defendant objected to the Journal Inquirer's publishing the same Sunday

comics that the Hartford Courant published in its early Sunday edition. Davis responded that it was important for the Hartford Courant to have a unique product so that people would want to buy that newspaper rather than another.

On cross-examination, Ellis testified that Editor & Publisher magazine contains a list of the Sunday comics that are available for publication from syndicators. That magazine lists more than 200 syndicated Sunday comics.

Following the hearing, the trial court found that the defendant had contracts with the syndicators that it had amended at some point to allow it to publish Sunday comic strips on Saturday, prior to their release date. It also found that, under the terms of the amended contracts, the syndicators had agreed not to permit the plaintiff to publish the Sunday comic strips on Saturday. Finally, it found that both the defendant and one of the syndicators had acknowledged to the plaintiff the existence of such a preclusive contractual provision.

The trial court also concluded that the plaintiff had established that there was probable cause to believe that the defendant had (1) modified its contract with the syndicators with the intention of limiting the plaintiff's contractual rights; (2) violated CUTPA by engaging in unscrupulous or oppressive acts; and (3) persuaded the syndicators to refuse to deal with the defendant in violation of the antitrust statutes. Accordingly, the trial court rendered judgment for the plaintiff and ordered the defendant to disclose the portion of its contracts with the syndicators who also contracted with the plaintiff governing the publication of Sunday comics. The defendant appealed from that judgment to the Appellate Court, and we transferred the appeal to this court pursuant to Practice Book § 65-1 and General Statutes § 51-199 (c).

The defendant claims on appeal: (1) that the trial court's findings of fact were not supported by the evidence presented at the hearing; and (2) that, in reaching its legal conclusions, the trial court misconstrued and misapplied the legal standard for granting a bill of discovery. The plaintiff contends, to the contrary, that the evidence supported the trial court's factual findings. It further contends that the record is inadequate for review of the trial court's legal conclusions. The plaintiff also argues, however, that, even if the court's conclusions are reviewable, the defendant's challenge to those conclusions is without merit. Finally, the plaintiff argues that, if this court reverses the judgment of the trial court, it should remand the case for a new hearing at which the plaintiff should be permitted to subpoena and examine a representative of the defendant to obtain additional factual support for its claims.

We conclude that the evidence presented at the

March 2, 2001 hearing was sufficient to support the factual findings on which the trial court relied in reaching its legal conclusions. We also conclude, however, that those factual findings were insufficient to support a finding of probable cause that the plaintiff had a cause of action against the defendant on the grounds alleged in its petition. Accordingly, we reverse the judgment of the trial court. We also conclude that the plaintiff is not entitled to a new hearing.

Before examining the merits of the defendant's claims, "a brief discussion of the bill of discovery is appropriate. The bill of discovery is an independent action in equity for discovery, and is designed to obtain evidence for use in an action other than the one in which discovery is sought. . . . As a power to enforce discovery, the bill is within the inherent power of a court of equity that has been a procedural tool in use for centuries. . . . The bill is well recognized and may be entertained notwithstanding the statutes and rules of court relative to discovery. . . . Furthermore, because a pure bill of discovery is favored in equity, it should be granted unless there is some well founded objection against the exercise of the court's discretion. . . .

"To sustain the bill, the petitioner must demonstrate that what he seeks to discover is material and necessary for proof of, or is needed to aid in proof of or in defense of, another action already brought or about to be brought. . . . Although the petitioner must also show that he has no other adequate means of enforcing discovery of the desired material, [t]he availability of other remedies . . . for obtaining information [does] not require the denial of the equitable relief . . . sought. . . . This is because a remedy is adequate only if it is one which is specific and adapted to securing the relief sought conveniently, effectively and completely. . . . The remedy is designed to give facility to proof. . . .

"Discovery is confined to facts material to the plaintiff's cause of action and does not afford an open invitation to delve into the defendant's affairs. . . . A plaintiff must be able to demonstrate good faith as well as probable cause that the information sought is both material and necessary to his action. . . . A plaintiff should describe with such details as may be reasonably available the material he seeks . . . and should not be allowed to indulge a hope that a thorough ransacking of any information and material which the defendant may possess would turn up evidence helpful to [his] case. . . . What is reasonably necessary and what the terms of the judgment require call for the exercise of the trial court's discretion." (Citations omitted; internal quotation marks omitted.) *Berger v. Cuomo*, 230 Conn. 1, 5–7, 644 A.2d 333 (1994).

"The plaintiff who brings a bill of discovery must demonstrate by detailed facts that there is probable

cause to bring a potential cause of action. Probable cause is the knowledge of facts sufficient to justify a reasonable man in the belief that he has reasonable grounds for presenting an action. . . . Its existence or nonexistence is determined by the court on the facts found. . . . Moreover, the plaintiff who seeks discovery in equity must demonstrate more than a mere suspicion; he must also show that there is some describable sense of wrong.”⁶ (Citation omitted; internal quotation marks omitted.) *Id.*, 7. “Whether particular facts constitute probable cause is a question of law.” *McMahon v. Florio*, 147 Conn. 704, 707, 166 A.2d 240 (1960).

I

We first address the defendant’s claim that the evidence presented at the March 2, 2001 hearing did not support the trial court’s factual findings. Specifically, the defendant challenges the court’s findings that: (1) the defendant amended its contracts with the syndicators so that it could publish the Sunday comic strips on Saturday, prior to their release date; (2) both the defendant and one of the syndicators acknowledged to the plaintiff the existence of a preclusive contractual condition; and (3) under the amended contracts, the syndicators agreed that they would not allow the plaintiff to publish the Sunday comic strips on Saturday.

As a threshold matter, we note that the plaintiff does not claim that it was harmed in any way by the defendant’s publication of the Sunday comics on Saturday. Rather, it claims only that it was injured by the syndicators’ refusal to allow it to publish those comics. The court therefore could not have relied on its finding that the defendant and the syndicators amended their contracts to allow such publication as support for its legal conclusions. Furthermore, if there was other evidence to support the trial court’s finding of an exclusive contract between the defendant and one of the syndicators, it is irrelevant whether they expressly acknowledged its existence. We conclude, therefore, that we need not consider whether the evidence presented at the hearing supported the trial court’s findings that the defendant and the syndicators amended their contracts or acknowledged the existence of an exclusive contract. Accordingly, we need determine only whether the evidence presented at the hearing supported the trial court’s finding that the defendant and the syndicators had exclusivity agreements with respect to the Sunday comics. We conclude that the evidence was sufficient to support this finding.

We note that the existence of contractual exclusivity provisions between the defendant and the syndicators with respect to the publication of the Sunday comics was not a fact relied on by the plaintiff in support of its bill of discovery but, rather, was one of the items of information sought by the plaintiff in its petition. It would defy common sense, therefore, to conclude that,

in order for the trial court to grant the petition, the plaintiff was required to establish by a preponderance of the evidence that the defendant and the syndicators had exclusive contractual arrangements.⁷ We conclude, instead, that the plaintiff was required to establish only that there was probable cause to believe both that the defendant and the syndicators had such arrangements and that those arrangements provided the basis for a cause of action. See *Berger v. Cuomo*, supra, 230 Conn. 7 (standard for determining whether trial court's unchallenged factual findings warrant granting of bill of discovery is whether facts demonstrate "that there is probable cause to bring a potential cause of action").

The following evidence supported the trial court's finding that there was probable cause to believe that the defendant and the syndicators had an agreement that prevented the syndicators from allowing the plaintiff to publish the Sunday comics. Ellis testified that, almost one year before the hearing, she had written to the defendant requesting that it release the exclusivity provisions for certain comic strips. Shortly thereafter, the defendant, through its parent corporation, responded only that it would look into the matter. The defendant provided no additional response. The trial court reasonably could have inferred from this testimony that, if the defendant did not have an exclusivity agreement with the syndicators, the natural response to the plaintiff's request would have been for it to deny the existence of such an arrangement or to assert that it had no control over the matter. Accordingly, the trial court could have inferred the existence of such an agreement from the defendant's failure to make a denial or to assert the absence of control.

Ellis also testified that she called Davis to inquire why the defendant objected to the plaintiff's having access to the Sunday comics. Davis responded that it was important for the newspaper to have a unique product. The trial court reasonably could have inferred from this response that the defendant believed that it had the ability to maintain the uniqueness of its Sunday newspaper by preventing the plaintiff from having access to the Sunday comics that it published.

Ellis also testified that, at some point in the year 2000, the Hartford Courant started publishing the Sunday comics in its early Sunday edition, which is actually published on Saturday. Prior to that time, Ellis had considered the plaintiff to be contractually bound to honor the release dates printed on the comics. The trial court reasonably could have inferred from this testimony that the syndicators' refusal to permit the plaintiff to publish the Sunday comics was not based on their reluctance to release the Sunday comics for publication before their release date, but, rather, on some other consideration that applied to the plaintiff, but not to the defendant.

We conclude that, on the basis of this evidence, the trial court reasonably could have determined that there was probable cause to believe that the defendant and the syndicators had a contractual arrangement that prevented the syndicators from allowing the plaintiff to publish the Sunday comics published by the defendant.

II

We next consider whether, if proven, the existence of such exclusive contracts, in and of itself, would constitute probable cause to believe that the plaintiff had a cause of action against the defendant. The trial court concluded that there was probable cause to believe that, by entering into exclusive contracts with the syndicators, the defendant had (1) tortiously interfered with the plaintiff's contractual rights; (2) violated CUTPA; and (3) violated Connecticut's antitrust laws. The defendant argues that the plaintiff never claimed, and the evidence did not establish, that the defendant had interfered with the plaintiff's contractual relations. It also argues that the plaintiff did not establish probable cause to believe that all of the elements of an antitrust claim exist. Finally, it argues that, in the absence of an antitrust violation, the plaintiff could not establish probable cause to believe that a violation of CUTPA existed. We assume, for purposes of our analysis, that the contracts between the defendant and the syndicators contained exclusivity provisions. We agree with the defendant, however, that the existence of such provisions would not constitute probable cause with respect to any of the causes of action found by the trial court.

A

We first consider whether the trial court properly determined that the existence of an exclusive contractual arrangement constituted probable cause to believe that the defendant tortiously had interfered with the plaintiff's contractual arrangements. The defendant argues that the plaintiff never made any such claim before the trial court and, even if it had, that the claim was not supported by the evidence. The plaintiff concedes that it had made no such claim.

We previously have recognized that "the right of a plaintiff to recover is limited by the allegations of the complaint . . . and any judgment should conform to the pleadings, the issues and the prayers for relief." (Citation omitted; internal quotation marks omitted.) *Kawasaki Kisen Kaisha, Ltd. v. Indomar, Ltd.*, 173 Conn. 269, 272, 377 A.2d 316 (1977). We conclude, therefore, that the trial court should not have raised this issue sua sponte. Accordingly, we need not consider whether the evidence established probable cause to believe that the plaintiff had a cause of action for tortious interference with its contractual relations.

B

We next consider the defendant's claim that the trial court improperly determined that there was probable cause to believe that the defendant had violated Connecticut's antitrust statutes. Specifically, the defendant claims that the plaintiff failed to demonstrate that: (1) competition is likely to be harmed by the existence of the exclusivity provisions; (2) the syndicators would have allowed the plaintiff to publish the Sunday comics in the absence of an exclusive agreement with the defendant and, therefore, that the plaintiff was harmed by the agreement; and (3) the existence of the exclusivity provisions, in and of itself, is violative of the antitrust laws. We conclude that the first and third claims are conceptually inseparable, and, accordingly, we treat them as a single claim. We also conclude that the existence of contractual exclusivity provisions between the defendant and the syndicators, if proved, would not, in and of itself, establish probable cause to believe that the antitrust laws have been violated. Because this determination is dispositive of the appeal, we need not consider the defendant's second claim.

As a preliminary matter, we address the plaintiff's claim that the record is inadequate to review the defendant's challenge to the trial court's legal conclusions. The following additional facts and procedural history are relevant to this claim. On September 7, 2001, the defendant, pursuant to Practice Book § 66-5, filed in the Appellate Court a motion for articulation of the factual and legal basis of the trial court's May 7, 2001 memorandum of decision. In accordance with the Practice Book, the motion was forwarded to the trial court for a ruling. The trial court denied the motion. The plaintiff claims that, because the trial court refused to provide the necessary articulation of its conclusion that there was probable cause to believe that the defendant had violated antitrust laws, the memorandum of decision does not set forth the necessary factual or legal basis for appellate review.

"The general purpose of [the relevant] rules of practice and their interplay is to ensure that there is a trial court record that is adequate for an informed appellate review of the various claims presented by the parties. . . . One specific purpose of a motion for articulation of the factual basis of a trial court's decision is to clarify an ambiguity or incompleteness in the legal reasoning of the trial court in reaching its decision. . . . Further articulation . . . is unnecessary where the [memorandum of decision] adequately states its factual basis, and where the record is adequate for informed appellate review of the [judgment]." (Citations omitted; internal quotation marks omitted.) *State v. Cobb*, 251 Conn. 285, 383, 743 A.2d 1 (1999), cert. denied, 531 U.S. 841, 121 S. Ct. 106, 148 L. Ed. 2d 64 (2000).

In the present case, the trial court clearly set forth its factual findings and stated that those findings estab-

lished probable cause to believe that the defendant had “persuaded the syndicators to refuse to deal with the [plaintiff] in violation of the Antitrust Act.” The record is also clear that the court was made aware of the legal standards pertaining to antitrust law as set forth by the parties in their briefs to that court. In such cases, we assume that the trial court has applied the correct legal standards. See *State v. Crumpton*, 202 Conn. 224, 232, 520 A.2d 226 (1987). Accordingly, we conclude that the record is adequate for review.

The plaintiff claims that the exclusivity provision in the contracts between the defendant and the syndicators of certain Sunday comics violated General Statutes §§ 35-26 and 35-28 (b) and (d).⁸ It claims that the effect of the provision was to prevent the plaintiff from offering those comics as part of an expanded weekend edition of its newspaper that would compete with the defendant’s Sunday newspaper. The defendant counters that such exclusivity provisions are presumptively legal and procompetitive and, accordingly, that in the absence of any evidence that the contracts impaired competition as a whole, the plaintiff failed to establish probable cause to believe that a violation had occurred. We agree with the defendant.

This court previously has recognized that “[u]nder the common law, the well-settled rule is that an anticompetitive covenant ancillary to a lawful contract is enforceable if the restraint upon trade is reasonable. . . . To satisfy this requirement of reasonableness, we have stated that the restraint must be limited in its operation with respect to time and place and afford no more than a fair and just protection to the interests of the party in whose favor it is to operate, without unduly interfering with the public interest.” (Citations omitted; internal quotation marks omitted.) *Elida, Inc. v. Harmor Realty Corp.*, 177 Conn. 218, 225–26, 413 A.2d 1226 (1979). This principle has come to be known as the “rule of reason.” *Id.*, 225.

“In rule of reason cases, the plaintiff bears the initial burden of showing that the alleged combination or agreement produced adverse, anticompetitive effects within the relevant product and geographic markets. . . . The plaintiff may satisfy this burden by proving the existence of actual anticompetitive effects, such as reduction of output, increase in price, or deterioration in quality of goods and services.” (Citation omitted.) *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1367 (3d Cir. 1996). “If a plaintiff meets his initial burden of adducing adequate evidence of market power or actual anticompetitive effects, the burden shifts to the defendant to show that the challenged conduct promotes a sufficiently pro-competitive objective.” *Id.*, 1367–68.

“[T]here are [however] certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively

presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.” (Internal quotation marks omitted.) *Elida, Inc. v. Harmor Realty Corp.*, supra, 177 Conn. 227. Such agreements constitute “per se” antitrust violations. *Id.* “[T]he ‘rule of reason’ was intended to be the prevailing standard to be applied for the purpose of determining whether a particular act had or had not brought about the wrong against which the statute provided in a given case. . . . ‘Per se’ rules of illegality should be applied only to conduct which is shown to be ‘manifestly anticompetitive.’ ” (Citation omitted.) *Id.*, 230–31.

A number of courts have concluded that the exclusive licensing of syndicated features to newspaper publishers is presumptively procompetitive and, therefore, does not violate the federal antitrust statutes.⁹ See *Paddock Publications, Inc. v. Chicago Tribune Co.*, 103 F.3d 42 (7th Cir. 1996), cert. denied, 520 U.S. 1265, 117 S. Ct. 2435, 138 L. Ed. 2d 196 (1997); *Woodbury Daily Times Co. v. Los Angeles Times-Washington Post News Service*, 616 F. Sup. 502 (D.N.J. 1985). In *Paddock Publications, Inc.*, the plaintiff, a publisher of a daily newspaper in the Chicago area, claimed that two larger newspapers in the same geographical area had “locked up the ‘most popular’ or ‘best’ supplemental [syndicated] services and features, [thereby] injuring consumers by frustrating competition.” *Paddock Publications, Inc. v. Chicago Tribune Co.*, supra, 44. The plaintiff conceded that “many quality comics and features [were] available to it . . . but insist[ed] that the best ones [were] committed to its larger rivals.” *Id.* The District Court dismissed the complaint for failure to state a claim on which relief might have been granted. *Id.* On appeal, the Court of Appeals, implicitly applying the rule of reason, concluded that “exclusive stories and features help the newspapers differentiate themselves, the better to compete with one another. A market in which every newspaper carried the same stories, columns, and cartoons would be a less vigorous market than the existing one.” *Id.*, 45. It also concluded that there was no evidence that the plaintiff had ever attempted to outbid the rival newspapers for the syndicated features; *id.*, 44; or that those newspapers had colluded with each other, thereby harming consumers. *Id.*, 45.

Finally, the court in *Paddock Publications, Inc.*, rejected the plaintiff’s implicit claim that the syndicated features were “essential facilities”; *id.*, 44; that “could not feasibly be duplicated [and therefore] must be shared among rivals” *Id.*, 45. It concluded, rather, that “this case does not involve a single facility that monopolizes one level of production and creates a potential to extend the monopoly to others. We have, instead, competition at each level of production; no one can ‘take over’ another level of production by withhold-

ing access from disfavored rivals.” Id. Accordingly, the Court of Appeals affirmed the judgment of the District Court dismissing the claim. Id., 47.

In *Woodbury Daily Times Co. v. Los Angeles Times-Washington Post News Service*, supra, 616 F. Sup. 502, the court considered a similar claim. Applying the rule of reason rather than a per se standard; id., 506; the court determined that “[t]he ability to present a unique product in the newspaper or broadcast media contributes to the value of a paper or television station and enhances its competitive edge in the market place. Limited exclusivity grants are thus the custom of these industries. . . . One aspect of the [competing newspaper’s] competitive draw would be lessened if another newspaper in the area published the same articles on the same day, or even worse, published the articles before the [competing newspaper] chose to use them.” Id., 510. “In the end, such exclusive subscriptions result in each interested area newspaper contracting with a different service, thus guaranteeing that the reading public has access to a wider variety of news reporting and opinions.” Id., 511. Accordingly, the court granted the defendants’ motion for summary judgment. Id., 512.

The plaintiff in this case in effect concedes that, under *Paddock Publications, Inc.*, and *Woodbury Daily Times Co.*, exclusivity provisions in contracts between newspapers and syndicators are, as a general rule, presumptively legal. It argues, however, that, because of the unusual factual circumstances of this case, those cases are not applicable here. Specifically, the plaintiff claims that, because the syndicators in this case have permitted the plaintiff to publish the same comics as the defendant on Monday through Saturday, the defendant cannot claim that the exclusivity provisions provide it with the marketplace advantage of being identified with those comics. Therefore, the plaintiff contends, the sole purpose and effect of the contractual restriction was to suppress competition in the market for expanded weekend newspapers, whether published on Saturday or Sunday, without any redeeming value for the marketplace. Accordingly, the plaintiff argues, the trial court properly concluded that the exclusivity provisions constituted per se violations of the antitrust laws. See *Elida, Inc. v. Harmor Realty Corp.*, supra, 177 Conn. 227 (recognizing that per se rule is applicable to “agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable” [internal quotation marks omitted]).

Thus, the plaintiff implicitly concedes that, if the exclusivity provisions had prevented the plaintiff from publishing certain comics on a daily basis, they would be presumptively legal. It argues, however, that, because the provisions prevent the plaintiff from publishing the comics *only* on Sunday, they do not enhance

the defendant's competitiveness while they do impair the plaintiff's ability to compete and, accordingly, are presumptively illegal. We are not persuaded.

First, the exclusivity provisions complained of by the plaintiff in this case are, on their face, *less* restrictive than the exclusivity provisions found, under a rule of reason analysis, to be procompetitive in *Paddock Publications, Inc.*, and *Woodbury Daily Times Co.* We cannot perceive any reason why the fact that the plaintiff is permitted to publish the comics at issue on Monday through Saturday should relieve it of the burden of establishing the existence of the actual anticompetitive effects of preventing it from publishing the comics in a weekend edition, or impose on the defendant the burden of establishing redeeming procompetitive virtues of the provisions.

More fundamentally, we simply cannot reconcile the plaintiff's claim that the exclusivity provisions constitute per se violations of the antitrust laws because their only purpose is to suppress competition in the market for expanded weekend newspapers, with its claim that the provisions have no redeeming procompetitive virtues. If the provisions suppress competition, they do so only by making the defendant's Sunday newspaper more desirable to consumers than competing weekend newspapers that are prevented from publishing the same Sunday comics. This is the same procompetitive effect that the exclusivity provisions challenged in *Paddock Publications, Inc.*, and *Woodbury Daily Times Co.* were found to have had on the markets in those cases. Accordingly, we conclude that the exclusivity provisions between the defendant and the syndicators do not constitute per se violations of the antitrust statutes.

We also conclude that, under the rule of reason, the plaintiff has not met its burden of establishing probable cause to believe that "the alleged . . . agreement produced adverse, anticompetitive effects within the relevant product and geographic markets." *Orson, Inc. v. Miramax Film Corp.*, supra, 79 F.3d 1367. The plaintiff produced no evidence supporting "the existence of [any] actual anticompetitive effects, such as reduction of output, increase in price, or deterioration in quality of goods and services." *Id.* Rather, the evidence showed only that the plaintiff's inability to publish those comic strips may have been a factor in its decision whether to publish an expanded weekend newspaper. It is not unreasonable to infer from this evidence that the plaintiff believed that its planned weekend edition would be more competitive if it contained the Sunday edition of all of the comics that its newspaper contains on a daily basis. "The antitrust laws, however, were enacted for the protection of *competition*, not *competitors*" (Citation omitted; emphasis in original; internal quotation marks omitted.) *Brunswick Corp. v. Pueblo Bowl-*

o-Mat, Inc., 429 U.S. 477, 488, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977).

We also reject the plaintiff's claim, essentially raised as an alternate ground for affirmance, that there is probable cause to believe that the eleven Sunday comic strips at issue in this case constitute an "essential facility" because the syndicators are the only source of those particular comics. The evidence showed that there are hundreds of syndicated comic strips available to the plaintiff. There simply is no evidence that the eleven comic strips that the plaintiff is prevented from publishing are essential for the publication of a viable newspaper. See *Paddock Publications, Inc. v. Chicago Tribune Co.*, supra, 103 F.3d 45 (rejecting "essential facilities" claim where case did "not involve a single facility that monopolizes one level of production and creates a potential to extend the monopoly to others").

We conclude that, in the absence of any evidence establishing the existence of any actual anticompetitive effects of the exclusivity provisions, the plaintiff has not established probable cause to believe that the antitrust statutes were violated.

III

The defendant also claims that the trial court improperly concluded that there was probable cause to believe that the defendant had violated CUTPA. It argues that, because the CUTPA claim was predicated solely on the antitrust claim, and because the plaintiff did not establish probable cause to believe that the antitrust laws had been violated, there is no basis for the claim. The plaintiff contends, to the contrary, that, even if the antitrust laws were not violated, the trial court properly found probable cause to believe that the defendant had engaged in unscrupulous or oppressive acts. We agree with the defendant.

"It is well settled that in determining whether a practice violates CUTPA we have adopted the criteria set out in the cigarette rule by the federal trade commission for determining when a practice is unfair: (1) [W]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers [competitors or other businessmen]. . . .

"All three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three. . . . Thus a violation of CUTPA may be established by showing either an actual deceptive practice . . . or a

practice amounting to a violation of public policy. . . . Furthermore, a party need not prove an intent to deceive to prevail under CUTPA.” (Citations omitted; internal quotation marks omitted.) *Cheshire Mortgage Service, Inc. v. Montes*, 223 Conn. 80, 105–106, 612 A.2d 1130 (1992).

The trial court concluded that there was probable cause to believe that the defendant had engaged in “unscrupulous or oppressive acts, causing a substantial injury to the readers of the [plaintiff’s] publication and to the [plaintiff].” In light of the evidence presented at the hearing, the “unscrupulous or oppressive acts” referred to by the trial court could only have been the exclusivity provisions in the contracts between the defendant and the syndicators. As noted by the court in *Woodbury Daily Times Co. v. Los Angeles Times-Washington Post News Service*, supra, 616 F. Sup. 510, however, “[l]imited exclusivity grants are . . . the custom” in the newspaper industry. Moreover, such provisions are generally procompetitive and, as such, are in furtherance of public policy and presumptively legal. See *Paddock Publications, Inc. v. Chicago Tribune Co.*, supra, 103 F.3d 45. We conclude that, in the absence of any evidence of substantial injury to consumers or to the plaintiff,¹⁰ these customary, procompetitive and presumptively legal contractual provisions do not constitute probable cause to believe that the criteria of the “cigarette rule” have been met. Accordingly, we conclude that the trial court improperly determined that there was probable cause to believe that the defendant had violated CUTPA.

IV

We next address the plaintiff’s claim that it is entitled to a new hearing at which it should be allowed to subpoena a representative of the defendant to provide additional facts in support of its bill of discovery. We disagree.

The following additional facts and procedural history are relevant to this claim. Prior to the hearing on the bill of discovery, the plaintiff attempted to serve a subpoena directed to Marty Petty, a former publisher of the Hartford Courant, or, in the alternative, the defendant’s designee with knowledge of its relationship with the syndicators. The subpoena directed the production of “[a]ny and all correspondence by and between [the syndicators] and the [defendant] in regard to restrictions on access to the agreements between the syndicators and the [defendant] related to the so-called Sunday comics, and the nature and extent of distribution of the so-called Sunday Hartford Courant which includes the Sunday comics.” Service was attempted at the offices of the defendant’s headquarters. At the time that the attempted service was made, however, Petty was no longer employed by the defendant.

The defendant moved to quash the subpoena on the grounds that: (1) service had not been made on Petty and the defendant was, therefore, not required to respond to the subpoena; and (2) the plaintiff was not entitled to any discovery until after a ruling on its petition for a bill of discovery. The trial court granted the motion to quash, concluding that the plaintiff was required to establish probable cause to believe that it had a cause of action against the defendant before the plaintiff would be entitled to discovery.

Thereafter, the plaintiff filed a second subpoena directed to Louis J. Golden, the deputy publisher of the Hartford Courant. The subpoena directed production of the same documents listed in the first subpoena. The defendant again filed a motion to quash and a motion for sanctions against the plaintiff for its failure to abide by the trial court's order quashing the first subpoena. The motion to quash was argued before the trial court at the commencement of the hearing on the bill of discovery. The trial court granted the motion.

The plaintiff now argues that, if this court determines that the record before the trial court did not establish probable cause to believe that the plaintiff had a cause of action against the defendant, this court should remand the case for a hearing at which the plaintiff should be allowed to subpoena a representative of the defendant to provide limited testimony as to the *existence* of the contractual exclusivity provisions, as distinct from their substance. The plaintiff concedes that it should not be able to compel production of the same information sought in the bill of discovery by use of a subpoena, but argues that the bill of discovery was aimed at the history, nature and substance of the contractual provisions, not their mere existence, of which the plaintiff already knew indirectly through hearsay.

We conclude that the plaintiff is not entitled to a new hearing. We have assumed for purposes of our analysis that the restrictive contractual provisions exist and have determined that their existence does not constitute probable cause to believe that the plaintiff has a cause of action against the defendant. Accordingly, nothing would be gained by allowing the plaintiff to establish the existence of the contractual provisions through direct testimony by a representative of the defendant.

The judgment is reversed and the case is remanded with direction to render judgment denying the petition for a bill of discovery.

In this opinion KATZ and ZARELLA, Js., concurred.

¹ General Statutes § 52-156a (a) provides: "(1) A person who desires to perpetuate testimony regarding any matter that may be cognizable in the Superior Court may file a verified petition in the superior court for the judicial district of the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show: (A) That the petitioner expects to be a party to an action cognizable in the superior court

but is presently unable to bring it or cause it to be brought, (B) the subject matter of the expected action and the petitioner's interest therein, (C) the facts which the petitioner desires to establish by the proposed testimony and the reasons for desiring to perpetuate it, (D) the names or a description of the persons the petitioner expects will be adverse parties and their addresses so far as known, and (E) the names and addresses of the persons to be examined and the substance of the testimony which the petitioner expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

“(2) The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least twenty days before the date of hearing the notice shall be served in the manner provided by section 52-57; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided by section 52-57, an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent.

“(3) If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with this section; and the court may make orders for the production of documents and things and the entry upon land for inspection and other purposes, and for the physical or mental examination of persons. For the purpose of applying this section to depositions for perpetuating testimony, each reference in this section to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

“(4) If a deposition to perpetuate testimony is taken under this section, it may be used in any action involving the same subject matter subsequently brought in the Superior Court.”

² General Statutes § 35-26 provides: “Every contract, combination, or conspiracy in restraint of any part of trade or commerce is unlawful.”

³ General Statutes § 35-28 provides: “Without limiting section 35-26, every contract, combination, or conspiracy is unlawful when the same are for the purpose, or have the effect, of: (a) Fixing, controlling, or maintaining prices, rates, quotations, or fees in any part of trade or commerce; (b) fixing, controlling, maintaining, limiting, or discontinuing the production, manufacture, mining, sale, or supply of any part of trade or commerce; (c) allocating or dividing customers or markets, either functional or geographical, in any part of trade or commerce; or (d) refusing to deal, or coercing, persuading, or inducing third parties to refuse to deal with another person.”

⁴ General Statutes § 42-110b provides in relevant part: “(a) No person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. . . .”

⁵ We note that the defendant claims that the existence of such exclusivity provisions was not established by the evidence presented at the hearing.

⁶ Both of the parties and the trial court treated the probable cause standard for evaluating an alleged cause of action set forth in *Berger v. Cuomo*, supra, 230 Conn. 1, as the applicable standard in this case. Accordingly, we leave for another day the questions of whether (1) the standards governing equitable bills of discovery also govern petitions filed pursuant to § 52-156a; see *Cadle Co. v. Drubner*, 64 Conn. App. 69, 777 A.2d 1286 (2001) (applying *Berger* standards to § 52-156a petition); and (2) the probable cause language in *Berger* was an unduly constricted interpretation of our prior jurisprudence governing bills of discovery. See *Aetna Life & Casualty Co. v. Union Trust Co.*, 230 Conn. 779, 788 n.5, 646 A.2d 799 (1994) (when parties have not briefed or argued law that could affect case, “we decide [the] case on the basis on which it was tried and decided in the trial court, and briefed and argued in this court”).

⁷ Both parties agree that the evidentiary standard for determining whether unchallenged factual findings support the granting of a bill of discovery is whether the findings constitute probable cause to believe that the plaintiff has a cause of action against the defendant. See footnote 6 of this opinion. The parties do not address, however, the question of what is the proper

evidentiary standard for evaluating disputed factual findings.

⁸ See footnotes 2 and 3 of this opinion for the text of those statutes.

⁹ General Statutes § 35-44b provides: “It is the intent of the General Assembly that in construing sections 35-24 to 35-46, inclusive, the courts of this state shall be guided by interpretations given by the federal courts to federal antitrust statutes.”

¹⁰ As we have noted, the only injury claimed by the plaintiff is that the inability to publish the eleven Sunday comic strips at issue may make its planned weekend edition less competitive than it otherwise would have been.
