

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

FLYING EAGLE ESPRESSO, INC.,

Plaintiff(s),

v.

HOST INTERNATIONAL INC., et al.,

Defendant(s).

NO. C04-1551P

ORDER ON MOTIONS FOR  
SUMMARY JUDGMENT

The above-entitled Court, having received and reviewed the motions of all three Defendants for summary judgment in this matter, all the pleadings filed in response to said motions, and all exhibits and declarations attached thereto, and having heard oral argument thereon, makes the following ruling:

IT IS HEREBY ORDERED that summary judgment will be GRANTED to all Defendants on the following causes of action:

1. Violations of the Washington anti-trust statutes (RCW 19.86.030, 19.86.040)
2. Violations of the Washington Consumer Protection Act (RCW 19.86.020)

IT IS FURTHER ORDERED that summary judgment will be DENIED on the following causes of action:

1. Civil conspiracy under Washington state law (as to all Defendants)
2. Violations of 42 U.S.C. § 1983 (as to all Defendants)
3. Violations of the National Labor Relations Act, 29 U.S.C. §§ 158(b)(4) and (e) (as to Defendant Hotel Employees and Restaurant Employees Union Local No. 8 only)

1           4.       Allegations of tortious interference with a business expectancy (as to Defendants the  
2                   Port of Seattle and Hotel Employees and Restaurant Employees Union Local No. 8  
3                   only).

4           IT IS FURTHER ORDERED that summary judgment as to the cause of action against  
5   Defendant the Port of Seattle for contempt of court will be DENIED; however, Plaintiff is ordered to  
6   move the Court for an order of referral of the civil contempt cause of action to the Honorable Barbara  
7   J. Rothstein of this district for a determination of whether she wishes to retain jurisdiction over such  
8   claim.

9   Background

10          By virtue of a long-term lease and concession agreement with the Defendant Port of Seattle  
11   ("the Port"), Defendant Host International ("Host") had the right to sublease concession space within  
12   the Seatac Airport. The Port was obligated by law to make a certain percentage of concession space  
13   available for "disadvantaged business enterprises" ("DBEs") and in 1994 Plaintiff Flying Eagle  
14   Espresso ("FEE") won out over several hundred other DBE applicants to open a retail coffee kiosk in  
15   the baggage claim area of the airport. Like the rest of the DBEs at the time, FEE employed non-union  
16   labor (although the business offered no benefit plan, FEE paid a higher per-hour wage than the union  
17   rate). Elmer Decl., ¶ 9.

18          Host's lease was set to expire at the end of 2004. The collective bargaining agreement  
19   ("CBA") that Defendant Hotel Employees and Restaurant Employees Union Local No. 8 ("HERE")  
20   was negotiating with Host prior to the expiration of Host's lease with the Port contained a provision  
21   (Article 2.01) with language aimed at non-union shops within the facility:

22               No work customarily performed by employees covered by this Agreement shall       be  
23               performed under any sublease, subcontract, or other agreement unless the       terms  
24               of any lease, contract or other agreement specifically state that (a) all such   work shall  
25               be performed only by members of the bargaining unit covered by       this Agreement  
26               and (b) the Employer shall at all times hold and exercise full       control of the terms and

1 conditions of employment of all such employees pursuant to the terms of this  
2 Agreement. CBA, Article 2.01<sup>1</sup>

3 The CBA was approved and executed in November 2002.

4 On October 31, 2002, the Port and HERE entered into a Memorandum of Understanding (the  
5 "MOU") describing a 3-tier concession structure which included an Exhibit A entitled "Position on  
6 Labor Harmony for Concessions." That exhibit's "General Statement" declared:

7 The Port of Seattle values and requires Labor Harmony among all of the  
8 vendors operating at the Airport. To this end, it will be the responsibility of  
9 concessionaires to furnish labor that can work in harmony with all other labor  
10 employed at the Airport and to propose and implement a Labor Harmony  
11 plan. This requirement is a material element of the concessionaire lease  
12 agreements (the "Contracts"). Failure by a concessionaire or any of its sublessees to  
13 comply with this requirement will be deemed a breach of the contract, which will  
14 subject the Concessionaire to termination of the Contract with the Port.<sup>2</sup>

15 In June 2003, the Port and Host entered into a new lease (which also contained reference to "labor  
16 harmony" and required Port approval of any sublease).

17 The Port had previously run into difficulty for requiring a third-party tenant to use union labor.  
18 An injunction issued by Judge Barbara J. Rothstein of this district in CityIce v. Port of Seattle (C99-  
19 1647BJR, Dkt. No. 29) prohibited the Port from engaging in "any conduct that interferes, either by the  
20 Port's actions or inactions, with the exercise of the federally protected rights of. . . third parties using  
21 Port facilities to assign work to their own employees. . ." It is this order that is the basis of Plaintiff's  
22 assertion that the Port is liable for civil contempt of court.

23 Shortly after these agreements were in place, Plaintiff's owner Jean Elmer ("Elmer") was  
24 informed on at least two occasions by Linda LaCombe ("LaCombe"), the Port's retail manager at the

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25 <sup>1</sup> Plaintiff makes much of the fact that, in the discussions leading up to the approval of the CBA, HERE  
26 notated a draft of the document with the language "Proposal to Apply to Current DBE's" appended to this  
27 section. Pltf Exh. 25, p. UNION 000241. The union makes much of the fact that the proposed language  
28 was ultimately withdrawn and does not appear in the final language.

29 The Port's and HERE's position is that this provision applied only to Tier II tenants (a category which  
30 not include FEE).

1 facility, that she would have to unionize in order to continue at SeaTac. Elmer Decl. ¶ 9, Pltf. Exh.'s  
2 59, 66. Later testimony by LaCombe indicated that both her position (vis-a-vis the requirements for  
3 renewal) and her communications to Elmer were reviewed and approved by her superiors. Pltf. Exh.  
4 70.

5 Elmer polled her employees and was told that they did not wish to join a union. Elmer Decl. ¶  
6 8. Throughout much of 2003, Elmer received communications, oral and written, from officials for the  
7 Port and Host to the effect that she would be required to join the union and that she would have to  
8 submit a Labor Harmony Plan (approved by the union) before her sublease would be renewed.  
9 Internal communications between representatives of the Defendants indicate that the Port and Host  
10 had discussed the issue and agreed that "all facilities covered by the HMS Host contract must be  
11 covered by collective bargaining." Pltf. Exh. 73.

12 On August 27, 2003, Host employee Robert van Snik sent Elmer a Letter of Intent ("LOI")  
13 offering to renew her sublease conditioned on the Port's approval of the sublease and FEE's  
14 submission of a Labor Harmony Plan. She was encouraged to "meet with representatives of HERE  
15 Local 8 to . . . assist you in developing your plan." Van Snik's letter stated that FEE's Labor Harmony  
16 Plan ("LHP") "is to contain a statement as to whether HERE Local 8 is in agreement with your plan."  
17 Pltf. Exh. 42. Within ten days, Plaintiff responded with inquiries about the LHP and whether it meant  
18 she had to unionize. Pltf. Exh. 43. Twenty-five days later, Mr. Van Snik of Host responded, but his  
19 response included no information about the LHP or the unionization requirement. Instead, Elmer was  
20 advised that FEE would have to relocate if they wished to renew their airport lease. Pltf. Exh. 44.  
21 Defendants do not controvert Plaintiff's allegation that the nature and substance of the LHP were  
22 never explained to her. Elmer Decl. ¶ 15.

23 In the wake of these exchanges, Elmer alleges that she tried to meet with union officials to  
24 discuss the LHP requirement. Elmer Decl. ¶ 13, Pltf Exh's 49, 52, 55. She was unsuccessful in this  
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1 attempt until November 13, 2003, when she met with Rick Sawyer of HERE ("Sawyer"). She alleges  
 2 (and HERE does not deny) that Sawyer said he knew nothing about Host's LHP requirement and had  
 3 no intention of getting involved in negotiations between FEE and Host on the issue.<sup>3</sup> Elmer Decl. ¶  
 4 13. Accepting his representations, Elmer concluded that there was no requirement that FEE become  
 5 unionized to continue on at SeaTac and left a voicemail to that effect with Port officials. Pltf Exh. 93.

6 FEE submitted a Letter of Intent on November 7, 2003. Pltf. Exh. 55. However, having had  
 7 no success obtaining a meeting with a union representative to that point, the LOI did not contain the  
 8 LHP Host had indicated was required. Following submission of the November 2003 LOI, FEE made  
 9 attempts to submit a draft of a LHP to Host (Pltf Exh's 85, 86). On December 19, 2003, van Snik  
 10 sent a letter to Elmer terminating their negotiations and indicating Host's intent to seek another  
 11 candidate to fulfill their DBE requirement. Pltf Exh. 87. The termination was confirmed in a letter to  
 12 FEE's attorneys several days later. Pltf Exh. 88.

13 Plaintiff did eventually send a finalized version of their LHP (unapproved by HERE and  
 14 indicating FEE's intent to remain non-union) to Host in January of the following year, but negotiations  
 15 had completely broken down by that point. Plaintiff alleges that every other DBE in the airport  
 16 submitted a LHP which indicated (usually in a single paragraph) their intent to adopt the CBA (Pltf  
 17 Exh's 95 - 101), and that every one of those requests for renewal was granted.

#### 18 Summary Judgment Standard

19 Summary judgment is not warranted if a material issue of fact exists for trial. Warren v. City  
 20 of Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995), cert. denied, 516 U.S. 1171 (1996). The underlying  
 21 facts are viewed in the light most favorable to the party opposing the motion. Matsushita Elec. Indus.  
 22 Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). "Summary judgment will not lie if . . . the

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24 <sup>3</sup> Sawyer testified that he was unaware of the LHP provision and believed the union had no role in  
 25 approving sublessees' labor harmony plans. Noble Decl. F, Sawyer Dep., pp. 128-132.

1 evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Anderson v.  
2 Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The party moving for summary judgment has the  
3 burden to show initially the absence of a genuine issue concerning any material fact. Adickes v. S.H.  
4 Kress & Co., 398 U.S. 144, 159 (1970). This can be done by either producing evidence negating an  
5 essential element of plaintiff’s claim, or by showing that plaintiff does not have enough evidence of an  
6 essential element to carry its ultimate burden at trial. Nissan Fire & Marine Ins. Co. v. Fritz  
7 Companies, Inc., 210 F.3d 1099, 1103 (9<sup>th</sup> Cir. 2000).

8       Once the moving party has met its initial burden, the burden shifts to the nonmoving party to  
9 establish the existence of an issue of fact regarding an element essential to that party’s case, and on  
10 which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24  
11 (1986). To discharge this burden, the nonmoving party cannot rely on its pleadings, but instead must  
12 have evidence showing that there is a genuine issue for trial. Id. at 324. Additionally, “at the  
13 summary judgment stage the judge’s function is not . . . to weigh the evidence . . . but to determine  
14 whether there is a genuine issue for trial.” Liberty Lobby, 477 U.S. at 249.

#### 15 Discussion

16       The first two causes of action (§§ 1 and 2 of the Sherman Act) in Plaintiff’s Second Amended  
17 Complaint have been previously dismissed upon motion of Defendants (Dkt. No. 31) and will not be  
18 discussed further. This opinion will first address the causes of action upon which summary judgment  
19 will be granted.

20       The Court GRANTS summary judgment on:

#### 21 §§3 and 4 of the Washington Consumer Protection Act/Anti-Trust (Fourth and Fifth Causes of 22 Action)

23       The Court’s dismissal of Plaintiff’s Sherman Act federal anti-trust claims was premised on a  
24 finding of “state actor” immunity for all defendants under the circumstances presented by this  
25

1 litigation. See Town of Hallie v. City of Eau Claire, 471 U.S. 34, 38, 44 (1985); Lorrie's Travel &  
2 Tours, Inc. v. SFO Airporter, Inc. 753 F.2d 790, 793 (9<sup>th</sup> Cir. 1985); Snake River Valley Electric  
3 Association v. Pacificorp., 357 F.3d 1042, 1047-48 (9<sup>th</sup> Cir. 2004). Defendants argue that "[s]tate  
4 actor immunity bars Flying Eagle from asserting antitrust claims under state law to the same extent  
5 that it bars such claims under the Sherman Act." Port's 1<sup>st</sup> Motion, p. 13.

6 The argument is made that the Washington legislature intended that the Consumer Protection  
7 Act ("CPA") be interpreted along the guidelines set up by the federal courts for corresponding federal  
8 statutes (State v. Black, 100 Wn.2d 793, 799 (1984)); since §§ 3 and 4 of the CPA are the state  
9 equivalent of the Sherman Act, Defendants claim the same protection afforded them under applicable  
10 federal precedents. However, the case law indicates that the state courts are to look to federal  
11 precedent for "guidance," (Id.), not that federal precedent is controlling.

12 The directive to be "guided by" federal law does not mean that we are  
13 bound to follow it. But neither are we free to ignore it, and indeed in  
14 practice Washington courts have uniformly followed federal precedent  
in matters described under the Consumer Protection Act.

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15 Any departure from federal law. . . must be for a reason rooted in our  
16 own statutes or case law and not in the general policy arguments this  
court would weigh if the issue came before us as a matter of first  
impression.

17 Blewett v. Abbott Laboratories, et al., 86 Wash.App. 782, 787-88 (1997).

18 Assurance Co. of America v. Wall & Assoc's, LLC of Olympia, 379 F.3d 557 (9<sup>th</sup> Cir. 2004)  
19 provides some further insight regarding how this Court should proceed regarding the application of  
20 the state actor doctrine to Washington anti-trust law: "[W]hen interpreting state law, federal courts  
21 are bound by decisions of the state's highest court. In the absence of such a decision, a federal court  
22 must predict how the highest state court would decide the issue. . ." Id. at 609-10. Therefore, we  
23 look to Washington state law for guidance.

1 The Washington CPA is patterned after federal law and the legislature anticipated that state  
 2 courts would be guided by federal court interpretation of federal antitrust law. RCW 19.86.920. See,  
 3 State v. Black, *supra*. This statute also commands that the regulatory scheme “be liberally construed  
 4 that its beneficial purposes may be served.” RCW 19.86.920. However, as noted above, this  
 5 admonition does not mean that state courts are bound to follow federal law. *See* Blewett v. Abbott  
 6 Laboratories, *supra*. As the Blewett court indicated, a departure from following the federal precedent  
 7 of the state actor immunity doctrine must have a firm foundation in state authority.

8 The closest Washington state corollary to the state actor immunity doctrine appears in the  
 9 exemption section of the CPA which governs state action or state regulated entities. The pertinent  
 10 language states that the CPA laws, including the anti-trust provisions, do not apply to “actions or  
 11 transactions permitted by any other regulatory body or officer acting under statutory authority of this  
 12 state.” RCW 19.86.170.<sup>4</sup> This appears to be the Washington codification of the state actor doctrine.

13 In delineating the application of this exception, Washington courts have taken the approach  
 14 that “[l]iberal construction’ is a command that the coverage of an act’s provisions in fact be liberally  
 15 construed and that its exceptions be narrowly confined.” Vogt v. Seattle-First National Bank, 117  
 16 Wn.2d 541, 552, 817 P.2d 1365 (1991) (en banc). As a result, Washington courts have carefully  
 17 scrutinized both the “action or transaction” involved and the permission required to qualify for  
 18 exemption under in RCW 19.86.170.

19 In Dick v. Attorney General (83 Wn.2d 684 (1974)) the Court articulated a narrow  
 20 interpretation of “action or transaction” such that a generally regulated practice does not automatically  
 21 receive exemption from CPA claims. Id. at 688. “If a particular practice found to be unfair or

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 23<sup>4</sup> The statute states that the CPA does not apply to “actions and transactions otherwise permitted,  
 24 prohibited or regulated under laws administered by the insurance commissioner of this state, the Washington  
 25 utilities and transportation commission, the federal power commission.” The narrower “actions or  
 26 transactions permitted” language applies only to “any other regulating body or authority.” RCW  
 19.86.170.



1 deceptive is not regulated, even though the business is regulated generally, it would appear to be the  
2 legislative intent that the provisions of the act should apply.” Id. Although Dick analyzed an older  
3 version of the exemption section of the CPA, more recent cases likewise uphold the narrow  
4 interpretation of activity defined in the case. See Vogt, 117 Wn.2d at 551. Washington courts making  
5 an “exemption” analysis have closely analyzed the activity at issue for specific permission and narrowly  
6 construed that permission in order to avoid conflict with the “liberal construction” intent of the  
7 Washington legislature. As a result, “permission” necessitates overt affirmative action to permit the  
8 activity by the entity involved in the complaint. Vogt, Id. at 552. Washington takes a very limited  
9 approach to its application of the exemption for activities permitted by most agencies.

10 As the parties’ briefing indicates, there are no Washington cases directly on point. The  
11 reasoning and ruling of Robinson v. Avis Rent A Car Systems, Inc. (106 Wn.App. 104 (2001))  
12 provides the closest analogous example, all the more so considering that it involved the Port’s  
13 relationship with car rental dealerships at the airport.. The Port charged rental car companies a  
14 concession fee for leasing space at the airport. The concession agreement originally prevented rental  
15 car companies from charging customers a separate fee to cover this expense. In order to recoup the  
16 expense, the car companies included the fee within the total charge quoted to the customer. When the  
17 Port decided not to enforce the provision preventing the charging of the separate fee, the rental  
18 companies began “unbundling” or separating the concession fee from the basic rental rate. Customers  
19 brought suit alleging that the additional concession fee was not quoted to them when making their  
20 reservations and the additional, separate charge was unfair or deceptive.

21 Several aspects of Robinson apply to the case at hand and suggest that Washington courts  
22 would not find state actor immunity applicable to Defendants’ actions here. First, both cases involve  
23 oversight activity by the Port. Robinson identifies the Port as a “regulatory body” as defined by RCW  
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1 19.86.170. Since the Port occupies the same landlord authority over Host as over Avis, the Port  
2 would qualify as a "regulatory body" within the meaning of the statute for this case.

3 The Robinson court also examined the powers granted to the Port as a regulating body for  
4 evidence of specific statutory authority permitting the activities of the rental car agencies. The opinion  
5 defined what must be demonstrated for specific permission: "[I]t is not enough to show that the Port...  
6 'permitted' unbundling...[t]he car rental companies must also show that unbundling is within the  
7 'statutory authority' of the Port to permit." Robinson, 106 Wn.App. at 822. The court found no  
8 authority in the Port's enabling statutes to permit the complained-of activities of the defendant car  
9 companies. RCW 14.08.120(6) gives the Port the authority to "determine the charges or rental for the  
10 use of any properties under its control and the charges for any services or accommodations, and the  
11 terms and conditions under which such properties may be used." Id. at 823 (citing RCW  
12 14.08.120(6)). The Robinson court's reading of this statute concluded that "this statute neither  
13 expressly nor impliedly grants to the Port the power to permit unbundling for purposes of exemption  
14 under the CPA." Id. At 823.

15 This Court's order dismissing the Sherman Act claims focuses on two other sections of  
16 14.08.120 permitting the Port

17 to confer the privileges of concession of supplying upon its airports goods,  
18 commodities, things, services and facilities...(RCW 14.08.120(4)) and ...to sell  
19 or lease any property, real or personal, acquired for airport purposes and  
20 belonging to the municipality, which in the judgment of its governing body, may  
21 not be required for aircraft landings, aircraft takeoffs, or related aeronautic  
22 purposes, in accordance with the laws of this state. RCW 14.08.120(5)

23 Dkt. No. 31, Order on Motion To Dismiss, pp. 4-5.

24 Similar to the provision allowing for rental car companies, this grant of authority allows the  
25 Port to lease to concessionaires like Host. However, it does not appear to give any authority for  
26 regulating subtenants of those concessionaires by requiring things like LHPs. Given Washington's  
narrow application of the exemption, the fact that the statute does not expressly or impliedly allow the

1 Port to permit a lessee to require that subtenants have a LHP (regardless of what that document  
2 consists of) is highly significant. Since the statute does not contain specific language discussing the  
3 Port's regulation of subtenants of concessionaires, the "overt affirmative action to permit the activity  
4 by the entity involved" required for exemption under RCW 19.86.170 is missing. Vogt, 117 Wn.2d at  
5 552. This suggests that the Washington courts would not find state actor immunity for the Port or  
6 the other defendants in this case.

7 As discussed in this Court's previous Order, the Ninth Circuit has been increasingly willing to  
8 broaden the state actor exemption. (Order, *supra* at 4-5). The federal precedents indicated that the  
9 structure of concession leasing at the airport was a reasonable consequence of the Port's authorizing  
10 statute. *Id.* at 5. However, Washington courts require a specific grant of permission for the discrete  
11 transaction or action involved. Concession leasing structure in general may be regulated under the  
12 Port statutes, but this general regulation is not adequate for exemption under the CPA.

13 This case fits the situation described in Dick v. Attorney General, where "a particular practice  
14 found to be unfair or deceptive is not regulated, even though the business is regulated generally." 83  
15 Wn.2d at 684. Based on a finding that the Washington courts have spoken on the issue of state actor  
16 immunity by announcing tests far stricter than the federal precedents applying state actor immunity,  
17 this Court is not inclined to allow dismissal of the state antitrust claims based only on the prior  
18 dismissal of the Sherman Act claims.

19 However, even with a finding that "state actor immunity" will not be extended to these  
20 Defendants for the allegations of violating the Washington anti-trust statutes, Defendants are  
21 nevertheless entitled to summary judgment on these causes of action. Plaintiff has the burden to  
22 prove possession of monopoly power in a relevant market. High Technology Careers v. San Jose  
23 Mercury News, 996 F.2d 987, 989-90 (9<sup>th</sup> Cir. 1993). What is fatal to FEE's anti-trust allegations is  
24 its failure to offer proof of what the relevant market is (in terms of geography or product) over which  
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1 they allege Defendants are exercising a monopoly. They argue that the definition of the requisite  
2 geographic market is a fact issue and contend (without citation to any evidence) that "SeaTac is a self-  
3 contained geographic market" and that "the logical geographic market is the SeaTac site." Plaintiff's  
4 1<sup>st</sup> Response, p. 40. The case law cited in support of their argument (International Boxing Club v.  
5 United States, 358 U.S. 242 (1959)) is not helpful: the Supreme Court in International Boxing found a  
6 "separate, identifiable market" based on "detailed findings" (Id. at 250-51) which are completely  
7 absent from Plaintiff's pleadings.

8 At oral argument, Plaintiff argued that the "market" which they were claiming had been  
9 monopolized by Defendants' activities was not the airport concessions market (generally) or coffee  
10 retail service (specifically) but rather the "labor market" represented (presumably) by all the jobs  
11 available within the airport. Plaintiff's complaint makes no mention of the "labor market" as the  
12 intended object of the anti-trust allegations. Their reply brief does make mention of an attempt to  
13 "monopolize the provision of labor in the concessions market at SeaTac" (Plt's 1<sup>st</sup> Reply, p. 39), but  
14 neither the Court nor Defendants read this to mean that Plaintiff's complaint was aimed at the  
15 monopolization of a "labor market." In any event, the deficiency in Plaintiff's proof is unaffected by  
16 this contention – whether monopolization of coffee stands or labor markets is the object of the  
17 complaint, Plaintiff has still failed to proffer the requisite proof of a "separate, identifiable market."

18 Plaintiff's anti-trust claims also suffer from a failure of proof of injury to competition.  
19 Intergraph Corp. v. Intel Corp., 195 F.3d 1346, 1354 (Fed.Cir. 1999). It is not enough to claim that  
20 FEE's own operations were injured; "[t]he antitrust laws were enacted for the protection of  
21 competition, not competitors," Id., quoting Brunswick Corp. v. Pueblo-Bowl-O-Mat, Inc., 429 U.S.  
22 477, 488 (1977). Plaintiff has provided no evidence, in the form of declarations, expert testimony or  
23 statistics, that Defendants' alleged activities have injured competition. The fact that the rest of the  
24 DBEs signed renewed leases after submitting pro-union LHPs may be probative on the issue of

1 mandatory unionization, but it falls short of proof of actual injury for anti-trust purposes (nor does  
2 Plaintiff present any statutory authority that mandatory unionization is "injury *per se*"). Based on  
3 these findings, summary judgment will be GRANTED on Plaintiff's state anti-trust law claims.

4 The Court also GRANTS summary judgment on:

5 **§ 2 of the Washington Consumer Protection Act (Sixth Cause of Action)**

6 To prevail in a private Consumer Protection Act action, a plaintiff must establish  
7 five distinct elements: (1) an unfair or deceptive act or practice; (2)  
8 occurring in trade or commerce; (3) public interest impact; (4) injury to  
9 plaintiff in his or her business or property; and (5) causation.

10 Hangman Ridge Training Stables, Inc. v. Safco Title Ins. Co., 105 Wn.2d 778, 780 (1986). Plaintiff  
11 must satisfy all five elements in order to prevail; in the summary judgment context, a plaintiff has the  
12 burden to establish, at a minimum, the existence of disputed issues of material fact regarding each of  
13 the elements of its cause of action. Celotex, supra at 323-24. Plaintiff's CPA cause of action in this  
14 case is vulnerable to summary judgment because they have not established any facts supporting the  
15 existence of a "public interest impact" as regards any of the defendants.

16 Despite Plaintiff's attempts to characterize its circumstances in a different light, the Court finds  
17 that the facts in this case constitute a private contractual dispute. "Ordinarily, a breach of a private  
18 contract affecting no one but the parties to the contract is not an act or practice affecting the public  
19 interest." Id. at 790. A complainant can refashion a private dispute into one with an impact on the  
20 public by (1) a "per se" showing of the violation of a statute with a specific legislative declaration of  
21 public interest (not alleged here) or (2) a showing that additional plaintiffs have been or will be  
22 impacted in a similar manner. The factors which need to be proven in this regard include:

- 23 (1) Were the alleged acts committed in the course of defendant's business?  
24 (2) Did defendant advertise to the public in general?  
25 (3) Did defendant actively solicit this particular plaintiff, indicating potential  
26 solicitation of others?  
(4) Did plaintiff and defendant occupy unequal bargaining positions?

1 While no one factor is dispositive and it is not necessary that all of them be established, FEE is  
2 required to establish sufficient "indicia of effect on public interest from which a trier of fact could  
3 reasonably find public interest impact." Id. at 790-91.

4 Plaintiff's evidence regarding HERE and the Port is simply non-existent with respect to three  
5 of the four factors. Neither the union nor the municipal governmental body advertise to the public in  
6 general, nor is there any proof that they solicited this particular plaintiff for anything. Since FEE was  
7 therefore not in a bargaining posture with either entity, there is no element of "unequal bargaining  
8 positions."

9 The CPA claim as regards Defendant Host presents somewhat different issues. Plaintiff  
10 certainly makes the case that the alleged acts were committed in the course of Host's business as a  
11 master concessionaire at the airport; that it was actively solicited by Host (as evidenced by the  
12 presentation to FEE of the August 27, 2003 LOI, Pltf Exh. 42); and (viewing the evidence in the light  
13 most favorable to Plaintiff) that the parties did not occupy equal bargaining positions (Host, as an  
14 international corporation, being possessed of far greater resources to bring to the bargaining/  
15 negotiating process than a single-stand coffee retailer like FEE).

16 But there is no evidence that Host advertised "to the public in general" and indeed no evidence  
17 that they even solicited the replacement DBE who took over the sublease formerly held by Plaintiff.  
18 FEE concedes that Defendants "may" not have advertised to the general public, but states conclusorily  
19 that Host did solicit new tenants for SeaTac space. While the Court may imagine that new applicants  
20 for vacant subleases found out about their availability somehow, this is no substitute for the  
21 requirement that a nonmovant in a summary judgment action produce evidence showing that there is a  
22 genuine issue for trial. Plaintiffs provide no proof of this solicitation, nor do they provide any case  
23 authority for the larger issue of whether the solicitation of a few DBEs constitutes the kind of  
24 "advertising to the public in general" which goes to the heart of the "public impact" issue.

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26 ORD ON MTNS  
FOR SUMM JMT - 14

1 In the final analysis, Plaintiff has not borne its burden of establishing genuine disputes of  
2 material fact tending to establish that its private contract dispute with Defendant Host has any public  
3 interest or public impact whatsoever. All Defendants are entitled to summary judgment dismissing the  
4 CPA § 2 claims against them.

5 The opinion now turns to those causes of action upon which summary judgment will not be  
6 granted.

7 Summary judgment will be DENIED on:

8 **Civil Conspiracy under State Law (Seventh Cause of Action)**

9 The establishment of a civil conspiracy among these defendants requires Plaintiff to  
10 demonstrate two elements: (1) that two or more parties combined to accomplish an unlawful purpose  
11 or combined to accomplish a lawful purpose by unlawful means, and (2) the conspirators entered into  
12 an agreement to accomplish the conspiracy. Newton Ins. Agency & Brokerage, Inc. v. Caledonian  
13 Ins. Group, Inc., 114 Wn.App. 151, 160 (2002).

14 None of the defendants disputes that requiring FEE to unionize as a condition of the renewal  
15 of their lease at SeaTac is legally impermissible. If Plaintiff succeeds in establishing the existence of  
16 genuine disputes of material fact concerning each of the two prongs of the civil conspiracy proof as  
17 regards each of these Defendants, they are entitled to a denial of summary judgment on this cause of  
18 action. The Court finds that Plaintiff has carried this burden.

19 Plaintiff's proof regarding these two prongs falls into two general categories: first, the  
20 documented agreements between Defendants – the MOU (between the Port and HERE) and the CBA  
21 (between Host and HERE); second, the evidentiary proof of the conduct and communications between  
22 representatives of each defense entity, both amongst themselves and with Elmer. This opinion will  
23 examine them each in turn.

1. Documented Agreements Supporting Plaintiff's Theory of Conspiracy

A. Memorandum of Understanding

The MOU is a multi-part document, two parts of which are at issue in this lawsuit. There is a "Memorandum of Understanding" which describes a three-tiered system of concessions within the airport. There is no dispute that, as described in the agreement, FEE was to be a "Tier I" concessionaire. The other part of the MOU which is relevant to this case is Exhibit A to the Memorandum (which is labeled "Position on Labor Harmony for Concession") – specifically, the "General Statement" which has been quoted *supra* and admonishes that "failure by a concessionaire or any of its sublessees" to implement a LHP will be deemed a breach of contract. Pltf Exh. 29, UNION002460.

Both of the parties to the MOU argue strenuously that Exhibit A is inapplicable to Tier I concessionaires, including Plaintiff. At the very least, the document is unclear in this regard. In the portion of the memorandum describing Tier II concessionaires, the following language appears: "See 2., below, for provisions related to Labor and Worker Retention that will be included in the solicitation for and selection of these concessionaires." Paragraph 2 states, in relevant part: "The Port will solicit qualifications of interested parties, and choose, the two Tier II prime concessionaires through Request for Qualifications ("RFQ"). . . These RFQs will be governed by the Position on Labor Harmony for Concessions (Exhibit A). . ." *Id.* at UNION002458-59.

This Court finds, as a matter of law, that the MOU and specifically Exhibit A, "Position on Labor Harmony" could be applied to Tier I as well as Tier II concessionaires. The language quoted above from Paragraphs 1 and 2 of the memorandum does not, as Defendants argue, clearly and unequivocally indicate that Exhibit A applied exclusively to Tier II concessionaires; it can only be read as indicating that Tier II concessionaires were to be included in the "labor harmony" requirements of Exhibit A which, by its own language, applied to "all vendors operating at the airport." (Emphasis



1 supplied.) The Court notes the following factors in reaching this conclusion: the labeling of the  
2 provision at issue as a "General Statement," the use of the phrase "all vendors," the language  
3 admonishing against "[f]ailure by a concessionaire or any of its sublessees" and the complete absence  
4 of any language indicating that the provisions contained in the "General Statement" were to be  
5 restricted to Tier II concessionaires only.

6 HERE claims, as regards the MOU, the protection of the Noerr-Pennington doctrine, which  
7 provides First Amendment protection to lobbying and legislative activities regardless of the party's  
8 subjective goal or interest. Eastern R.R. Presidents' Conference v. Noerr Motor Freight, Inc., 365  
9 U.S. 127, 137-38 (1961); United Mine Workers v. Pennington, 381 U.S. 657, 669-72 (1965). That  
10 protection was extended to unions in Franchise Realty Interstate Corp. v. San Francisco Local Joint  
11 Executive Board of Culinary Workers, 542 F.2d 1076 (9<sup>th</sup> Cir. 1976), *cert. denied*, 430 U.S. 940  
12 (1977). As long as FEE is unable to produce evidence of any acts of unlawful economic coercion, the  
13 union argues that their lobbying and persuasion efforts are afforded constitutional sanction.

14 In evaluating HERE's claim, the Court does not have to view the MOU in isolation. In  
15 addition to lobbying for a "labor harmony" requirement in its agreement with the Port, the union was  
16 also negotiating for language in its CBA which mandated that the Tier I concessionaires (such as  
17 Host) require all their sublessees whose businesses involved work "customarily performed" by the  
18 union to employ union labor. Noerr-Pennington has never been upheld as a shield to protect from  
19 liability a union defendant who lobbies a governmental body to support concessionaires in a  
20 requirement to unionize third-party subcontractors; especially with a court injunction already in place  
21 prohibiting such activity.

22 Nor is the Court required to ignore the fact that Plaintiff has produced evidence that seven  
23 other DBEs submitted the "labor harmony plans" called for in the MOU (and in the Port's lease with  
24 Host) which consisted of nothing more than a single paragraph agreeing to adopt the CBA and accept  
25

1 union representation for their workers. Pltf Exh's 95-101. It is circumstantial evidence of exactly  
2 what Plaintiff is claiming – that the cost of receiving a renewed sublease at the airport was  
3 unionization – and if Plaintiff's claim is ultimately upheld the union's activities will be outside the  
4 shield of Noerr-Pennington. A jury is entitled to consider whether that evidence tends to establish the  
5 existence of an agreement to achieve an unlawful purpose.

6 The union produces no case authority limiting the definition of "coercion" to actual strikes,  
7 boycotts or violence. Plaintiff has produced circumstantial evidence that the union was willing to  
8 increase the pressure on the other parties in order to accomplish what it desired; e.g., statements by  
9 union officials concerning "a campaign of escalating actions" (Noble Decl. E, Nelson Dep., p. 36; E  
10 119) and "a lot more coming" (Noble Decl. J, Wise Dep., pp.15 20; Exh. 6) create genuine issues of  
11 fact regarding the existence of coercion in the union's conduct.

12 Furthermore, if it is ultimately found that the MOU violated the CityIce injunction, there will  
13 be no question of a need to produce evidence of "economic coercion:" the CityIce injunction (1)  
14 already prohibited the Port from doing what FEE alleges the MOU accomplished (thus making it  
15 illegal *per se*) and (2) was based on a finding by Judge Rothstein that HERE had "committed an illegal  
16 secondary boycott," not that it had engaged in "economic coercion."

17 HERE replies that it is not required to predict whether the results of its lobbying will be  
18 judicially upheld to invoke the protections of Noerr-Pennington. Subscription Television, Inc. v.  
19 So. Cal. Theatre Owners Ass'n, 576 F.2d 230-233-34 (9<sup>th</sup> Cir. 1978). Since it genuinely sought a  
20 legitimate result through governmental action, the union argues, it is shielded. This is not a  
21 persuasive position: the union did not simply seek "work preservation" as a general concept; it  
22 specifically lobbied for the particular language of the MOU, and (as one of the other parties in the  
23 CityIce litigation) it can be held responsible if it knowingly trespassed the constraints established by  
24 the court's order in that case. If the MOU is found to be an illegal attempt to mandate third-party  
25

1 unionization as a condition of lease renewal, HERE should not be shielded from the consequences of  
2 seeking such a result. To the extent that the defendant union seeks summary judgment as a matter of  
3 law concerning its part in the creation of the MOU, that motion is denied.

4 **B. Collective Bargaining Agreement**

5 The crucial provision in this document is Article 2.01 and its requirement that "no work  
6 customarily performed by employees covered by this Agreement" will be contracted out under  
7 sublease unless those employees are likewise covered by the CBA. HERE argues that Plaintiff  
8 misreads Article 2.01: (1) it was intended to apply only to "new" Host sublessees, and (2) the union  
9 never sought to enforce it against anyone, including FEE. The union points to the lack of proof that  
10 2.01 was ever cited to coerce or persuade Host not to renew FEE's lease.

11 The union's arguments in this regard are not persuasive. Concerning the intended objective  
12 Article 2.01, there is nothing in the language that differentiates between "current" and "new"  
13 subleases. Furthermore, as a renewing tenant, Plaintiff was negotiating a "new" sublease with Host.  
14 Viewing the evidence in the light most favorable to Plaintiff, the fact that all the DBEs except FEE  
15 filed labor harmony plans indicating their agreement to unionize tends to prove that all the renewing  
16 sublessees were treated as "new" tenants. Furthermore, if the CBA is ultimately found to represent a  
17 "hot cargo" agreement in violation of § 8(e) of the NLRA<sup>5</sup>, it will be illegal regardless of whether  
18 either party to the agreement attempted to enforce it. See Teamsters Local 728 (Brown Transport  
19 Corp., 140 NLRB 1436, 1437, 52 LLRM 1258 (1963).

20 Regarding the union's "lack of coercion" argument: if coercion had been applied (as Plaintiff  
21 contends) its effects were felt when Host informed FEE that they would have to obtain union approval  
22 for a LHP which Plaintiff seeks to prove was simply a disguised requirement of mandatory  
23

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24 <sup>5</sup> A "hot cargo agreement" is an agreement between a union and a secondary (union) employer to boycott  
25 the goods or services of a primary (non-union) business; it is discussed in greater depth *infra*.

1 unionization. As discussed in the MOU analysis *supra*, FEE has produced evidence of statements by  
 2 union officials suggesting repercussions would ensue if these agreements were not adopted. A jury  
 3 could reasonably infer the existence of coercion from these statements.

4 The union takes the further position that the CBA is valid because they had a right to preserve  
 5 work for the union which had traditionally been performed by union labor, such as coffee service. The  
 6 two-part test for a lawful work-preservation clause (set out in NLRB v. Int'l Longshoremens Assoc.  
 7 447 U.S. 490, 504 (1980) (*a/k/a* ILA I) requires proof that (1) the object of the clause is preservation  
 8 of work traditionally performed by the union and (2) the contracting employer has the power to give  
 9 the employees the work at issue (the "right of control" test).<sup>6</sup> This situation, according to HERE,  
 10 meets both those criteria. Plaintiff has not disputed that, at some point in the past, retail coffee service  
 11 was the exclusive domain of the union – ILA I says that the focus is on the "lost work" of the union  
 12 and that they have a right to recapture that work. Id. at 507-508. The fact that no union worker ever  
 13 worked out of FEE's particular location is irrelevant – it is the kind of work historically performed by  
 14 union labor and that is what matters in a "work preservation" analysis. Id.

15 The union has not convinced this Court, however, that their agreement satisfies the "right to  
 16 control" part of the ILA test. The Supreme Court stated in that case that "if the contracting employer  
 17 has no power to assign the work, it is reasonable to infer that the agreement has a secondary objective,  
 18 that is, to influence whoever does have such power over the work." 447 U.S. at 504-05. Since Host  
 19 (the contracting employer) had no power to assign the work of FEE's employees, a jury would be free  
 20 to draw the inference that the intent of the "work preservation clause" was in fact to satisfy other  
 21 union objectives; i.e., to influence the non-union DBEs. HERE's response to this argument is that

22  
 23 The ILA cases involved a situation where a new technology – the use of stackable shipping containers –  
 24 had obviated the need for the traditionally union-performed service of loading and unloading cargo from  
 25 ships. The Supreme Court upheld the right of the union to recapture through CBAs the work lost through  
 the advent of the containers, even though container loading/unloading had never been performed by union  
 labor.

1 Host's right to renew FEE's lease is sufficient to satisfy the "right of control" test. HERE attempts to  
2 analogize to the ILA situation, but the situations in fact appear to be different in one crucial respect:  
3 the agreements in the ILA cases were directly with the contractors who controlled the container work,  
4 while the CBA at issue here requires Host to impose the agreement on subcontracting employers who  
5 had no part in negotiating the original agreement. It is a critical distinction and goes to the heart of the  
6 inquiry regarding whether the purpose of the agreement was "to satisfy union objectives elsewhere"  
7 (Id. at 504), thus crossing the boundary into unlawful activity. Plaintiff has raised sufficient questions  
8 of material fact regarding the existence of a "secondary objective" underlying the CBA to permit that  
9 question to go to a jury.

10 Although Defendants are not entitled to summary judgment as a matter of law on the basis of  
11 either the MOU or the CBA, ultimately, as Plaintiff points out, the civil conspiracy case does not stand  
12 or fall on these documents alone. Even though the agreements themselves may be found to have lawful  
13 ends, if they are proved to have been used for unlawful purposes, or if Defendants engaged in other  
14 activities which were themselves outside the bounds of permissible conduct in the context of labor and  
15 lease negotiation, Defendants may still be found to have conspired against Plaintiff. The Court finds,  
16 as discussed below, that Plaintiff has also raised genuine disputes of material fact in regards to  
17 Defendants' conduct which entitle them to survive summary judgment on their conspiracy cause of  
18 action.

19 **2. Defendants' Conduct Supporting Plaintiff's Theory of Conspiracy**

20 Plaintiff has raised disputed issues of material fact regarding whether the conduct of  
21 Defendants during the time period in question evidences (1) a combination "to accomplish an unlawful  
22 purpose or . . . to accomplish a lawful purpose by unlawful means and (2) "an agreement to  
23 accomplish the conspiracy. Newton, supra.

1 Again, the parties are not in dispute regarding the impermissibility of forcing FEE to unionize  
2 as a condition of receiving a lease renewal at the airport. Yet communications from officials from  
3 each of the defendants, viewed in the light most favorable to Plaintiff, could lead a reasonable jury to  
4 conclude that this was in fact the goal of Defendants and that they had agreed amongst each other to  
5 accomplish that goal.

6 The Court will not review the voluminous submissions by the parties in their entirety, but will  
7 instead focus on representative pieces of evidence which suffice to create issues of material fact on the  
8 key elements of Plaintiff's case which are challenged by Defendants' summary judgment motions.

9 First are the written statements by the Port's airport retail manager, Linda LaCombe ("LaCombe") to  
10 her superiors and then to Elmer. In March of 2003, LaCombe wrote an e-mail stating:

11 I met with Jean Elmer, Flying Eagle Espresso, this morning. She was told  
12 Host that, per the new labor Agreement, she would need to become a union  
13 represented business. . . I believe this is all true according to the Labor Agreement that  
Host has currently.

14 Pltf Exh. 63.

15 Two months later, she communicated not only the Port's understanding of the CBA to Elmer,  
16 but also the fact that the Port had discussed both the new lease and the labor agreement with  
17 representatives of Defendant Host:

18 I have gone over the specifics of the new lease with Host and their new  
19 contract with H.E.R.E. I understand that Pat Hedges and Art Spring [of  
20 Host) have also taken you through the contract and its requirements. It  
21 states in the Labor Agreement that any subtenant of Host must be unionized.  
It further states that any business/subtenant operating as a non-union shop,  
under this agreement, violates the contract between Host and H.E.R.E. Host  
has met with their attorney and there is no negotiating on this point.

22 Pltf Exh. 66. LaCombe closes the letter by indicating that "[t]he Port supports the contract between  
23 Host and H.E.R.E." Id. LaCombe repeated the Port's position to Elmer almost *verbatim* in another  
24 letter dated June 12, 2003, including that "Host has met with their attorney and there is no negotiating  
25

1 on this point. The Port is unaware of anything illegal in the Host Lease agreement with H.E.R.E.”  
2 Pltf Exh. 59.

3 In fact, it would have been illegal for Host and the union to agree to force subcontractors to  
4 unionize as a condition of having their leases renewed. Plaintiff succeeds, by virtue of this evidence, in  
5 creating a disputed material factual issue regarding the Port’s participation in and support of a plan to  
6 accomplish mandatory unionization of subcontractors. In its briefing, the Port has done its best to  
7 distance itself from LaCombe’s statements and portray them as the opinion or mistaken belief of a lone  
8 employee. But again Plaintiff produces documentary evidence which, viewed in a favorable light to  
9 FEE, suggests that this position was endorsed by her superiors. From a May 23, 2003 LaCombe e-  
10 mail to Mr. Reis and Mr. Natarajan of the Port:

11 She [Elmer] really must become a union member. I completely understand [Elmer]’s  
12 reluctance to do so. However, it was made very clear by the Commissioners that they  
13 value the fair and positive treatment of our employees here at Sea Tac. Currently,  
[Elmer] does not pay any benefits vacations, etc. for her employees.

14 Pltf Exh. 70 (emphasis supplied). Both LaCombe and her direct manager, Mr. Natarajan, testified at  
15 deposition that her communications were vetted by not only her superiors but the Port’s attorneys as  
16 well. Noble Decl. C, LaCombe Dep., pp. 36-41; Noble Decl. D, Natarajan Dep., pp. 37-39.

17 Regarding Defendant Host, it is likewise the finding of this Court that the evidence produced  
18 by Plaintiff is sufficient to create material issues of disputed fact regarding Host’s participation in a  
19 civil conspiracy to force a third-party subcontractor to accept a CBA they did not negotiate. It was  
20 Host’s Letter of Intent to FEE which first advised Plaintiff that a LHP approved by the union was a  
21 prerequisite to obtaining a new lease at the airport (a requirement that was at least partially responsible  
22 for the delay in finalizing a lease renewal which was cited by Host in terminating negotiations with  
23 Plaintiff). Since Host was not even a party to the MOU which established the labor harmony  
24 requirement, this alone is evidence from which a jury could conclude there had been a meeting of the

1 minds between these defendants as to the necessity of Plaintiff adopting the CBA between Host and  
2 HERE.

3 Additionally, there is evidence that representatives of both of the other defendants had been  
4 told that Host supported mandatory unionization for subcontractors. LaCombe's correspondence on  
5 behalf of the Port has been thoroughly discussed *supra*. Plaintiff also produced evidence that  
6 representations had been made to the union by Host that they would work toward the unionization of  
7 the DBEs.<sup>7</sup> Plaintiff has satisfied its burden of raising disputed issues of material fact regarding proof  
8 of the elements of a civil conspiracy involving Defendant Host.

9 Finally, the union contests FEE's proof of a "conspiracy" between HERE, Host and the Port.  
10 Their argument concerning the CBA has already been analyzed *supra*. As discussed above, the Court  
11 will not declare Article 2.01 of the CBA a legally-protected "work preservation clause" as a matter of  
12 law. FEE has produced sufficient facts to permit the issue of whether 2.01 was understood by the  
13 defendants to require subcontractor unionization to go to a jury.

14 HERE also maintains that no evidence supports Plaintiff's contention that the MOU was part  
15 of some larger conspiracy between these three entities and that Plaintiff has submitted no evidence of  
16 other communications between all the defendants (much less any agreements between them)  
17 concerning FEE's attempts to renew its lease. But it has already been established as a matter of law  
18 that Exhibit A of the MOU (with its mandatory LHP requirement) could be applied to Tier I  
19 concessionaires such as Plaintiff; indeed, it is apparent that Defendant Host did apply such a  
20 requirement, as reflected in its communications to FEE through the LOI.<sup>8</sup>

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21  
22 <sup>7</sup> From contemporaneous notes taken by a union official during negotiations between Host and HERE,  
23 union official Sawyer is quoted as saying "Art [Spring, of Host] made commitment that attorneys would  
36, work together to develop language that would bind all HMS and DBEs to be unionized." Noble Decl. E,  
Pltf Exh. 119.

24 <sup>8</sup> The August 27, 2003 LOI from Host to FEE stated:

25 Host is prepared to offer you the opportunity to continue operation of a coffee concession. .  
subject to the execution of a new sublease agreement for your location, which sublease will



1 The union argues that, even if a LHP was a prerequisite to lease renewal, it was not  
 2 synonymous with "mandatory unionization" and that the elements of the plan, listed at the end of  
 3 Exhibit A, support this position. This argument is greatly weakened, however, by apparent  
 4 contradiction represented by union president Sawyer (who signed the MOU containing the LHP  
 5 requirement) telling Elmer that he was unaware of any LHP requirement (Elmer Decl. ¶ 13) and didn't  
 6 consider it "appropriate" to discuss with her. Noble Decl. F, Sawyer Dep. p. 129. Although Elmer  
 7 reported immediately after this meeting that she now believed there was no unionization requirement  
 8 (Decl. of Natarajan, ¶ 14, Exh. F), she later came to believe that in fact Sawyer had been deceptive in  
 9 his responses to her. The Court does not weigh evidence at this stage of the proceedings, but it is  
 10 appropriate to determine if Plaintiff has established a genuine issue for trial, and the inconsistency  
 11 between Sawyer's participation in the drafting of the MOU and his representations to Elmer could lead  
 12 a jury to infer the existence of an agreement to freeze FEE out of the re-leasing process based on  
 13 Plaintiff's resistance to unionizing.

14 Proof of a conspiracy will rarely be achieved through direct evidence, and Plaintiff is entitled to  
 15 establish its case circumstantially. Gilbrook v. Westminster, 177 F.3d 839, 856-57 (9<sup>th</sup> Cir. 1999).  
 16 The circumstances established by Plaintiff's evidence are that HERE and the Port entered into a MOU,  
 17 which required the submission of LHPs by the sublessees of any concessionaire at the facility; that  
 18 Host and HERE entered into a CBA which required Host to sublease out work "customarily  
 19 performed" by union labor only to employers covered by the agreement; and that Host then told  
 20 Plaintiff it would not receive a new lease unless it submitted a union-approved LHP.

21 The point is not that Plaintiff has produced enough evidence to win a summary judgment  
 22 motion of its own or to prevail at trial. FEE's burden in responding to these summary judgment

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23 include the following terms and conditions:

24 \*\*\*

- 25 • A Labor Harmony Plan. . . . Your Labor Harmony Plan is to contain a statement as to  
 whether HERE Local 8 is in agreement with your plan. Pltf Exh. 42, HOST0000138.

26 ORD ON MTNS  
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1 motions is to produce evidence sufficient to raise a genuine dispute of material fact. A jury hearing  
2 this evidence (and the evidence of the other statements by representatives of defendants regarding  
3 mandatory unionization) could reasonably infer that there had been a meeting of the minds between all  
4 three Defendants that all sublessees would have to agree to join the union and that the vehicle for  
5 accomplishing that agreement would be the LHP. The Court must view the evidence produced in the  
6 light most favorable to Plaintiff, and the evidence produced suffices to create disputed material issues  
7 of proof on the civil conspiracy cause of action. On that basis, summary judgment must be DENIED.

8 The Court also DENIES summary judgment as to:

9 **Unfair Labor Practices (Third Cause of Action)**

10 This cause of action is directed only against the union and alleges violations of two sections of  
11 the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158 *et seq.*: § 8(b)(4)(B), which bars unions  
12 from "forcing or requiring any person . . . to cease doing business with any other person; and § 8(e),  
13 which defines as an unfair labor practice "any contract or agreement, express or implied" between a  
14 union and an employer "to cease doing business with any other person." Both of these provisions are  
15 aimed at the practice of "secondary boycotts," whereby a union can apply pressure on one (non-union  
16 employer through the union's relationship with another (union) employer. Violations of 8(b)(4) cover  
17 a wide range of actions but require some proof of coercion (Shepard v. NLRB, 459 U.S. 344, 351  
18 (1983)), while 8(e) is aimed at "hot cargo agreements" wherein a union and employer enter into an  
19 agreement that the employer will not do business with a second employer whom the union considers  
20 be unfair to organized labor. Betal Environmental Corp. v. Local Union No. 78, 123 F.Supp.2d 156,  
21 158, fn. 2 (S.D.N.Y. 2000) (citations omitted).

22 The union's arguments regarding "work preservation clauses" and the Noerr-Pennington  
23 doctrine appear to be addressed to both its alleged participation in the conspiracy to violate Plaintiff's  
24 federal rights and its alleged violations of the NLRA. The Court's analysis of those arguments *supra*

1 will not be repeated here, but that analysis requires denial of the union's summary judgment motion as  
2 it applies to the 8(b)(4) and 8(e) claims as well.

3 The union makes the additional argument, aimed at FEE's 8(b)(4) claim, that there is no  
4 evidence of "coercion" to sustain that violation. But the term "coerce" extends to "any form of  
5 economic pressure of a compelling or restraining nature" (Association of General Contractors of  
6 Calif., Inc. v. NLRB, 514 F.2d 433, 438-39 (9<sup>th</sup> Cir. 1975)) and the MOU contains unmistakable  
7 language that "[f]ailure by a concessionaire or any of its sublessees" to implement a LHP "will be  
8 deemed a breach of the Contract, which will subject the Concessionaire to termination of the Contr  
9 with the Port." Pltf Exh. 29, UNION 002460. A jury could reasonably infer, from this and other  
10 evidence produced by FEE, that this constituted "economic pressure of a compelling... nature."  
11 Further, statements by union officials regarding a "campaign of escalating actions" and "a lot more  
12 coming" also combine to create a genuine issue for trial regarding the existence of "coercion" in the  
13 union's statements and actions.

14 The union's request for summary judgment of dismissal of the claims of NLRA violations will  
15 be denied.

16 Summary judgment will likewise be DENIED regarding:

17 **Tortious Interference With Business Expectancy (Eighth Cause of Action)**

18 Plaintiff alleges this cause of action against the Port and HERE. There are five elements to  
19 establishing this cause of action: (1) a valid contract or business expectancy; (2) of which the Port and  
20 HERE had knowledge; (3) an intentional interference inducing or causing a breach of the contract or  
21 expectancy; (4) existence of an improper motive or use of an improper means in the interference; (5)  
22 resulting in damages. Leingang v. Pierce Co. Med Bureau, Inc., 131 Wn.2d 133, 157 (1997).

23 Plaintiff has brought forward evidence sufficient to create genuine disputes of material fact on  
24 all of these elements and is entitled to go forward with this claim. "A valid business expectancy  
25

1 includes any prospective contractual or business relationship that would be of pecuniary value.”  
2 Newton Insurance Agency & Brokerage, Inc. v. Caledonian Insurance Group, Inc., 115 Wn.App. 151,  
3 158 (2002). Certainly FEE’s negotiations with Host regarding renewal of its lease constituted a  
4 “prospective contractual or business relationship,” and neither the Port nor HERE have disputed that  
5 they were aware that the negotiations were taking place and that Plaintiff was seeking a new lease to  
6 continue its business at the airport.

7 The existence of “intentional interference inducing or causing a breach of . . . the expectancy”  
8 arising out of “an improper motive or use of an improper means” parallels Plaintiff’s allegations  
9 regarding the existence of a conspiracy. The analysis of Defendants’ motions for summary judgment  
10 on the conspiracy cause of action also suffices regarding their request for dismissal of this claim.  
11 Sufficient evidence has been adduced to create genuine issues of material fact regarding whether the  
12 Port and HERE interfered for an improper motive or using improper means with FEE’s business  
13 expectancy in a new airport lease. Neither of those defendants has challenged the adequacy of  
14 Plaintiff’s pleading of damages arising out of these facts.

15 The motion for summary judgment on Plaintiff’s eighth cause of action will be DENIED.

16 Finally, the Court DENIES summary judgment on:

17 **42 U.S.C. § 1983/Violation of Plaintiff’s Federally Protected NLRA Rights (Ninth Cause of**  
18 **Action)**

19 All Defendants have sought dismissal of this cause of action, which was added by amendm  
20 rather late in the case. For reasons largely explored under the analysis of the summary judgment  
21 motions on the civil conspiracy claim, this portion of the motion will be denied as to all Defendants  
22 well.

23 The elements of a §1983 claim are: (1) that the conduct complained of  
24 was committed by a person acting under color of state law; and (2) that  
25 the conduct deprived a person of rights, privileges, or immunities secured  
26 the Constitution or laws of the United States.

1 Johnson v. Hawe, 388 F.3d 676, 681 (9<sup>th</sup> Cir. 2004 (quoting Alford v. Haner, 333 F.3d 972, 975-76  
2 (9<sup>th</sup> Cir. 2003)). The "state actor" component can be established by showing that a private person  
3 conspired with a local governmental official. *See, e.g., Adickes v. Kress & Co.*, 398 U.S. 144 (1970).

4 The Port satisfies the "state actor" requirement by virtue of being a municipal governmental  
5 entity. For the same reasons that neither of the private defendants are entitled to summary judgment  
6 on Plaintiff's civil conspiracy cause of action, the Court finds that Plaintiff has sufficiently established  
7 disputed issues of material fact regarding whether Host and HERE conspired with the Port to satisfy  
8 this element of its § 1983 claim for summary judgment purposes. "A defendant's knowledge of and  
9 participation in a conspiracy may be inferred from circumstantial evidence from evidence of the  
10 defendant's actions." Gilbrook v. City of Westminster, 177 F.3d 839, 856-57 (9<sup>th</sup> Cir. 1999).

11 Regarding the deprivation of "rights . . . secured by the Constitution or laws of the United  
12 States" required for proof of the second element of § 1983, the Court finds that, as regards Plaintiff,  
13 those rights are represented by the protections afforded under the NLRA. Plaintiff has a right to  
14 operate free from "hot cargo" agreements and any other activities or conspiracies aimed at  
15 conditioning its continued operation on involuntary unionization, and, under certain circumstances  
16 (which have been found here), § 1983 represents a bulwark against that kind of activity.

17 Defendants reiterate many of their previous arguments regarding the legality of the MOU and  
18 the CBA and the lack of other circumstantial evidence demonstrating their intent to trespass on FEE'  
19 federally-protected rights under the NLRA. The analysis of those arguments will not be repeated her  
20 for the same reasons this Court found that Plaintiff has established the existence of genuine issues for  
21 trial on the allegations of civil conspiracy to violate its rights, Plaintiff has also shown that disputed  
22 issues of material fact remain concerning its allegations of § 1983 violations. Even if the documents at  
23 the heart of this case are ultimately found to either not apply to Plaintiff or not to contain explicit or  
24 implicit unionization requirements for airport sublessees, there remains sufficient evidence of oral and  
25

1 written statements by representatives of all defendants to create genuine factual disputes regarding  
2 whether these Defendants supported the forced, illegal unionization of this Plaintiff.

3 The union, however, does approach its summary judgment request on this claim from a  
4 different angle. To the extent that the §1983 claim is premised on the illegality of the CBA between  
5 Host and the union, HERE argues the NLRA preempts use of any other remedy, except in very limited  
6 circumstances which HERE alleges are not present. HERE claims that Plaintiff's claims regarding the  
7 CBA are premised exclusively on § 8(e) of the NLRA (HERE's §1983 Motion, p. 7) and cites case  
8 law that 8(e) allegations are outside a federal court's Taft-Hartley Act jurisdiction. Atchison, Topeka  
9 & Santa Fe RR v. Teamsters Local 70, 511 F.2d 1193, 1195 (9<sup>th</sup> Cir. 1975). Thus, the argument  
10 concludes, the sole remedy is a claim with the National Labor Relations Board ("NLRB").

11 The union does not entirely ignore the fact that Plaintiff has also alleged § 8(b)(4) violation  
12 against them (which is one of the exceptions to exclusive NLRA jurisdiction), but tries to argue that  
13 the fact that Plaintiff was not a party to the CBA means they cannot assert an 8(b)(4) violation as  
14 regards that agreement. It is not a compelling argument – the case they cite in support of it (Betal  
15 Environmental Corp. v. Local No. 78, 123 F.Supp.2d 156 (S.D.N.Y. 2000)) was also dependent on a  
16 finding that the Plaintiff there had presented no evidence that it had been forced or required to  
17 unionize. That is hardly the case here – as pointed out previously, there are many areas of disputed  
18 material fact regarding the issue of mandatory unionization

19 The union claims further preemption in the form of the exclusivity of §303 of the Labor  
20 Management Relations (Taft-Hartley) Act, 29 U.S.C. § 187. They cite Teamsters v. Morton, 377  
21 U.S. 252, 258-60 (1964) for the holding that the congressional intent behind §303 bars any non-  
22 NLRA remedies. They argue by analogy that the case law which prohibits punitive damages,  
23 attorneys' fees (Summit Valley Industries v. Carpenters Local 112, 456 U.S. 717, 723-34 (1982)) and  
24

1 §1985 violations (Amoco Oil Co. v. Electrical Workers Local 99, 5365 F.Supp. 1203, 1217-19  
2 (D.R.I. 1982)) also acts to bar relief under §1983.

3 The Court finds none of the union's "exclusivity" arguments persuasive. Plaintiff's claims  
4 against them are premised on violations of 8(b)(4) as well as 8(e) and as such are exempt from the  
5 exclusive jurisdiction of the NLRB. Congress gave parties with allegations of 8(b)(4) violations the  
6 right to sue a union for damages "in any district court of the United States." 29 U.S.C. § 187(b).  
7 Plaintiff cites Supreme Court case law which holds that the NLRA does not preclude a §1983 action  
8 arising from government interference with federally-protected labor rights. Golden State Transit  
9 Corp. v. City of Los Angeles, 493 U.S. 103, 108-09 (1989). Further, private parties may be liable  
10 under §1983 when they join with government entities to interfere with federally-protected rights.  
11 Dennis v. Sparks, 449 U.S. 24, 27-29 (1980).

12 Golden State, *supra*, also holds that the burden is on the union to establish that §1983  
13 protection has been withdrawn for violation of a particular federal right. 493 U.S. at 107. None of  
14 the union's cases involve a holding that §303 is the exclusive remedy which pre-empts §1983 in cases  
15 where 8(b)(4) violations are alleged. A recent District Court opinion from this circuit states:

16 [S]ection 303 has scant legislative history. The little historical guidance that  
17 does exist fails to indicate any Congressional intent that sections 8(b)(4)  
and 303 be the exclusive remedy for persons injured by secondary labor  
18 activities.

19 Sutter Health v. UNITE HERE, \_\_\_ F.Supp.2d \_\_\_, 2005 WL 1925910, \*5 (E.D.Cal. Aug. 10,  
20 2005).

21 It is the finding of this Court that Plaintiff has established sufficient disputed facts regarding  
22 violations of its rights under § 1983 to withstand summary judgment on that cause of action. None of  
23 Defendants' arguments that they are entitled to summary judgment as a matter of law has succeeded in  
24 persuading the Court that a jury should not hear and decide this matter.

1 As regards Plaintiff's final cause of action:

2 **Contempt of Court (Tenth Cause of Action)**

3 This allegation is made against the Port only and concerns Plaintiff's assertion that the Port's  
4 activities in the circumstances at issue in this case violate the terms of the injunction issued by Judge  
5 Rothstein in CityIce, *supra*. The Order and Consent which contain the injunction state:

6 - Court's Continuing Jurisdiction to Adjudicate Any Disputes Regarding This  
7 Consent Judgment. The Court hereby RETAINS JURISDICTION over the  
8 parties for the purposes of deciding any disputes or issues regarding the interpretation  
9 or application of, or compliance with, this Consent Judgment. Any such disputes  
10 or issues must be adjudicated in this Court, and only in this Court. Consent  
11 and Order, p. 5.

12 Defendant's motion for summary judgment on this claim will be DENIED at this stage of the  
13 proceeding to permit a referral of this claim to Judge Rothstein to permit her to determine whether she  
14 wishes to retain jurisdiction over this particular dispute concerning the application of the injunction.

15 **Conclusion**

16 Summary judgment will be GRANTED on Plaintiff's claims of violations of the Washington  
17 anti-trust laws and Consumer Protection Act. Summary judgment will be DENIED as to the  
18 following causes of action, which remain active in the case:

- 19 • Civil conspiracy under Washington state law (as to all Defendants)
- 20 • Violations of 42 U.S.C. § 1983 (as to all Defendants)
- 21 • Violations of the National Labor Relations Act, 29 U.S.C. §§ 158(b)(4) and (e) (as to  
22 Defendant HERE only)
- 23 • Allegations of tortious interference with a business expectancy (as to Defendants the  
24 Port of Seattle and HERE only).

25 Plaintiff's cause of action for contempt against the Port will be referred to Judge Barbara J.  
26 Rothstein for a determination of whether she wishes to retain jurisdiction over this particular  
application of her previous order.

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The clerk is directed to provide copies of this order to all counsel of record.

Dated: September 21, 2005



Marsha J. Pechman  
U.S. District Judge

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FOR SUMM JMT - 33

