

Litigators of the Week: Michael Nemelka, Aaron Panner and Derek Ho

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L-R: Michael Nemelka, Aaron Panner and Derek Ho

How do you persuade customers to testify against the two dominant companies in an industry to help win your client access to the data it needs? A trio of partners at Kellogg Hansen Todd Figel & Frederick say that if customers are sufficiently fed up with higher prices and the loss of their preferred service provider, they'll tell a judge about it.

Last Friday, Wisconsin federal judge James Peterson granted a preliminary injunction to Kellogg Hansen client Authenticom, which requires Reynolds and Reynolds and CDK Global - providers of auto dealer management systems that are used by nearly three-quarters of all US dealers - to allow this third-party data integrator to access dealer data on their systems.

Authenticom historically obtained access to the Reynolds and CDK systems through the dealers' own usernames and passwords, and would automatically and regularly "scrape" the data to feed to third-party vendors of additional features for the dealer management system, or DMS. However, Reynolds and CDK began blocking Authenticom from their systems, and in May it sued them for allegedly conspiring to shut down competition in the market for those data services.

This wasn't Kellogg Hansen's first time going up against CDK and Reynolds. Partner Michael Nemelka says the firm's lawsuit on behalf of another plaintiff - vendor Motor Vehicle Software Corporation - against them in January was "well received in the industry".

"Reynolds and CDK are the 800-pound gorillas in the industry," Nemelka says. "Until MVSC, nobody had dared to raise their head against them." The preliminary injunction was Authenticom's only option, he says, as the company could not sustain its business where it was constantly being blocked from serving its dealer and vendor customers.

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What came through in the three-day evidentiary hearing, says partner Aaron Panner, is the fact that Authenticom had provided the data integration service on a competitive basis, and this had been beneficial to dealers and vendors who were able to benefit from competitive pricing and innovation.

During that hearing at the end of June, Authenticom brought as witnesses vendors and dealers who were or wanted to be its customers but were blocked by CDK and Reynolds. Antitrust laws exist to protect consumers, and the position of the customers was very clear, Nemelka says; meanwhile, the defendants offered no customer witnesses.

His partner Derek Ho adds, “Customers are often very reluctant to testify against dominant companies like Reynolds and CDK,” but here the customers were so motivated that they overcame their normal reluctance.

“I think the judge recognised how far out of their way they were going to testify at trial, and then the substance of testimony at trial was, I would call it passionate, in a way that was quite powerful,” Ho says.

On the dealers’ side, Nemelka says, that motivation arose from their feeling that they were being charged for access to their own data. “By and large, they’re angered by CDK’s and Reynolds’ efforts to seize control of the data,” he says, as the defendants’ data integration service cost significantly more than Authenticom’s, and vendors often have no choice but to pass the price increase along to dealers.

Nemelka, who was lead counsel on the case, notes that Panner and Ho are more senior and experienced antitrust lawyers with cases such as Twombly, Italian Colors and Trinko under their belts.

“The support they and others provided on a case led by a young partner has been humbling to say the least, and their work is a primary reason we achieved the result we did,” Nemelka says. “Kellogg Hansen is a special place for many reasons, but to have senior partners show such support for a young partner is definitely one of them.”