

No. 07-56699

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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CYNTEGRA, INC., a California corporation,

*Plaintiff-Appellant,*

v.

IDEXX LABORATORIES, INC., a Delaware corporation,

*Defendant-Appellee.*

---

Appeal from the United States District Court  
for the Central District of California  
Hon. Philip S. Gutierrez  
Civil Case No. CV 06-4170 PSG (CTx)

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BRIEF FOR APPELLEE IDEXX LABORATORIES, INC.

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## **CORPORATE DISCLOSURE STATEMENT**

IDEXX Laboratories, Inc. is a publicly-traded Delaware corporation. There are no publicly held corporations that hold more than 10% of IDEXX's stock.

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## INTRODUCTION

This Court should affirm the District Court's summary judgment in favor of Defendant IDEXX Laboratories, Inc. ("IDEXX") because Plaintiff Cyntegra, Inc. ("Cyntegra") lacks standing to bring its antitrust claims and failed to establish the essential elements of any of its antitrust or state law claims. For two years, Cyntegra has taxed the resources of IDEXX and the federal courts to pursue a groundless lawsuit. Cyntegra's founder and sole employee, Simon Brodie, has a well-documented history of shoddy business ventures, one of which led to incarceration for a felony fraud conviction in the United Kingdom. Cyntegra is yet another of his short-lived ventures; and when it failed, Mr. Brodie rushed to file an antitrust lawsuit -- no doubt hoping for a quick settlement.

Cyntegra alleges that IDEXX, a longtime manufacturer of veterinary diagnostic products, uses unlawful distribution agreements to foreclose competitors from and to monopolize the market. Cyntegra also alleges that IDEXX illegally ties the sale of two of its tests and violates tortious interference and unfair competition laws in California. However, as the District Court properly recognized, the facts underlying this lawsuit do not reflect harm to competition or any unlawful conduct by IDEXX. Throughout the litigation, Cyntegra has relied on bald assertions, false accusations, and lawyer argument, without offering any credible **evidence** to substantiate its claims. Cyntegra's appellate brief contains

more of the same. Moreover, Cyntegra and its counsel's behavior throughout the litigation has been dilatory and unprofessional. Cyntegra repeatedly failed to comply with court rules, filed ten *ex parte* applications (several of which were after being sanctioned by the court), and was sanctioned for destroying key evidence.

The District Court correctly held that Cyntegra lacks standing because it could not demonstrate that it was a "business" capable of suffering injury. Cyntegra had no employees besides Mr. Brodie, no office or laboratory, insufficient investment, no evidence of the validity of its purported products, and no evidence of completed sales. Indeed, as the District Court found, "it is unclear whether Plaintiff ever had any products to sell." ER<sup>1</sup> 179 at 8.

Even if Cyntegra has standing, there is no legal merit to its case. The IDEXX distribution agreements challenged by Cyntegra have been upheld **four times** already, including by the Second Circuit. These courts have determined that the agreements are valid and do not violate the antitrust laws. In addition, Cyntegra's monopolization claims failed, as Cyntegra did not demonstrate that IDEXX possessed monopoly power in the relevant market. IDEXX submitted undisputed evidence that in the relevant market of animal testing services (which

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<sup>1</sup> Citations to "ER" refer to Cyntegra's Excerpts of Record, with the tab numbers corresponding to the District Court's docket of this action. Citations to "SER" refer to IDEXX's Supplemental Excerpts of Record, with the tab numbers corresponding to the District Court's docket of this action.

the District Court **adopted** and Cyntegra now **concedes**), IDEXX holds less than 40% market share. Further, the District Court found no basis for Cyntegra's tying claims, as Cyntegra was not harmed by the alleged tie, and the two IDEXX tests sold together were not separate products for antitrust purposes.

This Court should also affirm the discovery and evidentiary rulings that Cyntegra challenges because they were well within the District Court's discretion. After failing to comply with case schedules and court rules and squandering its opportunity to take more discovery, Cyntegra then sought relief from the very circumstances it created. The District Court gave Cyntegra numerous second chances, including a four month continuance of the summary judgment hearing for Cyntegra to take discovery. Yet, Cyntegra wasted these opportunities. The District Court properly exercised its discretion in limiting the scope of discovery, denying Cyntegra's requested extensions, rejecting Cyntegra's expert "rebuttal" report, and imposing sanctions against Cyntegra for spoliating key evidence.

### **JURISDICTIONAL STATEMENT**

The District Court's jurisdiction was based on 28 U.S.C. §§ 1331, 1337, and 1367. Cyntegra appeals from a final judgment disposing of all of its claims. This court has appellate jurisdiction under 28 U.S.C. § 1291.

The District Court entered a final judgment on November 7, 2007. Cyntegra timely filed its notice of appeal on November 16, 2007, pursuant to Fed. R. App. P. 4(a)(1)(A).

### **STATEMENT OF ISSUES ON APPEAL**

(1) Whether the District Court properly granted summary judgment to IDEXX on the grounds that (a) Cyntegra lacks standing to bring its antitrust claims; and (b) even if Cyntegra has standing, the evidence does not support its antitrust, tortious interference, or unfair competition claims.

(2) Whether the District Court properly exercised its discretion in:  
(a) limiting the scope of discovery; (b) denying Cyntegra's multiple requests for time extensions; (c) excluding Cyntegra's expert "rebuttal" report; and (d) granting IDEXX's motion for sanctions for spoliation of evidence.

### **STATEMENT OF THE CASE**

Cyntegra filed its Original Complaint against IDEXX in the Central District of California on June 30, 2006. On July 25, 2006, IDEXX filed a Motion to Dismiss Cyntegra's claims for unfair competition and intentional interference with contractual relations. The District Court granted this Motion as to Cyntegra's claim for interference with business contractual relations with leave to amend. On September 26, 2006, Cyntegra filed its First Amended Complaint ("FAC") against IDEXX, alleging eight causes of action: (1) exclusive dealing under Sherman Act

Section 1 and Clayton Act Section 3; (2) monopolization of trade under Sherman Act Section 2; (3) attempted monopolization of trade under Sherman Act Section 2; (4) unfair competition under California law; (5) intentional interference with business contractual relations under California law; (6) interference with prospective economic advantage under California law; (7) illegal tying *per se* under Sherman Act Section 1; and (8) illegal tying rule of reason under Sherman Act Section 1.

Cyntegra filed a motion for preliminary injunction on November 30, 2006 to enjoin IDEXX from enforcing its alleged exclusive dealing arrangements with distributors of veterinarian products and alleged tying of its FeLV diagnostic tests to its FIV diagnostic tests. Citing a lack of evidentiary support for Cyntegra's claims, the District Court denied Cyntegra's PI Motion on February 5, 2007. In its ruling, the District Court held that "[p]laintiff has failed to show a likelihood of success on the merits." IDEXX moved for summary judgment on March 13, 2007. Rather than oppose the motion, Cyntegra filed a Rule 56(f) motion on an *ex parte* basis, seeking to delay its opposition until after discovery. The District Court granted Cyntegra four months of discovery and continued the hearing on IDEXX's summary judgment motion to September 10, 2007. Cyntegra squandered its allotted time for discovery, engaging in delay tactics, and then, on the eve of the close of discovery, sought a modification of the scheduling order. During the



discovery period, Cyntegra filed no fewer than ten *ex parte* applications, despite the District Court's reprimands, and was eventually sanctioned \$500 for continuing needlessly to file *ex parte* applications.

After hearing, the District Court granted IDEXX's summary judgment motion on October 25, 2007, dismissing Cyntegra's case in its entirety, with prejudice. ER 179. The District Court found that Cyntegra lacks antitrust standing to assert its exclusive dealing and monopolization claims, that Cyntegra failed to demonstrate that IDEXX has monopoly power in the relevant market, and that Cyntegra failed to establish the elements of its tying, intentional interference and unfair competition claims.

This appeal follows entry of final judgment on November 7, 2007.

### **STATEMENT OF FACTS**

IDEXX develops and commercializes innovative technology-based products and services for veterinary, food and water applications. SER 51 at 2. IDEXX is a publicly traded company based in Westbrook, Maine. SER 51 at 2. IDEXX sells a variety of products that veterinarians use to diagnose and treat illnesses and conditions in companion animals. SER 51 at 2. Its products and services include in-clinic rapid assay tests, analyzers that are used by veterinarians in-clinic, pharmaceuticals and outside reference laboratory services. SER 51 at 2.

There are two main methods by which a veterinarian obtains test results for companion animals. First, a veterinarian can use an in-clinic test, such as IDEXX's rapid assay tests, to test an animal while it is present at the appointment. SER 51 at 2. As such, the animal's owner does not have to wait for test results while a sample is sent out to a reference laboratory. SER 51 at 2. IDEXX sells in-clinic tests for both cats and dogs. IDEXX sells its in-clinic tests mostly through distributors. SER 51 at 3. Other companies, such as Synbiotics and Heska, sell competing in-clinic products.

Second, a veterinarian can collect a sample from the animal and send it to a reference laboratory for analysis. IDEXX's competitor, VCA Antech, has the largest laboratory business by far. IDEXX Reference Laboratories offers such services through its worldwide network of laboratories that exclusively perform laboratory work on samples from animals. SER 53 at 2. IDEXX Reference Laboratories sends collection kits directly to veterinarians. SER 53 at 2. The veterinarians collect and send the samples to an IDEXX laboratory for analysis. IDEXX performs analyses on these samples and submits the results to the veterinarian online, via automatic download to a veterinarian's software, or by facsimile. SER 53 at 2. On a monthly basis, IDEXX bills veterinary clinics for the work that was performed by IDEXX for the clinic during that month. SER 53