

**Matter of Encore Coll. Bookstore, Inc. v City  
Univ. of N.Y.**

2008 NY Slip Op 33294(U)

December 3, 2008

Supreme Court, New York County

Docket Number: 101012/08

Judge: Lewis Bart Stone

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: STONE  
HON. LEWIS BART STONE *Justice*

PART 505

ENCORE COLLEGE BOOKSTORES  
- v - INC

CITY UNIVERSITY OF NY

INDEX NO. 101012/08  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion *and the related motion*  
*are decided in accordance with the amended*  
*Decision and Order*

**FILED**

DEC 10 2008

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 3 Dec 08

Lewis Bart Stone  
HON. LEWIS BART STONE *J.S.C.*

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 50S

----- X

In the Matter of the Application of :  
ENCORE COLLEGE BOOKSTORE, INC. :

Petitioner, :

For Relief Pursuant to Article 78 and Section 3001 :  
of the Civil Practice Law and Rules of the State :  
of New York, :

-against- :

CITY UNIVERSITY OF NEW YORK, BMCC :  
AUXILIARY ENTERPRISES CORPORATION and :  
KINGSBOROUGH COMMUNITY COLLEGE :  
AUXILIARY ENTERPRISES CORPORATION, :

Respondents. :

----- X

DECISION AND  
ORDER

INDEX NUMBER  
101012/08

**FILED**  
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COUNTY CLERK'S OFFICE  
NEW YORK

Hon. Lewis Bart Stone:

This proceeding was commenced by Petitioner, Encore College Bookstores, Inc. ("Encore"), pursuant to Civil Practice Law and Rules ("CPLR") Article 78 and CPLR §3001, by Notice of Motion dated January 25, 2008, seeking relief from actions of two auxiliary enterprise corporations which had been established for the benefit of community colleges in the City University ("CUNY") system, as they relate to provisions of leases let by the two corporations for campus bookstores at such colleges, relating to the disbursement of certain federal scholarship grants

administered by the colleges and further seeking a preliminary injunction against such provision. The respondents are CUNY, BMCC Auxiliary Enterprises Corporation (“BMCC”) and Kingsborough Auxiliary Enterprises Corporation (“Kingsborough”). The latter two entities are New York not-for-profit corporations, established respectively by the two community colleges, viz, Borough of Manhattan Community College (“MCC”) and Kingsborough Community College (“KCC”), to manage certain non-core educational functions of such colleges for the benefit of their respective institutions. Encore’s challenge relates specifically to provisions of the leases which provide that purchases of textbooks covered by scholarship funds could be directly debited at the store against the students’ scholarships, and that such direct debit program would be exclusive to the tenant under the lease. Encore asserts that this exclusive direct debit program violates NY General Business Law (“GBL”) §340.1, commonly known as the Donnelly Act, and Federal regulations relating to the federal scholarship program.

Respondents answered and each separately cross moved to dismiss.

BMCC’s Cross Motion was dated April 17, 2008 and sought a dismissal of Encore’s petition on the grounds that Encore lacked standing to sue and that Encore failed to state a claim for relief.

CUNY's cross motion was dated April 18, 2008, and sought dismissal of Encore's petition "on the grounds set forth in CUNY's memorandum of law," which both opposed Encore's petition and supported CUNY's Cross Motion. Such memorandum, which did not differentiate between the Cross Motion and the general opposition to Encore's petition, covered two general areas, one relating to various CPLR Article 78 issues and the other addressed Encore's Donnelly Act claims. CUNY's Article 78 grounds were that (1) Encore's claims were time barred, (2) Encore lacked standing to assert claims for violation of federal regulations and breach of fiduciary duty, (3) CUNY did not fail to perform a duty enjoined upon it by law and (4) that Encore failed to state a claim for breach of fiduciary duty. For Donnelly Act claims, CUNY's memorandum asserted defenses of sovereign immunity and that Encore failed to state a claim.

Kingsborough's cross motion, dated April 18, 2008, sought to dismiss Encore's petition pursuant to CPLR §3211(a)(1) and (7), viz, that "a defense is founded upon documentary evidence" and the pleading failed to state a "cause of action."

The Court established a briefing schedule and subsequently heard oral arguments of the parties on and the matter was thereupon fully submitted for decision.

## BACKGROUND

Encore owns and operates independent book stores located in close proximity to the MCC and KCC campuses. BMCC and Kingsborough, acting respectively for MCC and KCC, let space located on their campuses to Barnes & Noble College Bookstores, Inc. (“B&N”), by written leases, to operate campus bookstores. B&N, which is a subsidiary of Barnes & Noble, Inc., a publicly held corporation, which operates about 600 college book stores across the country, is not a party to this proceeding. The leases were awarded following the issuance of Requests for Proposals (“RFP”). Encore did not respond to these RFP’s.

The Federal government has established a system financial aid known as the Pell Grant program (USCA §1070 et. seq.), to help low income college students defray tuition, and, in certain instances, other educational expenses such as text books. At KCC and MCC, available Pell Grant aid for text books averaged approximately \$272.39 per participating student per semester in 2007. As MCC predominantly serves a large low income student body, the aggregate annual Pell Grants available for the purchase of text books at MCC amounts to more than two million dollars each year.<sup>1</sup>

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<sup>1</sup> In fall of 2007, MCC had about 19,614 full time students of which 10,038 received some Pell Grant and of those, 4,945 received text book grants. (Affidavit of Director of MCC Office of Financial Aid).

Under Federal regulations, the student's college administers any Pell Grant made to the student, and may apply that portion of the Pell Grant attributable to tuition directly to itself. For the remainder of the Pell Grant allowance, however, the student may determine how and where to spend such funds.

The RFP's provided that MCC and KCC would allow students to pay for text books purchased at the campus book stores by direct debit to their Pell Grant accounts and that such privilege would be exclusive to the selected campus book store. After this proceeding was commenced, Kingsborough settled Encore's claims against it by stipulation pursuant to which the lease between KCC and B&N was modified and the direct debit program was discontinued at KCC. Kingsborough agreed to give Encore sufficient prior notice of any reinstatement of the direct debit program at KCC to allow Encore to reinstate a challenge thereto.

### **DISMISSAL OF PROCEEDING AS AGAINST KINGSBOROUGH**

In its answer, Kingsborough asserted that because it has settled with Encore, Encore's petition must be dismissed as against Kingsborough. This Court concurs. While relief under CPLR Art. 78 is available to correct an improper determination of a body, to the extent the body itself has withdrawn the determination, no basis for relief under Article 78 remains. While under certain circumstances, threatened

improper actions by a body may also constitute the basis for relief by declaratory judgment, there is no current threat by Kingsborough, and therefore Encore has no basis for an action for declaratory relief against Kingsborough. Accordingly, Kingsborough is hereby dismissed as a party respondent to this proceeding. Because this proceeding against Kingsborough is terminated, Kingsborough's Cross Motion and the remainder of Kingsborough's defenses and objections are rendered moot and will not be addressed by this Court in this Decision and Order.

To the extent Encore's claims against CUNY derive from alleged actions of Kingsborough as a putative agent of CUNY, they likewise may not be asserted against CUNY in this proceeding. The dismissal of such claims here, however, is without prejudice to any right Encore may have against CUNY, Kingsborough or KCC for past damages, which might be validly and timely asserted and established in another action or proceeding.

As BMCC continues to maintain an exclusive direct debit system for its students to use their Pell Grant to purchase text books at the B&N store at MCC and continues to assert a right to do so, the reasons for dismissal of this CPLR Article 78 proceeding as against Kingsborough do not apply to BMCC or CUNY based on the alleged actions of BMCC as an agent of CUNY.

## **THE CROSS MOTIONS TO DISMISS**

Although Cross Motion practice is permissible in a CPLR Article 78 proceeding, the Cross Motions here, although designated as such, effectively present nothing more than a joinder of issue and the assertion of affirmative defenses which would be otherwise includable in an answer to the petition. For example, the Cross Motion asserted that Encore has failed to state a claim for relief adds nothing that an answer opposing the Petition on the merits could not assert. While it might have been appropriate to assert an affirmative defense, such as a statute of limitations or a challenge to standing, as a cross motion without a joinder of issue, including such items with a comprehensive answer which addresses all merits of the controversy, it only adds to procedural complications. As all matter in this dispute are before this Court, this Court will address the issues in CUNY's and BMCC's Cross Motions and their answers together as a matter of procedural economy.

## **STATUTE OF LIMITATIONS**

CUNY's Cross Motion asserts that Encore's petition is time barred. Under CPLR §217(1), a proceeding under CPLR Article 78 to review an action by a body must be commenced within four months of the final action of that body by which the

petitioner is purportedly aggrieved.<sup>2</sup> CUNY asserts that the relevant date here was the date when CUNY's procedures for the advance purchase program were announced in 2003 or, in the alternative, when BMCC issued its RFP which included the direct debit program in June 2005. Encore, on the other hand, asserts that the relevant commencement date for CPLR §217(1) purposes was when the B&N Lease at MCC was fully executed and delivered, a date within four months of the time Encore commenced this proceeding. This Court concurs with Encore and rejects CUNY's position. Until BMCC executed the lease, BMCC had made no final determination which could affect Encore. See Best Payphones, Inc. v. Dept. of Information Technology & Tel., 5 NY3d 30 (2005). BMCC could have withdrawn or modified the RFP at any time up to such time, or changed its mind and decided not to include a sole source direct debit program in the lease, as did apparently Kingsborough after the Kingsborough lease was awarded.

### **STANDING TO COMMENCE THE PROCEEDING**

Both CUNY and BMCC claim that Encore lacks standing to maintain a CPLR Article 78 proceeding against them. One lacking standing may not challenge a determination of a body, even if the same determination might be challenged by one

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<sup>2</sup> As BMCC asserts no Statute of Limitation defense, BMCC has waived any such affirmative defense.

having standing. Several Court of Appeals cases have recently addressed the issue of standing in the CPLR Article 78 context. Both Society of Plastics Indus. v. County of Suffolk, 77 NY 2d 761 (1991) and New York State Assoc. of Nurse Practitioners v. Novello, 2 NY3d 207 (2004) involved associations challenging governmental action on behalf of their constituent membership. In neither case did the Court find direct and specific pecuniary damage to the petitioner or one of its members so as to establish one of the prongs of standing that petitioner draws a direct injury in fact.<sup>3</sup>

Here, Encore is asserting its own direct pecuniary interest - that the direct debit program of BMCC has a direct, adverse and specific effect on itself and does not assert damage as a general public matter.<sup>4</sup> It is not an argument against standing that the asserted damage or effect may not itself be actionable; standing is merely the preliminary determination that the petitioner has a specific, as distinct from a public interest, in the action and can articulate a pecuniary interest so as to continue the proceeding to a determination of the merits.

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<sup>3</sup> Some statutes confer a broader basis of standing for a challenge to a determination made by a governmental agency made under such statutes. See, e.g., Chinese Staff and Workers Assn. v. City of N. Y., 68 NY2d 359, 366 (1986), which expands standing to exclude the need to show a direct injury in fact with respect to who may challenge certain environmental decisions. No such statute is present here.

<sup>4</sup> In its petition Encore has alleged specific and substantial revenue declines at its book store at MCC by reason of the direct debit program made available to the B&N store.

Here, Encore is not merely “the public at large.” Encore sells text books in close proximity to MCC and is located there for commercial purposes. Text book sales constitute a substantial portion of the business of book stores located in or near colleges which cater to students. Text books for particular courses are ordinarily selected by the college professors or instructors and bookstores catering to the students of that college regularly organize their stock to reflect such selections and group the designated books by course and professor or institution. Because they are required and primarily useful for the specific course selected by and available to a student, they are rarely purchased before the student has been admitted to and enrolled in a course, and because once the student has enrolled in a course, textbooks are needed for the course, it is important for the student to buy the textbook within a few days of the commencement of the course. As a practical matter, for any particular college there is rarely more than a handful of stores who can devote the space and stock for this purpose and bookstores in the business of selling books for specific courses need to be close to the school to be economically viable. Further, as a practical matter, few students will shop for text books at stores which are not specifically organized by course and professor or inconveniently located. If Encore were not located at or near BMC, it might be deemed a member of the “public at large,” as would be a seller of books located in another section of the City. Encore’s

interest is therefore distinguishable from that of “the general public.” Clearly Encore also has a pecuniary interest. It is in the business of selling text books and has an interest in both its profits and its ability to maintain or increase its profit margins by increasing sales. Pell Grant funds available for text book purchase at MCC are not immaterial in amount, and the availability of the direct debit system is a substantial factor which was expected by BMCC and B&N to induce a material number of students to take the lazy and simple default expedient of using the B&N store rather than enduring the hassle of seeking direct payments, and applying them to purchases at Encore’s book store.<sup>5</sup> In addition to the “hassle factor,” BMCC has put other practical limitations on a student’s free use of the Pell Grant funds for purchasing textbooks at Encore by requiring a student wishing to receive such funds other than by direct payment, apply to do so at least a week before classes start and then making such funds only available to the student at the earliest, sixteen days later, thus requiring a low-income student either to “front” the costs of his textbooks or to lose the ability to have a required textbook during a material portion of the semester.

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<sup>5</sup> Congressional action in 2006 to change employees’ participation in the Internal Revenue Code 401-k pension programs from an “opt in” to “opt out” basis was a Federal recognition of the observation by behavioral economists that people often take the default option when it would require thought and effort to take a different route, even one which may be clearly more advantageous. Such change of the §401-k default option has almost doubled the percentage of employees now covered by these plans, thus validating these economists views. Thus, being at the receiving end of a default option can be expected to produce significant business gains.

Further, requiring an opt out to be filed at least a week before the semester starts puts additional and unreasonable burdens on students, by requiring them to return to the school, secure the "opt out" form and file it on days not necessarily related to registration or classes, thus requiring them to incur additional carfare and perhaps lose employment compensation for such day.

Thus, this Court finds that Encore has standing to maintain this proceeding, and may proceed to consider Encore's claims on their merits, as well as other affirmative defenses asserted by Respondents.

### **SOVEREIGN IMMUNITY**

CUNY also asserts sovereign immunity as a defense to Encore's Donnelly Act claims on the grounds that CUNY's role constituted State action and is therefore immune from Donnelly Act claims. However, while SUNY and CUNY are agencies of the State, community colleges of CUNY and SUNY as distinct from senior colleges, do not partake of such immunity. See Pikulkin v. CUNY, 176 F.3d 598 (2d Cir. 1999). The test of state action is whether the State would be responsible for paying judgments and the degree of supervision exercised. As the level of supervision of a community college by CUNY is insufficient to bring a community college within the protection of State immunity, a fortiori, the level of supervision by

the State over BMCC, which is not even a Community College but is a New York not-for-profit corporation, is even more attenuated than over MCC, thus excluding BMCC from the sovereign immunity umbrella of the State.<sup>6</sup> CUNY's affirmative defense of sovereign immunity is therefore rejected. The rejection of the defense of sovereign immunity as to Donnelly Act claims does not resolve Respondents' other defenses that the Donnelly Act by its own terms is inapplicable to the Respondents and that Encore cannot establish a basis for relief under such Act. Such issues will be addressed below.

This proceeding was commenced under CPLR Article 78 against BMCC and CUNY to challenge their actions in entering into the exclusive direct debit contract with B&N. While the State and presumably CUNY under its status as an arm of the State may be immune from a suit for monetary damages in Supreme Court, such suits, being relegated to the New York State Court of Claims, petitioners under CPLR Art. 78 seeking to set aside or prevent improper governmental action are not so limited. CPLR Art. 78 proceedings are regularly and properly commenced in Supreme Court

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<sup>6</sup> Auxiliary service corporations for CUNY units were established in part to avoid the many potential stultifying rules applicable to CUNY or the units themselves to enable greater flexibility in providing services. Inherent to the distancing from these rules comes the reduction of the level of supervision by the State. Here, although BMC itself could have directly leased the college bookstore, it did not. While there is no record specifically as to why BMC did not, it is likely that State and City contracting rules, which do not apply to BMCC, would have imposed substantial additional costs and complexities to the process.

against bodies to review their actions, and there is no distinction between those bodies exempt from damage claims by reason of sovereign immunity, such as the State or its agencies, and those not exempt from damage claims, such as municipalities or community colleges or auxiliary enterprise corporations. Thus CUNY's claim that sovereign immunity forecloses consideration of issues which may be properly considered in an Article 78 proceeding must be rejected.

### **STANDING TO ASSERT CERTAIN CLAIMS ASSERTED**

BMCC and CUNY also assert that Encore "Lacks standing to assert claims for the Violation of Federal Regulation, and for Breach of Fiduciary Duty," citing Soc'y of Plastics Indus. v. County of Suffolk, *supra* and Transactive Corp. v. New York State Dept. of Soc. Srvs., 92 NY2d 579 (1998). As noted above, Soc'y of Plastics Indus., *supra*, is not relevant to Encore's standing as Encore here asserts its own specific economic damage.

CUNY and BMCC also cite The Book Exchange v. W. Va. Univ., No. 07-c-369 (Circ. Ct. W. Va. Dec. 7, 2007) to support their assertion that Encore lacks standing to maintain this proceeding. Such case, a relatively short, unreported West Virginia state court case, was decided by a trial court in a civil action, commenced by the Book Exchange, Inc., an independent bookstore, against West Virginia University

("WVU") and B&N to challenge an exclusive direct debit program established by WVU for the purchase of text books at its four campus book stores, operated by B&N, from funds awarded as West Virginia state scholarships. The Court found that the Book Exchange lacked standing to sue under five West Virginia statutes cited by Book Exchange had cited as the basis of its suit. No claims were asserted under Federal law or regulation. While superficially similar, The Book Exchange, appears to have involved an injunction and a civil suit for damages, and was not an action to challenge a decision by a body as is this proceeding. Further, the program in West Virginia related to state financial aid and not to Federal Pell Grant funds or Federal regulations relating thereto. Here, except for its claims under the Donnelly Act, Encore asserts no claims under a New York statute.

The Book Exchange upheld WVU's immunity from a damage award under the West Virginia antitrust statute.<sup>7</sup> While Encore here invokes the Donnelly Act, Encore does not here seek damages under such statute, but instead seeks to set the B&N lease aside on such grounds. A close reading of The Book Exchange leads this Court to conclude the plaintiff there instead sought damages against WVU.

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<sup>7</sup> As noted above, a defense of Sovereign Immunity which might be available to SUNY and CUNY, is not available in New York to a community college, or a fortiori, an auxiliary Enterprise Corporation. Thus, the ruling in The Book Exchange which related to West Virginia University is also not relevant here to questions of sovereign immunity.

Accordingly, this Court finds The Book Exchange not relevant to the issues before this Court.<sup>8</sup>

CUNY and BMCC also assert that Encore is not a fiduciary for BMC students, and therefore cannot sue on their behalf. They are correct. Encore does not claim, however that it sues on behalf of such students as a fiduciary or otherwise. It is Encore's position that the violation of obligations imposed on BMCC by Federal regulations create a basis for Encore to sue on its own behalf. Thus claims that Encore is not a fiduciary for students are irrelevant to this proceeding. Whether Encore's assertion that it may prevail on its suit is meritorious, however, is not a matter of standing but is to be determined in this proceeding.

### **DONNELLY ACT**

Encore asserts that the Donnelly Act forbids BMCC from agreeing with B&N to an exclusive direct debit program for Pell Grant funds of MCC students. Encore does not seek damages but seeks to enjoin the program or in the alternative, for this Court to order that BMCC allow Encore to participate in such program.

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<sup>8</sup> Under McKinney's Statutes §72(b), this Court is not, in any event, bound by The Book Exchange, as it is a decision of another court not superior to this court. Such decisions should, instead nonetheless, be given "respectful consideration," which this Court has done.

The Donnelly Act is New York State's anti-trust law. Its relevant provisions provide:

“Every contract, agreement, arrangement or combination whereby

A monopoly in the conduct of any business, trade or commerce or in the furnishing of any service in this state, is or may be established or maintained, or whereby

Competition or the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state is or may be restrained or whereby

for the purpose of establishing or maintaining any such monopoly or unlawfully interfering with the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state any business, trade or commerce or the furnishing of any service is or may be restrained, is hereby declared to be against public policy, illegal and void.” GBL §340.1

Although these terms are general and quite vague, the Donnelly Act, which was modeled after the Federal Sherman Anti-Trust Act 15 USCA §1 to provide an alternate forum in New York State for redress for a person damaged by illegal conspiracies in restraint of trade, has been regularly construed in light of Sherman Act precedents and given a different interpretation only where state policy differences in language or legislative history justify such different results. X.L.O. Concrete Corp. v. Rivergate Corp., 190 AD2d 113 (1<sup>st</sup> Dept. 1993), aff'd 83 NY2d 513 (1994),

Anheuser Busch Inc., v. Abrams, 71 NY2d 327 (1988). As no party to this controversy has offered any authority as to why in this controversy state policy might lead to a different result than Federal anti trust law, this Court may apply Federal precedent to construe the applicability of the Donnelly Act to the controversy.

As the Donnelly Act is designed to preserve competition, and not stifle it, its purpose is not to prevent vigorous competition or to prevent individual market participants, not conspiring with another, to maximize their own economic advantage in a marketplace. Accordingly, an economic analysis of the actions of CUNY and MCC is necessary to determine whether such actions can be found to violate the Donnelly Act.

What is clearly going on is an attempt by CUNY and MCC to extract profit for their own benefit from the Federal Pell Grant book allowances, a program enacted for the benefit of low income students and not their institutions or the funding sources of such institutions. As the earnings of BMCC inure to the benefit of MCC, any enhancement of such earnings is recaptured by MCC. Obtaining this supplement source of funds is desirable for both MCC and CUNY as such funds may reduce CUNY's need to provide funds for MCC programs and reduce MCC's reliance on CUNY for such funds and because such funds are shielded from the public budget process.

If the direct debit program created no economic benefit for CUNY by enabling it to enjoy higher rents from B&N, CUNY would not have wasted the cost of separately litigating this matter. As proved by Kingsborough's settlement with Encore in this proceeding, however, there is no CUNY wide imperative to impose an exclusive direct debit program for all campus bookstores.

If direct debit program was for the benefit of students, extending such program to the small number of competing bookstores would be of greater benefit to students as it would open the possibility of some price competition between book stores for students' Pell Grant text book dollars for new or used books. Thus, this Court can reach no other conclusion that the exclusive debit program was not designed to help students but was designed to increase the rental income from the bookstore to which such exclusivity had been awarded, so as to enhance the amount of rent to be charged the book store for the ultimate benefit of MCC and CUNY.

That MCC and CUNY have figured out a clever way of enhancing their income at the expense (at least in part) of its low income Pell Grant students and Encore, however, does not end the inquiry. This Court's jurisdiction to consider Encore's Donnelly Act claim is limited to an inquiry as to whether the exclusive debit program is illegal under the Donnelly Act no matter how disadvantageous it may be to Encore or unfavorable to MCC's low-income students.

The principle thrust of antitrust laws is to regulate relations between competitors who, by combining or conspiring, impair competition in the marketplace. The principal wrongs regulated by antitrust laws is price fixing or dividing markets between competitors. Here, there is no question that Respondents and B&N are not competitors as they do not compete with each other in the sale of text books nor are there any allegations of price fixing. At most, BMC and B&N are “in business” as landlord and tenant. While certain vertical restraints have been found to be proscribed by both the Sherman and Donnelly Acts, vertical restraints are neither per se legal nor illegal under either statute. In cases of vertical agreements, it is necessary to determine whether the restraint is unreasonable under the circumstances. Anheuser Busch, Ind. v. Abrams, supra. As the vertical relationship here was the result of an RFP bid process<sup>9</sup> open to all including Encore, which elected not to participate, it is hardly a conspiracy, even to the extent it may represent an economic restraint. Further, as the standard is one of reasonableness, it is incumbent for Encore to establish why the restraint is unreasonable within the context of anti trust case law precedents relating to vertical combinations. Encore has not done so.

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<sup>9</sup> As there is no allegation of collusion or impropriety in the RFP process, this Court must assume that such process was a fully competitive and open one, and that the exclusive direct debit program would have been included in the lease of any successful bidder for the campus book store.

Accordingly, this Court finds that Encore has not in this proceeding established a claim under the Donnelly Act. No price fixing was imposed or implied. No student was forced to buy from B&N instead of Encore. At worst B&N and MCC have made it much easier for low-income students to spend their text book funds at B&N. Accordingly, this Court finds that Encore has failed to set forth a substantive claim under the Donnelly Act.

### **FEDERAL REGULATIONS**

Federal regulations under the Pell Grant program are a different matter.

CUNY and MCC initially contend that Federal law or regulations may not be considered by this Court in this proceeding. They are incorrect. This Court as a court of general jurisdiction, must apply all applicable law, whether local, State or Federal.

CPLR §7803(3) makes no distinction between the sources of law a court is to consider. That a litigant might or might not invoke federal jurisdiction to commence an action or proceeding in Federal Court or seek or be denied administrative succor before a Federal agency is no bar to this Court in applying applicable Federal law or regulations to a proceeding properly before it.<sup>10</sup> However, while this Court is to consider such Federal law or regulation, in doing so it must determine whether the

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<sup>10</sup> Neither party has brought to the attention of this Court any Federal statute or decision pre-empting this Court of jurisdiction to consider the issues presented.

identified Federal law or regulation is in fact applicable and what it means.

Federal Regulations relating to the obligations of institutions of higher learning under the Pell Grant program and other Federal student aid programs are set forth in Code of Federal Regulations (“CFR”), Title 34 Education, Part 668. These Regulations require the disbursement of all student aid including Pell Grant funds by institutions of higher learning in only two ways: 1) by direct payment to a student or parent, or, 2) to credit the student’s account with the institution for current charges for tuition, room and board. 34 CFR §668.164(d)(1). The only exception allowed is where a student has given written authorization,<sup>11</sup> in which case the institution may disburse funds from a student’s account for current charges “that were incurred at the institution for educational related activities,” 34 CFR §668.164(d)(2) and §668.165. This exception, however, cannot apply to the text book portion of Pell Grants here for three independent reasons, viz, (1) BMCC does not obtain written prior authorization from students to directly debit their accounts for purchases at B&N, (2) text books are not activities, and (3) charges for books are charges of a private bookstore and not “at the institution.”

Thus, the direct debit program at BMC violates these Federal Regulations. The “opt out” program does not pass muster, not only for the above reasons, but for the

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<sup>11</sup> I.e. prior authorization.

reason that it is arbitrary and capricious in the time limits for its invocation and for the arbitrary and capricious delay in the payment of text book grants to such times as to make them, in effect, unavailable to most low-income students.<sup>12</sup> As Regulations duly issued by the Federal Department of Education have the force of law, the decision of MCC as agent for BMC to include the direct debit program in its lease with B&N violated BMC's obligation under Federal law. Accordingly, this Court finds that Encore has established a basis for relief in this proceeding.

### **REMEDY**

As this Court has determined that the inclusion of the exclusive direct debit program in the MCC-B&N lease violated BMC's obligations under Federal law, the Court must fashion an appropriate remedy. In doing so, the Court is not unmindful of the intent of CUNY and MCC to improperly capture economically a portion of the Pell Grants through an increase in rent for the book store premises, and that, to the extent B&N may have itself factored in the benefits to it of the exclusive direct debit program into its bid under the RFP, the cessation of the program will deprive B&N of the benefit of its bargain. However, bidders on a public contract or beneficiaries

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<sup>12</sup> The restrictions would effectively require a low-income student within to control his funds to make his election before he knew what his classes were, then buy his books with his own funds, and wait for reimbursement or forego the use of the books through a material part of the semester. It is unlikely that a low-income student would be in a position to take this course of action.

of public determination must assume the risks of Article 78 challenges,<sup>13</sup> and the Federal Regulations were published and available to anyone, including to B&N, and B&N cannot claim benefits arising out of a violation of Federal law.

Here, Encore seeks an injunction requiring BMC to terminate the program or an order to otherwise restore parity between it and B&N. In considering whether to issue an injunction, an equitable remedy, the Court must consider the entities and equities involved, which in this case means that the Court must consider that the respondents are public or quasi public entities, the interests of the students at MCC, whether recipients of Pell Grants or otherwise. In the usual Article 78 proceeding to set aside an improper determination, the remedy is to set the determination aside and tell the body which has made an improper determination to try again. Here, cancelling the B&N lease could adversely impact students as there would be assurance that if the lease was cancelled, B&N would not opt to leave. While Encore might fulfill the textbook needs of the students, campus book stores sell other items and there is nothing on the record to show that Encore sells such items or that other purveyors of such items exist in the neighborhood or that there are vacant spaces

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<sup>13</sup> Bidders in the real world reflect this risk in pricing their responses to public agency RFP's higher than to those from private parties and also often delay major commitments of funds until the four-month statute of limitations on challenges has passed where acting on a determination of a government agency.

available for a new supplier.

While Encore indicates that it would accept either an end to the direct debit program with B&N or the elimination of the exclusivity of such program and its extension to Encore (and presumably any other competitor), because this Court's decision is based on Federal regulations which require the Pell Grant textbook allowance be paid to the student or his family, any extension by this Court of the direct debit program to Encore would require the Court to indulge the same illegality as the Court has found improper. Further, so long as BMC maintains its "opt out" program which is designed to and would effectively prevent most low-income students from receiving the direct payment of textbooks funds in a timely and useful fashion, Encore would effectively have no relief. Accordingly, it is the Decision and Order of this Court that the action of BMCC, in including in the lease an exclusive direct debit program for the purchase of textbooks by its students using Pell Grant funds is hereby vacated and set aside, and respondents are hereby ordered and directed within thirty days of the service of notice of entry of this Decision and order to take such steps as may be required to cancel the direct debit program for textbook

purchases from Pell Grant funds at BMCC,<sup>14</sup> and to cancel the opt out program and pay Pell Grant funds available to students for other than direct and permissible fees payable to BMC for educational related activities as defined under Federal Regulations relating to the obligations of institutions of higher learning under the Pell Grant program and other Federal student aid programs directly to the student or his family promptly upon the availability of funds for such grants.

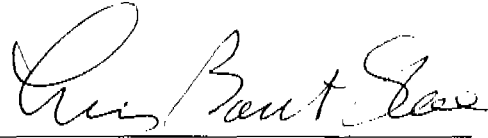
The Cross Motions of CUNY and BMCC are denied and the Cross Motion of Kingsborough is granted.

This is the Decision and Order of the Court.

DATED: DECEMBER 3, 2008  
NEW YORK, NEW YORK

**FILED**  
DEC 10 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

ENTER :



Hon. Lewis Bart Stone  
Justice of the Supreme Court

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<sup>14</sup> As this Court has found the direct debit program illegal, B&N cannot enforce such clause against MCC, BMCC or CUNY. As B&N is not a party to this proceeding, the Court leaves to BMCC, MCC and CUNY the problem of extricating themselves from this improper lease clause.