

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA
United States Department of Justice
Antitrust Division, Litigation I Section
450 Fifth Street, N.W.
Suite 4100
Washington, DC 20530,

Plaintiff,

v.

UNILEVER N.V.
Weena 455, PO Box 760
3000 DK Rotterdam
The Netherlands,

UNILEVER PLC
Unilever House
100 Victoria Embankment
London EC4Y 0DY
United Kingdom,

CONOPCO, INC.
800 Sylvan Avenue
Englewood Cliffs, New Jersey 07632,

and

ALBERTO-CULVER CO.
2525 Armitage Avenue
Melrose Park, Illinois 60160,

Defendants.

CASE NO.:

JUDGE:

Case: 1:11-cv-00858
Assigned To : Jackson, Amy Berman
Assign. Date : 5/6/2011
Description: Antitrust

COMPLAINT

The United States of America, acting under the direction of the Attorney General of the United States, brings this civil action to enjoin the proposed acquisition of Alberto-Culver Co.

(“Alberto Culver”) by Unilever N.V., Unilever PLC, and Conopco, Inc. (collectively, “Unilever”) and to obtain other equitable relief. The acquisition would likely substantially lessen competition in the United States in markets for value shampoo, value conditioner, and hairspray sold in retail stores in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and result in higher prices for consumers in these markets. The United States alleges as follows:

I. NATURE OF THE ACTION

1. Unilever and Alberto Culver are both large consumer products companies that sell shampoo, conditioner, hairspray, and many other products. On September 27, 2010, Unilever agreed to acquire Alberto Culver for approximately \$3.7 billion.

2. Value shampoo and value conditioner (collectively, “value shampoo and conditioner”) are the lowest priced shampoos and conditioners sold in stores and almost always sell for less than \$2.00 per bottle. Unilever sells value shampoo and conditioner under the Suave Naturals brand; Alberto Culver sells value shampoo and conditioner under the Alberto VO5 brand.

3. The proposed acquisition would eliminate substantial head-to-head competition between Unilever’s Suave Naturals and Alberto Culver’s Alberto VO5 brands and give Unilever a near monopoly of the sale of value shampoo and conditioner in the United States with shares of approximately 90 percent in these two markets.

4. The proposed acquisition would also eliminate substantial head-to-head competition between Unilever and Alberto Culver in the United States for hairspray sold in retail stores. Unilever sells hairspray mainly under the Suave, Suave Professional, Rave, and Dove brands. Alberto Culver sells hairspray primarily under the TRESemmé, Nexxus, and Alberto

VO5 brands. The proposed acquisition would make Unilever the largest seller of hairspray in the United States by increasing its market share from approximately 24 percent to over 45 percent.

5. Because the acquisition likely substantially lessens competition in the United States for the sale of value shampoo, value conditioner, and hairspray sold in retail stores, it violates Section 7 of the Clayton Act.

II. JURISDICTION, VENUE, AND INTERSTATE COMMERCE

6. The United States brings this action pursuant to Section 15 of the Clayton Act, as amended, 15 U.S.C. § 25, to prevent and restrain Defendants from violating Section 7 of the Clayton Act, 15 U.S.C. § 18. The Court has subject-matter jurisdiction over this action pursuant to Section 15 of the Clayton Act, 15 U.S.C. § 25, and 28 U.S.C. §§ 1331, 1337(a), and 1345.

7. Defendants Unilever and Alberto Culver manufacture, market, and sell consumer products, including shampoo, conditioner, and hairspray, in the flow of interstate commerce, and their production and sale of these products substantially affect interstate commerce. Defendants Unilever and Alberto Culver transact business and are found in the District of Columbia, through, among other things, selling consumer products to customers in this District. Venue is proper for Alberto Culver and Conopco, Inc. in this District under 15 U.S.C. § 22. Venue is proper in the District of Columbia for Unilever N.V., a Dutch corporation, and Unilever PLC, an English corporation, under 28 U.S.C. § 1391(d).

8. Defendants have consented to personal jurisdiction and venue in this judicial district.

III. THE DEFENDANTS

9. Unilever N.V. and Unilever PLC are corporations respectively organized under the laws of the Netherlands and England, with headquarters in Rotterdam and London. They

wholly own Conopco, Inc., a New York corporation and U.S. subsidiary of Unilever N.V. and Unilever PLC. In addition to hair care products, Unilever owns more than 400 brands of consumer products such as Hellmann's, Lipton, Surf, Dove, Suave, and Vaseline. Unilever had \$62 billion in sales in 2010.

10. Unilever's Suave Naturals brand is the most popular U.S. brand of value shampoo and conditioner, accounting for approximately 50 percent of value shampoo and conditioner sales. Unilever's hairspray brands (primarily Suave, Suave Professionals, Rave, and Dove) account for approximately 24 percent of U.S. hairspray sales.

11. Alberto Culver, a Delaware corporation headquartered in Melrose Park, Illinois, is a consumer products company that owns brands such as TRESemmé, Alberto VO5, Noxzema, Nexxus, St. Ives., Static Guard, and Mrs. Dash. Alberto Culver had \$1.6 billion in sales for the fiscal year ending September 30, 2010.

12. Alberto Culver's Alberto VO5 brand is the second most popular U.S. brand of value shampoo and conditioner, accounting for approximately 39 percent of value shampoo and conditioner sales. Alberto Culver's hairspray brands (primarily TRESemmé, Nexxus, and Alberto VO5) account for approximately 22 percent of U.S. hairspray sales.

IV. RELEVANT MARKETS

A. Relevant Product Markets

1) Value Shampoo and Conditioner

13. Shampoo is a hair care product used to clean hair. Conditioner is a hair care product used to moisturize and enhance the appearance of hair.

14. Value shampoos and conditioners are the lowest priced shampoos and conditioners sold in retail stores, with current retail prices of approximately \$1 per bottle for

smaller sizes (*e.g.*, 15-18 oz.) and almost always less than \$1.65 per bottle for larger family sizes (*e.g.*, 22.5-30 oz.). The parties' business documents and the hair care industry consistently refer to products in this price range as belonging to a "value," "opening-price-point," or "dollar" category. Industry participants, including manufacturers and retailers, widely recognize that shampoo and conditioner products within the value category compete more closely with each other than they do with higher priced shampoos or conditioners.

15. Several factors considered together, including product ingredients, attributes, industry recognition, and price, indicate that value shampoo and conditioner are not reasonably interchangeable with more expensive shampoo and conditioner.

16. Value shampoo and conditioner generally contain only inexpensive ingredients, such as basic soap and scent. More expensive shampoos and conditioners contain additional, more expensive ingredients, which are intended to provide specialized benefits not provided by value shampoo and conditioner such as smoothing, strengthening, repairing, adding volume, and benefits for different hair types (*e.g.*, curly, fine, frizzy, or color-treated hair).

17. Reflecting this difference in input costs and perceived consumer benefits, a significant price gap exists between value shampoo and conditioner and the next-lowest-priced shampoos and conditioners. For 15-18 oz. bottles, the price differential is generally 100 percent or more; value shampoo and conditioner are priced around \$1 and the next-lowest-priced shampoos and conditioners are priced between \$2.15 and \$2.80. For larger bottles, the price differential is also significant. For example, one large retailer's average price for a 30 oz. value brand bottle of shampoo is \$1.67 while the next-lowest-priced shampoo of that same size is, on average, \$2.98.

18. Total annual U.S. retail sales of value shampoo are approximately \$177 million. Total annual U.S. retail sales of value conditioner are approximately \$106 million.

19. Consumers purchase value shampoo and conditioner almost exclusively through retail food, drug, dollar, and mass merchandise stores (collectively, “retail stores”). Sales of value shampoo and conditioner through hairdressing salons are de minimis.

20. Purchasers of value shampoo and conditioner are unlikely to reduce their purchases of value shampoo and conditioner in response to a small but significant and non-transitory price increase to an extent that would make such a price increase unprofitable.

21. Value shampoo and value conditioner are each a relevant product market and a line of commerce within the meaning of Section 7 of the Clayton Act.

2) Hairspray Sold in Retail Stores

22. Hairspray is a product used to set or maintain a hair style after the hair has been dried and styled.

23. Mousses, gels, and other styling aids are not reasonably interchangeable with hairspray because consumers typically use those products in wet or damp hair to give hair form, shape, and style, not to set or maintain a hair style after the hair has been dried and styled.

24. The vast majority of consumers purchase hairspray in retail stores. Some consumers purchase hairspray through hairdressing salons. Several factors considered together indicate that hairspray sold in salons is not reasonably interchangeable with hairspray sold in retail stores, including (i) purchasing hairspray in salons is less convenient for many consumers who purchase hairspray in retail stores, (ii) many more brands are available in retail stores than are available in salons, (iii) the hair care industry views sales of hairspray in retail stores as separate from sales in salons and uses different marketing strategies in those different sales

channels, and (iv) the average price of hairspray sold in salons is at least three times more than the average price of hairspray sold in retail stores.

25. Total annual U.S. retail sales of hairspray sold in retail stores are approximately \$809 million.

26. Purchasers of hairspray sold in retail stores are unlikely to reduce their purchases of hairspray sold in retail stores in response to a small but significant and non-transitory price increase to an extent that would make such a price increase unprofitable.

27. Hairspray sold in retail stores is a relevant product market and a line of commerce within the meaning of Section 7 of the Clayton Act.

B. Relevant Geographic Markets

28. The relevant geographic markets, within the meaning of Section 7 of the Clayton Act, for the value shampoo, value conditioner, and hairspray product markets are no larger than the United States. Because of transportation costs, differences in brand presence and recognition, and U.S. regulations, a small but significant non-transitory price increase in each of these relevant product markets would not cause purchasers to switch to products sold outside of the United States to an extent that would make such a price increase unprofitable.

V. LIKELY ANTICOMPETITIVE EFFECTS

A. Value Shampoo and Conditioner

29. The markets for value shampoo and conditioner are highly concentrated. By unit volume, Unilever's share in each market is approximately 50 percent, and Alberto Culver's share is approximately 39 percent in each market. One other company accounts for almost all of the remaining sales in each market (approximately 10 percent).

30. If the proposed acquisition is consummated, the value shampoo and conditioner markets would become substantially more concentrated. The combined firm would control approximately 90 percent of the sales of value shampoo and conditioner.

31. Using a standard concentration measure called the Herfindahl-Herschman Index (or “HHI,” defined and explained in Appendix A), the proposed acquisition would produce an HHI increase of approximately 3913 and a post-acquisition HHI of approximately 8602 for value shampoo, and an HHI increase of approximately 3902 and a post-acquisition HHI of approximately 8066 for value conditioner.

32. The proposed acquisition would reduce the number of significant competitors from three to two in the value shampoo and conditioner markets and would eliminate significant head-to-head competition between Unilever and Alberto Culver. Currently, Unilever and Alberto Culver compete in the United States on price, and through product innovation and various forms of promotions.

33. The significant increase in market concentration that the proposed acquisition would produce in the United States, combined with the loss of head-to-head competition, is likely to substantially lessen competition in violation of Section 7 of the Clayton Act, resulting in higher prices for consumers of value shampoo and conditioner.

B. Hairspray Sold in Retail Stores

34. The market for hairspray sold through retail stores in the United States is moderately concentrated. By unit volume, Unilever’s market share is approximately 24 percent, and Alberto Culver’s is approximately 22 percent. The three next largest competitors have shares of 20 percent, nine percent, and eight percent.

35. If the proposed acquisition is consummated, the hairspray market would become substantially more concentrated, resulting in a highly concentrated market. The combined firm would control approximately 46 percent of hairspray sold through retail stores. Post-merger, Unilever and the company with the next largest share would account for approximately 66 percent of the market.

36. The proposed acquisition would produce an HHI increase of approximately 1034 and a post-acquisition HHI of approximately 2654 for hairspray.

37. The proposed transaction would combine the two largest hairspray companies and would eliminate significant head-to-head competition between Unilever and Alberto Culver. Currently, Unilever and Alberto Culver compete in the United States on price and through product innovation, couponing and other promotions.

38. The significant increase in market concentration that the proposed acquisition would produce, combined with the loss of head-to-head competition, is likely to substantially lessen competition in violation of Section 7 of the Clayton Act, resulting in higher prices for consumers of hairspray sold through retail stores.

VI. ABSENCE OF COUNTERVAILING FACTORS

A. Entry

39. Responses from competitors and new entry likely will not prevent the proposed acquisition's likely anticompetitive effects. Barriers to entering these markets include: (i) the substantial time and expense required to build a brand reputation to overcome existing consumer preferences; (ii) the substantial sunk costs for promotional and advertising activity needed to secure the distribution and placement of a new entrant's product in retail outlets; and (iii) the difficulty of securing shelf-space in retail outlets.

40. Because of these entry barriers even sophisticated well-funded entrants have not been able to enter the value shampoo and conditioner markets. For example, one major U.S. manufacture repositioned an existing brand into the value shampoo and conditioner markets in 2003, but discontinued it in 2004 because of low sales. Similarly, a major U.S. retailer introduced a private label value shampoo and conditioner in 2009, but also discontinued the product because of low sales.

41. Entry has been similarly difficult for hairspray sold in retail stores. In the last two years, no hairspray company has increased its unit sales by three percentage points or more.

B. Efficiencies

42. The proposed acquisition will not generate verifiable, merger-specific efficiencies sufficient to reverse the likely competitive harm of the acquisition.

VII. VIOLATION ALLEGED

43. The United States hereby incorporates paragraphs 1 through 42.

44. Unilever's proposed acquisition of Alberto Culver would likely substantially lessen competition in interstate trade and commerce, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and would likely have the following effects, among others:

- a) actual and potential competition in the United States between Alberto Culver and Unilever for sales of value shampoo, value conditioner, and hairspray sold in retail stores would be eliminated;
- b) competition generally in the United States for value shampoo, value conditioner, and hairspray sold in retail stores would be substantially lessened.

VIII. REQUEST FOR RELIEF

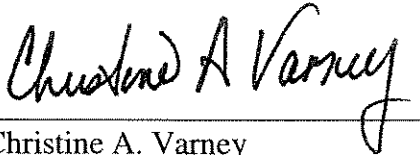
The United States requests:

- a) That the Court adjudge the proposed acquisition to violate Section 7 of the Clayton Act, 15 U.S.C. § 18;
- b) That the Court permanently enjoin and restrain the Defendants from carrying out the proposed acquisition or from entering into or carrying out any other agreement, understanding, or plan by which Alberto Culver would be acquired by, acquire, or merge with Unilever;
- c) That the Court award the United States the costs of this action; and
- d) That the Court award such other relief to the United States as the Court may deem just and proper.

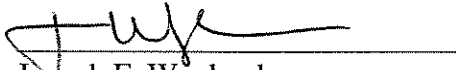
Dated: May 6, 2011

Respectfully submitted,

FOR PLAINTIFF UNITED STATES OF AMERICA



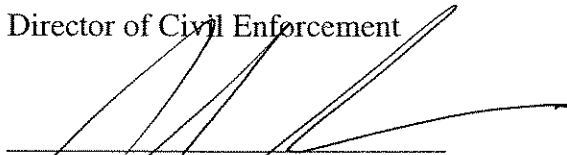
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APPENDIX A

The term “HHI” means the Herfindahl-Hirschman Index, a commonly accepted measure of market concentration. The HHI is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of 30, 30, 20, and 20 percent, the HHI is 2,600 ($30^2 + 30^2 + 20^2 + 20^2 = 2,600$). The HHI takes into account the relative size distribution of the firms in a market. It approaches zero when a market is occupied by a large number of firms of relatively equal size and reaches its maximum of 10,000 points when a market is controlled by a single firm. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.

Markets in which the HHI is between 1,500 and 2,500 points are considered to be moderately concentrated, and markets in which the HHI is in excess of 2,500 points are considered to be highly concentrated. See U.S. Department of Justice & FTC, *Horizontal Merger Guidelines* § 5.3 (2010). Transactions that increase the HHI by more than 200 points in highly concentrated markets presumptively raise antitrust concerns under the *Horizontal Merger Guidelines* issued by the Department of Justice and the Federal Trade Commission. See *id.*