

UNITED STATES DISTRICT COURT
DISTRICT OF THE VIRGIN ISLANDS
ST. THOMAS DIVISION

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
TOPA EQUITIES (V.I.), LTD.,)
)
Defendant.)

Civil No. 1994-179

12/7/94

COMPETITIVE IMPACT STATEMENT

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(b)-(h), the United States submits this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry with the consent of Topa Equities (V.I.), Ltd. in this civil antitrust proceeding.

I.

NATURE AND PURPOSE OF THE PROCEEDING

On Dec. 7, 1994, the United States filed a civil antitrust complaint, under Section 4 of the Sherman Act, 15 U.S.C. § 4, against Topa Equities (V.I.), Ltd., alleging that Topa Equities (V.I.), Ltd. restrained trade in violation of Section 3 of the Sherman Act, 15 U.S.C. § 3, through its acquisition and retention of exclusive Virgin Islands distribution rights to almost every brand of distilled spirits in the world market. (Hereinafter, the United States Virgin Islands will be referred

to as "the Virgin Islands.")

Topa Equities (V.I.), Ltd. is a holding company that wholly owns the Virgin Islands wholesale distilled spirits companies West Indies Corporation and Bellows International, Ltd.

(Hereinafter, Topa Equities (V.I.), Ltd. and its subsidiaries will be collectively referred to as "Topa.") Topa has the distribution rights in the Virgin Islands for almost every popular brand of distilled spirits available in the world market. Distilled spirits means liquor products of all types intended for human consumption, including, but not limited to, whiskey, gin, vodka, rum, tequila, brandy, liqueurs and cordials, but excluding wine and malt beverages and non-alcoholic beverages. Topa obtained these distribution rights mainly through the acquisition of its competitors.

The complaint alleges that the effect of the contracts in restraint of trade by which Topa obtained and has retained its monopoly position has been to lessen competition substantially, in violation of Section 3 of the Sherman Act, 15 U.S.C. § 3, by:

1. Decreasing actual and potential competition in the wholesale distribution of distilled spirits in the Virgin Islands;

2. Depriving retailers in the Virgin Islands of the benefits of free and open competition because Topa is the only source for almost all distilled spirits products and there are no alternative sources for competing distilled spirits products; and

3. Depriving suppliers of distilled spirits products to the Virgin Islands of the benefits of free and open competition, in part because Topa has inherent conflicts of interest in the representation of their distilled spirits products, such that the representation of one product necessarily results in diminished representation for competing products.

On _____, the United States and Topa filed a Stipulation by which they consented to the entry of a proposed Final Judgment designed to increase competition in the wholesale distilled spirits market in the Virgin Islands. The proposed Final Judgment, as explained more fully below, would order Topa to take no action to prevent its distilled spirits suppliers from canceling their distribution arrangements and appointing another wholesaler. The Final Judgment also contains a number of provisions ordering Topa not to interfere with the business operations of a competitor.

The United States and Topa have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment will terminate this action, except that the Court will retain jurisdiction to construe, modify and enforce the Final Judgment and to punish violations of the Final Judgment.

II.

EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. Description of the Defendant and the Violation

Under Virgin Islands law, every distilled spirits wholesaler and retailer must be licensed by the Virgin Islands government. In addition, any wholesaler who obtains a license for distilled spirits wholesaling is prohibited from retailing such products. Topa entered the wholesale distilled spirits business in the Virgin Islands through a predecessor company in 1980 and thereafter made a series of acquisitions of competitors. Topa now imports most of the distilled spirits products sold within the Virgin Islands. (Only a few brands of distilled spirits are produced within the Virgin Islands.) Wholesalers like Topa purchase distilled spirits products from suppliers, store them in warehouses, and sell them to retailers who, in turn, sell to consumers in retail outlets.

In the world distilled spirits market, liquor suppliers often grant exclusive distribution rights to wholesalers. In the Virgin Islands, wholesalers generally hold exclusive distribution rights for the distilled spirits products that they sell. The distribution rights usually are limited to the Virgin Islands. Exclusive distribution rights for some of the most popular brands are important to the success of a Virgin Islands distilled spirits wholesaler. It is difficult, however, to obtain a brand that is already being distributed by another wholesaler in the area, in part because a Virgin

Islands law, Title 12A V.I.C. §§ 131 and 132, allows a dealer to sue a supplier for wrongful termination. Topa has the exclusive distribution rights in the Virgin Islands for almost every popular brand of distilled spirits available in the world market.

Most retail distilled spirits business in the Virgin Islands takes place on the island of St. Thomas. On St. Thomas, warehouse space suitable for the operation of a wholesale distilled spirits business is scarce and expensive because of the restricted terrain. An entrant in the Virgin Islands wholesale distilled spirits market would need adequate and accessible storage space for its distilled spirits products on St. Thomas to have a successful business.

The potential for litigation under the Virgin Islands wrongful termination statute helps to protect Topa's exclusive rights to distribute the various brands of distilled spirits in the Virgin Islands and makes it difficult for a potential or existing competitor to obtain the rights to distribute these brands. This potential for litigation and the scarcity of warehouse space on St. Thomas are among the most important barriers to entry which make entry for a competitor difficult and costly, and significant entry into the Virgin Islands wholesale distilled spirits market has not occurred in at least ten years.

B. Effects on Competition

Through entry into the market and a series of acquisitions of competitors, Topa acquired the exclusive Virgin Islands distribution rights to almost every brand of distilled spirits in the world market. Topa has retained these distribution rights through continuing contractual relationships, both written and oral, with its suppliers. As a result of its acquisitions, and its retention of the exclusive distribution rights acquired, in 1991 Topa had a market share of approximately 96% of wholesale distilled spirits sold in the Virgin Islands market.

The United States filed its complaint because the effect of the contracts in restraint of trade by which Topa obtained and has retained its monopoly position has been to lessen competition substantially in the wholesale distribution of distilled spirits in the Virgin Islands. Retailers are deprived of alternative sources for competing products. Suppliers are also deprived of the benefits of free and open competition, in part because Topa has inherent conflicts of interest in the representation of their distilled spirits products and cannot represent all competing brands equally.

III.

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The United States and Topa have stipulated that the Court may enter the proposed Final Judgment after compliance with the APPA. The stipulation provides that entry of the Final

Judgment does not constitute any evidence or admission by any party with respect to any issue of fact or law. Under the provisions of the APPA, the proposed Final Judgment may not be entered unless the Court finds that entry is in the public interest. The Department believes that the proposed Final Judgment provides an adequate remedy for the alleged violation and is in the public interest. The term of the proposed Final Judgment is five years.

The Final Judgment allows suppliers of distilled spirits to leave Topa if they desire and also reduces substantial barriers to competition in the wholesale distilled spirits market in the Virgin Islands.

Paragraph IV.A orders Topa to take no action under any contract or under Title 12A, Sections 131 and 132, of the Virgin Islands Code (the local statute that protects dealers from wrongful termination by a supplier) to prevent its suppliers from canceling their distribution arrangements for distilled spirits, whether written or not, with Topa upon thirty-days' written notice and appointing a new wholesaler instead. If a supplier does cancel its distribution arrangements, Topa must, at the supplier's request, sell back to the supplier all of the distilled spirits Topa bought from the supplier and otherwise assist in the orderly disposition of the existing inventory of the supplier's product.

Under this provision of the Final Judgment, any dissatisfied supplier will be free to find an alternative

distributor if the supplier chooses to do so, and, moreover, a potential new wholesaler can freely solicit the business of any supplier. The Final Judgment also provides that Topa must waive its rights under the Virgin Islands statute which allows a dealer to sue a supplier for wrongful termination. Topa's waiver of its rights under this statute removes a significant potential impediment to a supplier changing wholesalers, and also removes a major potential problem for any wholesaler trying to take brands away from Topa.

Qualified personnel, with the necessary connections with the retail trade, are difficult to find in the Virgin Islands. Paragraphs IV.B and IV.C may help an entrant to hire and retain qualified personnel to run a distilled spirits business in the Virgin Islands without undue interference from Topa.

Paragraph IV.B orders Topa not to enter into with, or enforce or attempt to enforce against, any officer of Topa, any written contract, agreement or covenant not to compete in the distilled spirits industry in the Virgin Islands; and not to counter an offer of employment to any officer of Topa from any wholesaler with which a Topa supplier has entered into any arrangement to distribute its distilled spirits in the Virgin Islands. Otherwise, Topa may give its officers raises, bonuses and promotions in the ordinary course of business, counter offers of employment from distributors not engaged in the distribution of distilled spirits and take action against its former officers for the unlawful disclosure of trade secrets.

Paragraph IV.C orders Topa not to make unsolicited offers to hire any executive employee of any wholesaler with which a supplier has entered into any arrangement to distribute its distilled spirits in the Virgin Islands for two years following the opening for business of the new wholesaler, unless the employee has previously resigned from or been terminated by such wholesaler.

Paragraph IV.D orders Topa not to refuse to deal with any retailer because that retailer deals with another wholesaler. Topa has the Virgin Islands distribution rights for almost every major brand of distilled spirits available in the world market. Consequently, even if Topa loses some brands to a new or existing wholesaler, Topa will retain enormous influence over retailers. This provision will prevent Topa from abusing that position in the retail trade and will help ensure that a new or existing wholesaler will be able to compete fairly in the marketplace.

Paragraph IV.E orders Topa not to prevent, or attempt to prevent, any wholesaler with which a supplier has entered into any arrangement to distribute its distilled spirits in the Virgin Islands from obtaining warehouse space for the distribution of distilled spirits. This provision helps ensure that a Topa competitor will be able to obtain warehouse space for its products. Under the wording of this provision, the United States can seek Court-ordered relief should Topa do anything to prevent a competitor from obtaining warehouse

space. The provision allows Topa to obtain warehouse space for its own use, if it is acquired in "the ordinary course of business" and is an "ordinary and necessary" business requirement.

Paragraph IV.F orders Topa not to, directly or indirectly, merge or consolidate with, or acquire securities of, any other wholesaler without obtaining the prior written consent of the Antitrust Division of the Department of Justice. Paragraph IV.G also orders Topa not to acquire, without obtaining the prior written consent of the Antitrust Division of the Department of Justice, either any quantity in excess of 5% of a wholesaler's assets, excluding inventory, applied to the wholesale distribution of distilled spirits in the Virgin Islands, or any quantity in excess of 30% of a wholesaler's inventory of distilled spirits.

Topa is also ordered, within thirty days of the entry of this Final Judgment, to deliver to all suppliers who have contracts then-in-existence with Topa, written or otherwise, by certified letter or its equivalent (necessary because so many of the suppliers are not in the United States), a copy of the Final Judgment.

IV.

REMEDIES AVAILABLE TO POTENTIAL LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal

court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust actions under the Clayton Act. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no prima facie effect in any private lawsuit that may be brought against the defendants.

V.

PROCEDURES AVAILABLE FOR MODIFICATION OF
THE PROPOSED FINAL JUDGMENT

As provided by the APPA, any person believing that the proposed Final Judgment should be modified may submit written comments within the sixty day period from the date of publication in the Federal Register to John T. Orr, Chief, Atlanta Field Office, Antitrust Division, U.S. Department of Justice, Suite 1176, 75 Spring Street, S.W., Atlanta, GA 30303, (404) 331-7100. These comments, and the Department's responses, will be filed with the Court and published in the Federal Register. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent at any time prior to entry. The proposed Final

Judgment provides that the Court retains jurisdiction over these actions, and any party may apply to the Court for any order necessary or appropriate for their modification, interpretation or enforcement.

VI.

ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, litigation seeking structural relief, including forcing Topa to unilaterally terminate its distribution arrangements with some of its suppliers. The United States rejected that alternative because such structural relief would place an unacceptably large burden on the third-party suppliers. Moreover, the relief in the proposed Final Judgment presents an effective means to improve the level of competition in the Virgin Islands wholesale distilled

spirits market without creating a regulatory environment that might interfere with free market forces.

VII.

DETERMINATIVE DOCUMENTS

No documents were determinative in the formulation of the proposed Final Judgment. Consequently, the United States has not attached any such documents to the proposed Final Judgment.

Dated:

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