

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA, :
 :
 Plaintiff, :
 :
 v. : Civil Action No.
 :
 WHOLESALE TOBACCO DISTRIBUTORS OF : 77 Civ. 805 (CMM)
 NEW YORK INC.; :
 METROPOLITAN TOBACCO COMPANY, INC.; :
 VALLEY STREAM DISTRIBUTORS CO., INC.; :
 MODERN TOBACCO COMPANY, INC.; :
 J. ROSENBERG & SONS TOBACCO AND :
 CONFECTIONERS, INC.; :
 SANDERS-LANGSAM TOBACCO CO., INC. :
 WILLIAM BLOOMROSEN & SON, INC.; :
 JOS. A. SCHRAGER, INC.; :
 NU SERVICE TOBACCO CO., INC.; :
 GLOBE WHOLESALE COMPANY, :
 :
 Defendants. :
 :
-----X

The United States of America, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act (15 U.S.C. 16(b)), hereby submits this Competitive Impact Statement relating to the proposed Consent Judgment submitted for entry in this civil antitrust proceeding.

I

NATURE OF THE PROCEEDINGS

The United States, on February 17, 1977, filed a civil antitrust action under Section 4 of the Sherman Act (15 U.S.C. § 4) alleging that the above named defendants and unnamed co-conspirators from at least as early as 1965 had combined and conspired in violation of Section 1 of the Sherman Act (15 U.S.C. § 1) to raise, fix, and stabilize the wholesale prices at which cigarettes were sold in New York City.

Entry by the Court of the proposed Consent Judgment will terminate the action, except that the Court will retain jurisdiction over the matter for possible further proceedings,

within the twenty-five years next ensuing, which may be needed to interpret, modify or enforce the Judgment or to punish violations of any of the provisions of the Judgment.

II

DESCRIPTION OF THE PRACTICES INVOLVED IN THE ALLEGED VIOLATIONS

The defendants include the largest direct jobbers of cigarettes in New York City. The combined sales of cigarettes by the defendants in New York City in 1975 exceeded \$150 million and accounted for approximately 45 percent of all cigarettes sales by direct jobbers in New York City during that year. Cigarettes are manufactured at facilities located outside the State of New York, and are purchased by the defendants and shipped regularly and continuously in interstate commerce from other states into the State of New York for sale by the defendants in New York City.

For the purpose of forming and effectuating the combination and conspiracy, the defendants and co-conspirators communicated to one another at meetings of the defendant Wholesale Tobacco Distributors of New York Inc., in telephone conversations, and on other occasions, intention to raise the wholesale prices at which cigarettes are sold in New York City; jointly established in some cases the specific amount and in others the range by which such prices were to be increased; and jointly established a date on which such increases were to become effective. The Complaint alleges further that, as a result of the conspiracy, the wholesale prices of cigarettes in New York City have been fixed, raised, and maintained at artificial and non-competitive levels; purchasers of cigarettes have been deprived of free and open competition; and competition in the sale of cigarettes has been restrained.

III

EXPLANATION OF THE PROPOSED CONSENT JUDGMENT

The United States and the defendants have stipulated that the proposed Consent Judgment, in the form negotiated by and among the parties, may be entered by the Court at any time after compliance with the Antitrust Procedures and Penalties Act. The stipulation among the parties provides that there has been no admission by any party with respect to any issue of fact or law. Under the provisions of Section 2(e) of the Antitrust Procedures and Penalties Act, entry of the proposed Judgment is conditioned upon a determination by the Court that the proposed Judgment is in the public interest.

A. Prohibited Conduct

The proposed Judgment will prohibit each of the defendants from entering into any agreement with a direct jobber or subjobber of cigarettes to raise, fix, stabilize, or maintain prices or other terms or conditions at which cigarettes are offered for sale; establishing or determining dates for any change in prices at which cigarettes are offered for sale; establishing the amount or range of amount by which the price of cigarettes offered for sale shall be changed. The defendants will be enjoined from communicating to any direct jobber of cigarettes the actual or proposed prices or changes in price for any cigarettes offered for sale; and, the actual or proposed dates for any changes in the price of cigarettes offered for sale.

The defendants will be permitted, however, to communicate such information as is necessary to the bona fide purchase or sale of cigarettes between and among direct jobbers and/or subjobbers, or the announcing by any direct jobber and/or subjobber any price or proposed price changes

to any subjobber or retailer of cigarettes. Additionally, the defendant Wholesale Tobacco Distributors of New York Inc. may assist in the enforcement of federal, state, and local laws and regulations prohibiting the hijacking or bootlegging of cigarettes or the counterfeiting of tax stamps. Thus, any direct jobber may communicate pricing information to the Managing Director of the Wholesale Tobacco Distributors of New York Inc. solely for dissemination to federal, state or local law enforcement authorities. The Managing Director of the Wholesale Tobacco Distributors of New York Inc. may not, however, communicate such pricing information to any other direct jobber or subjobber.

The defendant Wholesale Tobacco Distributors of New York Inc. is prohibited from having any meeting of its members at which the prices of cigarettes offered for sale are communicated in any way by its officers, directors, agents, employees or members.

The defendant Wholesale Tobacco Distributors of New York Inc. is required by the Consent Judgment to conform its rules, regulations, by-laws, practices and policies to the terms of the Judgment and to furnish a copy of the Final Judgment to each of its members, both within ninety (90) days from the date of its entry. Then within one hundred twenty (120) days of entry, the amended by-laws, rules, and regulations will be served upon plaintiff, filed with the Court and furnished to each member.

Each defendant direct jobber is required to furnish within ninety (90) days of entry a copy of the Final Judgment to each of its officers and directors as well as each of its agents and employees having any responsibility for sales or pricing of cigarettes.

B. Scope of the Proposed Judgment

The proposed Judgment applies to each defendant, its officers, directors, agents, employees, subsidiaries, successors, assigns and to those persons in active concert or participation with any of them who shall receive actual notice of this Final Judgment by personal service or otherwise. For a period of five (5) years from the date of entry, each defendant shall require as a condition of sale of all or substantially all of its assets used in the distribution of cigarettes, that the acquiring party agree to be bound by the provisions of this Final Judgment. The acquiring party is required to file with the Court and serve upon plaintiff within thirty (30) days prior to the transfer of ownership its consent to be so bound.

The defendants are bound by the prohibitions of the proposed Judgment for a period of twenty-five (25) years from the date of its entry and thereafter the Judgment shall terminate and cease to be effective.

The Judgment applies to each defendant's activities wherever they may occur.

C. Effect of the Proposed Judgment on Competition

The relief encompassed in the proposed Consent Judgment is designed to prevent any recurrence of the conduct alleged in the Complaint. The prohibitive language of the Judgment should ensure that no future agreements or combinations between or among the defendants, between any defendant and a direct jobber, or between any defendant and a subjobber, to fix, raise, maintain or stabilize the wholesale price of cigarettes will be arranged.

The Judgment provides methods for determining defendants' compliance with the terms of the Judgment. The Department of Justice, through duly authorized representatives, may interview officers, employees and agents of each defendant regarding its compliance with the Judgment. Representatives of the Department are also given access, upon reasonable

notice, to examine each defendant's records for possible violations of the Judgment and to request defendants to submit reports to the Department of Justice on matters contained in the Judgment.

It is the opinion of the Department of Justice that the proposed Consent Judgment provides fully adequate provisions to prevent continuance or recurrence of violations of the antitrust laws charged in the complaint. In the Department's view, disposition of the lawsuit without further litigation is appropriate in that the proposed Judgment provides all the relief which the Department sought in its Complaint, and the additional cost of litigation necessarily involved if the issues were litigated would not result in any additional relief. Accordingly, the public interest is best benefited by the proposed consensual disposition of the action.

IV

ALTERNATIVE REMEDIES CONSIDERED BY THE ANTITRUST DIVISION

The defendants initially proposed a Consent Judgment which the Antitrust Division concluded would not ensure that the conspiracy charged in the Complaint would not continue or recur. The Division responded to the defendants proposed Judgment with a counter-proposal from which the final Consent Judgment was negotiated.

The primary point of difference that was ultimately compromised between the parties related to the communication of price information between direct jobbers. The defendants responded to the Division's prohibition, except for bona fide sales between direct jobbers, by stating that communication of pricing information was necessary to combat bootleggers and hijackers of cigarettes as well as those who would counterfeit cigarette tax stamps. Defendants reasoned that they could not assist law enforcement agencies by providing information on unreasonably low cost retail selling prices unless they could check the legitimate direct jobbers to determine at what price they were selling to the suspected retailer.

The Division suggested that the Managing Director of defendant Wholesale Tobacco Distributors of New York Inc. could perform the investigative tasks required and still refrain from passing competitive pricing information from one direct jobber to another. The defendants agreed with the Division's proposed solution to the problem and the second proviso in paragraph VI was included in the Final Judgment.

The defendants initially demanded that the scope of the Final Judgment be limited to their activities in New York City. However, the defendants admitted that some of them, in addition to operating in New York City, operated outside of the city and in other states. Accordingly, defendants withdrew their objection to the extended coverage.

V

REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGATION

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 such person has suffered as well as costs and reasonable attorney fees. Entry of the proposed Consent Judgment in this proceeding will neither impair nor assist the bringing of any such private actions. Under the provision of Section 5(a) of the Clayton Act (15 U.S.C. § 16(a)) this Consent Judgment has no prima facie effect in any lawsuits which may be pending or hereafter brought against the defendants.

XI

PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED JUDGMENT

As provided by the Antitrust Procedures and Penalties Act, any person believing that the proposed Judgment should be modified may submit written comments to Ralph T. Giordano, Antitrust Division, U.S. Department of Justice, Room 3630, 26 Federal Plaza, New York, New York 10007, within the

sixty (60) day period provided by the Act. These comments and the Department's response to them, will be filed with the Court and published in the Federal Register. All comments received will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Judgment at any time prior to its entry if it should determine that some modification of the proposed Judgment is necessary. The proposed Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for such order as may be necessary or appropriate for its modification, interpretation or enforcement.

VII

ALTERNATIVES TO THE PROPOSED CONSENT JUDGMENT

The alternative to the proposed Judgment was a full trial of the issue on the merits and on relief. The Antitrust Division considers the substantive language of the Final Judgment to be of sufficient scope and effectiveness to make litigation on the issues unnecessary, as the Judgment provides appropriate relief against the violations charged in the Complaint.

VIII

OTHER MATERIALS

No materials and documents of the type described in Section 2(b) of the Antitrust Procedures and Penalties Act (15 U.S.C. § 16) were considered in formulating this proposed Judgment. Consequently, none are submitted pursuant to such Section 2(b).

Dated: DEC 13 1978

ROBERT A. McNEW

DONALD FERGUSON

Attorneys, Department of
Justice,

Antitrust Division
26 Federal Plaza, Room 3630
New York, New York 10007