IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. UNIVERSAL SHIPPERS ASSOCIATION, INC., Defendant.	Civil Action No.: 96-1154-A Filed: August 22, 1996

COMPETITIVE IMPACT STATEMENT

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h), the United States submits this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry against and with the consent of defendant Universal Shippers Association, Inc. ("Universal") in this civil proceeding.

I.

NATURE AND PURPOSE OF THE PROCEEDING

On August 22, 1996, the United States filed a civil antitrust Complaint alleging that Universal Shippers Association, Inc. ("Universal") entered into an agreement with an ocean common carrier that unreasonably restrains competition for ocean transportation services in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

On the same date, the United States and Universal filed a Stipulation by which they consented to the entry of a proposed Final Judgment designed to undo the challenged agreement and prevent any recurrence of such agreements in the future.

Entry of the proposed Final Judgment will terminate this action, except that the Court will retain jurisdiction over the matter for any further proceedings that may be required to interpret, enforce or modify the Judgment or to punish violations of any of its provisions.

II.

PRACTICES GIVING RISE TO THE ALLEGED VIOLATION

Defendant Universal is a Delaware corporation with its principal place of business in Bedford, Virginia. A shippers' association is a group of ocean transportation customers ("shippers") that consolidates or distributes freight for its members on a nonprofit basis in order to secure volume discounts. Universal is itself a shippers' association and is composed of member shippers' associations and large independent distillers that ship their own products. Universal accounts for about half of the wine and spirits carried across the North Atlantic.

Prices in the ocean shipping industry are not set in a vigorously competitive market. The ocean shipping industry is comprised of both conference and independent ocean common carriers. A conference is a legal cartel of ocean common carriers; its members receive immunity from the antitrust laws (46 U.S.C. App. § 1701, *et seq.*, "1984 Shipping Act") to agree on prices and engage in other otherwise

illegal concerted activity. There are over 15 carriers that serve the North Atlantic trade between the United States and Europe, but the majority of these are members of the Trans-Atlantic Conference Agreement ("TACA"). TACA is a conference that has received antitrust immunity to jointly fix prices and limit capacity in the North Atlantic trade. Their prices are set forth in tariffs filed with the Federal Maritime Commission ("FMC") and are available to all shippers. Lykes Bros. Steamship Co., Inc. ("Lykes") is not a member of TACA. Lykes is an ocean common carrier that provides ocean transportation services for cargo worldwide, including services in the North Atlantic trade between the United States and Northern Europe. It operates as an independent carrier in the North Atlantic, offering transportation services to all shippers at tariff prices that it sets independently. In trades with a significant conference, such as the North Atlantic trade, independents as well as the conference possess some degree of market power over freight rates because there are relatively few separate sellers.

Under the 1984 Shipping Act, independent carriers or conferences may enter into service contracts with shippers or shippers' associations. In a service contract, a shipper or shippers' association commits to provide a certain minimum quantity of cargo over a fixed period, and the ocean carrier or conference commits to a certain price schedule based on that volume. Service contract prices are typically lower than the tariff prices.[1]

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[1]Independent carriers and conferences may also enter into service contracts with non-vessel operating common carriers ("NVOCCs"). An NVOCC offers

Universal entered into a service contract with Lykes on or about October 26, 1993, for the ocean transportation of wine and spirits from Northern Europe to the United States. The Lykes/Universal contract contained the following "automatic rate differential clause":

> Carrier guarantees that rates and charges in this Contract shall at all times be at least 5% lower than any other tariff, Time Volume or other service contract rates for similar commodities at a lesser volume and essentially similar transportation service. As necessary, Carrier shall reduce rates/charges in this Contract as necessary to honor this guarantee, promptly informing the Association and the FMC.

This clause requires Lykes to charge competing shippers or shippers' associations that purchase lesser volumes than Universal a rate that is at least 5% higher than Universal's.

Other shippers and shippers' associations compete with Universal and its members for importing wines and spirits into the United States. Universal's competitors seek to minimize their costs by, inter alia, obtaining the lowest possible rates for the ocean transportation of wine and spirits. But the automatic rate differential clause limited Lykes' incentive to offer to Universal's competitors transportation rates as favorable as Lykes could otherwise offer. To comply with the clause, Lykes must either offer these shippers prices that are at least 5% higher than the prices in Universal's service contract, or it must lower Universal's price for

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transportation services to shippers but does not operate the vessels. NVOCCs typically consolidate the freight of small shippers and then arrange for carriage of the consolidated freight.

all of Universal's service contract shipments in order to maintain the 5% differential. The latter is not an attractive alternative for Lykes, given Universal's volume. And in either case, Universal's competitors pay prices 5% higher than Universal — regardless of Lykes' cost of providing them with transportation — which adversely affects their ability to compete with Universal.

Where there are few separate sellers, as is the case here, an automatic rate differential clause in effect places a tax on the buyer's competitors. There is a danger that this tax will protect the buyer from competition from firms whose costs may otherwise be lower than its own, thus erecting barriers to competition. It is the raising of these barriers to competition with Universal, which already has a substantial market presence, that constitutes the unreasonable restraint of trade in this case.

III.

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The Plaintiff and Universal have stipulated that the Court may enter the proposed Final Judgment after compliance with the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h). The proposed Final Judgment provides that its entry does not constitute any evidence against or admission of any party concerning any issue of fact or law.

Under the provisions of Section 2(e) of the Antitrust Procedures and Penalties Act 15 U.S.C. § 16(e), the proposed Final Judgment may not be entered

unless the Court finds that entry is in the public interest. Section VIII(C) of the proposed Final Judgment sets forth such a finding.

The proposed Final Judgment is designed to eliminate the automatic differential clause from defendant's contracts for the provision of ocean liner transportation services with ocean common carriers or conferences. Under Section IV of the proposed Final Judgment, Universal is restrained and enjoined from maintaining, adopting, agreeing to, abiding by, or enforcing an automatic rate differential clause in any contract with an ocean common carrier or conference. Section VIII(A) of the proposed Final Judgment provides for a term of ten years. Section V nullifies any automatic rate differential clauses currently in effect in any of Universal's contracts with an ocean common carrier or conference.

Section VI(A) of the proposed Final Judgement requires Universal to send a copy of the Final Judgment to each ocean common carrier whose contract with Universal contains an automatic rate differential clause. Section IV(B) requires Universal to provide a copy of the Final Judgment to each director and officer at the time they take office, and to those employees that negotiate contracts for the provision of ocean liner transportation services, and to maintain a record and log of those signatures that they received, read, understand, and agree to abide by the Final Judgment. Section VI also obligates Universal to maintain an antitrust compliance program that meets the obligations specified in Section VI(C). In addition, Section VII of the Final Judgment sets forth a series of measures by which

the plaintiff may have access to information needed to determine or secure Universal's compliance with the Final Judgment.

The relief in the proposed Final Judgment removes the contractual clause that requires the ocean common carrier or conference to place in essence a 5% "tax" on the shipping costs of Universal's competitors. It restores to Universal's competitors the ability to compete for the lowest shipping prices.

IV.

ALTERNATIVE TO THE PROPOSED FINAL JUDGMENT

The alternative to the proposed Final Judgment would be a full trial on the merits of the case. In the view of the Department of Justice, such a trial would involve substantial costs to both the United States and Universal and is not warranted because the proposed Final Judgment provides relief that will fully remedy the violations of the Sherman Act alleged in the United States' Complaint.

V.

REMEDIES AVAILABLE TO PRIVATE 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 damage suffered, as well as costs and reasonable attorney's fees. Entry of the proposed Final Judgment will neither impair nor assist in the bringing of such actions. 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 subsequent action that may be brought against the defendant in this matter.

VI.

PROCEDURES AVAILABLE FOR
MODIFICATION OF THE PROPOSED FINAL 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 Roger W. Fones, Chief; Transportation, Energy, and Agriculture Section; Department of Justice, Antitrust Division; Liberty Place Building, Suite 500; 325 Seventh Street, N.W.; Washington, D.C. 20530, within the 60-day period provided by the Act. Comments received, and the Government's responses to them, 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, pursuant to Paragraph 2 of the Stipulation, to withdraw its consent to the proposed Final Judgment at any time before its entry if the Department should determine that some modification of the Judgment is warranted in the public interest. The proposed Judgment itself provides that the Court will retain jurisdiction over this action, and that the parties may apply to the Court for such orders as may be necessary or appropriate for the modification, interpretation, or enforcement of the Judgment.

VII.

DETERMINATIVE DOCUMENTS

No materials and documents of the type described in Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b), were considered in formulating the proposed Judgment, consequently, none are filed herewith.

Dated:

Respectfully submitted,

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