

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

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UNITED STATES OF AMERICA, :

Plaintiff, :

v. :

TOBACCO DISTRIBUTORS' ASSOCIATION OF N.J.; :

CONSOLIDATED SERVICE DISTRIBUTORS, INC.; : Civil No. 79-1003 (FBL)

EISLER & COMPANY, INC.; :

GLIKIN BROTHERS; : PROPOSED CONSENT JUDGMENT:

J. COSTAGLIOLA, INC.; : COMPETITIVE IMPACT

J. MINKIN TOBACCO & CANDY CO.; : STATEMENT

JERSEY CITY TOBACCO COMPANY; :

PATERSON TOBACCO & CONFECTIONERY CO.; : Filed: November 27, 1979

PINE LESSER & SONS, INC.; and :

WILLIAM SCHOENBERG, INC., :

Defendants. :

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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 April 2, 1979, 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 coconspirators from at least as early as 1969 and continuing thereafter through at least August 1977, the exact dates being unknown to the plaintiff, had combined and conspired in violation of Section 1 of the Sherman Act (15 U.S.C. § 1) to fix and raise the prices of cigarettes sold to retailers in the State of New Jersey. The Complaint alleges further that, as a result of the conspiracy, the prices of cigarettes to retailers in the State of New Jersey were fixed at and raised to non-competitive levels; price competition in the sale of cigarettes to retailers

in the State of New Jersey was restrained and retailers of cigarettes in the State of New Jersey were deprived of the benefits of full, free, and open competition in the purchase of cigarettes.

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 10 years next ensuing, which may be needed to interpret, modify or enforce the judgment or to punish alleged violations of any of the provisions of the judgment.

II

DESCRIPTIONS OF THE PRACTICES INVOLVED IN THE ALLEGED VIOLATIONS

All cigarettes sold in New Jersey are produced outside of the State. New Jersey law requires that only cigarette distributors it licenses may purchase cigarettes for resale within the State, and these distributors are required to affix a tax stamp before sale to licensed wholesalers and retailers. The defendants, except the Tobacco Distributors' Association of N.J. (TDA), are among the largest cigarette distributors licensed by the State of New Jersey. The TDA, a trade association, is a corporation composed of over 30 licensed cigarette distributors. The distributor defendants, all of whom are members of the TDA, regularly purchased substantial quantities of cigarettes, all of which were shipped in a continuous and uninterrupted flow in interstate commerce from manufacturers outside of the State of New Jersey directly to the defendants within the State. The defendants and coconspirators, beginning as early as 1969 and continuing until at least August 1977, held meetings wherein they discussed and agreed upon the prices at which the distributor defendants and coconspirators would sell cigarettes to retailers, and the TDA disseminated price lists which reflected these agreed to prices.

The sale of cigarettes by the distributor defendants and coconspirators during the period from 1973 through August 1977 totalled about \$500 million.

III

EXPLANATION OF THE PROPOSED CONSENT DECREE

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, adhering to, maintaining, furthering, or enforcing directly or indirectly any agreement, understanding, plan, or program with any distributor or wholesaler to:

(1) raise, fix, stabilize or maintain prices or other terms or conditions at which cigarettes are offered for sale to retailers; or (2) establish or determine dates for any change in price at which cigarettes are offered for sale to retailers.

The defendants also will be prohibited: (1) from communicating information, directly or indirectly to any distributor or wholesaler concerning the prices of any cigarettes offered for sale; or the date or dates for any changes in the prices of cigarettes offered for sale; or from arranging, sponsoring, attending, or participating in any meeting or other assembly of cigarette distributors or wholesalers in which proposals or statements concerning such prices and dates are made. The distributor defendants, however, will be permitted under the proposed judgment, only in connection with the bona fide sale

of cigarettes to another distributor, wholesaler or retailer, to announce the price or any contemplated change in price of cigarettes to that purchaser.

Each distributor defendant shall require as a condition of the sale or other disposition of all, or substantially all of its assets: (1) that the acquiring party agree to be bound by the provisions of the judgment; and (2) that the acquiring party file with the Court and serve upon the plaintiff its consent to be bound by the judgment at least 15 days prior to such sale or disposition.

Each distributor defendant will be required to furnish to each of its officers and agents and each employee having any responsibility for the pricing of cigarettes a copy of the Final Judgment within 60 days after its entry or within 60 days of the appointment or other designation of a person to such office or responsibility and will file with this Court and serve upon plaintiff a copy of an affidavit as to the fact and manner as to its compliance with such requirement.

The proposed judgment also will prohibit the defendant TDA from directly or indirectly receiving and collecting any information concerning present or proposed future prices for cigarettes and distributing such information by printed price lists or otherwise. The TDA, however, will be permitted to receive and collect this information if specifically requested in writing by the Division of Taxation of the Department of the Treasury of the State of New Jersey in connection with, or in furtherance of, its enforcement activities. The TDA may communicate such information only to the Division of Taxation. The defendant TDA is not prohibited by the judgment from receiving and collecting information pertaining to a distributor's cost of selling cigarettes for the purpose of communicating this information to the Legislature of the State of New Jersey or the Congress of the United States in connection with pending or proposed legislation.

The defendant TDA will be required within 30 days after entry of judgment to furnish a copy of the Final Judgment to each of its members and within 60 days after entry of judgment shall file an affidavit with the Court and serve a copy upon plaintiff as to the fact and manner of its compliance with such requirement. Also, the TDA, within 30 days following the enrollment of a new member or re-enrollment of a former member, shall mail a complete copy of the Final Judgment to each such new or re-enrolled member. The TDA also will be required to establish a program for dissemination of, education as to, and compliance with the judgment, advising each of its officers, its executive director, and each of its members of its and their obligations under the judgment. The program is to include the Final Judgment, in whole or in part, or an explanation of it together with a statement of the TDA's policy to comply with it, in an appropriate manual or internal memorandum. Within 120 days following entry of the judgment and thereafter for a period of five years, upon written request of the plaintiff on or about the anniversary date of the Final Judgment, the TDA will serve upon the plaintiff an account of all steps it has taken during the preceding year to discharge its obligation to inform and explain the judgment to its officers and members. It shall include with such account copies of all written directives the TDA issued during the prior year with respect to compliance with the terms of the judgment.

B. Scope of the Proposed Judgment

The proposed judgment applies to the defendant TDA, its officers, agents, executive director and members; to each distributor defendant, its officers, agents, servants and employees and to the persons in active concert or participation with any of the foregoing who shall receive actual notice of the Final Judgment by personal service or otherwise.

The defendants are bound by the provisions contained in the proposed judgment for a period of 10 years from the date

of its entry; and thereafter, the judgment shall terminate and cease to be effective unless the Court either modifies or vacates the judgment.

The judgment would apply to the defendants' activities wherever they may occur in the United States.

C. Effect of the Proposed Judgment on Competition

The relief encompassed in the proposed 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 will be arranged by, between or among the defendants to fix and raise prices of cigarettes offered for sale to retailers in the State of New Jersey.

The judgment provides methods for determining defendants' compliance with the terms of the judgment. The Department of Justice, through duly authorized representatives, may on written request interview officers, employees, and agents of each defendant regarding the defendant's compliance with the judgment. The Department also is given access, upon written request and on reasonable notice, to examine each defendant's records for possible violation of the judgment and to request each defendant to submit reports to the Department 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.

IV

ALTERNATIVE REMEDIES CONSIDERED BY THE GOVERNMENT

The defendants made one proposal for a consent judgment which the Government concluded failed to ensure that the conspiracy charged in the Complaint would not recur. The Government, at the request of defendants, made a counter-

proposal from which the proposed judgment was negotiated.

Briefly summarized, the defendants proposed that:

(1) the TDA not be dissolved as requested by the Government in its Complaint;

(2) the TDA and the distributor defendants be prohibited from engaging in price-fixing activities; provided, however, that such prohibition shall not prevent the TDA from informing its members of changes in the minimum prices of cigarettes as announced by the State of New Jersey, nor prevent any defendant from complying with the New Jersey Unfair Cigarette Sales Act of 1952, nor prevent any defendant from lobbying for changes in minimum prices, nor restrict any distributor defendant in the communication of cigarette price information necessary to effect a bona fide purchase or sale of cigarettes between and among cigarette distributors, nor prevent any distributor defendant from communicating cigarette price information to the TDA solely for dissemination to Federal, State, or local law enforcement officers; and

(3) the Final Judgment shall expire five (5) years from the date of its entry by the Court.

The Government, satisfied by the defendants' showing that the TDA, in addition to its participation in the conspiracy to fix cigarette prices, had engaged in lobbying, collective bargaining and other lawful activities, did not require that the TDA be dissolved as part of its counterproposal. It included, however, a separate Section (VIII) in its counterproposal which prohibits the TDA from collecting, receiving, or distributing cigarette price information except if it is specifically requested to do so in writing by the Division of Taxation of the Department of the Treasury of the State of New Jersey in connection with and in furtherance of its law enforcement activities, and permits the TDA to communicate the price information so collected only to that Division. The Government's counterproposal also permitted

the TDA to receive and collect cost information pertaining to a distributor's cost of selling cigarettes for the purpose of communicating such information to the Legislature of the State of New Jersey or the Congress of the United States in connection with pending or proposed legislation. Also, the same Section of the Government's counterproposal requires the TDA to serve copies of the Final Judgment on all of its present members and any new or former members it may thereafter enroll, and it is required to institute a program for the dissemination of, education as to, and compliance with the Final Judgment. This Section also provides that, on specific anniversary dates for a period of five (5) consecutive years after entry of the Final Judgment, the Government may require the TDA to give an account of the steps it has taken to discharge its compliance obligation.

The Government in its counterproposal also provided that all of the defendants be prohibited from communicating cigarette price information to any distributor or subjobber or meeting with them for such purpose except that, in connection with a bona fide sale, a defendant may communicate cigarette price information to the purchaser in the transaction.

The Government's counterproposal provides that the Final Judgment shall remain in existence for a period of ten (10) years following its entry. The Government believes that any period less than 10 years will not be sufficient to ensure that the effects of the wrongful conspiracy participated in by the defendants will be fully dissipated.

V

REMEDIES AVAILABLE TO POTENTIAL 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 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 antitrust actions. Under the provisions of Section 5(a) of the Clayton Act (15 U.S.C. § 16(a)) this proposed judgment has no prima facie effect in any lawsuits which may be pending or hereafter brought against the defendants.

VI

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 60-day period provided by the Act. These comments, and the Department'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 to withdraw its consent to the proposed judgment at any time prior to its entry if it should determine that some modification of it 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 considered by the Government was litigating the issues on the merits and on relief. In the Government's view, disposition of the law suit without further litigation is appropriate in that the proposed judgment provides substantially all the relief which the Government 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 Government believes entry of the proposed judgment is in the public interest.

VIII

No material and documents of the type described in Section 2(b) of the Antitrust Procedures and Penalties Act were considered in formulating the proposed judgment. Consequently, none are submitted pursuant to such Section 2(b).

Dated: New York, New York
November 27, 1979

/s/ Augustus A. Marchetti
AUGUSTUS A. MARCHETTI

/s/ Bruce Repetto
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