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ANTITRUST

CLIENT PUBLICATION

May 21, 2014

Ski Manufacturers Hit for Off-Piste Non-Compete

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When it comes to the US Federal Trade Commission, healthy competition for ski manufacturers is just as important off the slopes as on. Ski equipment makers, Tecnica Group and Marker Völkl, learned this lesson on Monday when they agreed to settle FTC charges that they unlawfully agreed not to compete for each company's respective ski endorsers or employees.[1] This case serves as an important reminder that non-compete agreements remain an area of focus for the US antitrust authorities.

Ski Manufacturers Barred from Non-Compete Agreements

In 1992, Tecnica Group and Marker Völkl entered into a legitimate collaboration to market and distribute complementary ski equipment. At the time, Tecnica was an Italian manufacturer of ski boots, and the Swiss-based Marker Völkl sold skis. Around 2004, in conjunction with their collaboration, the companies agreed not to compete with each other for prominent skiers' endorsements.

Ski equipment companies typically compete to secure a skier's endorsement. Endorsements from prominent skiers are an effective tool for marketing ski equipment and increasing sales, but the compensation, support services and discounted gear can make such endorsements costly. According to the FTC, the alleged purpose of the non-compete agreement was to prevent Tecnica and Marker Völkl from bidding up the cost of securing a skier's endorsement.

During the course of the collaboration, Tecnica acquired ski brands Nordica and Blizzard, product lines that competed directly with Marker Völkl. Although Tecnica's ski brands

[1] *In re Marker Völkl*, File No. 121 0004, *available at*, http://www.ftc.gov/enforcement/cases-proceedings/121-0004/marker-volkl-matter; *In re Tecnica Group*, File No. 121 0004, *available at*, http://www.ftc.gov/enforcement/cases-proceedings/121-0004/tecnica-group-matter.

remained outside the scope of the marketing and distribution collaboration, the non-compete provision applied company-wide to all products. In 2007, the companies expanded the scope of their 2004 agreement not to solicit, recruit or contact any skier who had previously endorsed their rival's skis to also apply to each company's employees. The collaboration ended in 2008. Although the FTC's Complaint provides no details, it appears that the non-compete agreements may have survived past the end of the marketing and distribution collaboration.

In its Complaint, the FTC alleged that the agreements not to compete were "not reasonably necessary for the formation or efficient operation of the collaboration between the companies." According to the FTC, the companies' failure to provide a "legitimate (cognizable and plausible) efficiency justification" for the non-competes supported its determination that the non-competition agreements "adversely affected competition for – and the compensation available to – athletes and employees whose services were unrelated to the collaboration."

Applying the analysis used in the *Polygram* case, in which two music producers agreed to a non-compete in conjunction with their joint venture to distribute albums from a Three Tenors concert,[2] the FTC alleged that the non-competition agreement between Tecnica and Marker Völkl was overly broad because its application exceeded the scope of the collaboration. Similar to the *Polygram* case, the FTC appears to have condemned the agreements in question as "inherently suspect" or quasi per se unlawful. The FTC appears to have presumed harm to skiers and employees without any market analysis or finding of market power. For example, it is far from clear on the meager facts provided in the Complaint that athletes did not have multiple alternative options for lucrative ski equipment endorsements.

While it is not part of the FTC's analysis, it seems probable that, had the non-compete been limited to the ski endorsers and employees covered by the marketing and distribution collaboration (and not broadly to products outside the scope of the collaboration), an otherwise "inherently suspect" agreement may have been defendable because it could be supported by a cognizable justification. The proposed consent orders prohibit each company from entering into similar unlawful agreements in the future.

The FTC's History of Policing Non-Competes

The case against the ski manufacturers is only the latest in the FTC's quest to eliminate unlawful non-compete agreements. In 2008, Dick's Sporting Goods agreed to settle FTC charges that its subsidiary, Golf Galaxy, had illegally agreed with a potential competitor, Golf Canada, to divide up the US market for the sale of golf equipment.[3] As was the case with Tecnica and Marker Völkl, the market allocation agreement originated as part of a legitimate collaboration, in place from 1998 until 2004, under which Golf Galaxy to provide certain consulting and training services to Golf Canada in return for shares of Golf Canada, a seat on its board and cash payments. The consulting agreement also barred Golf Canada from competing with Golf Galaxy.[4] In 2004, the parties entered into a new contract which terminated the

[2] *In re Polygram Holding, Inc.,* 136 F.T.C. 310 (2003), *aff'd*, 416 F.3d 29 (D.C. Cir. 2005).

[3] *In re Dick's Sporting Goods, Inc*., No. C-4240, *available at*, http://www.ftc.gov/enforcement/cases-proceedings/071-0196/dicks-sporting-goods-inc-matter.

[4] Specifically, Golf Canada was prohibited from operating retail stores in the US during the term of the agreement plus five years and from engaging in business outside Canada that competed with or was similar to Golf Galaxy's business for the duration of the agreement plus two years.

consulting services but extended the duration of the provision barring Golf Canada from establishing retail operations in the US. The new contract also prohibited Golf Galaxy from opening a store in Canada for at least four years.

Applying an analysis similar to the one most recently used in the case against the ski manufacturers, the FTC alleged that the 2004 agreement between Golf Galaxy and Golf Canada was "not reasonably necessary for the formation, efficient operation, or dissolution of the collaboration between the parties." The consent agreement prohibits Golf Galaxy from allocating markets for the sale of golf equipment and from enforcing the non-compete provisions in the 2004 agreement.

In early 2013, the FTC again demonstrated its intolerance for non-competition agreements that serve no pro-competitive purpose when it filed a complaint against bleach producers and distributors, Oltrin Solutions and JCI Jones Chemicals.[5] Under an agreement the parties entered in 2010, North Carolina-based Oltrin agreed to pay JCI $5.5 million for, among other things, JCI's promise to no longer sell bleach in North or South Carolina for a period of six years.

According to the FTC, the agreement eliminated competition between the companies in North and South Carolina. The parties agreed to a consent order that required Oltrin not only to release JCI from the non-compete agreement, but also to take actions to facilitate JCI's re-entry into the North and South Carolina bleach market.

Non-Compete Challenges by the Antitrust Division

The United States Department of Justice Antitrust Division has demonstrated equal determination in its battle against unlawful non-compete agreements. In 2010, the Antitrust Division reached a settlement with six high tech companies that prevents them from entering into non-solicitation agreements for employees.[6] According to the Antitrust Division's Complaint, Adobe Systems Inc., Apple Inc., Google Inc., Intel Corp., Intuit Inc. and Pixar entered into bilateral "no cold call" (or "no poach") agreements that prevented them from soliciting each other's employees.

Cold calling, which involves communicating directly with another company's employee who has not otherwise applied for a job opening, is an effective method of recruiting in the high tech industry. The Antitrust Division's Complaint alleged that no cold call agreements reduced the companies' ability to compete for high tech workers and lacked any pro-competitive justification. The settlement not only prohibits the companies from agreeing to a ban on cold calling, but also more broadly prohibits the companies from entering into agreements that prevent soliciting, recruiting or otherwise competing for employees.

eBay Inc. was one of the most recent targets of the Antitrust Division's unlawful non-compete crusade when, in 2012, the Antitrust Division filed a complaint alleging that the company had entered into an agreement with Intuit that prevented each company from recruiting employees from the other and that further prohibited eBay from hiring Intuit employees who approached eBay.[7] The Antitrust Division alleged that the agreement's sole purpose was to limit competition for employees between the two companies, which resulted in employees' lost opportunities for better jobs or higher pay.

5 *Oltrin Solutions, LLC; JCI Jones Chemicals, Inc.*, No. C-4388, *available at*, http://www.ftc.gov/enforcement/cases-proceedings/1110078/oltrin-solutions-llc-company-jci-jones-chemicals-inc.

6 *United States v. Adobe Systems, Inc., Apple Inc., Google Inc., Intel Corp., Intuit, Inc., and Pixar*, Case No. 1:10-cv-01629 (D.D.C.), *available at*, http://www.justice.gov/atr/cases/adobe.htm.

7 *United States v. eBay*, Inc., Case No. 5:12-cv05869 (N.D. Cal.), *available at*, http://www.justice.gov/atr/cases/ebay2.html.

Earlier this month, eBay agreed to a settlement that would bar it for five years from entering or maintaining competitive agreements relating to the hiring and retention of employees.

Lessons Learned

The aforementioned cases suggest that the US antitrust authorities are not afraid to question the scope or purpose of non-competition agreements between competitors. While non-competition obligations are common features in many collaborations, joint ventures and transactions, they must be carefully crafted to ensure they are truly ancillary to a legitimate venture and limited in scope to that which is reasonably necessary to protect the legitimate interests of the parties. A further reason for caution is the potential for follow-on civil litigation that often follows agency enforcement in the US. A class action following the Antitrust Division's no poach prosecutions recently settled for $324 million.[8]

The FTC's Complaint also serves as an important reminder that the antitrust laws apply equally to agreements not to compete by buyers (i.e., those purchasing labor or endorsement services) and not just to sellers.

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[8] Although recent news suggests that the settlement may be in doubt as inadequate. *See Silicon Valley no-poaching settlement in doubt*, Howard Mintz, MERCURY NEWS, May 12, 2014, *available at* http://www.mercurynews.com/business/ci_25745903/silicon-valley-no-poaching-settlement-doubt.