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IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff,	:	**COMPLAINT FOR INJUNCTIVE RELIEF**
vs.	:	
NUTTALL, INC. d.b.a. NUTTALL BERNINA, NORMAN D. NUTTALL, RHONDA LOPEZ, D&D INCORPORATED d.b.a. DAVE'S BERNINA,	:	Civil No. 000903757
	:	Filed: May 11, 2000
Defendants.	:	JUDGE: Frederick

The State of Utah, acting through the Attorney General, brings this civil antitrust action for equitable and other relief against NUTTALL, INC. d.b.a. NUTTALL BERNINA, NORMAN D. NUTTALL, RHONDA LOPEZ, and D&D INCORPORATED d.b.a. DAVE'S BERNINA (collectively "Defendants") to prevent and enjoin Defendants from continuing to violate the

antitrust laws by a variety of actions that unlawfully restrained competition through agreements between competitors to divide markets and allocate customers. Specifically, Defendants, as dealers of Bernina brand sewing machines, (1) had a mutual understanding to divide markets and allocate customers and (2) had a tacit agreement not to sell products, or to submit non-competitive bids, in the geographic territory assigned to the other through a market division agreement. Moreover, Defendants NUTTALL BERNINA, and RHONDA LOPEZ threatened DAVE'S BERNINA that NUTTALL BERNINA would sell Bernina brand sewing machines in DAVE'S BERNINA'S dominant area at low prices to punish DAVE'S BERNINA if it did not agree to continue participating in the plan to divide markets.

As a result of this conduct, public school districts in Salt Lake County have been deprived of effective competition in public bidding for sewing machine contracts that specified the Bernina brand. In addition, consumers and school districts in Salt Lake County have paid higher prices for Bernina brand sewing machines as a result of the agreements to divide markets among dealers of this brand of sewing machines.

Plaintiff complains and alleges as follows:

I. JURISDICTION AND VENUE

1. This action is filed by the State of Utah under the Utah Antitrust Act, §76-10-918, Utah Code Ann. to prevent and restrain violations of the Act by Defendants.

2. The unlawful acts and practices alleged in this Complaint occurred in Salt Lake

County, Utah County, and elsewhere in the State of Utah. Venue is proper in this district under §76-10-924 Utah Code Ann. as Defendant RHONDA LOPEZ resides in this county, and the principal place of business of the corporate Defendant, NUTTALL BERNINA, is in this county.

3. Defendant NUTTALL BERNINA operates retail stores in Salt Lake County and Utah County, selling sewing machines to public and consumer customers throughout Utah. Defendant DAVE'S BERNINA operates one retail store in Utah County, selling sewing machines to public and consumer customers in Utah. The Court has jurisdiction over this action and over the parties pursuant to §§76-10-916 and 76-10-918, Utah Code Ann.

II. DEFENDANTS

4. NUTTALL INC., doing business as NUTTALL BERNINA ("NUTTALL BERNINA") is a Utah Corporation with its principal place of business in Salt Lake City. It is an authorized dealer of the Bernina brand of sewing machines which it sells from five locations in Utah from Ogden to Provo. It has been in business since 1978.

5. NORMAN D. NUTTALL is a resident of Davis County, Utah. He is the founder, president, and a director of NUTTALL BERNINA.

6. RHONDA LOPEZ is a resident of Salt Lake County, Utah. She is the majority owner, vice president, corporate secretary, and a director of NUTTALL BERNINA.

7. D&D INCORPORATED, doing business as DAVE'S BERNINA ("DAVE'S BERNINA") is a Utah corporation with its principal place of business in Provo, Utah. It is an

authorized dealer of the Bernina brand of sewing machines which it sells from a single location in Provo. It has been in business since 1960.

III. BACKGROUND

8. Sewing machines are sold in trade and commerce in Utah to public entities and to individual consumers. Bernina brand sewing machines are manufactured by Bernina of Switzerland and imported into the United States by a subsidiary, Bernina of America.

9. New Bernina brand sewing machines are sold in the United States only by retail dealers ("dealers") authorized by Bernina of America to sell its products. Sales can be made only from individual locations approved by Bernina of America. While Bernina of America requires that sales of the Bernina brand sewing machines be made only from sales locations approved by the company, Bernina of America does not assign exclusive territories to its authorized dealers. Dealers are free to sell sewing machines to buyers in any location in the dealer's state. However, for sales in areas where the dealer cannot service the sewing machines being sold, the dealer must pay a fee to the dealer in the area where the customer is located. In addition, Bernina of America places limitations on a dealer's ability to sell Bernina machines over the Internet.

10. In addition to NUTTALL BERNINA and DAVE'S BERNINA, there are five other authorized Bernina dealers in Utah. These are located in St. George, Vernal, Moab, Richfield, and Logan.

11. DAVE'S BERNINA and NUTTALL BERNINA are the only authorized Bernina

retail dealers with a principal place of business or with approved retail locations in the Wasatch Front area.

12. Sales to public customers generally are accomplished through the authorized dealers' submission of bids in response to "Invitations to Bid" issued by school districts for use in high school vocational and educational programs. In many cases the school district's Invitation to Bid will result in Bernina being the only brand of sewing machine that will meet the stated bid specifications. This may occur because the school is seeking additional machines identical to other machines in use at the school or where the school prefers a particular brand of machines (either because the educator prefers one brand or the school determines that a particular brand results in better instruction). In such cases, the Invitation to Bid may specify the Bernina brand or may accomplish the same result by the use of bid specifications that can be met only by the Bernina brand of machines.

13. If a school's Invitation to Bid is written in a way that only the Bernina brand machine meets the bid specifications, competition in responding to the Invitation to Bid will exist only to the extent that more than one authorized Bernina dealer submits competitive bids to the school.

14. Prior to 1985, the manufacturer of Bernina sewing machines, Bernina Switzerland, offered its dealers a school district discount. To ensure that the discount was passed on to the schools, dealers were limited in the markup they were allowed to charge the school

districts, above the discounted dealer price. Under this limited markup system, dealers were not able to charge school districts prices significantly higher than the dealer's costs. Consequently, dealers had no economic incentive to submit bids to school districts outside their immediate areas and dealers in the immediate area of schools buying Bernina products could not take advantage of the limited number of dealers bidding for school contracts by increasing the amount of the bid.

15. Around 1985, Bernina of America, Inc. was established by the manufacturer to oversee sales in the United States. Around this time, DAVE'S BERNINA and NUTTALL BERNINA began buying their products directly from Bernina of America. Bernina of America continued to offer school district discounts to dealers but has had no policy limiting the size of markups for machines sold to schools. Without a markup limitation, a Bernina dealer would not be constrained in the prices it bid to school districts. If the specifications in the Invitation to Bid did not limit bids to Bernina products, the Bernina dealer's prices would be constrained by the prices expected to be received from dealers selling other brands of sewing machines. If, however, the school district Invitation to Bid was structured so that only Bernina machines would qualify, a Bernina dealer's bid price was constrained only to the extent that the dealer expected other Bernina dealers to submit competitive bids.

16. Between 1985 and 1990 DAVE'S BERNINA, in Provo, and NUTTALL BERNINA, headquartered in Salt Lake City, had an agreement with each other under which each

dealer was understood to have its own exclusive territory and each dealer agreed not to sell Bernina products in the territory "allocated" to the other. DAVE'S BERNINA was understood to have exclusive right to territory in Utah County and NUTTALL BERNINA had Salt Lake County. J. David Borget of DAVE'S BERNINA and NORMAN NUTTALL of NUTTALL BERNINA spoke during this time to coordinate their actions in support of this agreement. On several occasions, DAVE'S BERNINA decided to submit bids outside its agreed-upon territory, into NUTTALL BERNINA'S "allocated" territory, which bids contained a non-competitive, artificially high, price in order to give the appearance of competition, but the bids were designed to make sure that DAVE'S BERNINA did not win the bid. At other times, DAVE'S BERNINA decided to submit "no bid" responses to bid invitations in order not to risk winning a bid outside its "allocated" territory.

17. In about 1990 NUTTALL BERNINA opened a retail store in Utah County. This action angered DAVE'S BERNINA who considered the market-division agreement to have been violated. Nevertheless, until the late 1990s, DAVE'S BERNINA did not compete for school district contracts in Salt Lake County. As described below, even as late as 1999, Defendants considered the market-division agreement still to be in force.

18. In January and again in May 1999, DAVE'S BERNINA was asked to bid on a contract to supply Bernina sewing machines to Granite School District. DAVE'S BERNINA won both those bids and began supplying Bernina machines to several schools in Granite School

District. The Salt Lake City School District also asked DAVE'S BERNINA to bid for a contract to supply sewing machines in Salt Lake City. DAVE'S BERNINA also won that contract, which was awarded in February 1999. NUTTALL BERNINA had bid on both contracts from Granite and Salt Lake school districts, but had submitted a higher price than was bid by DAVE'S BERNINA. The Invitations to Bid for both these contacts specified Bernina sewing machines as the only brand that would satisfy the contract's requirements.

19. Prior to 1999, DAVE'S BERNINA had received requests from Jordan School District to bid on sewing machine contracts and had declined to submit any bids. In May 1999, DAVE'S BERNINA again was solicited to bid for a contract to supply sewing machines to Jordan School District. Jordan's Invitation to Bid specified Bernina machines as the only machines that would qualify for portions of the contract. Based on its successes in Granite and Salt Lake school districts, DAVE'S BERNINA submitted a bid to supply Bernina sewing machines to Jordan School District. NUTTALL BERNINA also submitted a bid to Jordan School District to supply Bernina sewing machines. The contract was awarded to DAVE'S BERNINA on June 15, 1999.

IV. PRODUCT MARKET AND GEOGRAPHIC MARKET ANALYSIS

20. It is common for school district Invitations to Bid to specify Bernina brand sewing machines as the only brand that meets bid specifications. In addition, sales to school districts are accomplished in a unique manner. The product is not sold from a dealer's storefront

and inventory, but is sold through a public bidding process, generally involving the purchase of multiple machines. As a result of the public bidding process, the purchase of multiple units, a lower wholesale price from the manufacturer, and the dealer's hope that school district students who are taught sewing on a Bernina machine are more likely to purchase a Bernina machine for personal use, prices to public school districts are substantially below the price at which Bernina products are sold in retail consumer sales transactions.

21. Because of these unique factors, sales of Bernina sewing machines to school districts are not in the same competitive market as retail sales of Bernina sewing machines. Sales of Bernina sewing machines to public school districts is a separate, relevant product market.

22. Generally, school district contracts require the selling dealer to service the sewing machines during the warranty period. As a result of the low margins and the service obligations, it is impractical for a dealer to sell sewing machines to school districts located a long distance from the dealer. DAVE'S BERNINA and NUTTALL BERNINA are the only authorized Bernina dealers within a 90 mile radius of Salt Lake and Utah counties. The impracticality of servicing bids a long distance from a dealer's location is demonstrated by the fact that authorized Bernina dealers outside the Wasatch Front rarely submit bids for any school district contracts in Salt Lake County or Utah County. The relevant geographic market for sales of Bernina sewing machines to public school districts is Salt Lake and Utah counties.

V. VIOLATIONS ALLEGED

23. NUTTALL BERNINA and DAVE'S BERNINA were competitors for public contracts for the sale of sewing machines to the Jordan, Granite, and Salt Lake school districts and are competitors for retail and public entity sales of Bernina sewing machines in Salt Lake and Utah counties. NUTTALL BERNINA is the largest volume Bernina dealer in the world. DAVE'S BERNINA also ranks among the top Bernina dealers nationwide in sales volume.

24. Shortly after Jordan School District awarded a bid to DAVE'S BERNINA in June 1999 to supply sewing machines to the district, RHONDA LOPEZ called a purchasing official from Jordan School District stating that DAVE'S BERNINA would not be able to provide the service needed by the district for the machines being purchased; falsely reporting that in prior sewing machine sales to Granite School District, DAVE'S BERNINA had not installed the machines as required; and arguing that Bernina's reputation would suffer because of the alleged inability of DAVE'S BERNINA to perform on the contract as required. LOPEZ told the purchasing official that there was an "understood" territorial agreement between NUTTALL BERNINA and DAVE'S BERNINA and that, pursuant to that agreement, DAVE'S BERNINA had given NUTTALL BERNINA permission to perform the service component of the contract awarded to DAVE'S BERNINA.

25. RHONDA LOPEZ also called Susan D. Parker, a regional sales manager for Bernina of America complaining about the actions of DAVE'S BERNINA. As a result of

LOPEZ'S call, Parker called the Jordan purchasing official to discuss the bid of DAVE'S BERNINA implying that NUTTALL BERNINA should be providing any service on machines being purchased by the district. Later, Parker again called the Jordan official, this time indicating that Parker had received incorrect information from LOPEZ and that Bernina of America was supportive of the position being taken by the school district not to release DAVE'S BERNINA from the contract. Parker told the Jordan official that there were no assigned territories for DAVE'S BERNINA or NUTTALL BERNINA.

26. In the meanwhile, NORMAN NUTTALL called David Borget of DAVE'S BERNINA. NORMAN NUTTALL angrily complained to Borget that DAVE'S BERNINA had bid, and won, school district contracts in Granite, Salt Lake, and now Jordan school districts. NORMAN NUTTALL complained that the school district contracts in Salt Lake County belonged to NUTTALL BERNINA and that DAVE'S BERNINA had no business bidding on those contracts. Defendant NORMAN NUTTALL asked Borget: "Are you trying to take over Salt Lake?"

27. In response, Borget informed NORMAN NUTTALL that DAVE'S BERNINA'S bids in Salt Lake County were a result of a) NUTTALL BERNINA's decision in 1988 to open a retail store in Utah County, where DAVE'S BERNINA is headquartered and inside the territory "allocated" to DAVE'S BERNINA under the market-division agreement reached between the two dealers in 1985 and b) a desire to increase the chances that the school districts would, in the

end, select the Bernina brand for their sewing needs.

28. NORMAN NUTTALL threatened to cut prices at the Utah County NUTTALL BERNINA store as long as needed to hurt the business success of DAVE'S BERNINA. NORMAN NUTTALL threatened Borget saying "I'll run you out of business."

29. By the end of this conversation, Borget and NORMAN NUTTALL agreed that LOPEZ would contact Jordan School District saying that DAVE'S BERNINA was withdrawing from the contract. The two dealers intended that this action would result in NUTTALL BERNINA taking over the Jordan School District contract that had been awarded to DAVE'S BERNINA. Borget then sent Jordan's actual purchase order for the Bernina machines to RHONDA LOPEZ, at NUTTALL BERNINA.

30. During this time, LOPEZ also called Borget, trying to convince DAVE'S BERNINA to withdraw from the Jordan contract. During this call, Borget suggested to LOPEZ that in return for withdrawing from the Jordan contract, NUTTALL BERNINA should close its store in Utah County, or at least cease selling Bernina products in that store. LOPEZ rejected the proposal. However, based on his earlier conversations with NORMAN NUTTALL Borget decided to go ahead and withdraw from the Jordan contract.

31. As a result of the oral agreement with NORMAN NUTTALL Borget allowed LOPEZ to contact Jordan School District and indicate an intention for DAVE'S BERNINA to withdraw from the contract. In a call to Borget from Jordan School District, Borget informed

Jordan School District purchasing officials that he was feeling pressure from NUTTALL BERNINA and that he had sent Jordan's purchase order to NUTTALL BERNINA, to allow NUTTALL BERNINA to perform on the contract. DAVE'S BERNINA sent a letter to Jordan, declining the award of the contract. DAVE'S BERNINA also sent a copy of this letter to NUTTALL BERNINA.

32. In response to the letter and telephone request from DAVE'S BERNINA Jordan refused to permit the company to withdraw and informed Borget that he was obligated to deliver the products to Jordan, at the prices in the bid of DAVE'S BERNINA. Jordan sent another copy of the purchase order to Borget so DAVE'S BERNINA could place the purchase order with the manufacturer immediately.

33. Borget then contacted LOPEZ informing her that Jordan would not allow DAVE'S BERNINA to withdraw from the bid. LOPEZ then proposed to Borget that DAVE'S BERNINA go ahead and provide the machines to Jordan as required by the contract, but that DAVE'S BERNINA pay to NUTTALL BERNINA the profits from the sales to Jordan and transfer to NUTTALL BERNINA the sales credits (received from the manufacturer and counting towards conditions of a sales contest from Bernina) related to the sales of those machines. DAVE'S BERNINA rejected this proposal.

34. Subsequently, DAVE'S BERNINA discovered that NUTTALL BERNINA placed newspaper advertisements in Utah County offering to sell sewing machines at prices from $200-

$300 below the prices charged by NUTTALL BERNINA in its two Salt Lake City stores. DAVE'S BERNINA interpreted this as a threat by NUTTALL BERNINA to punish DAVE'S BERNINA for bidding on school district contracts in Salt Lake County and as a warning that NUTTALL BERNINA might begin selling machines in Utah County at substantially discounted prices to cut into DAVE'S BERNINA'S profitability.

VI. ANTICOMPETITIVE EFFECTS

35. Defendants' agreements to allocate markets between the two dealers and their attempts to monopolize trade and commerce in the sale of Bernina brand sewing machines in Salt Lake County and Utah County have reduced competition for sales of these products to public and consumer purchasers in Utah through distortions of the bidding process. For public bids for these products, the agreements resulted in no effective competition for Invitations for Bid that specified the Bernina brand machines.

36. Defendants' conduct resulted in consumers and public entities paying higher prices for Bernina machines than would have occurred in the absence of the conspiracy to restrain trade, the conspiracy to monopolize, and the unilateral attempts to monopolize by NUTTALL BERNINA, NORMAN NUTTALL, and RHONDA LOPEZ.

VII. FIRST CAUSE OF ACTION

(Attempted Monopolization in Violation of §76-10-914(2))

NUTTALL BERNINA, NORMAN NUTTALL, and RHONDA LOPEZ

37. The allegations of paragraphs 1 - 36 of the Complaint are realleged and incorporated by reference here with the same force and effect as though said paragraphs were set forth here in full.

38. From at least as early as 1985 and continuing at least through the end of 1998, Defendants NUTTALL BERNINA, NORMAN NUTTALL, and RHONDA LOPEZ attempted to monopolize and conspired with DAVE'S BERNINA to monopolize trade and commerce in the sale of Bernina sewing machines in Salt Lake County, Utah by a) having an understanding that DAVE'S BERNINA would not sell sewing machines in Salt Lake County and would not submit competitive bids to public school districts in Salt Lake County or that DAVE'S BERNINA would withdraw from a contract already awarded to it in Salt Lake County, b) threatening DAVE'S BERNINA with low price sales if it did not cease competing in Salt Lake County, c) contacting Jordan School District, the public entity that had awarded the bid to DAVE'S BERNINA, disparaging the competitor and claiming authority from DAVE'S BERNINA for NUTTALL BERNINA to assume responsibility for the Jordan contract, and d) attempting to get the manufacturer's representative to assist NUTTALL BERNINA, NORMAN NUTTALL, and RHONDA LOPEZ in getting the contract assigned to NUTTALL BERNINA, a per se violation

of the Utah Antitrust Act, §76-10-914(2), Utah Code Ann.

VIII. SECOND CAUSE OF ACTION

(Conspiracy in Restraint of Trade in Violation of §76-10-914(1))

ALL DEFENDANTS

39. The allegations of paragraphs 1 - 38 of this Complaint are realleged by reference here with the same force and effect as though said paragraphs were set forth here in full.

40. From at least as early as 1985 and continuing at least through the end of 1998, Defendants a) entered into and maintained agreements to prevent competition for the sale of Bernina brand sewing machines in Salt Lake County and Utah County and enforced those agreements through threats and through price signaling, b) agreed with DAVE'S BERNINA that it would submit high, non-competitive, bids when requested to bid on contracts in Salt Lake County, c) agreed with DAVE'S BERNINA that DAVE'S BERNINA would withdraw from a contract already awarded, and d) pressured DAVE'S BERNINA to pay to the NUTTALL Defendants the profits expected from the Jordan contract, a per se violation of the Utah Antitrust Act §76-10-914(1), Utah Code Ann.

IX. REQUESTED RELIEF

Plaintiff requests:

1. That all agreements between DAVE'S BERNINA and NUTTALL BERNINA allocating territories between them and any attempts between them and actions by either of them

not to compete against the other be adjudged and decreed to be per se unlawful and in violation of §76-10-914(1), Utah Code Ann.

2. That Defendants' conduct as described in this Complaint be adjudged and decreed to be per se unlawful attempts to monopolize and a conspiracy to monopolize trade and commerce in the sale of Bernina sewing machines in Salt Lake and Utah counties in violation of §76-10-914(2), Utah Code Ann.

3. That Defendants be permanently enjoined from any agreements, contracts, or conspiracies in restraint of trade or commerce. In particular that Defendants be permanently enjoined from, in any manner, directly or indirectly, continuing, maintaining, or renewing these agreements, or from engaging in any other combination, conspiracy, agreement, understanding, plan, program, or arrangement having the same effect as the alleged violations, including:

a. Any agreements or understandings with other retail dealers of sewing machines regarding exclusive territories for any dealer;

b. Declining to sell any products or submit bids for any products or submitting a non-competitive bid as a result of any understanding or agreement on territorial markets;

c. Participating in any meetings, telephone calls, or other discussions with competing sewing machine dealers relating to matters which are the subject of competition between them. Prohibited conduct includes any discussions of

territories, prices to be offered, whether bids will be submitted or withdrawn, or similar type activities;

4. That Plaintiff recover fines in amounts the Court deems proper, not to exceed $100,000 per violation from each Defendant NORMAN NUTTALL and RHONDA LOPEZ and a fine not to exceed $500,000 per violation from Defendants NUTTALL BERNINA and DAVE'S BERNINA;

5. That Plaintiff recover the costs of this action; and

6. That Plaintiff have such other and further relief as the case requires and the Court deems proper.

DATED This 11th day of May, 2000.

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THE STATE OF UTAH