

COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 50/CR/May12
015024

In the matter between:

The Competition Commission

Applicant

and

Oceana Group Ltd
Oceana Brands Ltd

First Respondent
Second Respondent

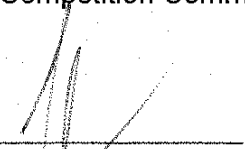
Panel : N Manoim (Presiding Member), Y Carrim (Tribunal Member) and A Wessels (Tribunal Member)

Heard on : 19 June 2012

Decided on : 19 June 2012

Order

The Tribunal hereby confirms the order as agreed to and proposed by the Competition Commission and the respondent, annexed hereto marked "A".



Presiding Member
N Manoim

Concurring: Y Carrim and A Wessels



competitiontribunal south africa

Form CT 6

About this Form

This Form is issued in terms of the Competition Tribunal Rules.

Please indicate in the space provided the nature of your motion, including specific reference to the relevant section of the Act or Tribunal Rules.

If this Notice of Motion concerns a matter being brought in terms of Division E of Part 4 of the Competition Tribunal Rules, it must comply with the requirements of Competition Tribunal Rule 42(3).

Contacting the Tribunal

The Competition Tribunal
Private Bag X24
Sunnyside
0132
Republic of South Africa
tel: 27 12 394 3300
fax: 27 12 394 0169
e-mail: ctsa@comptrib.co.za

Notice of Motion

Date: 7-May-2012 **File #** CC Case No.2008JUL3827

To: The registrar of the Competition Tribunal

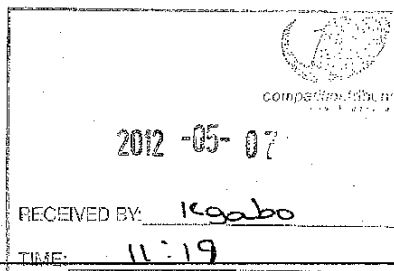
Concerning the matter between:

The Competition Commission (Applicant)

and Oceana Group Ltd and Oceana Brands Ltd (Respondent)

Take notice that the Applicant intends to apply to the Tribunal for the following order:

Confirmation of the Consent Agreement entered into between the Competition Commission and the Respondent(s) as a Consent Order in terms of Section 49D of the Competition Act 89 of 1998, as amended, read together with Competition Commission Rule 18 and Competition Tribunal Rule 24.



Name and Title of person authorised to sign:

Wendy Mkhwanazi: Chief Legal Counsel

Authorised Signature:

Date:

7-May-2012

For Office
Use Only:

Tribunal file number:

Date filed:

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

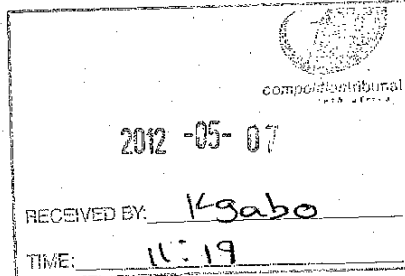
CT Case No: _

CC Case No.: 2008JUL3827

In the matter between:

COMPETITION COMMISSION

and



Applicant

OCEANA GROUP LIMITED

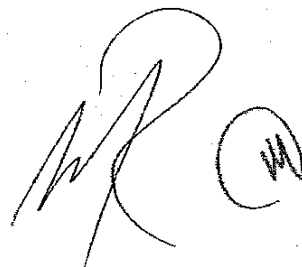
First Respondent

OCEANA BRANDS LIMITED

Second Respondent

CONSENT AGREEMENT BETWEEN THE COMPETITION COMMISSION, OCEANA BRANDS LIMITED AND OCEANA GROUP LIMITED IN RESPECT OF AN ALLEGED CONTRAVENTION OF SECTIONS 4(1)(b)(i) AND 4(1)(b)(ii) OF THE COMPETITION ACT, 1998 (ACT NO. 89 OF 1998), AS AMENDED

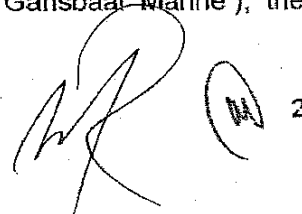
The Competition Commission ("**Commission**"), Oceana Group Limited ("**Oceana Group**") and Oceana Brands Limited ("**Oceana Brands**") (collectively "**Oceana**") hereby agree that application be made to the Competition Tribunal ("**Tribunal**") for confirmation of this Consent Agreement as an order of the Tribunal in terms of section 49D as read with sections 58(1)(b) and section 59(1)(a) of the Competition Act, 1998 (Act No. 89 of 1998), as amended, on the terms set out below:



1. Definitions

For the purposes of this Consent Agreement the following definitions shall apply:

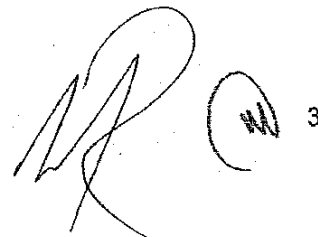
- 1.1 **"Act"** means the Competition Act, 1998 (Act No. 89 of 1998), as amended;
- 1.2 **"Commission"** means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the Act, with its principal place of business at 1st Floor, Mulayo Building (Block C), the DTI Campus, 77 Meintjies Street Sunnyside, Pretoria Gauteng;
- 1.3 **"Commissioner"** means the Commissioner of the Commission, appointed in terms of section 22 of the Act;
- 1.4 **"Complaint"** means the complaint initiated by the Commissioner in terms of section 49B of the Act under case number 2008Jul3827 (as extended);
- 1.5 **"Consent Agreement"** means this agreement duly signed and concluded between the Commission and Oceana;
- 1.6 **"Oceana"** means Oceana Group Limited and its wholly owned subsidiary, Oceana Brands Limited;
- 1.7 **"Oceana Brands"** means Oceana Brands Limited, a wholly owned subsidiary of Oceana Group Limited, a company duly incorporated and registered in terms of the company laws of South Africa, with its principal place of business at 7th Floor, Oceana House, 25 Jan Smuts Street Foreshore, Cape Town 8001;
- 1.8 **"Oceana Group"** means Oceana Group Limited, a company duly incorporated and registered in terms of the company laws of South Africa, with its principal place of business at 7th Floor, Oceana House, 25 Jan Smuts Street Foreshore, Cape Town 8001;
- 1.9 **"Parties"** means the Commission and Oceana;
- 1.10 **"Respondents"** means the firms against whom an investigation was initiated, being Oceana Group, Foodcorp (Pty) Ltd ("Foodcorp"), Premier Fishing SA (Pty) Ltd ("Premier Fishing"), Gansbaai Marine (Pty) Ltd ("Gansbaai Marine"), the



South African Pelagic Fish Processors Association ("SAPFPA") and the South African Pelagic Fishing Industry Association ("SAPFIA"), Pioneer Fishing (Pty) Ltd ("Pioneer Fishing"), Saldanha Foods (Pty) Ltd, West Point Processors (Pty)Ltd, West Point Fishing Company (Pty) Ltd, Saldanha Bay Canning Co (Pty) Ltd (collectively referred to as "Saldanha Foods"), SA Vismeelbemarkings Maatskappy (Pty) Ltd ("SAVM"), South African Deep Sea Trawling Association and Sea Harvest Corporation (Pty) Ltd ("Sea Harvest") Terresan Pelagic Fishing (Pty) Ltd ("Terresan") Paternoster Visserye (Pty) Ltd ("Paternoster Visserye"), Tiger Brands Limited ("Tiger Brands") and Brimstone Corporation Investments Ltd ("Brimstone").

2. The Complaint and Complaint Investigation

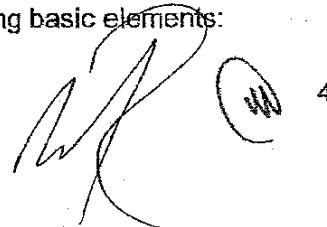
- 2.1 On 8 July 2008 the Commissioner initiated an investigation against Oceana Group, Foodcorp, Premier Fishing, Gansbaai Marine, SAPFPA and SAPFIA in respect of allegations that the above mentioned entities engaged in price fixing and/or the fixing of trading conditions and/or market allocation in contravention of section 4(1)(b) of the Act in respect of pelagic fish. Pelagic fish comprises three species of fish namely anchovy, pilchards and red eye.
- 2.2 On 19 January 2010, the Commission extended the Complaint to include additional respondents, namely Pioneer Fishing, Saldanha Bay Canning, SAVM, SA Deep Sea Trawling Association and Sea Harvest. The Commission also supplemented its complaint with allegations that the Respondents had entered into exclusive supply agreements with trawlers for the supply of pelagic fish, in contravention of sections 5(1), 8(c) and 8(d)(i) of the Act as well as with an allegation of market allocation involving Oceana Group and Sea Harvest.
- 2.3 On 23 March 2012 the Commission further extended the Complaint to include additional respondents, namely Saldanha Foods (Pty) Ltd, West Point Processors (Pty)Ltd, West Point Fishing Company (Pty) Ltd, Terresan Pelagic Fishing (Pty) Ltd Paternoster Visserye (Pty) Ltd, Tiger Brands Limited and Brimstone Corporation Investments Ltd. At the conclusion of its investigation of the above complaints, the Commission found that:



3

2.3.1 Raw fish price formula

- 2.3.1.1 There has been a longstanding and open practice within the small pelagic fish industry for factory owners, vessel owners / operators, skippers and crew (all acting through their respective representative bodies) to agree an industry wide formula linking the payment of boat owners, skippers and crew to an average annual fishmeal price achieved within the industry ("the raw fish price formula").
- 2.3.1.2 Oceana Brands, Foodcorp, Premier Fishing SA, Gansbaai Marine, Terresan, Paternoster Visserye, Pioneer Fishing and Saldanha Foods are all active in the market for processing pelagic fish into canned fish and/or fish meal and are therefore in a horizontal relationship in terms of the Act.
- 2.3.1.3 Oceana Brands, Foodcorp, Premier Fishing SA, Terresan, Paternoster Visserye, Pioneer Fishing and Saldanha Foods are vertically integrated and they also compete in the upstream market for catching pelagic fish.
- 2.3.1.4 The above firms are members of SAPFPA. During 1999 to 2010 they, in meetings of SAPFPA and through correspondence distributed by SAPFPA to its members, took decisions to implement the historical raw fish price formula (as had been agreed with vessel owners / operators, skippers and crew) as payment for the service of catching raw pelagic fish as follows:
- 2.3.1.4.1 SAVM calculates the average fish meal price achieved during the preceding calendar year and circulates it annually to SAPFPA and its members.
- 2.3.1.4.2 The raw fish price is calculated by SAVM and comprises an amount equal to 11% of the average fish meal price achieved during a calendar year and the result of the calculation is provided to SAPFPA and communicated to its members and to the representative bodies for vessel owners, skippers and crew.
- 2.3.1.4.3 This 11% formula comprises the following basic elements:



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2.3.1.4.3.1 4.8825% for basic payment to the skipper and crew of a vessel and;

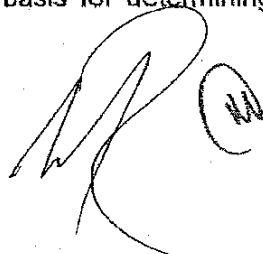
2.3.1.4.3.2 6.1175% for payment to boat owners;

2.3.1.5 All the market participants used the 11% raw fish price formula in respect of payment for the service of catching pelagic fish during the period of 1999 to 2010 whether they attended the SAPFPA meetings or not. However, during 2008 Oceana introduced its own payment mechanism for private boat owners (which was not based on the industry average annual realisation for a ton of fishmeal as announced by SAPFPA). Other market participants still use the 11% formula to date.

2.3.1.6 In addition to the fixing of the raw fish price formula, the factory owners, vessel owners / operators, skippers and crew (all acting through their respective representative bodies) also agreed to associated trading conditions, namely the so-called "voorskot" and "agterskot" payments. In effect these were agreements in respect of advance and catch up payments, which were also published by SAPFPA and that a canned fish bonus would be payable. This, however, differed from processor to processor.

2.3.1.7 In the course of the SAPFPA meetings and negotiations with the representative bodies of vessel owners, skippers and crew, competitively sensitive information was exchanged. This facilitated agreement in respect of the raw fish price formula and its implementation.

2.3.1.8 The above conduct amounts to a contravention of section 4(1)(b)(i) in that the parties agreed to fix the prices payable to vessel owners/ operators, skippers and crew for the services provided by each in the catching of pelagic fish. This was accomplished by continuing to implement the raw fish price formula as a basis for determining the

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amounts payable for the services rendered by the vessel owners/operators, skippers and crew.

2.3.2 Price Fixing in Respect of Quota

2.3.2.1 Oceana Brands and Pioneer Fishing are, as previously mentioned, both active in the market for processing pelagic fish as well as the upstream market for catching pelagic fish and therefore in a horizontal relationship in terms of the Act.

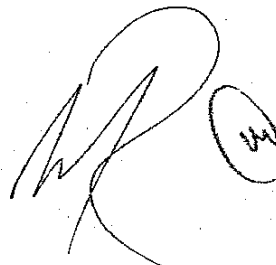
2.3.2.2 During 2006 an agreement was reached between Oceana and Pioneer Fishing to fix the quota rental fees negotiated by Mr Redah de Maine acting on behalf of three quota holding companies in Port Elizabeth in respect of the use of their pilchard quota for the 2006 fishing season

2.3.2.3 The above conduct amounts to a contravention of section 4(1)(b)(i).

2.3.3 Fixing of Prices for Canned Fish

2.3.3.1 Over a period of time Oceana purchased canned pilchards from its competitors Pioneer Fishing, Premier Fishing and Saldanha Bay Canning, and when doing so it frequently agreed to a pricing mechanism separately with each of the 3 above competitors which linked the ex -factory purchase price to Oceana's list price for the sale of canned product.

2.3.3.2 As a consequence of this pricing mechanism Oceana was required to exchange competitively sensitive information regarding market conditions, the list price for its products and the dates for effective list and purchase price increases with its competitors in the market for processing canned fish and they in turn provided similarly competitively sensitive information to Oceana. These arrangements over time enhanced the risk of price rigidity in the downstream canned pilchard market.



6

2.3.3.3 The purchase of canned pilchard using this mechanism took place between 2001 and 2009 and amounts to a contravention of section 4(1)(b)(i) in that the agreements between the parties and the subsequent sharing of sensitive information gave rise to an indirect fixing of the price for canned fish.

2.3.4 **Non-compete Agreement**

2.3.4.1 During its consideration of a merger in 2008 (Competition Tribunal Case No. 130/LM/Dec08) where Brimstone Investment Corporation Limited ("Brimstone"), through a wholly owned subsidiary called Business Venture, was increasing its stake in Sea Harvest from 21.52% premerger to 56.94% post merger, it came to the Commission's attention that there was an agreement concluded in 2000 between Tiger Brands Limited ("Tiger"), Brimstone, Sea Harvest and other shareholders of Sea Harvest which contained provisions constraining competition between Tiger, Brimstone and Sea Harvest.

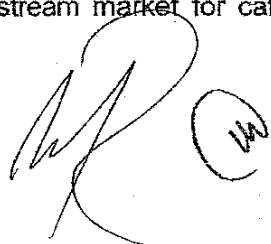
2.3.4.2 The agreement prevents Brimstone and its subsidiaries from venturing into any market in which Sea Harvest is active. This agreement may have prevented Oceana from expanding into Sea Harvest's terrain. Brimstone had a controlling stake in Oceana.

2.3.4.3 Oceana and Sea Harvest have both Tiger and Brimstone as common substantial shareholders. In terms of section 4(2) of the Act they are presumed to have engaged in a horizontal practice.

2.3.4.4 Further, Oceana and Sea Harvest have, during the period 2000 to 2008 implemented the non-compete agreement concluded between Tiger and Brimstone. This conduct is in contravention of section 4(1)(b)(ii) of the Act.

2.3.5 **Market Allocation in Respect of Suppliers**

2.3.5.1 Oceana Brands and Pioneer Fishing are both active in the market for processing pelagic fish as well as the upstream market for catching

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pelagic fish and are therefore in a horizontal relationship in terms of the Act.

2.3.5.2 In 2006 Pioneer and Oceana Brands reached an agreement that they would not compete with regard to each other's suppliers of fish in the Mossel Bay region. Specifically it was agreed that the poaching of Pioneer's fish suppliers in Mossel Bay by Oceana was to be avoided so that Pioneer could meet its prior commitment to supply a quantity of canned product to Oceana Brands.

2.3.5.3 This conduct amounts to a contravention of section 4(1)(b)(ii) of the Act in that the parties agreed to divide markets by allocating suppliers in Mossel Bay.

3. Admissions by Oceana

3.1 Oceana Brands admits it was party to the conduct described in 2.3.1, 2.3.2, 2.3.3 and 2.3.5, and that its involvement therein contravened section 4(1)(b) of the Act.

3.2 With regard to the Commission's findings described in paragraph 2.3.4, Oceana Group admits that Tiger and Brimstone are both substantial shareholders of Oceana Group, and that Tiger and Brimstone are party to the Shareholders' Agreement referred to in paragraph 2.3.4.1.

4. Administrative penalty

4.1 Oceana Brands is liable for and has agreed to pay an administrative penalty sections 58(1)(a)(iii) as read with sections 59(1)(a), 59(2) and 59(3) of the Act, in the amount of R34 750 050 (thirty-four million, seven hundred and fifty thousand and fifty Rands). The administrative penalty represents 5% of Oceana Brands' affected turnover derived from the pelagic fish operations in South Africa in the 2010 financial year.

4.2 Oceana Brands will pay the amount set in paragraph 4.1 to the Commission within 3 (three) months of the date of confirmation of this Consent Agreement as an order of the Tribunal.



8


- 4.3 This payment shall be made to the Commission's bank account, details of which are as follows:

**BANK NAME: ABSA BANK
BRANCH NAME: PRETORIA
ACCOUNT HOLDER: COMPETITION COMMISSION FEES ACCOUNT
ACCOUNT NUMBER: 4050778576
ACCOUNT TYPE: CURRENT ACCOUNT
BRANCH CODE: 323 345**

The payment will be paid by the Commission to the National Revenue Fund in accordance with section 59(4) of the Act.

5. Agreement concerning future conduct

- 5.1 Oceana agrees to fully cooperate with the Commission in relation to the prosecution of the Complaint upon referral. Without limiting the generality of the foregoing, Oceana specifically agrees to:
- 5.1.1 testify in the complaint referral in respect of alleged contraventions covered by this Consent Agreement; and
 - 5.1.2 provide witnesses to testify in the complaint referral (if any) in respect of alleged contraventions covered by this Consent Agreement; and
 - 5.1.3 to the extent that it is in existence, provide evidence, written or otherwise, which is in its possession or under its control, concerning the alleged contraventions contained in this Consent Agreement.
- 5.2 Oceana records that it has ceased its participation in the conduct as described herein and agrees that it will in future refrain from conduct that may give rise to a contravention of section 4(1)(b) of the Act.
- 5.3 For this purpose, Oceana has developed, implemented and is monitoring a competition law compliance programme incorporating corporate governance designed to ensure that its employees, management, directors and agents do not engage in future contraventions of the Act.

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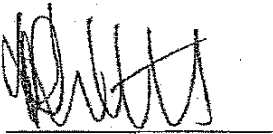
5.4 Oceana will submit a copy of its compliance programme to the Commission within 30 (thirty) days of the date of confirmation of the Consent Agreement by the Tribunal.

6. Full and Final Settlement

This Consent Agreement, upon confirmation as an order by the Tribunal, is in full and final settlement, between the Commission and Oceana, of all proceedings investigated by the Commission under case number 2008JUL3827 (as extended).

Dated and signed at ~~Geneva~~ on the 11 day of April 2012.

For Oceana

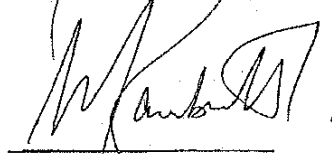


Francois Kuttel

Chief Executive Officer Oceana Group

Dated and signed at ~~Geneva~~ on the 13 day of April 2012.

For the Commission



Shan Ramburuth

Competition Commissioner