

OUR REF: E130124/LL/COM/ss
YOUR REF:
WRITER: Louis Leventis
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ACTION NO.:



**CAMATTA
LEMPENS**
PTY LTD LAWYERS

22 August 2013

EXPRESS POST

FILE No:
DOC:
MARS/PRISM:

Australian Competition
and Consumer Commission
GPO Box 3131
CANBERRA ACT 2601

ABN 34 008 140 332

Level 1
345 King William St
Adelaide SA 5000
T: 08 8410 0211
F: 08 8410 0566
DX: 54202 Adelaide

Dear Sir/Madam

THIRD LINE FORCING NOTIFICATION (FORM G)

We act for RXBRY Pty Ltd, the Applicant in the above matter.

We **enclose** the Third Line Forcing Notification (Form G) together with a cheque in the sum of \$100.00 for the lodgement fee.

Our client claims confidentiality over the matters listed in Attachment 1 – Details of Existing Licensees/Outlets. The Existing Licensees will be notified by circular letter of the outcome if the notification is to stand.

Should you have any queries please contact us.

Yours faithfully
CAMATTA LEMPENS PTY LTD

LOUIS LEVENTIS
Senior Associate
llevantis@camattalempens.com.au

AUST. COMPETITION &
CONSUMER COMMISSION

26 AUG 2013

CANBERRA

Form G
Commonwealth of Australia
Competition and Consumer Act 2010 — subsection 93 (1)

NOTIFICATION OF EXCLUSIVE DEALING

To the Australian Competition and Consumer Commission:

Notice is hereby given, in accordance with subsection 93 (1) of the *Competition and Consumer Act 2010*, of particulars of conduct or of proposed conduct of a kind referred to subsections 44ZZW, 47 (2), (3), (4), (5), (6), (7), (8) or (9) of that Act in which the person giving notice engages or proposes to engage.

PLEASE FOLLOW DIRECTIONS ON BACK OF THIS FORM

1. Applicant

- (a) Name of person giving notice:
(Refer to direction 2)

N96929

RXBRY PTY LTD ACN 123 868 280 ("RXBRY")

- (b) Short description of business carried on by that person:
(Refer to direction 3)

RXBRY is in the business of operating cafes and restaurants and granting Caffe Supremo licensees the right to operate a Caffe Supremo style café/restaurant business ("**the licence business**") on the terms set out in the Licence Agreement between the parties in the Australian market. The licence business involves the sale of products which include meats, poultry, seafood, smallgoods, pasta, pizza, salads, vegetables and beverages (both alcoholic and non-alcoholic) ("**products**") for consumption at Caffe Supremo style cafes/ restaurants.

- (c) Address in Australia for service of documents on that person:

c/- **RXBRY Pty Ltd**, Attention: Mark Vettese, 664 North East Road, Holden Hill SA 5088

2. Notified arrangement

- (a) Description of the goods or services in relation to the supply or acquisition of which this notice relates:

The notification relates to the acquisition of:-

- products;
- Sauces, spices, seasonings, bread, oils, vegetables and dressings used in making the products ("**Ingredients**")

- (b) Description of the conduct or proposed conduct:

See Annexure "A" (parts 1 & 2)

3. Persons, or classes of persons, affected or likely to be affected by the notified conduct

- (a) Class or classes of persons to which the conduct relates:
(Refer to direction 5)

Persons who are licensees or will become licensees of **RXBRY** and who are granted the right to operate a Caffe Supremo licence business on the terms set out in the Licence Agreement between the parties.

- b) Number of those persons:

(i) At present time: 4 – see notation in Attachment of company stores

(ii) Estimated within the next year: 5

- (c) Where number of persons stated in item 3 (b) (i) is less than 50, their names and addresses:

See Attachment 1

4. Public benefit claims

- (a) Arguments in support of notification:
(Refer to direction 7)

See Annexure "A" (part 3)

- (b) Facts and evidence relied upon in support of these claims:

See Annexure "A" (part 3)

5. Market definition

Provide a description of the market(s) in which the goods or services described at 2 (a) are supplied or acquired and other affected markets including: significant suppliers and acquirers; substitutes available for the relevant goods or services; any restriction on the supply or acquisition of the relevant goods or services (for example geographic or legal restrictions):
(Refer to direction 8)

See Annexure "A" (part 4)

6. Public detriments

- (a) Detriments to the public resulting or likely to result from the notification, in particular the likely effect of the notified conduct on the prices of the goods or services described at 2 (a) above and the prices of goods or services in other affected markets:
(Refer to direction 9)

See Annexure "A" (part 5)

- (b) Facts and evidence relevant to these detriments:

See Annexure "A" (part 5)

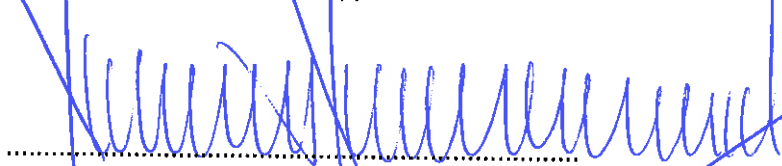
7. Further information

- (a) Name, postal address and contact telephone details of the person authorised to provide additional information in relation to this notification:

Mr Louis Leventis
Camatta Lempens Pty Ltd
Level 1, 345 King William Street
Adelaide SA 5000

Dated: 23 August 2013

Signed by/on behalf of the applicant



**LOUIS LEVENTIS
SENIOR ASSOCIATE**

CAMATTA LEMPENS PTY LTD LAWYERS

DIRECTIONS

1. In lodging this form, applicants must include all information, including supporting evidence that they wish the Commission to take into account in assessing their notification.

Where there is insufficient space on this form to furnish the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the applicant.

2. If the notice is given by or on behalf of a corporation, the name of the corporation is to be inserted in item 1 (a), not the name of the person signing the notice, and the notice is to be signed by a person authorised by the corporation to do so.
3. Describe that part of the business of the person giving the notice in the course of the which the conduct is engaged in.
4. If particulars of a condition or of a reason of the type referred to in section 47 of the *Competition and Consumer Act 2010* have been reduced in whole or in part to writing, a copy of the writing is to be provided with the notice.
5. Describe the business or consumers likely to be affected by the conduct.
6. State an estimate of the highest number of persons with whom the entity giving the notice is likely to deal in the course of engaging in the conduct at any time during the next year.
7. Provide details of those public benefits claimed to result or to be likely to result from the proposed conduct including quantification of those benefits where possible.
8. Provide details of the market(s) likely to be affected by the notified conduct, in particular having regard to goods or services that may be substitutes for the good or service that is the subject matter of the notification.
9. Provide details of the detriments to the public which may result from the proposed conduct including quantification of those detriments where possible.

ANNEXURE "A"

SUBMISSION TO THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION REGARDING THIRD LICE FORCING NOTIFICATION

1. Description of the Conduct or Proposed Conduct (refer to Section 2(b) of Form G)

1.1 The conduct to which this notification relates is the requirement for Caffe Supremo Licensees to acquire:-

- products
- Ingredients

from third party suppliers who have been approved by RXBRY (approved suppliers)

1.2 RXBRY Licences are granted to Licensees on the following basis:-

1.2.1 RXBRY shall:-

- (a) endeavour at all times to arrange sufficient suppliers of the products so as to fulfil the needs of the Licensee;
- (b) at the commencement of the licence supply the Licensee with a list of the products which are available for purchase from approved suppliers and from time to time to update the list.

1.2.2 Approved Products

- (a) The Licensor and the Licensee agree under the Licence Agreement the list of products which have been approved by the Licensor for the sale or use by the Licensee in the licence business. The Licensor is by written notice able to add or remove a product from the list. By definition products includes ingredients.
- (b) Non-approved products which are subsequently approved by the Licensor become approved products unless and until withdrawn. The Licensor may require a Licensee to withdraw from supply in the licence business any Approved Products which in the Licensor's reasonable opinion:-
 - does not conform or no longer conforms with the standards, quality controls and specification for products;
 - does not conform or no longer conforms with the range of products to be supplied;
 - is or may be a health or safety risk.
- (c) Subject to the provisions of the Act the Licensee is to use the Licensee's best endeavours to maintain at all times the level of Approved Products specified by the Licensor from time to time as is necessary for the proper conduct of the licence business. The Licensor is obliged to source all products from such appropriate suppliers that meet standards for quality, reliability and products control.
- (d) Should the Licensee wish to purchase any non-approved products then it must submit all necessary details and samples to the Licensor and should the Licensee wish to purchase any Approved Products from any non-approved supplier then the Licensee must obtain the approval of the Licensor. The Licensor cannot unreasonably withhold consent. On consent being given the supplier becomes an approved supplier.

- (e) The Licensee contractually acknowledges that:-
- (i) The above provisions are reasonable and necessary to maintain strict quality control in respect of the supply of all products to all of the Licensees of the Licensor who sell or use the products; or
 - (ii) It is of essential importance that the Licensee purchases Approved Products only from approved suppliers especially as there are at times benefits to the Licensee and other licensees such as discounts because of bulk buying and maintaining good quality products for sale or use in the licence business.

1.2.3 Rebates

- (a) The Licensor may receive licence fees, royalties, rebates or other financial incentives or benefits ("fees") expressly from manufacturers and suppliers of the Products and this is acknowledged in the Licence Agreement by the Licensee. The amount of the fees vary depending on the commercial arrangements. The Licensor will, in the majority of cases at its discretion, remit a percentage of the rebate to the Caffe Supremo Advertising Fund with the balance used by the Licensor to cover a range of costs which ultimately benefit the Caffe Supremo Licensing system. Typically the rebates retained are used for developing the Caffe Supremo system including research, development, recruitment, supply, overhead, travelling, administration and other costs and expenses. RXBRY discloses to its Licensees in the Disclosure Document and in its Licence Agreement the above matters and accounts to Licensees annually for receipts and expenditure or at other times if requested.
- (b) The Licensee must comply with all directions given by the Licensor in relation to purchases from third party suppliers, including, but not limited to directions related to the acquisition of the fees by the Licensor or the Licensee or both.

1.2.4 General

- (a) Where a hotel or licensed club is licensed to operate a Caffe Supremo style café/restaurant from its premises, beverages may be excluded from the Products as hotels and licensed clubs have their own supply arrangements in respect of beverages with the hotel and licensed club industry.
- (b) Provisions from the Applicant's current Licence Agreement relating to Products is set out in **Attachment 2**.

2. **The Purpose of the Conduct or Proposed Conduct**

- 2.1 RXBRY operates a licence system for its Licensees to sell the products which includes the Ingredients at a retail level to customers who purchase the products from the respective premises and for the advertising and promotion of the licence business under the style and name Caffe Supremo. RXBRY has no direct involvement in the financial side of each licence business.
- 2.2 The prime purpose of the Caffe Supremo licence system is expressed in the Licence Agreement as the Licensees of RXBRY advertising and promoting their respective business for the mutual benefit of each other under the style and business name of Caffe Supremo followed by the geographical location of each licence business.
- 2.3 The purpose of the conduct or proposed conduct referred to in clause 1.1 is not to lessen competition in the relevant market or markets but to:-
 - ensure consistency and quality in the products and the Ingredients;
 - ensure consistency in customer experience regardless of which licence business they buy products from to give certainty and to ensure customers are not misled in advertising and promotion of Caffe Supremo style cafes and restaurants;

- protect the value and reputation of Caffe Supremo and each individual licence business through the use and sale of Products and the provision of services which are consistent with the Caffe Supremo image in the relevant market or markets;
- do its best to ensure that Licensees are able to acquire products including the Ingredients at competitive prices through the power of bulk buying, making Caffe Supremo outlets more competitive and affordable in the market;
- ensure uniformity of services and quality provided to the public;
- ensure uniformity and full compliance with food, health and safety standards (including but not limited to food compliance with safety handling procedures regarding the sale of products including the Ingredients to the public);
- safeguard the public and other Caffe Supremo Licensees from any Caffe Supremo Licensee(s) either using poor quality products or Ingredients or purchasing a product or Ingredients from a supplier who may have a lower quality standards of products and Ingredients from that advertised and marketed by RXBRY to the public.

3. Public Benefit Claims (refer to Section 4 of Form G)

- 3.1 RXBRY submits that the conduct or proposed conduct has considerable public benefit.
- 3.2 Caffe Supremo licence businesses in the marketplace increase competition increasing the likelihood of lower prices for end consumers and better protect public health and safety through quality of product controls.
- 3.3 Small independent businesses operating alone do not have access to the benefits of large organisations such as buying power, market presence and group marketing putting them at a significant disadvantage.
- 3.4 Caffe Supremo Licensees gain a number of benefits from being part of the Caffe Supremo Licensing system:-
- high quality products, ingredients and certainty of supply
 - better pricing by negotiation
 - advertising and marketing
 - increased sales
 - increased profitability
 - better buying power
 - compliance with food, health and safety standards
- 3.5 As a consequence of the benefits accruing to Licensees and the benefits of the conduct or proposed conduct consumers in the relevant retail markets will benefit.
- 3.6 The increased competitiveness and viability of Licensees enables them to compete with and promote competition at the retail level.
- 3.7 Suppliers to the system benefit by having a greater measure of certainty as to volumes of sales and products giving them a greater ability to plan, expand and invest in their own business and to supply at more competitive prices increasing competition resulting in lower prices to end consumers.

4. Market Definition (refer to Section 5 of Form G)

The market can reasonably be defined as the Australian market for the retail sale of café/restaurant meals and beverages and the wholesale market for the sale of the Products and Ingredients. Based on investigations and RXBRY's own knowledge these markets are highly competitive and there are a large number of participants ranging from independent businesses, to franchise chains and national and international operations.

5. Public Detriments (refer to Section 6 of Form G)

- 5.1 RXBRY submits there is no public detriment that results from the conduct as proposed conduct and that the conduct or proposed conduct will not lessen competition in the wholesale or retail markets.
- 5.2 At a wholesale level the conduct or proposed conduct will not prevent Caffè Supremo Licensees from dealing with other suppliers provided the standards of quality and continuing supply, public health and safety are met. No exclusivity is granted for the ongoing supply of Products and Ingredients. RXBRY is not limited in its dealings with competitors of approved suppliers.
- 5.3 At a retail level consumers may acquire the Products including the Ingredients from any number of businesses not just Caffè Supremo Licensees and are free to shop around and compare quality and prices for similar Italian style outlets or for alternate product offerings.
- 5.4 As a result, RXBRY submits that the conduct or proposed conduct will increase competition in the wholesale market and retail market and result in a range of benefits to the public.
- 5.5 **RXBRY is making this application out of an excess of caution.** In this respect:-
- 5.5.1 its product purchase system is one of quality control not of exclusive dealing;
 - 5.5.2 there is not exclusive dealing as its product purchase system allows for the purchase of products or ingredients from other parties;
 - 5.5.3 the extent (if any) the conduct or proposed conduct is exclusive dealing is not conceded;
 - 5.5.4 the extent (if any) the conduct or proposed conduct otherwise contravenes Section 47 of the Act is not conceded; and
 - 5.5.5 the public benefits in any event resulting from the conduct or proposed conduct outweigh any public detriment caused by the conduct or proposed conduct.

ATTACHMENT 1

(Refer Item 3(c))

DETAILS OF EXISTING LICENSEES/OUTLETS

1. Name: Returned and Services League of Australia (Queensland Branch) Gaythorne Sub Branch Inc. trading as Caffe Supremo Gaythorne
Location: ;
Phone:
2. Name: Goodna RSL Services Club Inc. trading as Caffe Supremo Goodna
Location:
Phone:
3. Name: Brisbane Bears-Fitzroy Football Club Ltd ACN 054 263 473 trading as Caffe Supremo Springwood
Location:
Phone:
4. Name: The Southport Workers Community Club Inc. trading as Caffe Supremo Southport
Location:
Phone:

ATTACHMENT 2

(refer Annexure "A" Item 1.2.4(b))

7.12.11 Products

7.12.11.1 Product Availability

The Licensor shall:-

- (a) endeavour at all times to arrange sufficient suppliers of the products so as to fulfill the needs of the Licensee;
- (b) at the commencement of this Agreement supply the Licensee with a list of the products which are available for purchase from approved suppliers during the currency of this Agreement and from time to time to update this list.

7.12.11.2 Approved Products

The Licensor and the Licensee agree as follows:-

- (a) List of Products
 - (i) the list of products provided by the Licensor pursuant to sub-clause 7.12.11.1 hereof are a list of products which have been approved by the Licensor ("**Approved Products**") for the sale or use by the Licensee in the licence business;
 - (ii) the Licensor may at any time by written notice to the Licensee, add a product to, or remove any product from the list of Approved Products.

- (b) Alternative Products

Any non-approved products which are subsequently approved by the Licensor pursuant to sub-clause 7.12.11.5 shall become an Approved Product unless and until withdrawn in accordance with sub-clause 7.12.11.2 (c).

- (c) Withdrawal of Products

The Licensor may at any time require the Licensee to withdraw from supply in the licence business, any Approved Products, which in the Licensor's reasonable opinion:-

- (i) does not conform or no longer conforms with the standards, quality controls and specifications for products to be supplied in the Licensor's retail licence system; or
- (ii) does not conform or no longer conforms with the range of products to be supplied in the licence system; or
- (iii) is, or may be, a health or safety risk.

AND the Licensee must immediately withdraw any products from sale or supply when required to do so by the Licensor under this sub-clause 7.12.11.2.

7.12.11.3 Products Level

Subject to the provisions of the *Competition and Consumer Act* the Licensee shall use its best endeavours to maintain at all times during this Agreement the level and type of Approved Products specified by the Licensor from time to time as is necessary for the proper conduct of the licence business.

7.12.11.4 Standards

The Licensor with the intention of maintaining the high level of products quality as is necessary for the success of its licence system shall source all products from such appropriate suppliers that meet the standards for quality, reliability and products control as specified by the Licensor from time to time and as shall be approved by the Licensor as meeting its standards for quality, reliability and products control.

7.12.11.5 Purchase of Products

The Licensee shall purchase the products from suppliers approved by the Licensor **PROVIDED THAT:-**

- (a) should the Licensee wish to purchase any non-approved products then it must submit all necessary details and samples to the Licensor for its approval;
- (b) should the Licensee wish to purchase any Approved Products from any non-approved supplier then it must obtain the approval of the Licensor;

AND any approval sought by the Licensee pursuant to either of sub-clauses 7.12.11.5 (a) or (b) shall not be unreasonably withheld.

7.12.11.6 Products of the Approved Supplier

- (a) the Licensee shall ensure that all payments for the purchase of the products from any approved suppliers shall be paid in accordance with the approved supplier's current written terms and conditions of payment or in accordance with any special arrangement which the Licensor may from time to time make with any approved supplier and in this respect time shall be of the essence in relation to any such payment or payments;
- (b) the Licensee authorises the Licensor to obtain such information and/or documentation (including but not limited to statements, invoices and computer print outs) as the Licensor may require in respect of any dealings of the Licensee with any supplier of the products including but not limited to the time of payment by the Licensee to such supplier for the products and in this respect the Licensee shall execute such further documentation as the Licensor may from time to time request.

7.12.11.7 Storage of the Products

The products including ingredients must be stored at the premises by the Licensee in such a manner that they continue to meet the standards and specifications as to quality as prescribed by the Licensor

7.12.11.8 Acknowledgement by Licensee

The Licensee acknowledges that:-

- (a) the provisions of this sub-clause 7.12.11 are reasonable and are necessary to maintain strict quality control in respect of the supply of all products to all of the Licensees of the Licensor who sell or use the products;
- (b) it is of essential importance that the Licensee purchases Approved Products only from Approved Suppliers especially as there are at times benefits to the Licensee and other licensees such as discounts because of bulk buying and maintaining good quality products for sale or use in the licence business.