

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. CV96-5945
)	
BRUSH FIBERS, INC.,)	Filed: August 29, 1996
)	
Defendant.)	

COMPETITIVE IMPACT STATEMENT

Pursuant to Section 2 of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(b), the United States files this Competitive Impact Statement relating to the proposed final judgment as to United States v. Brush Fibers, Inc., submitted for entry in this civil antitrust proceeding.

I

NATURE AND PURPOSE OF THE PROCEEDINGS

On *August 29th*, the United States filed a civil antitrust complaint alleging that under Section 4 of the Sherman Act, as amended, 15 U.S.C. § 4, certain companies and individuals, including the above-named defendant, combined and conspired from at least as early as January 1990 to April 1995, to lessen and eliminate competition in the sale of tampico fiber in the United States, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

Specifically, BFI agreed with its supplier to fix and maintain resale prices for tampico fiber in the United States at amounts set by the supplier. Moreover, the complaint alleges,

BFI continued to adhere to the resale price agreement even after learning that it was part of a larger agreement involving its supplier and other co-conspirators, including the only other major United States distributor of tampico fiber. The overall conspiracy, which also included an allocation of sales and production levels, had the effect of cartelizing nearly all sales of tampico fiber in the United States and artificially inflating the price of tampico fiber.

The complaint seeks a judgment by the Court declaring that the defendant engaged in an unlawful combination and conspiracy in restraint of trade in violation of the Sherman Act. It also seeks an order by the Court to enjoin and restrain the defendant from any such activities or other activities having a similar purpose or effect in the future.

The United States and the defendant have stipulated that the proposed final judgment may be entered after compliance with the APPA, unless the United States withdraws its consent.

The Court's entry of the proposed final judgment will terminate this civil action against the defendant, except that the Court will retain jurisdiction over the matter for possible further proceedings to construe, modify or enforce the judgment, or to punish violations of any of its provisions.

II

DESCRIPTION OF THE PRACTICES GIVING RISE TO THE ALLEGED VIOLATIONS OF THE ANTITRUST LAWS

As defined in the complaint, tampico fiber is a natural

vegetable fiber produced by the lechuguilla plant and grown in the deserts of northern Mexico. It is harvested by individual farmers, processed, finished and exported worldwide, where it is used as brush filling material for industrial and consumer brushes. It is available in natural white, bleached white, black, gray and a wide variety of mixtures.

The complaint further alleges that the defendant accounted for aggregate United States sales of tampico fiber of approximately \$10 million during the period from January of 1990 through April of 1995. During this time, the defendant obtained from a Mexican processor, through an intermediary company, substantial quantities of tampico fiber. The defendant, acting as the Mexican processor's exclusive United States distributor, sold this tampico fiber to its customers throughout the United States, including those located in the Eastern District of Pennsylvania, in a continuous and uninterrupted flow of interstate commerce. Similarly, the complaint alleges that non-defendant co-conspirators sold and shipped additional substantial quantities of tampico fiber in a continuous and uninterrupted flow of interstate commerce from another processing facility in Mexico through their exclusive United States distributor to customers throughout the United States, including some located in the Eastern District of Pennsylvania.

The complaint alleges that the defendant and co-conspirators engaged in an agreement, the effect of which was to fix the resale prices of tampico fiber sold in the United States. Resale

price sheets were provided to the defendant and another co-conspirator United States distributor by their respective co-conspirator suppliers. As a condition of becoming and remaining a United States distributor of tampico fiber, the defendant agreed by written contract with its supplier to sell at the prices listed on the price sheet. From at least January 1990 on, the defendant and the other United States' distributor of tampico fiber had identical price sheets prepared by their respective co-conspirator suppliers, and the majority of sales were made by the distributors at these list prices or other agreed-upon prices.

The defendant continued to observe the resale price maintenance scheme even after learning of collusive agreements between the two Mexican suppliers of tampico fiber. The resale price scheme had the effects of fixing and stabilizing the resale prices of tampico fiber. The defendant's conduct also lessened or eliminated competition between the two principal United States distributors of tampico fiber. The anticompetitive effects of the defendant's conduct were heightened because it was one of only two significant United States distributors of tampico fiber. The defendant's adherence to the resale price maintenance scheme together with other acts of its co-conspirators had the effect of cartelizing nearly all sales of tampico fiber in the United States and artificially inflating the prices of tampico fiber. BFI's supplier in this scheme has already plead guilty and agreed to enter a consent decree in response to criminal and civil

charges relating to the entire agreement.

III

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The United States and the defendant have stipulated that a final judgment, in the form filed with the Court, may be entered by the Court at any time after compliance with the APPA, 15 U.S.C. § 16(b)-(h). The proposed final judgment provides that the entry of the final judgment does not constitute any evidence against or an admission by any party with respect to any issue of fact or law. Under the provisions of Section 2(e) of the APPA, entry of the proposed final judgment is conditioned upon the Court finding that its entry will be in the public interest.

The proposed final judgment contains two principal forms of relief. First, the defendant is enjoined from repeating the conduct it undertook in connection with the tampico fiber conspiracy and from certain other conduct that could have similar anticompetitive effects. Second, the proposed final judgment places affirmative burdens on the defendant to pursue an antitrust compliance program directed toward avoiding a repetition of the tampico fiber conspiracy.

A. Prohibited Conduct

Section IV of the proposed final judgment broadly enjoins the defendant from conspiring to fix prices, allocate sales, discourage new entrants, or otherwise restrict or eliminate the supply of tampico fiber sold to any customer in the United States, or from communicating certain pricing or sales

information that could further such a conspiracy (IV (A), (B), (C) and (D)); from agreeing with a supplier to set or control the resale prices of defendant or any other distributor to its customers (IV (E)); and from joining any group whose aims or activities are prohibited by Sections IV (A)-(E) of the final judgment (IV (F)).

Specifically, as regards tampico fiber sold in the United States, Sections IV (A)-(F) of the proposed final judgment provide as follows. Section IV (A) of the proposed final judgment enjoins the defendant from directly or indirectly agreeing with any other distributor or with any supplier of tampico fiber to (1) raise, fix or maintain the prices or other terms or conditions for the sale or supply of tampico fiber; (2) allocate sales volumes, territories or customers for tampico fiber; (3) discourage or eliminate any new entrant into the tampico fiber market; and (4) restrict or eliminate the supply of tampico fiber to any customer.

Section IV (B) of the proposed final judgment enjoins the defendant from communicating to, requesting from or exchanging with any distributor or supplier (other than its own supplier) of tampico fiber any current or future price, price change, discount or other term or condition of sale charged or quoted, or to be charged or quoted to any customer or potential customer for tampico fiber, whether communicated in the form of a specific price or in the form of information from which such specific price may be computed.

Section IV (C) of the proposed final judgment enjoins the defendant from distributing to any distributor or supplier (other than its own supplier) of tampico fiber price lists or other pricing material that is used, has been used, or will be used in computing prices or terms or conditions of sale charged or to be charged for tampico fiber.

Section IV (D) of the proposed final judgment enjoins the defendant from communicating to, requesting from or exchanging with any distributor or supplier (other than its own supplier) of tampico fiber information regarding the volume of sales of tampico fiber or the location or identity of customers.

Section IV (E) of the proposed final judgment enjoins the defendant from directly or indirectly entering into, adhering to, maintaining, furthering, enforcing or claiming any right under any contract, agreement, understanding, plan or program with any supplier to fix or maintain the prices at which tampico fiber may be resold or offered for sale by defendant or any other distributor.

Section IV (F) of the proposed final judgment enjoins the defendant from participating or engaging, directly or indirectly, through any trade association, organization or other group, in any activity which is prohibited in Sections IV (A)-(E) of the proposed final judgment.

B. Permitted Conduct

Two exceptions to the broad prohibitions of Section IV of the proposed final judgment are contained in Section V.

Section V (A) permits any necessary negotiations or communications with any distributor or supplier, or any agent, broker or representative of such distributor or supplier in connection with bona fide proposed or actual purchases of tampico fiber from or sales of tampico fiber to that distributor or supplier. Section V (B) makes it clear that the final judgment does not prohibit the defendant from unilaterally deciding to resell tampico fiber at prices suggested by its supplier. However, the defendant is obliged to make and retain written reports as to any suggestion by its supplier as to appropriate resale prices and deliver copies of the written reports to the Antitrust Division on or about each anniversary date of the final judgment.

C. Defendant's Affirmative Obligations

Section VI requires that within thirty (30) days of entry of the final judgment, the defendant adopt or pursue an affirmative compliance program directed toward ensuring that its employees comply with the antitrust laws. More specifically, the program must include the designation of an Antitrust Compliance Officer responsible for compliance with the final judgment and reporting any violations of its terms. It further requires that the defendant furnish a copy of the final judgment to each of its officers and directors and each of its employees who is engaged in or has responsibility for or authority over pricing of tampico fiber within sixty (60) days of the date of entry, and to certify that it has distributed those copies and designated an Antitrust

Compliance Officer within seventy-five (75) days. Copies of the final judgment also must be distributed to anyone who becomes such an officer, director or employee within thirty (30) days of holding that position and to all such individuals annually.

Furthermore, Section VI requires the defendant to brief each officer, director and employee engaged in or having responsibility over pricing of tampico fiber as to the defendant's policy regarding compliance with the Sherman Act and with the final judgment, including the advice that his or her violation of the final judgment could result in a conviction for contempt of court and imprisonment, a fine, or both, and that the defendant will make legal advice available to such persons regarding compliance questions or problems. The defendant annually must obtain (and maintain) certifications from each such person that the aforementioned briefing, advice and a copy of the final judgment were received and understood and that he or she is not aware of any violation of the final judgment that has not been reported to the Antitrust Compliance Officer. Finally, the defendant must submit to the plaintiff an annual declaration as to the fact and manner of its compliance with the final judgment, including any reports responsive to Section V of the final judgment.

Under Section VII of the final judgment, the Justice Department will have access, upon reasonable notice, to the defendant's records and personnel in order to determine defendant's compliance with the judgment.

D. Scope of the Proposed Judgment

(1) Persons Bound by the Decree

The proposed judgment expressly provides in Section III that its provisions apply to the defendant and each of its officers, directors, agents and employees, subsidiaries, successors and assigns and to all other persons who receive actual notice of the terms of judgment.

In addition, Section III of the judgment prohibits the defendant from selling or transferring all or substantially all of its stock or assets used in its tampico fiber business unless the acquiring party files with the Court its consent to be bound by the provisions of the judgment.

(2) Duration of the Judgment

Section IX provides that the judgment will expire on the tenth anniversary of its entry.

E. Effect of the Proposed Judgment on Competition

The prohibition terms of Section IV of the final judgment are designed to ensure that the defendant will act independently in determining the prices and terms and conditions at which it will sell or offer to sell tampico fiber, and that there will be no anticompetitive restraints (horizontal or vertical) in the tampico fiber market. The affirmative obligations of Sections VI and VII are designed to insure that the corporate defendant's employees are aware of their obligations under the decree in order to avoid a repetition of behavior that occurred in the

tampico fiber industry during the conspiracy period. Compliance with the proposed judgment will prevent price collusion, allocation of sales, markets and customers, concerted activities in restricting new entrants and customers, and resale price restraints by the defendant with other tampico fiber distributors and such distributors' suppliers.

IV

REMEDIES AVAILABLE TO POTENTIAL PRIVATE PLAINTIFFS

After entry of the proposed final judgment, any potential private plaintiff who might have been damaged by the alleged violation will retain the same right to sue for monetary damages and any other legal and equitable remedies which he or she may have had if the proposed judgment had not been entered. The proposed judgment may not be used, however, as prima facie evidence in private litigation, pursuant to Section 5(a) of the Clayton Act, as amended, 15 U.S.C. § 16(a).

V

PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED CONSENT JUDGMENT

The proposed final judgment is subject to a stipulation between the government and the defendant which provides that the government may withdraw its consent to the proposed judgment any time before the Court has found that entry of the proposed judgment is in the public interest. By its terms, the proposed judgment provides for the Court's retention of jurisdiction of

this action in order to permit any of the parties to apply to the Court for such orders as may be necessary or appropriate for the modification of the final judgment.

As provided by the APPA (15 U.S.C. § 16), any person wishing to comment upon the proposed judgment may, for a sixty-day (60) period subsequent to the publishing of this document in the Federal Register, submit written comments to the United States Department of Justice, Antitrust Division, Attention: Robert E. Connolly, Chief, Middle Atlantic Office, Suite 650 West, 7th and Walnut Streets, Philadelphia, Pennsylvania 19106. Such comments and the government's response to them will be filed with the Court and published in the Federal Register. The government will evaluate all such comments to determine whether there is any reason for withdrawal of its consent to the proposed judgment.

VI

ALTERNATIVE TO THE PROPOSED FINAL JUDGMENT

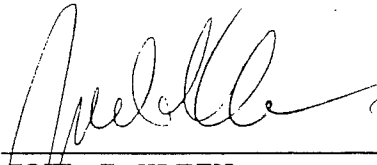
The alternative to the proposed final judgment considered by the Antitrust Division was a full trial of the issues on the merits and on relief. The Division considers the substantive language of the proposed judgment to be of sufficient scope and effectiveness to make litigation on the issues unnecessary, as the judgment provides appropriate relief against the violations alleged in the complaint.

VII
DETERMINATIVE MATERIALS
AND DOCUMENTS

No materials or documents were considered determinative by the United States in formulating the proposed final judgment. Therefore, none are being filed pursuant to the APPA, 15 U.S.C. § 16(b).

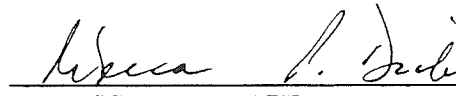
Dated:

Respectfully submitted,



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