IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, Plaintiff, v. IXTLERA DE SANTA CATARINA, S.A. DE C.V.; and MFC CORPORATION, Defendants.	))))))))))	FILED: 9/26/96 Civil Action No. CV96-6515

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. Ixtlera de Santa Catarina, S.A. de C.V. and MFC Corporation, submitted for entry in this civil antitrust proceeding.

I

NATURE AND PURPOSE OF THE PROCEEDINGS

On September 26, 1996, the United States filed a civil antitrust complaint alleging that under Section 4 of the Sherman Act, as amended, 15 U.S.C. § 4, the above-named defendants combined and conspired with others 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. A companion criminal information against Ixtlera de Santa Catarina, S.A. de C.V. ("Ixtlera") and MFC Corporation ("MFC") was filed on September 26, 1996. The civil complaint alleges that as part of

the conspiracy, the defendants and co-conspirators among other things:

(a) fixed the prices at which tampico fiber was imported into the United States;

(b) fixed the resale prices for tampico fiber charged by their exclusive United States distributors; and

(c) allocated sales between such distributors.

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

The United States and defendants 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 these defendants, 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 defendant MFC had United States sales of tampico fiber of approximately $14,699,000 during the period from January of 1990 through April of 1995. During this time, the defendants sold and shipped substantial quantities of tampico fiber in a continuous and uninterrupted flow of interstate commerce from the processing facility of Ixtlera in Mexico through its exclusive United States distributor, MFC, a company headquartered in Texas, to MFC's customers throughout the United States, including those located in the Eastern District of Pennsylvania. 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 defendants and co-conspirators engaged in three forms of concerted action and states three causes of action: (1) an agreement to fix import prices, (2) an agreement to fix resale prices, and (3) an agreement to allocate sales. Essentially, the complaint alleges that defendants and their co-conspirators fixed the prices at which tampico fiber was sold to their two respective exclusive United States distributors, agreed on the resale prices to be

charged by those two distributors and agreed to a percentage allocation of sales volume between those distributors.

The defendants and their co-conspirators went far beyond suggesting and adhering to suggested resale prices. Resale price sheets were provided by Ixtlera and the co-conspirator processor to MFC and the co-conspirator distributor. As a condition of becoming and remaining a United States distributor of tampico fiber, the co-conspirator distributor agreed by written contract with its supplier to sell at the prices listed on the price sheet. From at least January 1990 on, both MFC and the co-conspirator distributor had identical price sheets supplied by Ixtlera and the co-conspirator processor, and the majority of tampico fiber sales were made by those distributors at these list prices or other agreed-upon prices. MFC made the sales with its two top executives' knowledge of and participation in the collusive agreement with their putative competitor.

The use of resale price maintenance by the defendants and co-conspirators was designed to and had the effect of monitoring and enforcing the horizontal price-fixing and sales volume allocation agreements between the defendants and co-conspirators. The defendants' conduct had the effect of lessening or eliminating competition between the two United States distributors of tampico fiber in order to maintain prices at artificially high and non-competitive levels.

In furtherance of the conspiracy, the defendants and their co-conspirators, among other things, periodically met, discussed and agreed to new import and resale prices for tampico fiber, and

met, discussed and compared the annual sales volumes of their United States distributors to ensure they were at or about the percentages the defendants and co-conspirators had agreed upon for each.

III

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The United States and the defendants 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 United States has filed a criminal information charging Ixtlera, MFC and unnamed co-conspirators with a conspiracy to fix the prices and allocate sales of tampico fiber imported into and sold in the United States, in violation of the Sherman Act (15 U.S.C. § 1).

The United States does not routinely file both civil and criminal cases involving the same underlying conduct. It is appropriate to do so in this case, however, because of the extent of the control of the market by a small number of companies conspiring to eliminate price competition in the sale of tampico fiber in the United States through a comprehensive scheme of fixing the prices of imported tampico fiber, allocating sales

volumes between their exclusive distributors, and agreeing upon the prices at which those distributors would resell tampico fiber within the United States.

The proposed final judgment contains three principal forms of relief. First, the defendants are enjoined from repeating the conduct they undertook in connection with the tampico fiber conspiracy and from certain other conduct that could have similar anticompetitive effects. Second, in light of their overwhelming shares of the tampico fiber market in the United States and of evidence that they have previously discussed consolidating operations, Ixtlera is prohibited from merging with its co-conspirator processor, Fibras Saltillo, S.A. de C.V., without providing the Antitrust Division ninety (90) days notice. Such a transaction, if consummated, would likely nullify the prophylactic measures pertaining to horizontal conduct contained in both this proposed final judgment and the final judgment entered by the Court against Fibras Saltillo on August 20, 1996. Third, the proposed final judgment places affirmative burdens on the defendants 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 each defendant from conspiring to fix prices, allocate sales, discourage or eliminate new entrants, or otherwise restrict or eliminate the supply of tampico fiber sold to any customer in the United States, (IV (A)); from communicating pricing, sales volume and customer information to any processor, supplier or

distributor of tampico fiber other than its own (IV (B), (C) and (D)); from communicating regarding discouraging or eliminating new entrants (IV (E)); from engaging in resale price maintenance (IV (F)-(I)); and from joining any group whose aims or activities are prohibited by Sections IV (A)-(I) of the proposed final judgment (IV (J)). Finally, Ixtlera is enjoined from merging with, acquiring the stock or assets of, or selling its stock or assets to Fibras Saltillo, S.A. de C.V., a major processor of tampico fiber and a co-conspirator, without providing the Antitrust Division ninety (90) days notice.

Specifically, as regards tampico fiber sold in the United States, Sections IV (A)-(E) of the proposed final judgment provide as follows:

Section IV (A) of the proposed final judgment enjoins each defendant from agreeing with any other processor, supplier or distributor 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; or (4) restrict or eliminate the supply of tampico fiber to any customer.

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

Section IV (E) of the proposed final judgment enjoins each defendant from communicating with any processor, supplier or distributor regarding discouraging or eliminating any new entrant into the tampico fiber market or restricting or eliminating the supply of tampico fiber to any customer.

Section IV (F) of the proposed final judgment enjoins Ixtlera 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 distributor to fix or maintain the prices at which tampico fiber

sold by Ixtlera may be resold or offered for sale by any distributor.

Section IV (G) of the proposed final judgment enjoins Ixtlera from directly or indirectly adopting, promulgating, suggesting, announcing or establishing any resale pricing policy for tampico fiber.

Section IV (H) of the proposed final judgment enjoins Ixtlera from threatening any distributor with termination or terminating any distributor on the basis of that distributor's pricing; or discussing with any present or potential distributor any decision regarding termination of any other distributor for any reason directly or indirectly related to the latter distributor's resale pricing, provided, however, that nothing herein shall prohibit Ixtlera from terminating a distributor for any reason other than the distributor's resale pricing;

Section IV (I) of the proposed final judgment enjoins MFC 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 MFC or any other distributor.

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

Section IV (K) of the proposed final judgment enjoins Ixtlera from merging with, acquiring all or part of the assets or

securities of, or selling all or part of its assets or securities to the Mexican tampico fiber processor Fibras Saltillo, S.A. de C.V., or its owners, officers, directors, agents, employees, subsidiaries, successors and assigns without first providing plaintiff with at least ninety (90) days written notice prior to closing the transaction. Such notification shall include a complete description, in English, of the proposed transaction and the reasons therefor. Ixtlera agrees to provide promptly all information, with English translations, reasonably requested by plaintiff in connection with its investigation of the proposed transaction, consents to the jurisdiction of the Court to adjudicate the legality of the proposed or consummated transaction under the antitrust laws of the United States, and waives any objections to venue. Nothing in this paragraph shall prohibit Miguel Schwarz Marx, principal of Ixtlera, from divesting to any person, without notice, the 27.5 percent interest in Fibras Saltillo, S.A. de C.V. which he currently holds.

B. Permitted Conduct

Four 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 processor, supplier or distributor of tampico fiber or with any agent, broker or representative of such processor, supplier or distributor in connection with bona fide proposed or actual purchases of tampico fiber from, or sale of tampico fiber to, that processor, supplier or distributor.

Section V (B) makes it clear that nothing contained in the proposed final judgment would prohibit MFC from unilaterally deciding to resell tampico fiber at prices suggested by its supplier. However, any instance of this must be reported and the reports must be retained in MFC's files.

Section V (C) makes it clear that although Miguel Schwarz Marx, an owner and officer of Ixtlera, is otherwise prohibited from discussing with or obtaining information from Fibras Saltillo regarding Fibras Saltillo's prices, volume, customers or marketing plans for tampico fiber (IV (A)-(E)), as a 27.5 percent owner of Fibras Saltillo, he can have limited access to historical pricing information of Fibras Saltillo to A&L Mayer Associates, Inc. (Associates) or Associates successor that serves as a conduit between Fibras Saltillo and its United States distributor (currently Brush Fibers, Inc.), provided such information is at least six months old and is used solely to protect the value of Schwarz's investment in Fibras Saltillo under Mexican law.

Section V (D) makes it clear that nothing contained in the final judgment would prevent (1) MFC from continuing to act as Ixtlera's exclusive distributor for tampico fiber in the United States; (2) MFC and Ixtlera from conducting negotiations regarding such an exclusive distributorship; or (3) Ixtlera from deciding to appoint another company as its exclusive distributor in the United States.

C. Defendants' Affirmative Obligations

Section VI requires that within thirty (30) days of entry of the final judgment, the defendants adopt or pursue an affirmative compliance program directed toward ensuring that their 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 each 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 each 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 defendants 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, each defendant must submit to the plaintiff an annual declaration as to the fact and manner of its compliance with the final judgment.

Under Section VII of the final judgment, the Justice Department will have access, upon reasonable notice, to the defendants' records and personnel in order to determine defendants' 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 each of the defendants and each of their owners, 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 each of the defendants 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 each 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 ensure that each corporate defendant's employees are aware of their obligations under the decree in order to avoid a repetition of the conspiracies in the tampico fiber industry that led to this case and the companion criminal proceeding. Compliance with the proposed judgment will deter price collusion, allocation of sales, markets and customers, concerted activities in restricting new entrants and customers, and resale price restraints by each of the defendants with each other and with other tampico fiber processors and/or distributors.

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 defendants 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 it to withdraw 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 and fully effective 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,

/s/
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