

Decision and Order

67 F.T.C.

It is further ordered, That respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist.

IN THE MATTER OF

PERMANENTE CEMENT COMPANY ET AL.¹

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 7 OF
THE CLAYTON ACT

Docket 7939. Complaint, June 14, 1960—Decision, March 23, 1965²

Consent order, following remand of proceeding by the Court of Appeals, Ninth Circuit, on Mar. 18, 1965, requiring the second largest cement producer on the West Coast, and its subsidiary, to divest, absolutely and in good faith, within four years, to purchasers approved by the Commission, all the assets, properties, rights and privileges, tangible or intangible, of the Olympic Portland Cement Co., Ltd., a principal competitor in the manufacture and sale of portland cement acquired in 1958, the divestment to prohibit any change which might impair present production capacity;

To divest, absolutely and in good faith, within two years, to purchasers approved by the Commission, the ready-mixed concrete, and cement aggregates facilities, including all equipment, acquired in 1959 from Pacific Building Materials Co. and Readymix Concrete Co., located in Albina (Portland) and Vancouver (Washington), the divestiture to prohibit any change of assets which might impair present production capacity, and to make available and affirmatively offer to purchasers certain raw materials at prices, terms, and conditions as prescribed by this Order;

To cease and desist from acquiring any part of any corporation engaged in the manufacture or sale of ready-mixed concrete in the States of Oregon and Washington for the next two years, or until the Commission issues a Trade Regulation Rule concerning acquisitions in the cement industry, and to comply with other obligations of this Order as set forth below.

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The Commission having issued its complaint on June 14, 1960, charging respondents with violation of Section 7 of the Clayton Act,

¹ Now known as Kaiser Cement & Gypsum Corp.

² This order supersedes the Commission's Order of Apr. 24, 1964, 65 F.T.C. 410, with respect to Count I which required respondent to divest itself of Olympic Portland Cement Co., Ltd., within one year.

Complaint, Initial Decision, Opinions, and Order as to Count I reported in 65 F.T.C. 410.

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as amended, and respondents having been served with a copy of that complaint; and

The Commission having determined that the circumstances are such that the public interest would be served by waiver here of the requirement of the Commission's Notice of July 14, 1961, requiring the filing of notice of intention to enter into a consent agreement; and

The hearing examiner having certified to the Commission respondents' duly executed agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in the complaint, and waivers and provisions as required by the Commission's Rules; and

The Commission having considered the aforesaid agreement and having determined that it provides an adequate basis for appropriate disposition of this proceeding, the agreement is hereby accepted, the following jurisdictional findings are made, and the following order is entered:

1. Respondent Permanente Cement Company (hereinafter referred to as "Permanente") is a corporation organized, existing and doing business under the laws of the State of California with its office and principal place of business located at 300 Lakeside Drive, Oakland, California.

2. Respondent Glacier Sand & Gravel Company (hereinafter referred to as "Glacier") is a corporation organized, existing and doing business under the laws of the State of Washington with its office and principal place of business located at 5975 East Marginal Way, Seattle, Washington.

3. The Federal Trade Commission has jurisdiction over the subject-matter of this proceeding and the respondents.

ORDER

COUNT I.

It is ordered, That respondent Permanente Cement Company, a corporation, and its officers, directors, agents, representatives, employees, subsidiaries, affiliates, successors and assigns, within four (4) years from the date of service of this Order, shall divest, absolutely and in good faith, all stock, assets, properties, rights and privileges, tangible or intangible, including but not limited to all properties,

plants, machinery, equipment, raw material reserves, trade names, contract rights, trademarks, and goodwill acquired by Permanente Cement Company as a result of the acquisition by Permanente Cement Company of the stock and assets of the Olympic Portland Cement Company, Ltd., together with all plants, machinery, buildings, land, raw material reserves, improvements, equipment and other property of whatever description that has been added to or placed on the premises of the former Olympic Portland Cement Company, Ltd., so as to restore the Olympic Portland Cement Company, Ltd., as a going concern and effective competitor in the manufacture and sale of cement.

It is further ordered, That pending divestiture, Permanente Cement Company shall not make any changes in any of the plants, machinery, buildings, equipment, or other property of whatever description, of the former Olympic Portland Cement Company, Ltd., which might impair its present capacity for the production, sale and distribution of cement, or its market value, unless such capacity or value is fully restored prior to divestiture.

It is further ordered, That by such divestiture, none of the stock, assets, properties, rights or privileges hereinabove described in this Order as to Count I shall be sold or transferred, directly or indirectly, to (a) any person who is at the time of the divestiture an officer, director, employee, or agent of, or under the control or direction of, Permanente Cement Company or any of the subsidiaries or affiliated corporations of Permanente Cement Company, or owns or controls, directly or indirectly, more than one (1) percent of the outstanding shares of common stock of Permanente Cement Company, (b) any company producing cement in Western Washington, as that term is defined in the complaint, as amended, or (c) to any purchaser who is not approved in advance by the Federal Trade Commission.

It is further ordered, That if Permanente Cement Company divests the assets, properties, rights and privileges hereinabove described in this Order as to Count I to a new corporation, the stock of which is wholly owned by Permanente Cement Company, and if Permanente Cement Company then distributes all of the stock in said corporation to the stockholders of Permanente Cement Company in proportion to their holdings of Permanente Cement Company stock, then the preceding paragraph of this Order shall be inapplicable, and the following provisions of this paragraph shall take force and effect in its stead. No person who is an officer, director or executive employee of Permanente Cement Company, or who owns or controls, directly or indirectly, more than one (1) percent of the stock of Permanente

Cement Company, shall be an officer, director or executive employee of any new corporation described in this paragraph, or shall own or control, directly or indirectly, more than one (1) percent of the stock of any new corporation described in this paragraph. Any person who must sell or dispose of a stock interest in Permanente Cement Company or the new corporation described in this paragraph in order to comply with this paragraph may do so within six (6) months after the date on which distribution of the stock of the said corporation is made to stockholders of Permanente Cement Company.

It is further ordered, That, as used in this Order as to Count I, the word "person" shall include all members of the immediate family of the individual specified and shall include corporations, partnerships, associations and other legal entities as well as natural persons.

It is further ordered, That respondent Permanente shall carry out its obligations to sell and divest as provided in this Order as to Count I as follows: (a) during the second half of the third year of the period herein provided for, said respondent shall prepare the required program for actively soliciting bids on the properties and assets to be divested and shall submit a written report to the Commission every sixty (60) days in said half year of the steps so taken by it; (b) during the fourth year of said period said respondent shall actively solicit and make a bona fide effort to sell the properties and assets to be divested, any such sale to be effective at the end of said fourth year, and shall make a written report of such activities to the Commission every ninety (90) days during said year; (c) in the event that at any time during said four year period said respondent shall receive a written offer to purchase said properties and assets, it shall submit a copy thereof to the Commission within sixty (60) days after receipt, and if any such offer appears to said respondent or to the Commission to be bona fide said respondent shall use its best efforts to keep said offer open until the fourth year of said period; and (d) in negotiating for the sale and divestment ordered hereby, said respondent shall have the right to negotiate with any prospective purchaser for, and to attempt to contract for, the purchase by said respondent of not in excess of fifty (50) percent of the cement produced at the Bellingham plant in the three (3) year period following the effective date of such sale and divestment.

COUNT II

It is ordered, That respondents and their subsidiaries, affiliates, officers, directors, agents, representatives, employees, successors and

assigns, shall, within two (2) years from the date of service of this Order, divest, absolutely and in good faith, and to a purchaser or purchasers approved by the Federal Trade Commission, the ready-mixed concrete and aggregates facilities acquired by respondent Glacier from Pacific Building Materials Company and Readymix Concrete Company which are located at Albina (Portland)¹ and Vancouver (Washington),² including, without limitation, all machinery or equipment which is presently being used at either of said locations in the manufacture and sale of ready-mixed concrete and aggregates (including twelve (12) ready-mixed concrete mixer trucks at each of said facilities and such additional other types of vehicles as may be necessary to establish such purchaser or purchasers as effective competitors in the manufacture and sale of ready-mixed concrete and aggregates). The land upon which the Albina facility is located shall be subleased to the purchaser thereof on terms no less favorable than those contained in the lease between respondent Glacier and the Union Pacific Railroad, the owner of said property. The Vancouver Warehouse Building (formerly used for the sale of building materials), and the land upon which it is situated, need not be divested, unless the purchaser desires to acquire said warehouse building and land, and offers to pay the fair market value thereof. Respondents shall, in any event, lease that portion of said building presently used as an office for said Vancouver facility to the purchaser of the Vancouver facility.

It is further ordered, That respondents shall begin to make good faith efforts to divest the aforesaid facilities promptly after the date of service of this Order and shall continue such efforts to the end that the divestiture thereof shall be effected within the aforesaid period of two (2) years. If divestiture of either or both of said facilities shall not have been accomplished within the specified two (2) year period, or any extension thereof, the Commission will give respondents notice and an opportunity to be heard before the Commis-

¹ The "Albina facility" to be divested is shown by CX 151 B, page 2467 of the record (Volume 1-2, 7939-1) entitled in the lower right hand corner:

"Pacific Building Materials Co.
Portland, Oregon
Albina Plant
March 1, 1959."

² The "Vancouver facility" to be divested is shown by CX 151 A, page 2465 of the record (Volume 1-2, 7939-1) entitled in the lower right hand corner:

"Pacific Building Materials Co.
Portland, Oregon
Vancouver Plant
(Vancouver, Wash.)
March 1, 1959."

sion issues any further Order or Orders which the Commission may deem appropriate. If respondents are unable to divest either or both of said facilities, as an entity, but have received a bona fide offer to purchase the ready-mixed concrete plant at either or both of said locations, they may apply to the Commission for permission to divest said ready-mixed concrete plant or plants without divesting the aggregate facility at the same location.

It is further ordered, That, in said divestiture, respondents shall not sell or transfer, directly or indirectly, any of the aforesaid assets (a) to any corporation, or to anyone who is at the time of divestiture an officer, director, employee or agent of a corporation, engaged in the production and sale of portland cement, or the principal business of which is the distribution of portland cement, (b) to any corporation or person controlled by one of the foregoing corporations or persons, (c) to any person who is an officer, director, employee or agent of, or under the control or direction of, Permanente Cement Company or any of its subsidiaries or affiliates, or who owns or controls, directly or indirectly, more than one (1) percent of the outstanding shares of common stock of Permanente Cement Company, or (d) to Ross Island Sand & Gravel Company or to any officer, director, employee, agent or stockholder of said company.

It is further ordered, That, pending divestiture, respondents shall not make any changes in any of the assets to be divested which shall impair their present capacity for the manufacture, sale and distribution of ready-mixed concrete or aggregates, or their market value.

It is further ordered, That, for a period of three (3) years from the date of such sale and divestiture respondent Glacier shall, in each calendar year, make available and affirmatively offer: (a) to the purchaser of the Vancouver facility, in the event said facility is sold and divested as a separate and distinct unit in good faith and at prices, terms and conditions, then currently offered by respondent, Glacier, to competing purchasers in the Vancouver area, a quantity of processed mineral aggregates, for the use of such purchaser in the manufacture of ready-mixed concrete at said facility, equivalent to the quantity consumed by such facility in the manufacture of ready-mixed concrete in the calendar year 1964; and the foregoing shall apply with like force and effect to the Albina facility (substituting the phrase "the Portland area" for "the Vancouver area") should respondent receive permission from the Commission to divest only the ready-mixed concrete plant at the Albina facility; and (b) to the purchaser of the Albina facility, in good faith and at a reasonable price, a quan-

tity of unprocessed mineral aggregates for the use of such purchaser in the manufacture of ready-mixed concrete at said facility, equivalent to the quantity consumed by such facility (and, if the same purchaser acquires the Vancouver facility, at such facility also) in the manufacture of ready-mixed concrete in the calendar year 1964.

It is further ordered, That respondent Permanente shall not supply in any calendar year to the purchaser or purchasers of the aforesaid facilities, for consumption in the manufacture of ready-mixed concrete, more than thirty-five percent (35%) of the portland cement consumed, in the aggregate, by both of the divested ready-mixed concrete plants: *Provided, however*, That:

(i) The foregoing limitations shall not apply to sales of portland cement to either of the divested facilities following the expiration of three years from the date of divestiture of each such facility; and

(ii) Sales of portland cement to either of the divested facilities as a result of the specification by a customer of said plant, in an oral or written agreement with the operator of said plant, requiring the purchase of respondent Permanente's cement shall not be taken into consideration in computing the amount of cement supplied or consumed in accordance with this paragraph.

It is further ordered, That, for a period of eighteen (18) months from the date of the last divestiture made hereinunder, respondents shall not sell or distribute ready-mixed concrete in the Portland, Oregon-Vancouver, Washington area except from its Curry Street facility: *Provided*, That the above limitation shall not apply to ready-mixed concrete produced by any temporary plant established for the purpose of supplying concrete to a single project which requires from respondent Glacier at least 15,000 cubic yards of concrete. For the purpose of the foregoing proviso a single project shall include, without limitation, projects such as a shopping center, housing development, apartment house, school, factory, bridge or a highway section.

It is further ordered, That, for a period of two (2) years from the date of service of this Order, or until the issuance or announcement by the Federal Trade Commission of a trade regulation rule or report concerning mergers or acquisitions in the cement industry, if such event occurs prior to the expiration of such two-year period, respondents shall cease and desist from acquiring, directly, or indirectly, through subsidiaries or otherwise, any part of the share capital or assets of any corporation engaged in the manufacture or sale of ready-mixed concrete in the States of Oregon and Washington.

It is further ordered, That respondents shall, within sixty (60) days after the date of service of this Order, and every sixty (60) days thereafter until respondents have fully complied with the provisions of this Order as to Count II, submit in writing to the Federal Trade Commission a report setting forth in detail the manner and form in which respondents intend to comply, are complying or have complied with this Order. All compliance reports shall include, among other things that are from time to time required, a summary of all contacts and negotiations with potential purchasers of the specified facilities, the identity of all such potential purchasers, and copies of all written