

IN THE MATTER OF
TEXAS INDUSTRIES, INC.

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

Docket 8656. Complaint, Jan. 22, 1965—Decision, Dec. 3, 1965

Consent order requiring a Texas producer and seller of portland cement to sell within 2 years all of the ready-mixed concrete facilities it had obtained through the acquisition of a Memphis, Tenn., ready-mix concrete company, and for 3 years following this divestiture it shall not produce or sell ready-mixed concrete in the Memphis area.

COMPLAINT

The Federal Trade Commission has reason to believe that Texas Industries, Inc. has acquired the stock and assets of Fischer Lime & Cement Company, Inc., a corporation, in violation of Section 7 of the Clayton Act (U.S.C., Title 15, Section 18), as amended, and therefore, pursuant to Section 11 of said Act, it issues its complaint, stating its charges in that respect as follows:

I

Definitions

1. For the purposes of this complaint the following definitions shall apply:

a. "Portland cement" includes Types I through V of portland cement as designated by the American Society for Testing Materials. Neither masonry nor white cement is included.

b. "Ready-mixed concrete" includes all portland cement concrete manufactured and delivered to a purchaser in a plastic and unhardened state. Ready-mixed concrete includes central-mixed concrete, shrink-mixed concrete and transit-mixed concrete.

c. "Concrete products" includes all masonry products, concrete pipe, precast and prestressed concrete products, precast architectural products and packaged premixed concrete, all of which are manufactured from portland cement.

d. "Memphis area" includes Shelby County, Tennessee and Crittenden County, Arkansas.

II

Texas Industries, Inc.

2. Texas Industries, Inc., respondent herein, is a corporation organized and existing under the laws of the State of Delaware with its principal executive offices located at 715 Avenue H East, Arlington, Texas.

3. Respondent, directly or through its subsidiaries, is principally engaged in the production and sale of materials employed in the manufacture of concrete, including cement, heavyweight aggregates and Haydite lightweight aggregates and in the production and sale of a full range of finished concrete products utilizing such materials. For the fiscal year ended May 30, 1963, respondent had sales of \$26,401,088, assets of \$30,570,804 and income of \$2,180,164.

4. Respondent, directly or through its subsidiaries, owns and operates one or more manufacturing plants, aggregate producing operations or distribution facilities in Corpus Christi, Dallas, Eastland, Fort Worth, Houston, Midlothian and Odessa, Texas; Des Moines, Iowa; Kansas City, Kansas; Alexandria, Monroe, New Orleans and Shreveport, Louisiana; Detroit, Michigan; Minneapolis, Minnesota; and Memphis, Tennessee.

5. In 1960, respondent commenced producing portland cement at its plant located at Midlothian, Texas. This cement plant was originally constructed with a rated annual capacity of 1,500,000 barrels and was subsequently enlarged in 1963 to the present rated annual capacity of 3,000,000 barrels. Respondent's total portland cement shipments in 1962 amounted to 1,724,466 barrels and in 1963, 2,306,483 barrels. Approximately 60% of these portland cement shipments were utilized in respondent's own operations.

6. Respondent has grown from 7 ready-mixed concrete plants in 1955 to 47 such plants in 1963, principally through a series of acquisitions. Respondent's sales of ready-mixed concrete and concrete products for the fiscal years ended May 30, 1961 through May 30, 1963, and the nine month period ended February 29, 1964, stated in millions of dollars, were approximately as follows:

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	<i>Ready-mixed Concrete</i>	<i>Concrete Products</i>
1961	\$ 9.8	\$6.6
1962	10.2	7.2
1963	10.7	7.7
1964	19.2	6.5

7. At all times relevant herein, respondent was a corporation engaged in commerce, as "commerce" is defined in the Clayton Act.

III

Fischer Lime & Cement Company, Inc.

8. Fischer Lime & Cement Company, Inc. (Fischer), is a corporation organized and existing under the laws of the State of Delaware with offices located at 269 Walnut Street, Memphis, Tennessee. By an agreement dated August 23, 1963, Fischer was organized as a transferee corporation to receive all of the operating assets of Fischer Lime & Cement Company, Inc. (Fischer Tennessee), a Tennessee corporation.

9. Prior to the acquisition Fischer Tennessee was principally engaged in the production and sale of ready-mixed concrete and concrete products in the Memphis area. In 1962, Fischer Tennessee had sales of \$6,871,491, assets of \$4,036,041 and net income of \$91,053.

10. Fischer Tennessee operated five ready-mixed concrete plants and was either the largest or second largest producer of ready-mixed concrete, and the largest or second largest consumer of portland cement, in the Memphis area. During 1962, Fischer Tennessee consumed 345,059 barrels of portland cement and sold 217,640 cubic yards of ready-mixed concrete.

11. At all times relevant herein, Fischer and Fischer Tennessee were engaged in commerce, as "commerce" is defined in the Clayton Act.

IV

Acquisitions

12. On or about September 30, 1963, respondent, through its wholly owned subsidiary, National Concrete Industries, Inc. (National), acquired all of the issued and outstanding capital stock of Fischer in exchange for all of the capital stock of Fischer Tennessee owned by National. The consideration had an aggregate value of \$2,600,000.

V

The Nature of Trade and Commerce

13. Portland cement is a material which in the presence of water binds aggregates, such as sand and gravel, into concrete. Portland cement is the essential ingredient in the manufacture of ready-mix concrete and concrete products. There is no practicable substitute for portland cement in the manufacture of concrete.

14. The portland cement industry in the United States is substantial. In 1963, there were about 51 companies operating approximately 182 plants. Total shipments of portland cement in that year amounted to 349,321,000 barrels having a value of \$1,116,555,000.

15. On a national basis, approximately 57% of all portland cement is shipped to companies engaged in the production of ready-mixed concrete. In the heavily populated metropolitan areas, the percentage of portland cement consumed by ready-mixed concrete companies is generally higher. Ready-mixed concrete producers are the only businesses engaged in the sale of concrete as a commodity.

16. Due to such factors as transportation costs and the necessity of supplying competitive delivery service to consumers, the effective market area of portland cement production and distribution facilities is limited. Similar considerations limit the market area for ready-mix companies.

17. Cement producers sell their portland cement to consumers, such as ready-mixed concrete companies, manufacturers of concrete products, contractors and building materials dealers. In the past such consumers, in general, have not been integrated or affiliated with portland cement producers.

18. In recent years there has been a trend of mergers and acquisitions by which ready-mixed concrete companies in major metropolitan areas in various portions of the United States have become integrated with portland cement companies. As ready-mix companies have been acquired by producers of cement, competing cement producers have sought to acquire other cement consumers in order to protect their markets against the actual or expected foreclosure caused by these acquisitions, and to prevent additional foreclosure of their markets as a result of future such acquisitions by their competitors. Thus each acquisition by a cement producer of a substantial consumer of portland cement forms an integral part of a chain reaction of acquisitions—contributing both to the share of the market already foreclosed by acquisitions, and to the impetus for further such acquisitions.

19. In recent years, the Memphis area has been dominated by two ready-mixed concrete companies, including Fischer. These two companies accounted for approximately 50% of the ready-mixed concrete shipments in the Memphis area. The two dominant ready-mixed concrete producers in the Memphis area have since 1963 become integrated, through acquisitions, with portland cement companies.

VI

Violation of Section 7

20. The effect of the acquisition of Fischer Lime & Cement Company, Inc., by Texas Industries, Inc., both in itself and by aggravating the trend towards vertical integration between suppliers and consumers of portland cement, may be substantially to lessen competition or to tend to create a monopoly in the production and sale of portland cement and ready-mixed concrete in the Memphis area, in adjoining markets, or in the United States as a whole, in the following ways, among others:

(a) Competitors of respondent may have been or may be foreclosed from a substantial share of the market for portland cement.

(b) The entry of new sellers of portland cement and ready-mixed concrete may be inhibited or prevented.

(c) The ability of non-integrated competitors of respondent effectively to compete in the sale of portland cement may be substantially impaired.

(d) As an integrated manufacturer and seller of portland cement and ready-mixed concrete respondent has achieved or may achieve a decisive competitive advantage over its competitors which are engaged only in the manufacture and sale of portland cement, or ready-mixed concrete.

(e) The production of ready mixed concrete, now a decentralized, locally controlled, small business industry, may become concentrated in the hands of a relatively few producers of portland cement.

Now, therefore, the acquisition of Fischer Lime & Cement Company, Inc. by Texas Industries, Inc., as above alleged, constitutes a violation of Section 7 of the Clayton Act (U.S.C., Title 15, Section 18), as amended.

DECISION AND ORDER

The Commission having issued its complaint on January 22, 1965, charging the respondent named in the caption hereof with violation of Section 7 of the Clayton Act, as amended, and the respondent having been served with a copy of that complaint; and

The Commission having duly determined that in the circumstances presented the public interest would be served by waiver here of the provision of Section 2.4(d) of its Rules that the consent order procedure shall not be available after issuance of complaint; and

The respondent and counsel for the Commission having executed an agreement containing a consent order, an admission 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 respondent that the law has been violated as set forth in such complaint, and waivers and provisions substantially 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 Texas Industries, Inc., is a corporation organized and existing under the laws of the State of Delaware with its principal office and place of business located at 715 Avenue H. East, Arlington, Texas.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent.

ORDER

I

It is ordered, That respondent, Texas Industries, Inc. (hereinafter "Texas Industries"), within two years after the effective date of this order, divest, absolutely and in good faith, and to a purchaser or purchasers approved by the Federal Trade Commission, the following ready-mixed concrete facilities located in Shelby County, Tennessee, acquired from Fischer Lime & Cement Company, Inc.:

Getwell plant and leasehold interest;

Bodley plant, together with a sufficient portion of the leasehold on which it is located to permit the efficient operation of the plant;

Hunter plants 1 and 2 and related facilities, not including dry-mix facilities, together with a sufficient portion of the approximately six-acre site owned by Fischer Concrete Company, Inc., bounded on the south by Hunter Street to permit the efficient operation of the plants and related facilities;¹

¹ Nothing herein shall prevent Texas Industries from retaining a right of access over said site to reach its dry-mixed concrete facilities, or the right to joint use of the quality control laboratory or radio communications system facilities there located, or agreeing with the person or persons to which divestiture is made for the retention of a portion of the tools, service equipment and spare parts at the truck repair shop there located.

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Portable plant, commonly known as Allen Road plant, now located at Hunter Street site;²

Portable plant, commonly known as Pontotoc plant, now located at Linden-Walnut Street property;²

All machinery and vehicles, including ready-mixed concrete mixer trucks, committed to the production of ready-mixed concrete.

With respect to any land required to be divested hereunder Texas Industries shall have the right, if the person to whom said land is divested so elects, in lieu of selling said land to lease said land for a term which, if the lessee exercises all its renewal options, will extend for a period of at least ten years.

Nothing in this paragraph shall be deemed to prohibit Texas Industries from retaining, accepting and enforcing bona fide liens, mortgages, deeds of trust or other forms of security on all or parts of the assets required to be divested hereunder for the purpose of securing to Texas Industries full payment of the price at which said assets are disposed of or sold, or to prohibit Texas Industries from accomplishing the required divestiture in whole or in part by means of a lease-purchase agreement or agreements, or a conditional sale or sales, pursuant to which Texas Industries retains title to the assets until the purchase price is fully paid: *Provided, however,* That if, after bona fide disposal pursuant to the divestiture order, Texas Industries, by enforcing a bona fide lien, mortgage, deed of trust or other form of security, or by reason of the purchaser's failure to comply with the terms of a lease-purchase agreement or conditional sale agreement when and as required, regains control of any of said assets Texas Industries shall divest itself of said assets within twelve months from the time of said reacquisition to a purchaser or purchasers approved by the Federal Trade Commission: *And provided further,* That so long as Texas Industries retains a security interest with respect to any of the assets divested hereunder, or with respect to assets as to which divestiture is made by lease-purchase or conditional sale agreement any part of the sale price remains unpaid and owing, Texas Industries shall not in any calendar year supply more than thirty-five percent of the portland cement purchased by the purchaser of said assets for consumption in ready-mix concrete producing facilities divested hereunder. Sales of portland cement for consumption in any of said facilities as a result of the specification by a customer, in an oral or written agree-

² In lieu of divesting said plant, Texas Industries may remove said plant to a point outside Shelby County, Tennessee and Crittenden County, Arkansas, within the time permitted for divestiture hereunder.

ment with the operator of said facilities, requiring the purchase of Texas Industries' cement, shall not be taken into consideration in computing the amount of cement supplied or consumed in accordance with this paragraph.

II

It is further ordered, That, in any divestiture, Texas Industries not sell or transfer, directly or indirectly, any of the aforesaid assets 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, or to any corporation or person controlled by one of the foregoing corporations or persons, or to any person who at the time of divestiture is an officer, director, employee or agent of, or under the control or direction of, Texas Industries or any of its subsidiaries or affiliates, or owns or controls, directly or indirectly, more than one percent of the outstanding shares of common stock of Texas Industries.

III

It is further ordered, That for a period of three years from the date upon which the divestiture required by this order is completed Texas Industries not produce, sell or distribute ready-mixed concrete in Shelby County, Tennessee, or Crittenden County, Arkansas.

IV

It is further ordered, That Texas Industries, within sixty days after the effective date of this order and every one hundred and eighty days thereafter until Texas Industries has fully complied with the divestiture provisions of this order, submit in writing to the Federal Trade Commission the names and addresses of all prospective purchasers of the assets required to be divested by this order with which Texas Industries has had contacts or negotiations; and that Texas Industries, until it has fully complied with the divestiture provisions of this order, maintain a file of all written communications between it and such prospective purchasers relating to the potential purchase of said assets, which file shall be made available to the Federal Trade Commission in the event that the divestiture required herein is not completed within two years after the effective date of this order.

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IN THE MATTER OF
CONGRESS TEXTILE PRINTERS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket C-1021. Complaint, Dec. 8, 1965—Decision, Dec. 8, 1965

Consent order requiring a New Jersey textile processor to cease using lacquer or other highly flammable substances in processing its net fabrics or textile articles unless clear disclosure is made that such articles are dangerously flammable and unsafe for ordinary use.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Congress Textile Printers, Inc., a corporation, and Peter B. Levy and Abraham H. Levy, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Congress Textile Printers, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey with its office and principal place of business at 179 Goffle Road, in the city of Hawthorne, State of New Jersey.

Respondents Peter B. Levy and Abraham H. Levy are officers of the corporate respondent and formulate, direct and control the acts, practices and policies of the said corporate respondent including those hereinafter set forth. Their office and principal place of business is the same as that of the aforesaid corporate respondent.

PAR. 2. Respondents are now, and for some time last past, have been engaged in the printing and processing of textile fabrics for customers and principals who ship or deliver such textile fabrics in commerce to respondents for such purposes. The aforesaid textile fabrics, when printed or processed by respondents are shipped or delivered from respondents' place of business in the State of New Jersey to respondents' customers or principals or other concerns located in various other States of the United States. Respondents maintain, and at all times mentioned, have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.