
IN THE MATTER OF
OCCIDENTAL PETROLEUM CORPORATION
CONSENT ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED
VIOLATION OF SEC. 7 OF THE CLAYTON ACT

Docket C-1450. Complaint, Nov. 7, 1968—Decision, Nov. 7, 1968

Consent order requiring a California corporation, principally engaged in

Complaint

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exploring and developing natural resources, to divest an acquired business selling diammonium phosphate and blended fertilizers and forbidding it to acquire any domestic competitor in any line of business for the next 5 years without prior approval of the Commission.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondent has violated the provisions of Section 7 of the Clayton Act (15 U.S.C., Sec. 18), issues this complaint, stating its charges as follows:

I. RESPONDENT

Occidental Petroleum Corporation

1. Respondent, Occidental Petroleum Corporation ("Occidental"), is a corporation organized and existing under the laws of the State of California, with its office and principal place of business at 10889 Wilshire Boulevard, Los Angeles, California, 90024.

2. Occidental, in 1967, was approximately the 102nd largest industrial corporation in the United States in terms of sales and approximately the 96th largest in terms of assets. Its total sales during 1967 amounted to over \$825 million, while its total assets approximated \$800 million.

3. Occidental is principally engaged in the exploration for and development of natural resources, including oil, gas, coal, sulfur, and phosphate rock, the marketing and transportation of crude oil produced by others, and the manufacture and sale of fertilizers and other agricultural chemicals.

4. Occidental is the fifth largest of twelve companies now mining phosphate rock in Florida. Its mining facilities, located in Hamilton County, have a design capacity of three million short tons. In addition to the Hamilton County facilities, Occidental owns substantial reserves of phosphate rock located in Florida.

5. In September 1966, Occidental commenced operation of a new \$32 million phosphate chemical complex located approximately one mile from its Hamilton County mining facilities. This complex is designed to produce 225,000 tons of phosphorus pentoxide ("P₂O₅") annually in the form of phosphoric acid. This P₂O₅ can be used to produce up to 400,000 tons per year of ammoniated phosphates and/or triple superphosphates, or it can be sold as superphosphoric acid and as merchant grade phosphoric acid. Much of the phosphate rock mined by Occidental is used internally at this complex; the remainder is marketed primarily

to fertilizer companies.

6. At all times relevant herein, Occidental has sold and shipped products in interstate commerce throughout the United States and engaged in "commerce" within the meaning of the Clayton Act.

II. THE ACQUIRED COMPANY

Hooker Chemical Corporation

7. Hooker Chemical Corporation ("Hooker") is a corporation organized and existing under the laws of the State of New York, with its office and principal place of business located at 277 Park Avenue, New York, New York, 10017.

8. Hooker, in 1967, was approximately the 244th largest industrial corporation in the United States in terms of sales and approximately the 191st largest in terms of assets. Its total sales during 1967 were \$364.5 million, while its total assets amounted to \$366 million.

9. Hooker is a major diversified producer of farm chemicals, industrial chemicals, and plastics. For the fiscal period ending December 31, 1967, approximately 19% of Hooker's consolidated sales were accounted for by fertilizers and other agricultural chemicals, 10% by pulp and paper chemicals, 7% by detergent and dry cleaning chemicals, 21% by metal treating chemicals, 15% by chemicals and specialties for other industrial uses, 20% by plastics, and 8% by international sales.

10. Hooker's Farm Chemical Division produces diammonium phosphate ("DAP"), a concentrated high analysis ammonium phosphate fertilizer which is sold for domestic and foreign use, to other producers, to distributors, and to farmers through its fifteen retail bulk blending plants. Hooker is the second or third largest DAP producer in the United States. In addition, Hooker produces a variety of other agricultural chemicals.

11. At all times relevant herein, Hooker has sold and shipped products in interstate commerce and engaged in "commerce" within the meaning of the Clayton Act.

III. TRADE AND COMMERCE

Diammonium Phosphates

12. Diammonium phosphate is a high nitrogen-phosphate content fertilizer which was introduced in 1955. It has since become one of the most widely used plant nutrients, being employed both as a direct application fertilizer and as an ingredient in blended fertilizers.

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13. The DAP industry is currently growing at a rate of 14–15% per year and long-term growth possibilities are excellent in light of the projected world food shortage. Presently, there is a temporary overcapacity situation because of: (1) Agency For International Development contract reductions; and (2) a recent invasion of the industry by petroleum companies.

14. Forty-one companies are presently producing DAP. Total industry capacity is estimated to be 7,850,000 short tons per year. The four largest producers of DAP account for 25% of total capacity, while the top eight account for 43%.

IV. THE ACQUISITION

15. On March 21, 1968, directors of Occidental and Hooker agreed in principal on the acquisition of Hooker by Occidental; a definitive agreement was reached on May 7, 1968 ("The Agreement"). The Agreement was approved by the stockholders of both companies on July 18, 1968. The acquisition was consummated on July 24, 1968.

V. VIOLATION CHARGED

16. The effect of the acquisition of Hooker by Occidental may be substantially to lessen competition or to tend to create a monopoly in the production and sale of diammonium phosphate and blended fertilizers in the United States in the following ways, among others:

(a) Actual competition in the manufacture and sale of DAP and blended fertilizers will be eliminated; and

(b) Concentration in the production and sale of DAP and blended fertilizers will be substantially increased and the possibility of deconcentration lessened.

17. The acquisition of the diammonium phosphate and blended fertilizer business of Hooker by Occidental, as alleged above, constitutes a violation of Section 7 of the Clayton Act (15 U.S.C., Sec. 18).

DISSENTING STATEMENT

NOV. 7, 1968

By JONES, *Commissioner*:

I cannot agree with the Commission's final acceptance of the consent order entered into with Occidental Petroleum Corp. as an adequate disposition of the anticompetitive impact which I believe inheres in Occidental's acquisition of Hooker Chemical

Corp. In so doing the Commission ignored the documented protest of one member of the public writing in support of small chemical competitors who detailed a series of anticompetitive results which he believed would flow from the merger. The consent order leaves this acquisition in large part untouched with only minor divestiture required and in addition contains a wholly inadequate ban on future acquisitions which I believe has serious anticompetitive overtones.

To require the relatively incidental divestiture of Hooker's diammonium phosphate fertilizer facilities as the order does in no way restores the actual and potential competition which Hooker as an independent company represented in the broader fertilizer and agricultural chemical industry.

Moreover, the merger eliminates Hooker as a small actual—and potentially major—factor in the highly oligopolistic sulphur industry which has been experiencing a growing demand, under-capacity, and increasing prices over the past few years. The top two producers of sulphur have about 72 percent of the U.S. market with Occidental in third position with four percent. Hooker is the only major phosphate fertilizer producer without its own developed sulphur producing facilities. Available evidence documents the strong likelihood that Hooker was on the edge of significant entry into the sulphur industry and would have developed its own sulphur production if it had not been acquired by Occidental. Hooker had been wholly dependent on long-term supply contracts for its sulphur requirements. Such dependence, in light of demonstrable previous excess demand, rising prices over the past few years, and the possibility of future acute shortage, led Hooker to take steps to establish its own independent position. As one of many sulphur projects it had constructed a sulphur plant at Bryan Mound, Texas in July of 1966, which was just beginning to develop, and which it has been estimated may eventually yield up to 20 percent of the sulphur that was available to the U. S. market in 1967. It had undertaken a joint venture in Mexico to produce sulphur there; it was in the process of obtaining survey permits for further exploration in the Gulf Coast area; and it had been offered a 50% interest in what it regarded as a "prime sulphur prospect" in Vinton Dome, Louisiana. Its Texas and Mexican properties looked attractive enough so that before the Hooker merger, Occidental had tried to obtain for itself an interest in them.¹

¹ It was announced Nov. 4 that Occidental has made a new sulphur discovery in three wells on the Hooker Mexican property "which appear to be amenable to mining."

The anticompetitive impact of this acquisition was not, therefore, confined simply to the phosphate fertilizer production of these two companies. An even more significant impact of Hooker's acquisition by Occidental was to prevent the development of a more competitive structure for an already highly concentrated sulphur industry very much in need of new firms and new sources of sulphur. Failure to require Occidental to undo the merger and re-establish Hooker as an independent company has deprived the users of sulphur of a much needed increase in sulphur capacity. Specifically it has deprived users like the smaller phosphate fertilizer producers of the benefits of a more competitively priced sulphur which could have been anticipated to result from an increase in sulphur capacity. At the same time this acquisition confronts these users with a decreasing sulphur supply situation since the one-eighth portion of Occidental's sulphur production which was formerly available to them will in all probability now be diverted to Hooker's phosphate production.² Moreover, Occidental, already the third largest U.S. sulphur producer in a highly oligopolistic industry, will now acquire Hooker's incipient significant market share and the benefits flowing from it.

Except for diammonium phosphate capacity, therefore, this consent order permits the swallowing up of a leading, vigorous producer of agricultural and other chemicals with sales in 1967 of \$364 million into a firm with 1967 sales of over \$825 million. And even with respect to diammonium phosphate capacity, there is no guarantee that the firm to whom it is divested can possibly insure the restoration of the same level of competitive viability to this industry which existed when these resources were in the hands of Hooker with its strong research, technical, managerial and marketing experience in agricultural chemicals. One can only surmise the other areas of potential competition which might have developed if Hooker, which was vigorously engaged as a matter of policy in adding new chemistry products to its lists, had been allowed to continue its independent existence.³

The second aspect of this consent order which I find very

² It has been estimated by Commission staff that Hooker requires up to 55,000 long tons of sulphur per year for its non-fertilizer phosphate chemical needs. Occidental in 1967 produced 429,000 long tons.

³ This merger may have created other anticompetitive effects in the areas of phosphate rock and petroleum and natural gas production, and it may have created an impediment to the development of a promising new technology respecting a sulphur saving method of phosphate production through the use of electric furnace phosphoric acid. However, these aspects of the merger were not even explored because of the Commission's decision instead to dispose of this matter without further investigation.

disturbing is the narrowly limited acquisition ban which the Commission has accepted in lieu of its usual broad ban on future acquisitions. The limited ban agreed to in this order in my judgment raises more problems than it can ever solve. It will inevitably encourage the incidence of anticompetitive conglomerate mergers and, even more serious, may present companies with a ready made method of debilitating their competition with the virtual sanction of the Federal Trade Commission.

Under the novel ban agreed to in this order, instead of being barred from acquiring any *company* engaged in the same line of commerce, Occidental-Hooker can make any future acquisition it chooses provided no competing line of *assets* is acquired. To my knowledge this concept of permissible acquisitions has never before been advanced much less accepted by any antitrust enforcement agency. Its import is extremely serious, for it can put into the hands of acquisition minded companies such as Occidental a virtually invulnerable instrument with which to weaken seriously the viability of their conglomerate competitors without necessarily running afoul of the antitrust laws. Furthermore, it cannot fail to accelerate the already accelerating movement into non-competing line acquisitions.

There are many ways in which an acquisition by a firm like Occidental of a competitor's non-competing lines could damage that firm's competing lines, and the order takes account of none of them. If this is to become the pattern of such acquisition bans in the future, nothing in such orders will prevent a firm like Occidental from being able to use its acquisition power to debilitate or even emasculate its smaller competitors by buying up all their product lines except those with which the buying firm directly competes. Nothing in the order will prevent a firm like Occidental from buying up as part of a deal for a specific non-competing line a disproportionate share of common overhead facilities, such as common advertising, marketing, production, accounting, or managerial resources, which might be jointly used by all product lines, competing as well as non-competing, thereby depriving the competing lines of optimal use of these common facilities and putting them at a disadvantage with Occidental's product lines. Management skills extend beyond a single product line, and such permitted acquisitions could deprive a company of essential managerial skills and thus leave other, possibly competing lines less well-managed. It is not unlikely that in multi-product firms, cost savings of large scale buying might, for instance, have come from the high volume purchase of chemi-

cal inputs used in common by several product lines. When some of these lines are sold to firms like Occidental, such economies and cost savings for the non-acquired firm may disappear as well. Other possible anticompetitive consequences which might flow to the competitive business as a result of the acquisition of non-competitive lines of that business might include such factors as the cost advantage from joint advertising of competing and non-competing lines which might no longer exist for a competing line when a non-competitor is sold to Occidental or a firm like it; and the "deep pocket" of the high profits of a non-competing line which might have served to strengthen the position in the marketplace of some other line competitive with an acquiring firm like Occidental, but which may no longer do so when that non-competing line is acquired. All of these and more are possible competitive advantage situations for competing product lines which could easily be sacrificed in a non-competing line merger by putting the competing line at a pronounced cost disadvantage vis-a-vis Occidental or an acquiring firm in a similar situation. Yet the order, by permitting non-competing line mergers, takes no cognizance of these or any other sources of possible competitive injury.

A further objectionable feature of the ban in its present form is the failure of the order to provide an operational way of separating non-competing line asset acquisitions which hinder competition in other lines from those which do not. The order does not require Occidental to inform the Commission of non-competing asset acquisitions and hence it puts Occidental in the position of determining what constitutes a competing or non-competing line of commerce for purposes of deciding whether mergers are eligible for notification to the Commission. When in case after case the question of what constitutes the relevant line of commerce for purposes of defining competition has been shown to be a matter of real controversy, the ban contained in this order surrenders to Occidental the power to decide this vital question in an industry—chemicals—where common processes and common end uses can make the dividing lines a matter of real disagreement.

The terms of the order thus effectively result in an emasculation of the Commission's power to enforce any ban on Occidental. One can imagine other firms in future consent negotiations wanting these same non-competing line exemptions and the same self-policing powers as Occidental has here. This ban, by permitting this type of acquisition, in effect can act as a stimulant to objectionable non-competing line mergers and provides a virtually unassailable method of weakening a competitor by virtually au-

thorizing acquisitions of its non-competing lines.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Restraint of Trade proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of Section 7 of the Clayton Act, as amended; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of 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 alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it has reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Occidental Petroleum Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 10889 Wilshire Boulevard, Los Angeles, California, 90024.

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, Occidental Petroleum Corporation ("Occidental"), its officers, directors, agents, representatives, employees, subsidiaries, affiliates, successors, and assigns, within three (3) years from the effective date of this Order, shall

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divest, absolutely and in good faith, subject to the approval of the Federal Trade Commission, all of the assets, properties, rights, and privileges, tangible and intangible, formerly used by Hooker Chemical Corporation in the manufacturing, marketing, distribution, and/or sale of diammonium phosphate and blended fertilizers, including, but not limited to, all plants located at Taft, Louisiana, Marseilles, Illinois, and elsewhere, equipment, machinery, inventory, customer lists, accounts receivable, trade names, trademarks, patents, technology, know-how, and goodwill, to the end that such divestiture will be accomplished in such manner that the divested assets will be operated as a going concern and effective competitor in the manufacturing and sale of diammonium phosphate and blended fertilizers.

II

It is further ordered, That, pending divestiture, Occidental shall not make or permit any deterioration in any of the plants, machinery, buildings, equipment, or other property or assets to be divested pursuant to this Order which may impair their present capacity or market value, unless such capacity or value is restored prior to divestiture.

III

It is further ordered, That Occidental and its subsidiaries for a period of five (5) years from the effective date of this Order, shall cease and desist from acquiring, directly or indirectly, without the prior approval of the Federal Trade Commission, the whole or any part of the stock, share capital, or assets or any domestic concern (which includes any foreign corporation doing business within the United States) where both Occidental or one of its subsidiaries and such concern are both engaged in either the manufacturing, mining, marketing, distribution, or sale of any product in the same line of commerce and where the proposed acquisition includes assets used in a competing line of business: *Provided*, That the prior approval of the Federal Trade Commission shall not be required in connection with routine purchases in the ordinary course of business of such items as materials, supplies, equipment, machinery, real estate, or interests in the oil, gas, or mineral deposits therein, except, that Occidental shall notify the Federal Trade Commission of any such acquisitions of interests in oil, gas, or mineral deposits from a domestic concern, in the ordinary course of business, within ten (10) days after the consummation date if the consideration paid for such interests exceeds \$250,000.

It is further ordered, That

(1) Within sixty (60) days from the effective date of this Order, and every sixty (60) days thereafter until the divestiture required by this Order has been completed, Occidental shall report in writing to the Federal Trade Commission its actions and progress in complying with the provisions of and in fulfilling the objectives of this Order and its plans for effecting such divestiture and the actions it has taken in implementation thereof, including, in addition to such other information as may be required, (a) the name, address and official capacity of the individual or individuals designated to carry out such divestiture and to negotiate with interested parties, (b) a brochure, presentation or other writing containing all of the essential information necessary to permit an interested party to evaluate the business to be divested, including a description and listing of its assets, (c) the efforts made and to be made in advertising and affirmatively announcing the availability of the business to be divested, (d) the particular efforts made to locate and interest prospective purchasers not previously engaged in the industry, (e) a summary of contacts and negotiations relating to the sale of the facilities ordered to be divested, including the identities of all parties expressing interest in the acquisition of the business to be divested and, subject to any legally recognized privilege, copies of all written communications pertaining to negotiations, offers to buy or indications of interest in the acquisition of the whole or any part of the business to be divested, and (f) copies of all agreements and forms of agreement relating directly or indirectly to proposed sale of the whole or any part of the business to be divested; and

(2) The respondent shall report in writing within sixty (60) days from the effective date of this Order, and every six (6) months thereafter setting forth in detail the manner and form in which it has complied, and is complying with Paragraph III of this Order.

It is further ordered, That Occidental shall forthwith distribute a copy of this Order to each of their operating divisions.

Commissioner Jones dissented and filed a statement.

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IN THE MATTER OF

RHEALEE STORES, INC.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF THE FEDERAL TRADE COMMISSION AND THE
FUR PRODUCTS LABELING ACTS

Docket C-1451. Complaint, Nov. 8, 1968—Decision, Nov. 8, 1968

Consent order requiring a Dallas, Texas, millinery retailer to cease falsely invoicing its fur products.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Rhealee Stores, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling Act, and it now 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 Rhealee Stores, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware.

Respondent is a retailer of millinery including fur products with its office and principal place of business located at 2040 Farrington, Dallas, Texas.

PAR. 2. Respondent is now and for some time last past has been engaged in the introduction, into commerce, and in the sale, advertising and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products; and has sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of furs which have been shipped and received in commerce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were falsely and deceptively invoiced by the respondent in that they were not invoiced as required by Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated under such Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products covered by invoices which failed to show the true animal name of the fur used in any such