

IN THE MATTER OF
MARQUETTE CEMENT MANUFACTURING COMPANY

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE
CLAYTON ACT

Docket 8685. Complaint, May 20, 1966—Decision, Sept. 8, 1969

Order modifying an earlier order dated January 7, 1969, 75 F.T.C. 32, which required a Chicago, Ill., cement manufacturing company to divest certain stock and/or assets of three acquired companies by (1) prohibiting respondent from selling to Westchester Concrete, Inc., more than 35 percent of its annual portland cement requirements so long as respondent retains a security interest in said company, (2) requiring a prompt divestiture of a ready-mix concrete plant in Yonkers, N.Y., (3) redinvesting any assets respondent may acquire in Cooney Bros., Inc., and (4) prohibiting the acquiring of any ready-mix concrete companies for 10 years without Commission approval.

OPINION OF THE COMMISSION

SEPTEMBER 8, 1969

BY ELMAN, *Commissioner*:

In 1964, the respondent herein, a major manufacturer of portland cement, acquired the assets of a group of firms engaged in the production and sale of ready-mixed concrete.¹ On May 20, 1966, the Commission issued a complaint against respondent charging that the acquisitions violated Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. After a hearing and appeal from the initial decision of the hearing exam-

¹ The companies whose assets were acquired were known as Cooney Bros., Inc., Plaza Concrete Corp., and Mamaroneck Stone Corp. All three firms were controlled by the Cooney family and are sometimes referred to collectively in this opinion as "the Cooney companies."

Opinion of the Commission

76 F.T.C.

iner, the Commission, having concluded that the acquisitions violated the Clayton Act as charged, issued an order on January 7, 1969 [75 F.T.C. 32], requiring respondents, *inter alia*, to "divest absolutely and in good faith" all stock and assets acquired illegally.² On March 10, 1969, pursuant to the provisions of Section 3.71 and Section 3.72 of the Commission's Rules of Practice,³ respondent filed with the Commission a "Petition to Reopen the Proceedings and to Modify or Set Aside Order Due to Changed Conditions." Complaint counsel has filed a reply to respondent's petition in which modification of the Commission's present order is requested; respondent has filed an answer to complaint counsel's reply. In sum, respondent contends that since it had substantially divested itself of the illegally acquired assets before the Commission issued its order, the Commission's proceedings have been mooted and deprived of any public interest; respondent therefore moves that the proceedings be reopened, the complaint dismissed, and the order set aside.⁴ Respondent further contends that, in the event the Commission determines that an order is still required, the order should be modified, with certain exceptions, along the lines proposed by complaint counsel.⁵ We proceed to consider each of these contentions.

I

In March 1967, nearly a year after the Commission issued its complaint in this matter, respondent began to divest itself of the assets it had illegally acquired from the Cooney companies. Respondent substantially completed the divestiture begun on its own initiative in December 1968 shortly before the Commission issued its order. Respondent asserts, and complaint counsel agrees, "that respondent's divestiture of the acquired assets prior to the Commission's Order has been made in good faith and does substantially comply with the Commission's decision and Order in this

² The Commission's order will not become final until the expiration of the time allowed for filing a petition for review, 15 U.S.C. § 21(g); respondent has requested, and the Commission has not opposed, an extension of time for filing the record with the Court of Appeals for the Fifth Circuit until 40 days after the Commission decides the instant petition.

³ Section 3.71 of the Commission's Rules provides for reopening a Commission proceeding either on the Commission's own initiative "or on the request of any party to the proceeding." Section 3.72 provides in relevant part that "Whenever an order to show cause or petition to reopen is not opposed, or if opposed but the pleadings do not raise issues of fact to be resolved, the Commission, in its discretion, may decide the matter on the order to show cause or petition and answer thereto"

⁴ Respondent's petition, pp. 11-12.

⁵ Respondent's answer, p. 1.

matter.”⁶ However, it does not follow that this case is thereby rendered moot or respondent is relieved of its liability under Section 7 of the Clayton Act. The Supreme Court has repeatedly held that voluntary cessation of conduct illegal under the antitrust laws does not in itself render a case moot. *U.S. v. Concentrated Phosphate Export Association*, 393 U.S. 199 (1968); *U.S. v. W. T. Grant*, 345 U.S. 629 (1953); *U.S. v. Trans-Missouri Freight Association*, 166 U.S. 290 (1897). Voluntary cessation of unlawful conduct may render a case moot “if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.” *U.S. v. Concentrated Phosphate Export Association*, 393 U.S. at 203.

However, while respondent asserts that there is nothing to indicate that it will embark upon a similarly unlawful course of action in the future, its self-serving statement is clearly insufficient to meet this standard. *Ibid.* In fact, as will be discussed more fully below, contrary to respondent’s suggestion that there is nothing to indicate that it may again be found in violation of the Act, respondent has retained various security interests in the assets it has sold or leased and has also retained the right to repossess these assets in the event the transferees are unable to complete their financial obligations to respondent or establish themselves in the market in which they compete.⁷ In these circumstances, the Commission is not only authorized, it is duty-bound to continue to exercise its jurisdiction to assure continued compliance with the requirements of the law. See *U.S. v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316 (1961).⁸ Moreover, if changed circumstances have made the Commission’s present order inappropriate, it is the duty of the Commission to fashion an order which will effectively redress the proved violation of law, *cf.* 366 U.S. at 323. Respondent’s contention that this case has been mooted by its voluntary divestiture is therefore rejected, and its request to the Commission that the complaint be dismissed and the Commission’s order set aside is denied.

⁶ Complaint counsel’s reply to respondent’s petition, p. 2. Of course, final determination as to whether respondent has substantially complied with the Commission’s order rests with the Commission, not complaint counsel. The details of respondent’s divestiture are discussed below.

⁷ Respondent’s petition, p. 8.

⁸ “The proper disposition of antitrust cases is obviously of great importance and their remedial phase, more often than not, is crucial. For the suit has been a futile exercise if the Government proves a violation but fails to secure a remedy adequate to redress it. ‘A public interest served by such civil suits is that they effectively pry open to competition a market that has been closed by defendants’ illegal restraints. If this decree accomplishes less than that, the Government has won a lawsuit and lost a cause.’” 366 U.S. at 323-24.

II

The Commission is presented for the first time with the facts as to the manner in which respondent has effected a divestiture of the assets acquired from the Cooney companies. No dispute as to these facts is raised by the present pleadings. The principal issue before the Commission, therefore, is whether modification of the Commission's order is appropriate in view of respondent's divestiture and, if so, what modifications should be made.

In substance, the assets acquired by respondent from the Cooney companies consisted of five ready-mixed concrete plants with related equipment and associated leasehold interests, three mobile plants, and miscellaneous personalty and realty interests. Included among the assets at one of the fixed plant sites (Tarrytown) were dump trucks, aggregate hauling trucks, and related equipment as well as dock and yard facilities for the handling and storage of aggregates. The accompanying table* shows the present status of the assets acquired by respondents from the Cooney companies. Of the five fixed plants, three have been transferred to Westchester Concrete, Inc. (Westcon); one has been sold to the Village of Mamaroneck and dismantled;⁹ and one—the plant at Yonkers, N.Y.—has been closed down by respondent after unsuccessful attempts by it to find a purchaser or lessee. Respondent retains possession of this plant. The mobile plants have either been transferred to Westcon or dismantled and most of the remaining miscellaneous assets have been sold or otherwise transferred to various purchasers. The dump trucks, aggregate hauling trucks and related equipment at the Tarrytown facility have been leased to Wren Lines, Inc. (Wren), a new company formed to haul aggregate from the Tarrytown dock site and to operate as a common carrier of material. The dock and yard facilities at Tarrytown have been leased to a division of the Martin-Marietta Corporation.

The foregoing brief recitation of the manner in which respondent has effected divestiture makes it abundantly clear that strict compliance with the terms of the Commission's present order is no longer a practical possibility and that these proceedings must be reopened so that the order may be modified in light of the

⁹ The Village of Mamaroneck apparently considered this plant a nuisance and purchased it in connection with a harbor beautification plan. Respondent contends and complaint counsel does not dispute that the same condemnation would probably have taken place whether or not respondent had acquired this plant. Respondent's petition Exhibit C-5; Complaint counsel's reply, p. 4.

* [p. 366]

changed conditions which now exist. The Commission's present order required respondent to restore each of the acquired companies "as going concerns and effective competitors in the lines of commerce * * * in which they were engaged at the time of the acquisitions," and, pending divestiture, to make no changes in the properties of the acquired companies which would impair their market value or their capacity to function in the lines of commerce in which they were engaged. The transfer of the Mamaroneck plant and the fragmentation of the aggregates portion of the Cooney business by themselves make it impossible for the objectives of the Commission's present order to be fully achieved.¹⁰ The question before the Commission, therefore, is how the order may best be modified to most nearly achieve the objectives of this litigation; to answer this question, it is necessary to review briefly some of the details of the divestiture to Westcon.

Westchester Concrete, Inc. (Westcon), is a corporation which was apparently formed primarily for the purpose of acquiring respondent's ready-mixed concrete business; respondent owns no stock in Westcon.¹¹ Although Westcon's incorporators were apparently at one time indirectly associated with respondent, no officer, director or employee of respondent presently operates or is affiliated with Westcon.¹² By a series of agreements made between March 13, 1967, and January 2, 1968, respondent transferred to Westcon the ready-mixed concrete plants in Newburgh, Verplanck, and Tarrytown, N.Y., and two mobile concrete batching plants. These transfers were not effected by outright cash sales; rather, Westcon is obligated to make quarterly payments on its indebtedness to respondent until the indebtedness is fully discharged; under the agreements, completion of all obligations would not occur before 1976.¹³ In all agreements, respondent holds non-negotiable demand notes as well as a security interest in the assets sold to Westcon, together with a right to terminate the agreement and repossess the assets in the event of default by Westcon.¹⁴ In addition to its basic obligations under the agreements referred to above, Westcon is indebted to respondent for

¹⁰ Respondent alleges, and complaint counsel apparently concedes, that the sale of the Cooney assets as "an integral unit was not possible due to the lack of interest by anyone to purchase or lease those assets as an integral unit." Respondent's petition, Exhibit F.

¹¹ Respondent's petition, Exhibit F, p. 2; complaint counsel's reply, p. 4.

¹² Respondent's petition, Exhibit F, p. 3; complaint counsel's reply, p. 4.

¹³ " * * * for the plants and equipment obtained through all of the above agreements, Westcon is obligated to pay respondent a total of \$1,187,671 in quarterly installments totalling \$37,116 over a period extending into 1976." Complaint counsel's reply, p. 7.

¹⁴ See respondent's petition, Exhibits C-1, C-2, and C-4.

Opinion of the Commission

76 F.T.C.

DISPOSITION BY RESPONDENT OF PROPERTIES ACQUIRED
FROM COONEY COMPANIES

PROPERTY ACQUIRED

PRESENT STATUS

I. *From Cooney Bros., Inc.*

- | | |
|---|---|
| (1) Newburgh, Orange County, N.Y. Ready-Mixed Concrete Plant and Equipment, on leased premises. | (1) Sold to Westcon (premises sublet) by agreement of June 5, 1967 (RPX C-2). |
| (2) Verplanck, Westchester County, N.Y. Ready-Mixed Concrete Plant and Equipment, on leased premises. | (2) Sold to Westcon (premises sublet) by agreement of March 13, 1967 (RPX C-1). |
| (3) Tarrytown, Westchester County, N.Y. Ready-Mixed Concrete Plant and Equipment; leased premises include | (3) Sold to Westcon by agreement of March 13, 1967 (RPX C-1); |
| (a) Plant premises; | (a) Leased to Martin-Marietta Corp. and subleased by it to Westcon (RPX A-1, A-2). |
| (b) Yard and dock facilities used as aggregates terminal. | (b) Leased to Martin-Marietta Corp. by agreement of March 13, 1967 (RPX A-1). |
| (4) Aggregate hauling trucks, replacements, and related equipment. | (4) Leased to Wren Lines, Inc. by agreement of March 13, 1967 and supplementary agreement (RPX B-1, B-2). |

II. *From Plaza Concrete Corp.*

- | | |
|---|---|
| (1) Yonkers, Westchester County, N.Y. Ready-Mixed Concrete Plant and Equipment, on leased premises. | (1) Closed by respondent on December 29, 1967 after temporary operation by Westcon under agreement of June 5, 1967 (RPX C-3). Westcon declined to exercise option to purchase. Respondent has unsuccessfully sought other purchasers for plant and equipment and does not intend to reopen plant. |
|---|---|

III. *From Mamaroneck Stone Corp.*

- | | |
|--|--|
| (1) Mamaroneck, Westchester County, N.Y. Ready-Mixed Concrete Plant and Equipment. | (1) Sold to Village of Mamaroneck by deed of September 5, 1967; plant and equipment dismantled by Village and site cleared.* (RPX C-5) |
|--|--|

IV. *Other*

- | | |
|---------------------------------|--|
| (1) Portable Batching Plants in | (1) |
| (a) Binghamton, N.Y. | (a) Dismantled and moved to respondent's Corona, N.Y. site; respondent has unsuccessfully sought purchasers or lessees (Respondent's petition, pp. 6-7). |

361

Opinion of the Commission

- | | |
|---------------------------|---|
| (b) Pellets Island, N.Y. | (b) Transferred to Westcon (RPX C-4). |
| (c) Stilesville, N.Y. | (c) Transferred to Westcon (RPX C-4). |
| (2) Miscellaneous assets. | (2) Sold to various purchasers (RPX D-1, D-2, D-3). |

RPX: Respondent's petition Exhibit.

* Property purchased by Village for harbor beautification and to eliminate alleged nuisance.

credits against cement purchases in the amount of \$793,219, which indebtedness is to be reduced to \$575,000 by February 28, 1970.¹⁵ Westcon is current on all payments to respondent under the agreements.

Data provided to the Commission by complaint counsel indicate that, for the first full year of operation by Westcon, the plants acquired by Westcon operated, on the whole, at levels of purchase and sale substantially greater than the levels at which the same plants had been operated by the Cooney companies prior to their acquisition by respondent.¹⁶ However, 73 percent of Westcon's 1968 purchases of portland cement were made from respondent.¹⁷ The forecast for Westcon's 1969 purchases indicates that a substantially lesser portion of their requirements (no more than 52 percent) would be met by purchases from respondent.¹⁸ In sum, while both complaint counsel¹⁹ and respondent²⁰ represent to the Commission that Westcon's financial prospects appear promising, and that the company has the potential to continue to operate as a successful competitor, Westcon is deeply indebted to respondent and appears to be operating at its sufferance.

¹⁵ Complaint counsel's reply, p. 9.

¹⁶ The following tables appear in complaint counsel's reply, p. 7:

Plant	Cement purchases of Cooney organization by plant (bbis.)			Cement purchases by Westcon, 1968	Concrete sales of Cooney organization by plant (cu. yds.)			Concrete sales by Westcon, 1968
	1962	1963	1964		1962	1963	1964	
Tarrytown.....	125,578	87,925	72,861	166,673	95,712	63,288	56,419	121,659
Newburgh.....	44,438	47,810	59,715	77,629	54,435	63,455	51,350	57,932
Verplanck.....	10,679	9,552	22,306	78,672	15,282	21,352	27,220	59,152
Yonkers.....	56,230	67,537	70,642	-----	44,520	58,691	59,221	-----
Total.....	236,920	212,824	225,524	322,974	209,949	206,786	194,210	238,743

¹⁷ Respondent's petition, Exhibit E.

¹⁸ *Ibid.*

¹⁹ See complaint counsel's reply, p. 9.

²⁰ See respondent's petition, p. 9, and Exhibit F, paragraph 6.

III

The principal vice of the Marquette-Cooney merger was that it added momentum to an established trend toward vertical integration in the cement industry in the New York Metropolitan Area (NYMA), foreclosing a substantial portion of the market for portland cement in the NYMA by tying Cooney, a major consumer, to Marquette, a major manufacturer.²¹ The natural remedy suggested by the Clayton Act to redress the wrong done by this merger is to effect a complete undoing of the acquisition. *U.S. v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316 (1961). Accordingly, the present Commission order requires respondent to divest itself of the Cooney assets "absolutely." Such an order, no less than an order directing "complete" divestiture, requires not only the transfer of ownership of the illegally acquired properties, but complete "severance of all managerial and all financial connections" between respondent and the acquired company or the divestee. *Utah Public Service Commission v. El Paso Natural Gas Company*, 395 U.S. 464 at 472 (1969). The transfer to Westcon described above obviously fails to meet these standards. Under the terms of respondent's agreements with Westcon, respondent is left with a substantial equitable interest in the assets acquired from the Cooney companies and has the right to reacquire these assets if the considerable indebtedness incurred by Westcon is not properly discharged. Moreover, in view of the fact that the major portion of Westcon's purchases continues to be made from the respondent, the divestiture has not yet effectively eliminated the substantial market foreclosure resulting from the merger.²²

In view of the Supreme Court's recent decision in *Utah Public Service Commission v. El Paso Natural Gas Company*, *supra*, it may be urged that the Commission should not accept, as providing an adequate remedy for a violation of Section 7 of the Clayton Act, any divestiture which is less than complete. Nevertheless, there are several reasons why we are inclined to view the divestiture to Westcon as providing a practical basis for an effec-

²¹ See *Marquette Cement Manufacturing Company*, FTC Docket No. 8685, slip op. p. 7, *et seq.* (January 7, 1969) [75 F.T.C. 32, at 95 *et seq.*].

²² "Prior to the merger, Cooney purchased cement from a number of sources, including Marquette, with no one supplier dominating until 1964, the year of the merger, when the Colonial Sand & Stone Co., the leading firm in the market, supplied over 75 percent of Cooney's needs, the balance coming from nine smaller suppliers. In 1965 and 1966, after the merger, Marquette supplied 99.9 percent and 83.7 percent of Cooney's requirements. The balance was supplied by a cement producing subsidiary of the United States Steel Corp. in 1965, and by Colonial in 1966." *Marquette Cement Manufacturing Company*, F.T.C. Docket No. 8685, slip op. p. 4 (January 7, 1969) (footnote omitted) [75 F.T.C. 32, at 92].

tive remedy. The divestiture has evidently been undertaken in good faith and without any intention to undermine any order the Commission may have entered. It has created a going concern with the proven capacity to operate at levels comparable to the levels at which Cooney operated prior to the merger and with the potential for continuing to compete effectively in the principal market served by the Cooney companies. Moreover, the public interest in the prompt disposition of antitrust cases is a factor which must be considered and acceptance of the divestiture to Westcon may avoid the protracted delays which have operated, in other cases,²³ to frustrate the public interest in securing early relief from the adverse effects of antitrust violations. For these reasons and for other reasons peculiar to this case, the Commission accepts the divestiture to Westcon as providing substantial relief from the violation here. However, as the Supreme Court has observed, "The key to the whole question of an antitrust remedy is of course the discovery of measures effective to restore competition." *U.S. v. E. I. du Pont de Nemours & Co.*, 366 U.S. at 326 (1961). Therefore, acceptance of the transfer to Westcon as the basic remedy in this case requires the Commission to include in its order sufficient safeguards to assure that Westcon will function, as much as possible, as an independent force in the marketplace and that the remaining ties between Westcon and respondent do not operate to perpetuate the foreclosure accomplished by the merger. We therefore adopt, in essence, the proposal of complaint counsel to modify the order so as to prohibit respondent from selling to Westcon, so long as respondent retains a security interest in the assets transferred to Westcon or so long as Westcon is indebted to respondent in substantial amounts for purchases of portland cement, more than thirty-five percent of Westcon's portland cement requirements in any one year. Of course, the modified order still requires prompt divestiture of the Yonkers plant and will also contain appropriate provisions for redivestiture in the event respondent reacquires the Cooney assets.

While respondent had at one time stated that it would not oppose the imposition of a limitation upon its sales to Westcon during Westcon's indebtedness to respondent,²⁴ it now contends

²³ See, e.g., *F.T.C. v. Proctor & Gamble Co.*, 386 U.S. 568 (1967) (10 years between merger and final decision of the Supreme Court directing divestiture); *General Foods Corp. v. F.T.C.*, 386 F. 2d 936 (3rd Cir. 1967), cert. denied, 391 U.S. 919 (1968) (10 years between merger and denial of certiorari by Supreme Court); the acquisition challenged in *Utah Public Service Commission v. El Paso Natural Gas Company*, 395 U.S. 464 (1969), occurred in 1957 and the matter is still in litigation.

²⁴ Respondent's answer, p. 2.

that it should not be subjected to such a restriction principally because it would amount to a "penalty" which is more harsh than the original order and which would not have been imposed on respondent had it divested itself, under the Commission's present order, of the Cooney assets in the same manner as it now has.²⁵ The fallacy in respondent's argument is evident. Had the respondent divested itself "absolutely" of the Cooney assets as required by the present order, the Commission would have had no need to adopt measures designed to limit the potentially pernicious effects of respondent's continuing interest in the Cooney assets. Moreover, since the Commission clearly has the authority to compel absolute divestiture, the authority to take lesser steps in order to restore competition where divestiture has been less than absolute is well within its power; the Commission acts within its remedial powers wherever the remedy selected is reasonably related to the injury to be avoided, *F.T.C. v. Ruberoid Co.*, 343 U.S. 470 (1952). Respondent's objections to this limitation are therefore without merit.²⁶

IV

One further question remains to be considered. The Commission's present order prohibits respondent from acquiring, without the prior approval of the Commission, any corporation "engaged in the sale of ready-mixed concrete or concrete products" in respondent's marketing area.²⁷ Respondent objects to this provision of the order insofar as it bars acquisition, without prior Commission approval, of companies engaged in the sale of "concrete products." Respondent maintains that the prohibition goes beyond the scope of the complaint, record and findings and that it is vague and overly broad. Respondent also points out that no such provi-

²⁵ *Id.* at pp. 2-3.

²⁶ In the modified order proposed by complaint counsel, sales "of portland cement for consumption by Westcon, as a result of specification by a customer, in a written agreement, requiring the purchase of portland cement manufactured by Marquette * * *" were to be exempted from calculation of the thirty-five percent limitation. We do not adopt this exemption in our order. If such an exemption would substantially increase Westcon's purchases from respondent, it would defeat the purposes of our order to fail to compute these sales within the limitation. On the other hand, since portland cement is a fairly standardized product (see Examiner's Finding 25 in this proceeding) it is extremely unlikely that elimination of the exemption would adversely affect Westcon's ability to meet the demands of its customers. Prior to the merger, Cooney purchased much less than 35 percent of its requirements from Marquette (see footnote 22, *supra*); consequently, an absolute limitation of 35 percent provides Marquette with market access to the former Cooney companies at a level greater than its pre-merger sales and is, if anything, favorable to respondent.

²⁷ The order also prohibits acquisition of any corporation "which purchased in excess of 10,000 barrels of portland cement in any of the five (5) years preceeding the merger." Respondent does not challenge the appropriateness of this provision of the order in the present pleadings.

sion has been included in Commission orders entered in similar cases so that, under the present order, respondent would be subject to restrictions not imposed upon any of its competitors.²⁸

This provision of the order was included in view of the demonstrated trend toward competitively injurious vertical mergers in the cement industry and in view of respondent's participation in this movement.²⁹ It was formulated to assure that respondent would not be able to defeat the ultimate purposes of the order by acquiring any company which, even though not engaged in the sale of ready-mixed concrete, was an important consumer of portland cement. It is well established that the remedial powers of the Commission include the power to frame its orders broadly enough to prevent respondents from engaging in practices in the future which are similar to the illegal practices which initially prompted Commission action, see, e.g., *Federal Trade Commission v. Colgate-Palmolive Co.*, 380 U.S. 374, at 394-95 (1965); see also *Jacob Siegel Co. v. Federal Trade Commission*, 327 U.S. 608, at 612-13 (1946). Moreover, in enforcing the law, the Commission is not required to act on an industry-wide basis but may enter and enforce its orders against particular industry members, as the facts warrant, in its discretion, see *Federal Trade Commission v. Universal-Rundle Corp.*, 387 U.S. 244 (1967). Consequently, we reject respondent's contention that the Commission is without the power to include such a provision in its order. However, while the Commission does not lack the authority to include such a provision in its order, upon reconsideration and in the exercise of our discretion, we are inclined to delete the provision here. While other cases may require inclusion of such a provision, we are satisfied that in the particular circumstances of this case the public interest will be adequately protected by the entry of an order prohibiting acquisition of ready-mixed concrete companies without prior Commission approval. The order will be so modified.

Commissioner MacIntyre did not participate in this action.

ORDER REOPENING PROCEEDING AND MODIFYING PREVIOUS ORDER

The Commission having issued an order and decision in this matter on January 7, 1969 [75 F.T.C. 32], ordering respondent, Marquette Cement Manufacturing Company, to divest absolutely

²⁸ Respondent's answer, pp. 3-6.

²⁹ *Marquette Cement Manufacturing Co.*, FTC Docket No. 8685, slip op. p. 21 (January 7, 1969 [75 F.T.C. 32, 104]).

Order Reopening Proceeding and Modifying Previous Order 76 F.T.C.

and in good faith certain stock and/or assets acquired by respondent as a result of its acquisition of Cooney Bros., Inc., Plaza Concrete Corporation, and Mamaroneck Stone Corp., and respondent having filed on March 10, 1969, a petition to reopen the proceedings and modify or set aside the order due to changed conditions, and respondent having informed the Commission of the divestiture which respondent has made to Westchester Concrete, Inc., and Wren Line, Inc., prior to issuance of the order, the Commission, for the reasons stated in the accompanying opinion, has determined that changed conditions of fact and the public interest require that these proceedings be reopened and that the order previously entered herein be modified to provide as follows:

It is ordered, That so long as respondent, Marquette Cement Manufacturing Company, a corporation, or any of its subsidiaries either (1) retains a bona fide lien, mortgage, deed of trust, or other security interest in any of the assets divested to Westchester Concrete, Inc., (Westcon) for the purpose of securing payment of the price at which said assets were transferred to Westcon, or (2) so long as the extension of credit by respondent or any of its subsidiaries to Westcon for portland cement purchases exceeds \$50,000, neither respondent nor any of its subsidiaries shall in any calendar year supply more than thirty-five (35) percent of the portland cement purchased by Westcon.

It is further ordered, That during the period respondent or any of its subsidiaries retain a bona fide lien, mortgage, deed of trust, or other security interest in the assets divested to Westcon, and so long as the extension of credit by respondent or any of its subsidiaries to Westcon for portland cement purchases exceeds \$50,000, respondent will submit a written report showing the balance of credit extended and its sales of portland cement, in barrels, to Westcon for each six months of the calendar year commencing in January 1970.

It is further ordered, That if respondent or any of its subsidiaries for any reason reacquires possession, ownership or control of any of the assets divested to Westcon or Wren, respondent shall absolutely, and in good faith, divest itself of said assets within six (6) months from the time of said reacquisition so as to reestablish going concerns and effective competitors in the lines of commerce and geographic markets in which Westcon and Wren are engaged.

It is further ordered, That respondent and its subsidiaries, of-

361 Order Reopening Proceeding and Modifying Previous Order

ficers, directors, agents, representatives, employees, affiliates, successors and assigns, within one (1) year from the date that this order becomes final, shall divest absolutely and in good faith all assets and properties, tangible and intangible, including but not limited to all plants, machinery, equipment, trade names, contract rights, trademarks, and good will acquired by Marquette and its subsidiaries as a result of its acquisition of the stock and/or assets of Cooney Bros., Inc., Plaza Concrete Corporation and Maroneck Stone Corp. and which are now located at the former ready-mix concrete plant site of Plaza Concrete Corporation at Yonkers, Westchester County, New York. None of the assets, properties, rights or privileges, described in this paragraph, shall be sold or transferred, directly or indirectly, to any person who is at the time of the divestiture an officer, director, employee, or agent of, or under the control or direction of Marquette Cement Manufacturing Company or any subsidiary or affiliated corporations of Marquette Cement Manufacturing Company, or who owns or controls, directly or indirectly, more than one (1) percent of the outstanding shares of common stock of Marquette Cement Manufacturing Company, or to any purchaser who is not approved in advance by the Federal Trade Commission.

It is further ordered, That for a period of ten (10) years respondent 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 share capital or other assets of any company engaged in the sale of ready-mixed concrete within respondent's present or future marketing area for portland cement or which purchased in excess of 10,000 barrels of portland cement in any of the five (5) years preceding the merger.

It is further ordered, That respondent shall, within sixty (60) days from the date this order becomes final and every ninety (90) days thereafter until divestiture is fully effected, submit to the Commission a detailed written report of its actions, plans and progress in complying with the provisions of this order and fulfilling its objectives. All reports shall include, among other things that will be from time to time required, a summary of all contacts and negotiations with potential purchasers of the stock and/or assets to be divested under this order, the identity of all such potential purchasers, and copies of all written communications to and from such potential purchasers.

Commissioner MacIntyre not participating.

Complaint

76 F.T.C.

IN THE MATTER OF

AMERICAN DENTAL LABORATORIES, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-1588. Complaint, Sept. 10, 1969—Decision, Sept. 10, 1969*

Consent order requiring Affton, Mo., distributors of toothbrush vending machines and supplies to cease misrepresenting that they will furnish profitable locations to purchasers of their vending machines, that they will train such purchasers, that no soliciting will be required, that they are connected with the du Pont Company or any motel chain, and to cease using the word "Laboratories" in their trade name which misrepresents that they operate a laboratory.

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 American Dental Laboratories, Inc., a corporation, and Ed Zenthoefer and Ray Kowalskey, 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 American Dental Laboratories, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its principal office and place of business located at 9722 Reavis Park Drive, in the city of Affton, State of Missouri.

Respondents Ed Zenthoefer and Ray Kowalskey are officers of said corporation. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of toothbrush vending machines, disposable toothbrushes and supplies used and dispensed thereby to purchasers for installation in commercial establishments such as office buildings, hotels, motels, and restaurants for resale to the public.