

Corporation, acquired in 1969, and two paint roller companies, acquired in 1970, and prohibits any acquisition, without prior FTC approval for the next ten years of any domestic concern engaged in the manufacture or sale of manually powered paint applicators or any concern supplying those industries.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondent EZ Paints Corporation, a corporation, has violated and is now violating the provisions of Section 7 of the Clayton Act, as amended (U.S.C. Title 15, Section 18) through the acquisition of the stock and assets of various corporations, as hereinafter more particularly designated and described, and it appearing to the Commission that a proceeding by it with reference thereto would be in the public interest, hereby issues its complaint pursuant to the provisions of Section 11 of the aforesaid Clayton Act (U.S.C. Title 15, Section 21) stating its charges as follows:

I. DEFINITIONS

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

(a) *Manually powered paint applicators*: Paint and varnish brushes, paint rollers, including pans, covers, handles, and other accessories sold separately, or as part of a paint roller kit; and miscellaneous paint applicators other than spray equipment and aerosol cans.

(b) *Manually powered paint application industry*: Persons, partnerships, joint ventures, and corporations engaging in the manufacture and sale of manually powered paint applicators, as defined in (a), immediately above.

(c) *Paint rollers*: As used separately, includes, in addition to the complete paint roller, pans, covers, handles, and other accessories sold separately, or as part of a paint roller kit.

II. RESPONDENT

2. Respondent, EZ Paints Corporation, sometimes hereinafter referred to as "EZ," is, and has been, at all times relevant herein, a corporation organized, existing, and doing business under the laws of the State of Delaware, with its present office and principal place of business located at 4051 South Iowa Avenue, Milwaukee, Wisconsin.

3. EZ is presently engaged in the manufacture, sale, and distribution of manually powered paint applicators and related paint application accessories. It also is engaged in the manufacture, sale, and distribu-

tion of knitted pile fabric, some of which is sold in the form of yard goods, principally to paint roller manufacturers and to the apparel trades, and some of which is further processed by EZ and sold in the form of end products such as floor coverings, decorative bath accessories, and hospital pads.

4. In the course and conduct of its business, EZ is, and has been, at all times relevant herein, engaged in selling its products to purchasers located in various States of the United States, and caused such products, when sold, to be transported from its facilities in various States of the United States to such purchasers located in various States of the United States. In so doing, EZ is engaged in "commerce," as "commerce" is defined in the Clayton Act, as amended, and has been continuously so engaged at all times relevant herein.

5. EZ's development has been characterized through the past decade by continuous growth. For calendar year 1959, EZ had net sales of approximately \$3,711,000, and total assets approximated \$2,218,000. For fiscal year ended July 31, 1970, net sales were approximately \$28,346,000 and total assets approximated \$19,013,000. Acquisitions accounted for a significant portion of this growth.

III. ACQUISITIONS

American Brush Corporation

6. Prior to and until March 19, 1969, American Brush Corporation, sometimes hereinafter referred to as "ABC," was a corporation organized, existing, and doing business under the laws of the State of Illinois, with its office and principal place of business located at 1111-1119 North Franklin Street, Chicago, Illinois.

7. ABC was engaged in the manufacture, sale, and distribution of manually powered paint applicators. In 1968, the year preceding its acquisition by EZ, it had net sales of approximately \$2,091,000, and as of June 30, 1968, it had total assets approximating \$1,098,200.

8. In the course and conduct of its business prior to March 19, 1969, as aforesaid, ABC sold its products to purchasers located in various States of the United States and caused such products, when sold, to be transported from its facilities in Illinois to such purchasers located in various other States of the United States. In so doing, ABC was engaged in "commerce," as "commerce" is defined in the Clayton Act, as amended.

9. Pursuant to an agreement adopted February 27, 1969, EZ, on March 19, 1969, acquired all of the issued and outstanding capital stock of ABC for \$550,000, cash.

Masterset Brushes, Inc. and King Paint Roller, Inc.

10. Prior to and until April 28, 1970, Masterset Brushes, Inc., sometimes hereinafter referred to as "Masterset," and King Paint Roller, Inc., sometimes hereinafter referred to as "King," were corporations organized, existing, and doing business under the laws of the States of New York and Michigan, respectively, with their offices and principal places of business located at 131 Walnut Avenue, Bronx, New York, and 12345 Schaefer Highway, Detroit, Michigan, respectively.

11. Masterset and King were closely held corporations administered by the same executive officers, and operated so as to mutually benefit each other.

12. Masterset and King were both engaged in the manufacture, sale, and distribution of manually powered paint applicators. In 1969, the year preceding their acquisition by EZ, Masterset and King had combined net sales of approximately \$4,000,000, and as of February 28, 1970, the companies had combined total assets of \$1,893,000.

13. In the course and conduct of their businesses prior to April 28, 1970, as aforesaid, both Masterset and King sold their products to purchasers located in various States of the United States and caused such products, when sold, to be transported from their facilities in New York and Michigan, respectively, to such purchasers located in various other States of the United States. In so doing, both Masterset and King were engaged in "commerce," as "commerce" is defined in the Clayton Act, as amended.

14. Pursuant to an agreement and plan of reorganization adopted February 28, 1970, EZ, on April 28, 1970, acquired all of the issued and outstanding capital stock of both Masterset and King in exchange for 15,000 shares of EZ's Cumulative Convertible Preferred Series B stock, plus an earn-out payable in the same class of stock, based upon increases in the acquired corporations' earnings.

IV. NATURE OF TRADE AND COMMERCE

15. Manually powered paint applicators are a separate and distinct product which is distinguished from all other paint applicators and all other products in a number of ways, including, but not restricted to, method of use, cost of production, marketing, and consumer acceptance.

16. In the United States prior to World War II, paint was principally applied by brush. During World War II the paint roller was developed, offering a new method by which to apply paint. Initially paint rollers were produced principally by firms not engaged in the

manufacture of paint brushes. During the past decade, however, substantial market pressure has resulted in a significant number of companies originally engaged in the manufacture of either paint brushes or paint rollers entering into the manufacture and sale of both. Currently, of the top twelve concerns in the manually powered paint application industry, ten manufacture and sell both paint brushes and paint rollers. Of the remaining companies within this industry, most if not all, manufacture and/or distribute both paint brushes and paint rollers.

17. Approximately three years ago miscellaneous flat paint applicators other than brushes and rollers were introduced. In 1969, such miscellaneous flat paint applicators constituted an insignificant portion of the total sales of manually powered paint applicators.

18. The manufacture and sale of manually powered paint applicators is a significant industry in the United States. In 1969, value of shipments was approximately \$99.3 million, up from 1967 value of shipments of \$88.6 million. There has been a significant increase in the level of concentration in the manually powered paint application industry. In 1967, the top four and top eight manufacturers had approximately 34.6 percent and 51.3 percent of domestic plant shipments, respectively. By 1969, these shares had increased to approximately 39.4 percent and 57.6 percent, respectively. By attributing to the acquiring company the 1969 plant shipments of those companies acquired in 1970, the market shares of the top four and top eight in 1969 increased to 45.8 percent and 65.2 percent, respectively.

19. The aforesaid increase in concentration has been paralleled by a number of independent manually powered paint applicator concerns leaving the industry, either by virtue of merger or by voluntarily ceasing operations. Additionally, there has not been a significant new entrant into this industry within the past two decades.

20. In 1968, prior to the aforesaid acquisitions, EZ was the second largest manufacturer of manually powered paint applicators, accounting for approximately 9.2 percent of the plant shipments in the United States. In that year, ABC ranked fourteenth, with approximately 2.3 percent of domestic plant shipments, while Masterset and King combined were ninth, accounting for approximately 3.9 percent. Subsequent to the acquisitions, as aforesaid, EZ became the largest domestic manufacturer of manually powered paint applicators.

21. Paint rollers constitute a significant segment of manually powered paint applicator sales, representing approximately \$26.5 million in 1967, and increasing to approximately \$31.2 million in 1969. Concentration in this segment is high. In 1969, the top four and top eight

manufacturers had in excess of 59.2 percent and 76.7 percent of domestic plant shipments of paint rollers, respectively.

22. In 1969, EZ was the largest manufacturer of paint rollers, accounting for approximately 29.7 percent of the plant shipments of that product in the United States. In that year, ABC and King had approximately 0.5 percent and 1.2 percent of domestic shipments, respectively.

23. The largest segment of manually powered paint applicator sales is in paint and varnish brushes, representing approximately \$62.1 million in 1967, and increasing to approximately \$68.1 million in 1969. Concentration in this segment is significant. In 1969, the top four and top eight manufacturers accounted for approximately 38.7 percent and 60.3 percent of domestic plant shipments.

24. Prior to the aforesaid acquisitions, EZ was not engaged in the manufacture of paint and varnish brushes. However, in 1969, ABC was the thirteenth largest manufacturer of that product with approximately 2.8 percent of domestic plant shipments, and Masterset was the sixth largest such producer with approximately 5.5 percent of domestic plant shipments. The combined sales of these acquired companies would have made EZ the third largest manufacturer of paint and varnish brushes in the United States in 1969.

V. EFFECTS OF THE ACQUISITIONS

25. The effect, cumulatively and individually, of the aforesaid acquisition by EZ of the stock and assets of ABC; Masterset; and King may be substantially to lessen competition or to tend to create a monopoly in the manufacture and sale of manually powered paint applicators in the United States as a whole in the following ways, among others:

- (a) Actual competition between EZ and the aforesaid corporations acquired by it has been eliminated;
- (b) Actual competition between and among the aforesaid corporations acquired by EZ has been eliminated;
- (c) The dominant position of EZ has been enhanced and may be further enhanced;
- (d) An industry trend toward concentration has been accelerated and further acquisitions may be induced;
- (e) The degree of concentration has been increased and may be further increased; and
- (f) The entry of new competitive entities has been and may continue to be made more difficult.

26. The effect, cumulatively and individually, of the aforesaid acquisition by EZ of the stock and assets of ABC; Masterset; and King

may be substantially to lessen competition or to tend to create a monopoly in the manufacture and sale of paint rollers in the United States as a whole in the following ways, among others:

(a) Actual competition between EZ and the aforesaid corporations acquired by it has been eliminated;

(b) Actual competition between and among the aforesaid corporations acquired by EZ has been eliminated;

(c) The dominant position of EZ has been enhanced and may be further enhanced;

(d) An industry trend toward concentration has been accelerated and further acquisitions may be induced;

(e) The degree of concentration has been increased and may be further increased; and

(f) The entry of new competitive entities has been and may continue to be made more difficult.

27. The effect, cumulatively and individually, of the aforesaid acquisition by EZ of the stock and assets of ABC; Masterset; and King may be substantially to lessen competition or to tend to create a monopoly in the manufacture and sale of paint and varnish brushes in the United States as a whole in the following ways, among others:

(a) Potential competition between EZ and the aforesaid corporations acquired by it and between EZ and all others has been eliminated;

(b) Actual competition between and among the aforesaid corporations acquired by EZ has been eliminated;

(c) The competitive position of EZ has been enhanced and may be further enhanced;

(d) An industry trend toward concentration has been accelerated and further acquisitions may be induced;

(e) The degree of concentration has been increased and may be further increased; and

(f) The entry of new competitive entities has been and may continue to be made more difficult.

VI. NATURE OF THE VIOLATION

28. The acquisition by EZ of the stock and assets of the aforesaid corporations, individually, and/or together with the cumulative effect thereof, 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 heretofore determined to issue its complaint charging the respondent named in the caption hereof with viola-

tion of Section 7 of the Clayton Act, as amended, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; 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 complaint to issue herein, 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 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 respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon provisionally accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, and having received and duly considered comments from interested members of the public, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 4051 South Iowa Avenue, Milwaukee, Wisconsin.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I

It is ordered. That subject to the prior approval of the Federal Trade Commission, respondent EZ Paints Corporation, a corporation (hereinafter referred to as EZ), through its officers, directors, agents, representatives, employees, subsidiaries, affiliates, successors and assigns, shall within one year from the date this order becomes final, divest absolutely and in good faith all assets, rights, property and privileges, tangible and intangible, including all plants, equipment, machinery, raw material reserves, inventory, customer lists, trade names, good will and other property of whatever description acquired by EZ as a result of its acquisition of Frank Gill Co. (hereinafter referred to as Gill), including all additions and improvements made

thereto, which are necessary to establish Gill as a separate independent and viable going concern in the lines of commerce in which it was engaged prior to said acquisition.

II

It is further ordered, That subject to the prior approval of the Federal Trade Commission, respondent EZ, through its officers, directors, agents, representatives, employees, subsidiaries, affiliates, successors and assigns, shall within one year from the date this order becomes final, divest absolutely and in good faith all assets, rights, property and privileges, tangible and intangible, including, all plants, equipment, machinery, raw material reserves, inventory, customer lists, trade names, good will and other property of whatever description acquired by EZ as a result of its acquisition of King Paint Roller, Inc. (hereinafter referred to as King), including all additions and improvements made thereto, which are necessary to establish King as a separate, independent, and viable going concern in the lines of commerce in which it was engaged prior to said acquisition.

III

It is further ordered, That subject to the prior approval of the Federal Trade Commission, respondent EZ, through its officers, directors, agents, representatives, employees, subsidiaries, affiliates, successors and assigns, shall within one year from the date this order becomes final, divest absolutely and in good faith, the name American Brush Corporation (hereinafter referred to as ABC), and all paint and varnish brush accounts of ABC to whom ABC sold \$1,000 or more of paint and varnish brushes during the last full fiscal year of ABC preceding its acquisition by EZ, or the most recent full fiscal year of ABC, and which are still paint and varnish brush accounts of ABC as of the date of this order. Such divestiture shall be accomplished by sale of (a) the name American Brush Corporation; (b) all paint and varnish brush trademarks owned by ABC as of the time of its acquisition by EZ; (c) a list of all such paint and varnish brush customers; (d) all product specifications and specialized dies used by ABC in the production of paint and varnish brushes for the accounts to be sold pursuant to this order; (e) any finished goods, work-in-process, packaging materials, or specialized raw materials in ABC's inventory at the time of divestiture which are applicable exclusively to such accounts together with a list of the sources of such specialized raw materials; and (f) a transfer of all unfilled paint and varnish brush orders and contracts with such accounts, to the extent that such orders and contracts are assignable.

IV

It is further ordered, That following the divestiture contemplated by the preceding paragraph of this order, EZ, its officers, directors, agents, representatives, employees and subsidiaries will (a) refrain for a period of one year from the date of such divestiture from the sale of any paint or varnish brushes to any account sold pursuant to the preceding paragraph of this order; and (b) permanently refrain from the sale of any paint or varnish brushes under the ABC corporate name or any trademark divested under the preceding paragraph of this order. *Provided, however,* nothing contained in subparagraph (a) above shall prevent EZ from selling paint or varnish brushes to any other company which purchased \$1,000 or more of paint and varnish brushes from a nondivested component of EZ during its last full fiscal year prior to its acquisition by EZ (i.e., Masterset Brushes, Inc.). A list of such firms to which the foregoing provision applies is contained in a letter of representation from EZ to the Federal Trade Commission.

V

It is further ordered, That pursuant to the requirements of Paragraphs I, II, and III above, none of the stock, assets, rights or privileges, tangible or intangible, to be divested by EZ shall be divested directly or indirectly to anyone who is, at the time of the divestiture, an officer, director, employee, or agent of, or under the control, direction, or influence of EZ or any of EZ's subsidiaries or affiliated corporations or who owns or controls more than one (1) percent of the outstanding shares of the capital stock of EZ.

VI

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

VII

It is further ordered, That respondent EZ shall cease and desist for ten (10) years from the date this order becomes final from acquiring directly or indirectly, through subsidiaries or otherwise, without prior approval of the Federal Trade Commission, any part of the assets, stock, share capital, or other actual or potential equity interest or

right of participation in the earnings of any domestic concern, corporate or non-corporate, which is engaged in the manufacture or sale of manually powered paint applicators or engaged in the manufacture or sale of raw materials to companies engaging in the manufacture or sale of manually powered paint applicators, or from entering into any arrangements or understanding with such a concern through which respondent EZ becomes possessed of that concern's market share.

For the purposes of this order, manually powered paint applicators are defined as: paint and varnish brushes; paint rollers including pans, covers, handles, and other accessories sold separately, or as part of a paint roller kit; and miscellaneous paint applicators other than spray equipment and aerosol cans.

VIII

It is further ordered, That respondent EZ shall within sixty (60) days after date of service of this order, and every sixty (60) days thereafter until respondent EZ has fully complied with the provisions of this order, submit in writing to the Federal Trade Commission a verified report setting forth in detail the manner and form in which respondent EZ intends to comply or has complied with this order. All compliance reports shall include, among other things that are from time to time required, a summary of contracts or negotiations with anyone for the specified stock, assets and plant, the identity of all such persons, and copies of all written communications to and from such persons.

IX

It is further ordered, That respondent EZ notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any change in the corporation which may affect compliance obligations arising out of the order.

IN THE MATTER OF

H-S ENTERPRISES, INCORPORATED, ET AL.

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

Docket C-2107. Complaint, Nov. 26, 1971—Decision, Nov. 26, 1971

Consent order requiring a Lincoln, Rhode Island, marketer of "Stripper SX" or "Safety Strip," a paint and resin disintegrator, to cease misrepresenting