

IN THE MATTER OF
MARTIN MARIETTA CORPORATION, ET AL.

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

Docket 9039. Complaint, June 24, 1975 — Decision, Dec. 20, 1976

Consent orders requiring three portland cement manufacturers, Martin Marietta Corporation, Rockville, Md., Ideal Basic Industries, Inc., Denver, Colo., and OKC Corp., Dallas, Tex., among other things to offer, for a ten-year period, a point of origin price for bulk portland cement to a customer each time a delivered price is offered. Customers are given the option of furnishing or arranging transportation from the mill at the point of origin price. The Ideal order defines the point of origin price as the delivered price less the actual freight which would have been incurred to the destination. The other two orders define the point of origin price as the delivered price less the unabsorbed or average freight factor included in it. Further, the orders prohibit the exchange of price information among competitors and control of the place of use of portland cement which has been sold to a customer.

Appearances

For the Commission: *James C. Egan, Jr.*

For the respondents: *Harold F. Parker, Terrence C. Sheehy, J.F. Bruce and William J. Hunter, Howrey, Simon, Baker & Murchison, Washington, D.C. for Martin Marietta Corporation. Gordon Granier and Jeffrey C. Pond, Holland & Hart, Denver, Colo. for Ideal Basic Industries, Inc. Daniel McCallen, Dallas, Tex. and Edward T. Tait and Eric F. Stoer, Reed, Smith, Shaw & McClay, Washington, D.C. for OKC Corp.*

COMPLAINT

The Federal Trade Commission, having reason to believe that the above named respondents have violated and are now violating Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. §45), and believing that a proceeding by it in respect thereof is in the public interest, hereby issues this complaint, charging as follows:

I. DEFINITIONS

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

- (a) "Portland cement" – a material which includes types I through V as specified by the American Society for Testing Materials, not including either masonry or white cement; and
- (b) "Ready mixed concrete" – a material produced by combining

portland cement, aggregates such as rock and sand, water and occasionally certain admixtures.

II. RESPONDENTS

PAR. 2. Respondent Martin Marietta Corporation is a corporation organized, existing and doing business under the laws of the State of Maryland, with its principal office and place of business at 11300 Rockville Pike, Rockville, Maryland. In 1972, Martin Marietta Corporation had sales of portland cement of \$131,798,000.

PAR. 3. Respondent Ideal Basic Industries, Inc., is a corporation organized, existing and doing business under the laws of the State of Colorado, with its principal office and place of business at 821 17th St., Denver, Colorado. In 1972, Ideal Basic Industries, Inc., had sales of portland cement of \$146,126,871.

PAR. 4. Respondent OKC Corp. is a corporation organized, existing and doing business under the laws of the State of Delaware, with its principal office and place of business at 1949 North Stemmons Freeway, Dallas, Texas. In 1972, OKC Corp. had sales of portland cement of \$16,498,657.92.

PAR. 5. Each of the respondents is substantially engaged in the manufacture and sale of various types of portland cement.

III. COMMERCE

PAR. 6. In the course and conduct of its business, each of the respondents is causing, and, for a substantial period of time, has caused the portland cement it manufactures to be sold to purchasers in various States of the United States, and is causing, and for a period of time, has caused the portland cement it manufactures to be shipped and distributed from its places of manufacture or storage located in various States of the United States to purchasers located in various other States of the United States. Each of the respondents, therefore, is, and has been, engaged in "commerce" and the business of each respondent is in and affects "commerce" as "commerce" is defined in the Federal Trade Commission Act, as amended.

IV. NATURE OF TRADE AND COMMERCE

PAR. 7. The manufacture and sale of portland cement is a substantial industry in the United States. In 1972, there were about 50 portland cement companies in the United States operating approximately 170 plants. Domestic shipments of portland cement in 1972 amounted to approximately 83 million short tons, valued at about \$1.6 billion.

PAR. 8. Portland cement manufacturers sell their portland cement to

consumers such as ready mixed concrete companies, prestressed concrete products manufacturers, concrete block producers, contractors and building materials dealers. Approximately sixty (60) percent of all portland cement is shipped to firms engaged in the production and sale of ready mixed concrete.

PAR. 9. Portland cement is a standard commodity made according to standardized specifications, and the quality of the product does not differ substantially among producers except as between recognized and standardized grades thereof. Charges for transporting portland cement constitute a substantial portion of the cost of the product to the customer.

PAR. 10. The three respondents account for approximately seventy-five (75) percent of the sales of portland cement in the State of Oklahoma.

PAR. 11. In the course and conduct of the aforesaid business, each of the respondents, at all times referred to herein, has been in substantial competition in commerce with other respondents and with other corporations in the sale and distribution of portland cement as defined herein except insofar as such competition has been hindered, lessened, restricted, restrained or eliminated as alleged in this complaint.

V. NATURE OF THE OFFENSE

PAR. 12. In the conduct of the aforesaid business, the respondents, individually and collectively, with knowledge that other respondents and other sellers of portland cement simultaneously do likewise, are now using and for a number of years have used and pursued various courses of business behavior constituting unfair methods of competition and unfair acts in or affecting commerce. Among the unfair methods of competition in which respondents, individually and collectively, have been and are now engaged are the following:

- (a) exchanging, collecting and compiling information concerning prices, and terms and conditions of sale of portland cement;
- (b) establishing and maintaining a system of pricing for portland cement resulting in respondents quoting and charging identical delivered prices to each destination point;
- (c) refusing to allow customers to pick up portland cement at the site of manufacture or at a terminal site;
- (d) refusing to allow customers to arrange for the transportation of portland cement from the site of manufacture or a terminal site by a licensed hauler of a customer's choice;
- (e) refusing to permit the use of any hauler, other than their designated hauler, to transport portland cement manufactured by respondents from manufacture or terminal site; and

(f) controlling and attempting to control the point of use of portland cement sold to customers.

VI. EFFECTS

PAR. 13. The capacity, tendency and effects of the aforesaid alleged conduct of respondents, individually and collectively, are, among others, to:

- (a) stabilize prices and provide certainty in the pricing of portland cement;
- (b) stabilize prices and provide certainty in the bidding for sale of portland cement for use on public projects;
- (c) reduce and hinder actual and potential competition among respondents in the sale and distribution of portland cement;
- (d) prevent use of the cheapest and most efficient mode of transportation of portland cement; and
- (e) artificially raise the price paid by consumers, public and governmental bodies, and other customers for portland cement.

VII. VIOLATION

PAR. 14. The aforesaid acts and practices of each respondent are all to the prejudice of the public; have a tendency to restrain and prevent, and have actually restrained and prevented competition in the sale of portland cement; and have a tendency to create in each respondent a monopolistic control over the terms and conditions of the sale of portland cement and, therefore, constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. §45).

PAR. 15. The aforesaid acts and practices of the respondents, collectively, constitute a combination to restrict or eliminate competition in the sale and delivery of portland cement, are all to the prejudice of actual and potential competitors and customers of respondents and the public; have a dangerous tendency to and have actually restrained and prevented competition in the sale of portland cement; and have a tendency to create in respondents a monopoly in the sale and distribution of said product and, therefore, constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. §45).

DECISION AND ORDER AS TO MARTIN MARIETTA CORPORATION

The Commission having heretofore issued its complaint charging the respondent named in the caption hereto with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondent

having been served with a copy of that complaint, together with a notice of contemplated relief; 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, 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 withdrawn this matter from adjudication in accordance with Section 2.34(d) of its Rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing a consent order having thereupon been placed on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter pursuant to Section 2.34(b) of its Rules, now in further conformity with the procedure prescribed in Section 2.34(b) of its Rules, the Commission hereby makes the following jurisdictional findings, and enters the following order:

1. Respondent Martin Marietta Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its office and principal place of business located in the city of Rockville, State of Maryland.

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

DEFINITIONS

For purposes of this order, the following definitions shall apply:

"Portland cement" — a material sold in bulk which includes types I through V as specified by the American Society for Testing Materials, not including either masonry or white cement.

"Point of origin price" — price set by respondent for purchases by a customer at a mill or distribution point from which a delivered price is quoted to that customer. The "point of origin price" shall be no greater than the delivered price offered to the customer less the cost of transportation factor which was included by respondent in the delivered price.

"Delivered price" — price set by respondent for purchases by a

customer at a designated destination point. "Delivered price" shall include a cost of transportation factor, which factor shall consist of either (i) the nonabsorbed actual freight charge to the designated destination point or (ii) the average freight charge for an established geographic area in which that destination point is located.

II

It is ordered, That respondent, its successors and assigns, and its directors, officers, agents, representatives, employees and affiliates (hereinafter "respondent"), directly or indirectly, through any corporate or other device in connection with the sale or distribution of portland cement:

1. Shall within ninety (90) days from the effective date hereof and for a period of ten (10) years thereafter, where a delivered price is offered to a customer from a mill or distribution point, also allow that customer the option of obtaining a point of origin price at that mill or distribution point and arranging or furnishing transportation from that mill or distribution point for the purchase of portland cement in quantities of at least a truckload in bulk cement vehicles (the minimum truckload tonnage to be the truckload minimum for licensed carriers as established by the Federal or State agency having jurisdiction over the applicable tariff) when the customer furnishes or arranges transportation physically compatible with respondent's facilities and complies with reasonable loading schedules and loading procedures of respondent.

2. Shall not exchange with its competitors information concerning prices, discount rates and other terms and conditions pertinent to the sale of portland cement, except in connection with a bona fide sale to, or purchase from, any such competitor or in connection with negotiations related thereto.

3. Shall not control or attempt to control the place of use of portland cement which has been sold to a customer, provided that, nothing contained herein shall affect respondent's right to obtain contractual assurances necessary to comply with the Robinson-Patman Act.

III

It is further ordered, That, consistent with the definitions contained in Part I of this order, nothing contained in this order shall be interpreted as prohibiting respondent, when acting individually, (1) from exercising its right to establish the price at which and to select the customers to which it shall sell; (2) from selling at a point of origin or

delivered price established in good faith to meet the equally low price of a competitor; (3) from absorbing all of any part of actual freight charges on shipment to any geographic area; or (4) from charging the same price to all customers within an established geographic area. No pricing practice engaged in by respondent shall be deemed immune or exempt from the antitrust laws by reason of anything contained in this paragraph.

IV

It is further ordered, That all persons in respondent's organization having sales and policy responsibilities with respect to the subject matter of this order shall be notified of the terms of this order.

V

It is further ordered, That respondent, pursuant to Section 3.61 of the Commission's Rules, within ninety (90) days after this order becomes effective, submit in writing to the Federal Trade Commission a report setting forth in detail the manner and form in which respondent has complied with this order.

DECISION AND ORDER AS TO IDEAL BASIC INDUSTRIES, INC.

The Commission having heretofore issued its complaint charging the respondent named in the caption hereto with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondent having been served with a copy of that complaint, together with a notice of contemplated relief; 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, 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 withdrawn this matter from adjudication in accordance with Section 2.34(d) of its Rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter pursuant to Section 2.34(b) of its Rules, now in further conformity with the procedure prescribed in Section 2.34(b) of its Rules,

the Commission hereby makes the following jurisdictional findings, and enters the following order:

1. Respondent Ideal Basic Industries, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located in the city of Denver, State of Colorado.

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

DEFINITIONS

For the purposes of this order, the following definitions shall apply:

"Portland cement" — a material sold in bulk which includes types I through V as specified by the American Society for Testing Materials, not including either masonry or white cement.

"Point of origin price" — a price set by respondent for purchases by a customer at a mill or distribution point from which a delivered price is quoted to that customer. The "point of origin price" shall be no greater than the delivered price offered to the customer less the actual transportation costs which would be incurred by the seller if the sale were made on a delivered basis.

"Delivered price" — a price set by respondent for purchases by a customer at a designated destination point, which price includes the cost of transportation to that designated destination point.

II

It is ordered, That respondent, its successors and assigns, and its directors, officers, agents, representatives, employees and affiliates (hereinafter "respondent"), directly or indirectly, through any corporate or other device in connection with the sale or distribution of portland cement:

1. Shall within ninety (90) days from the effective date hereof and for a period of ten (10) years thereafter, where a delivered price is offered to a customer from a mill or distribution point, also allow that customer the option of obtaining a point of origin price at that mill or distribution point and arranging or furnishing transportation from that mill or distribution point for the purchase of portland cement in quantities of at least a truckload in bulk cement vehicles (the minimum truckload tonnage to be the truckload minimum for licensed carriers as

established by the Federal or State agency having jurisdiction over the applicable tariff) when the customer furnishes or arranges transportation physically compatible with respondent's facilities and complies with reasonable loading schedules and loading procedures of respondent.

2. Shall not exchange with its competitors information concerning prices, discount rates and other terms and conditions pertinent to the sale of portland cement, except in connection with a bona fide sale to, or purchase from, any such competitor or in connection with negotiations related thereto.

3. Shall not control or attempt to control the place of use of portland cement which has been sold to a customer, provided that, nothing contained herein shall affect respondent's right to obtain contractual assurances necessary to comply with the Robinson-Patman Act.

III

It is further ordered, That, consistent with the definitions contained in Part I of this order, nothing contained in this order shall be interpreted as prohibiting respondent, when acting individually, (1) from exercising its right to establish the price at which and to select the customers to which it shall sell; (2) from selling at a point of origin or delivered price established in good faith to meet the equally low price of a competitor; (3) from absorbing all or any part of actual freight charges on shipment to any geographic area; or (4) from charging the same price to all customers within an established geographic area. No pricing practice engaged in by respondent shall be deemed immune or exempt from the antitrust laws by reason of anything contained in this paragraph.

IV

It is further ordered, That all persons in respondent's organization having sales and policy responsibilities with respect to the subject matter of this order shall be notified of the terms of this order.

V

It is further ordered, That respondent, pursuant to Section 3.61 of the Commission's Rules, within ninety (90) days after this order becomes effective, submit in writing to the Federal Trade Commission a report setting forth in detail the manner and form in which respondent has complied with this order.

DECISION AND ORDER AS TO OKC CORP.

The Commission having heretofore issued its complaint charging the respondent named in the caption hereto with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondent having been served with a copy of that complaint, together with a notice of contemplated relief; 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, 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 withdrawn this matter from adjudication in accordance with Section 2.34(d) of its Rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter pursuant to Section 2.34 (b) of its Rules, now in further conformity with the procedure prescribed in Section 2.34(b) of its Rules, the Commission hereby makes the following jurisdictional findings, and enters the following order:

1. Respondent OKC Corp. 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 in the city of Dallas, State of Texas.

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

DEFINITIONS

For the purposes of this order, the following definitions shall apply:
"Portland cement" — a material sold in bulk which includes types I through V as specified by the American Society for Testing Materials, not including either masonry or white cement.

"Point of origin price" — price set by respondent for purchases by a customer at a mill or distribution point from which a delivered price is quoted to that customer. The "point of origin price" shall be no greater

than the delivered price offered to the customer less the cost of transportation factor which was included by respondent in the delivered price.

"Delivered price" — price set by respondent for purchases by a customer at a designated destination point. "Delivered price" shall include a cost of transportation factor, which factor shall consist of either (i) the non-absorbed actual freight charge to the designated destination point or (ii) the average freight charge for an established geographic area in which that destination point is located.

II

It is ordered, That respondent, its successors and assigns, and its directors, officers, agents, representatives, employees and affiliates (hereinafter "respondent"), directly or indirectly, through any corporate or other device in connection with the sale or distribution of portland cement:

1. Shall within ninety (90) days from the effective date hereof and for a period of ten (10) years thereafter, where a delivered price is offered to a customer from a mill or distribution point, also allow that customer the option of obtaining a point of origin price at that mill or distribution point and arranging or furnishing transportation from that mill or distribution point for the purchase of portland cement in quantities of at least a truckload in bulk cement vehicles (the minimum truckload tonnage to be the truckload minimum for licensed carriers as established by the Federal or State agency having jurisdiction over the applicable tariff) when the customer furnishes or arranges transportation physically compatible with respondent's facilities and complies with reasonable loading schedules and loading procedures of respondent.

2. Shall not exchange with its competitors information concerning prices, discount rates and other terms and conditions pertinent to the sale of portland cement, except in connection with a bona fide sale to, or purchase from, any such competitor or in connection with negotiations related thereto.

3. Shall not control or attempt to control the place of use of portland cement which has been sold to a customer, provided that, nothing contained herein shall affect respondent's right to obtain contractual assurances necessary to comply with the Robinson-Patman Act.

III

It is further ordered, That, consistent with the definitions contained

in Part I of this order, nothing contained in this order shall be interpreted as prohibiting respondent, when acting individually, (1) from exercising its right to establish the price at which and to select the customers to which it shall sell; (2) from selling at a point of origin or delivered price established in good faith to meet the equally low price of a competitor; (3) from absorbing all or any part of actual freight charges on shipment to any geographic area; or (4) from charging the same price to all customers within an established geographic area. No pricing practice engaged in by respondent shall be deemed immune or exempt from the antitrust laws by reason of anything contained in this paragraph.

IV

It is further ordered, That all persons in respondent's organization having sales and policy responsibilities with respect to the subject matter of this order shall be notified of the terms of this order.

V

It is further ordered, That respondent, pursuant to Section 3.61 of the Commission's Rules, within ninety (90) days after this order becomes effective, submit in writing to the Federal Trade Commission a report setting forth in detail the manner and form in which respondent has complied with this order.

IN THE MATTER OF

SPIEGEL, INC.

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

Docket 8990. Complaint, Aug. 7, 1974 — Modified Order, Dec. 27, 1976

Order modifying an earlier order dated Aug. 18, 1975, 40 F.R. 44317, 86 F.T.C. 425, by limiting the reporting requirements of Paragraphs II and V, as mandated by the Court of Appeals for the Seventh Circuit in its August 9, 1976, decision and judgment, 540 F. 2d 303 (1976), to only those suits instituted in a county other than that where the defendant resided at the commencement of the action, or where he signed the contract sued on.

Appearances

For the Commission: *Randall H. Brook* and *Barry E. Barnes*.

For the respondent: *Basil J. Mezines, Stein, Mitchell & Mezines*, Washington, D.C.

MODIFIED ORDER TO CEASE AND DESIST

Respondent, having filed in the United States Court of Appeals for the Seventh Circuit on October 7, 1975, a petition to review an order to cease and desist issued herein on August 18, 1975; and the Court having rendered its decision and judgment on August 9, 1976, affirming and enforcing the Commission's order with modification of Paragraphs II and V; and the time in which to file a petition for certiorari having expired without either party having filed such a petition;

Now, therefore, it is hereby ordered, That the aforesaid order to cease and desist be, and it hereby is, modified in accordance with the decision and judgment of the Court to read as follows:

ORDER

I

For purposes of this order, the term "respondent" means "Spiegel, Inc., a corporation, and its successors, assigns, officers, agents, representatives and employees, acting directly or through any corporation, subsidiary, division, or other device, including any collection agency."

II

It is ordered, That respondent, in connection with the collection of retail credit accounts in or affecting commerce, as "commerce" is