

Complaint

93 F.T.C.

IN THE MATTER OF
LANCASTER COLONY CORPORATION, ET AL.

DISMISSAL ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION AND CLAYTON ACTS

Docket 9119. Complaint, Oct. 25, 1978 — Dismissal Order, March 6, 1979

This order dismisses the complaint against two manufacturers of machine-made glassware alleging violations of Section 7 of the Clayton Act, and Section 5 of the Federal Trade Commission Act. The Commission, in dismissing the complaint, held that under the unique circumstances presented in this case, further proceedings in the matter are not in the public interest.

Appearances

For the Commission: *Edward T. Colbert* and *William D. Mitchell*.

For the respondents: *Richard Murphy* and *Fred A. Summer*, *Dunbar, Kiezel & Murphy*, Columbus, Ohio, *Edward Wolf*, *J.B. Rather* and *R.W. Davis*, *White & Case*, New York City and *John W. Barnum*, *White & Case*, Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondents, each subject to the jurisdiction of the Commission, have entered into an acquisition agreement which, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, that said agreement already constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21, and Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

I

Definition

PARAGRAPH 1. For the purpose of this complaint, the following definition shall apply: "Machine-made glassware" means all moderately-priced soda-lime glass beverageware, tableware, food preparation glassware, and novelty and ornamental glassware items produced by machine.

II

Federal Paper Board Company, Inc.

PAR. 2. Federal Paper Board Company, Inc. (Federal Paper) is a corporation organized and existing under the laws of the State of New York, with a principal place of business at 75 Chestnut Ridge Road, Montvale, New Jersey.

PAR. 3. Federal Paper through its unincorporated Federal Glass Company division (Federal Glass) produces machine-made glassware and sells said machine-made glassware throughout the United States.

PAR. 4. In its fiscal year ended December 31, 1977, Federal Paper had net sales of approximately \$397,000,000, and net income of approximately \$13,800,000; Federal Glass had net sales of approximately \$48,000,000 and income before allocation for taxes and corporate overhead of approximately \$910,000.

PAR. 5. Federal Glass is the third largest manufacturer of machine-made glassware in the United States.

PAR. 6. Federal Glass, until 1978, was for many years a member of the American Glassware Association, which is a trade association made up of the major domestic manufacturers of machine-made glassware.

III

Lancaster Colony Corporation

PAR. 7. Lancaster Colony Corporation (Lancaster Colony) is a corporation organized and existing under the laws of the State of Delaware, with a principal place of business at 37 West Broad St., Columbus, Ohio.

PAR. 8. Lancaster Colony, through its subsidiary Indiana Glass Company, an Indiana corporation, produces machine-made glassware, and sells said machine-made glassware throughout the United States. Lancaster Colony also produces machine-made glassware through its subsidiary Lancaster Glass Corporation, an Ohio corporation, and sells said machine-made glassware throughout the United States.

PAR. 9. In its fiscal year ended June 30, 1978, Lancaster Colony had sales of approximately \$237,000,000, and net income of approximately \$23,300,000. Lancaster Colony had sales of machine-made glassware of approximately \$35,500,000.

PAR. 10. Indiana Glass Company is the fourth largest manufacturer of machine-made glassware in the United States.

COMMISSION DECISIONS

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PAR. 11. Indiana Glass Company, until 1978, was for many years a member of the American Glassware Association, which is a trade association made up of the major domestic manufacturers of machine-made glassware.

IV

Jurisdiction

PAR. 12. At all times relevant herein Federal Paper and Lancaster Colony have been engaged in the manufacture and sale of machine-made glassware in interstate commerce and are engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and each is a corporation whose business is in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

V

The Acquisition Agreement

PAR. 13. On or about April 1978 Federal Paper and Lancaster Colony agreed in principle to the acquisition by Lancaster Colony of all Federal Glass assets of Federal Paper. The proposed purchase agreement provides, *inter alia*, for the sale of the Federal Glass assets of Federal Paper in exchange for approximately \$42,000,000. A letter of intent was executed by Lancaster Colony on August 29, 1978.

VI

Trade and Commerce

PAR. 14. Relevant lines of commerce are the manufacture and sale of machine-made glassware and submarkets thereof.

PAR. 15. A relevant section of the country or geographic market is the entire United States.

PAR. 16. The United States machine-made glassware market is highly concentrated with the combined market share of the four largest manufacturers estimated to be approximately 74 percent.

PAR. 17. Barriers to entry into the manufacture of machine-made glassware and submarket thereof are substantial.

VII

Actual Competition

PAR. 18. Federal Paper and Lancaster Colony are and have been for many years actual competitors in the manufacture and sale of machine-made glassware and submarkets thereof, and actual competitors of others engaged in the manufacture and sale of machine-made glassware and submarkets thereof throughout the United States.

VIII

Effects

PAR. 19. The effect of the proposed acquisition may be to substantially lessen competition or to tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, or Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

(a) actual competition between Federal Paper and Lancaster Colony in the manufacture and sale of machine-made glassware and submarkets thereof will be eliminated;

(b) actual competition between competitors generally in the manufacture and sale of machine-made glassware and submarkets thereof may be lessened;

(c) Federal Paper will be eliminated as an actual substantial independent competitor in the manufacture and sale of machine-made glassware and submarkets thereof;

(d) concentration in the manufacture and sale of machine-made glassware and submarkets thereof will be increased and possibilities for eventual deconcentration may be diminished;

(e) mergers or acquisitions between other machine-made glassware manufacturers may be encouraged, thus causing a further substantial lessening of competition and tendency toward monopoly in the relevant markets.

IX

Violations Charged

PAR. 20. The proposed acquisition by Lancaster Colony of the Federal Glass assets of Federal Paper (if consummated), the proposed Purchase Agreement between Lancaster Colony and Federal Paper (if executed), and the agreement in principle between

Lancaster Colony and Federal Paper, constitute violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and are or would be unfair acts, practices or methods of competition in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

ORDER GRANTING COMPLAINT COUNSEL'S MOTION TO
WITHDRAW FROM ADJUDICATION AND TO DISMISS THE
COMPLAINT

The administrative law judge (ALJ) has certified to the Commission the motion of respondent Federal Paper Board Company, Inc. (Federal) to terminate this proceeding by an order prohibiting the sale of any of the assets of its Federal Glass Division (Division) to respondent Lancaster Colony Corporation (Lancaster). Also certified to the Commission is complaint counsel's motion to withdraw the case from adjudication and to dismiss the complaint. The ALJ recommends that the Commission accept Federal's motion and deny that of complaint counsel.

The Division has been closed since January 31, 1979, when Federal announced the shutdown of its plant, alleging continuing operating losses. However, Federal has refused to provide complaint counsel with financial and other relevant information in support of its "failing company" defense. In their papers, complaint counsel note that the withdrawal of the Wheaton Glass Co. and the Eastcliff Corporation from negotiations to purchase the Division have exhausted all feasible alternatives to liquidation of the Division or sale to Lancaster. Complaint counsel recognize the possibility that some other purchaser might exist but suggest that the slight chance of identifying another party which will expeditiously return the plant to normal operation is not worth the gamble of approximately 1500 jobs at stake. Counsel further point out that liquidation of the Division could result in the loss of its customers to the two largest firms in this industry, Anchor Hocking Corporation and the Libbey Division of Owens-Illinois.

Under these rather unique circumstances, and in the exercise of our discretion, we conclude that further proceedings in this matter are not in the public interest. Accordingly,

It is ordered, That the complaint in this matter is hereby dismissed.

IN THE MATTER OF
CHILDREN'S ADVERTISING

TRR No. 215-60. Interlocutory Order, March 7, 1979

ORDER MODIFYING SCHEDULE

Effective March 9, 1979, the Commission will be temporarily reduced to four members, of whom two are not presently participating in the instant proceeding. Whether or not two Commissioners might properly exercise certain decisionmaking authority under these circumstances, the Commission believes that, if at all reasonably possible, it is in the public interest that Commission decisions of significance with respect to this proceeding be taken with the participation of no fewer than three Commissioners. At the same time, certain phases of most Magnuson-Moss rulemaking proceedings, including this one, typically involve little or no intervention by the Commission because of the wide latitude to conduct hearings vested in the presiding officer. It would be productive of considerable delay, and manifestly not in the public interest, were such phases of a matter to be suspended merely because of the desire of the Commission that decisions to be made at some unspecified time in the future be made with the participation of no fewer than three members.

In light of the foregoing, the Commission can perceive no reason why the presently ongoing "legislative" hearings in this matter, which are subject to the direction of the presiding officer, ought not proceed as scheduled. Nor does any reason appear why interested parties may not thereafter propose issues for designation, or why the presiding officer may not subsequently recommend designation of such issues.¹ However, it is the present intention of the Commission that it will not designate such issues as contemplated by the Initial Notice of Rulemaking, 43 F.R. 17967, 17971 (April 27, 1978) until it may do so pursuant to a vote in which at least three members of the Commission participate. To achieve these results the following order is issued:

It is ordered, That following completion of the Washington, D.C. "legislative" hearing in this matter, persons wishing to do so must submit to the presiding officer on or before April 30, 1979, or by such other time as the presiding officer may in his sole discretion establish (1) proposed disputed issues of fact that are material and

¹ The Initial Notice of Proposed Rulemaking, 43 F.R. 17967, *et seq.* (April 27, 1978), makes no express reference to the role of the presiding officer in the designation process. It was the Commission's intention that the presiding officer should make a recommendation to the Commission as to what issues, if any, should be designated.