

IN THE MATTER OF

ALLIED CORPORATION

CONSENT ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket C-3109. Complaint, May 17, 1983—Decision, May 17, 1983

This consent order requires a Morristown, N.J. producer and seller of three high-purity acids, among other things, to divest Hi-Pure Chemicals, Inc. (Hi-Pure) within 15 months from the effective date of the order. Hi-Pure, acquired from Fisher Scientific Company (Fisher), must be divested absolutely and in good faith as a viable business concern to a Commission-approved buyer. Further, respondent is required to grant Hi-Pure's acquirer a ten-year royalty-free nonexclusive license to patents owned or applied for by Fisher which are used by Hi-Pure in the manufacturing or packaging of any of the three high-purity acids. Additionally, the company is barred for a period of ten years from acquiring any business entity engaged in the manufacturing or packaging of high-purity acids, without prior Commission approval.

Appearances

For the Commission: *Rendell A. Davis, Jr.*

For the respondent: *Bertram M. Kantor, Wachtel, Lipton, et al.*, New York City and *Brian C. Mohr, Skadden, Arps, Slate, Meager & Flom*, New York City.

COMPLAINT

The Federal Trade Commission, having reason to believe that Allied Corporation ("Allied"), a corporation subject to the jurisdiction of the Commission, intends to acquire the Fisher Scientific Company ("Fisher") and Fisher's wholly-owned subsidiary, Hi-Pure Chemicals, Inc. ("Hi-Pure"), both corporations subject to the jurisdiction of the Commission, in violation of 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, and that a proceeding in respect thereof would be in the public interest, hereby issues this complaint, pursuant to Section 11 of the Clayton Act, as amended, 15 U.S.C. 21, and Section 5(b) of the Federal Trade Commission Act, as amended, 15 U.S.C. 45(b), stating its charges as follows:

I. Definition

1. For the purposes of this complaint the following definition shall apply: *high-purity acid* means any nitric acid, hydrochloric acid, or hydrofluoric acid which is suitable for use in laboratories or in semiconductor manufacturing facilities.

II. Allied

2. Allied is a corporation organized and existing under the laws of the State of New York with its principal office at Columbia Road and Park Ave., Morristown, N.J.

3. Allied is a diversified company engaged in the production and sale of chemicals, plastics, oil, gas, electrical products, refractories, seat belts and other products.

4. Allied is one of the leading manufacturers in the production and sale of high-purity acid in the United States.

5. In 1980, Allied had total sales of approximately \$5.5 billion and total assets of approximately \$4.5 billion.

III. Fisher

6. Fisher is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania with its principal office at 711 Forbes Avenue, Pittsburgh, Pennsylvania.

7. Fisher produces and sells laboratory equipment and laboratory chemicals.

8. In 1980, Fisher had net sales of approximately \$424 million and total assets of approximately \$190 million.

IV. Hi-Pure

9. Hi-Pure is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania with its principal office at R.D. No. 3 (Edelman), Nazareth, Pennsylvania.

10. Hi-Pure is a wholly-owned subsidiary of Fisher.

11. Hi-Pure manufactures and sells substantial quantities of high-purity acid.

12. In 1980, Hi-Pure had net sales of approximately \$4.5 million (including sales to Fisher) and total assets of approximately \$1.9 million.

V. Jurisdiction

13. At all times relevant herein Allied, Fisher, and Hi-Pure have been engaged in the production and sale of high-purity acid in interstate commerce and Allied, Fisher, and Hi-Pure are engaged in commerce as "commerce" is defined in the Clayton Act, as amended, 15

U.S.C. 12 *et seq.*, and each is a corporation whose business is in or affects commerce as "commerce" is defined in the Federal Trade Commission Act, as amended, 15 U.S.C. 41 *et seq.*

VI. The Acquisition

14. On or about July 30, 1981, Allied announced a tender offer for 47% of the outstanding common stock and all of the 8-1/2% convertible subordinated debentures of Fisher. On or about July 30, 1981, Allied and Fisher entered into an agreement which provides, *inter alia*, for the acquisition of Fisher by Allied.

VII. Trade and Commerce

15. The relevant lines of commerce are the manufacture and sale of high-purity nitric acid, the manufacture and sale of high-purity hydrochloric acid, and the manufacture and sale of high-purity hydrofluoric acid.

16. The relevant section of the country is the entire United States.

VIII. Actual Competition

17. Allied and Hi-Pure are now and have been for many years actual competitors in the manufacture and sale of high-purity acid.

IX. Effects

18. The effects of the proposed acquisition may be substantially to lessen competition or to tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and the acquisition constitutes an unfair method of competition and unfair act or practice within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

(a) substantial actual competition between Allied and Hi-Pure in the relevant markets may be eliminated;

(b) substantial actual competition among competitors generally in the relevant markets may be lessened;

(c) concentration in the relevant markets may be increased and the possibilities for eventual deconcentration may be diminished;

(d) mergers or acquisitions between other high-purity acid producers in the relevant markets may be fostered, thus causing a further substantial lessening of competition or tendency toward monopoly in such markets; and

(e) barriers to entry into the relevant markets may be increased.

X. Violations Charged

19. By reason of the foregoing, the proposed acquisition by Allied of Fisher constitutes a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the acquisition of Fisher Scientific Company by Allied Corporation, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Clayton Act and the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Allied Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York with its offices and principal place of business located at Columbia Road & Park Ave., Morristown, N.J.

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

For purposes of this Order,

(a) *respondent* means Allied Corporation, its subsidiaries, affiliates, divisions, successors, and assigns;

(b) *Hi-Pure* means Hi-Pure Chemicals, Inc. and also means all assets of Fisher Scientific Company, and its subsidiaries, affiliates, and divisions, which are located at Nazareth, Pennsylvania and which are used in the manufacture or sale of high-purity acid;

(c) *Fisher Scientific Company* means Fisher Scientific Company and its subsidiaries, affiliates and divisions; and

(d) *high-purity acid* means any nitric acid, hydrochloric acid, or hydrofluoric acid which is suitable for use in laboratories or in semiconductor manufacturing facilities.

I

It is ordered, That, within 15 months from the date on which this Order becomes final and subject to the prior approval of the Federal Trade Commission, respondent shall divest absolutely and in good faith all of Hi-Pure as a viable business concern to a third party that represents that it intends to use the assets of Hi-Pure in the manufacture, distribution or sale of high-purity acid in the United States. Pending divestiture, respondent shall neither make nor permit any deterioration of Hi-Pure, except for normal wear and tear, that may impair its operating abilities, competitive viability or market value.

II

It is further ordered, That in connection with any divestiture made pursuant to Paragraph I of this Order, respondent will grant to the acquirer of Hi-Pure a royalty-free nonexclusive license for a term of ten years to all patents owned or applied for by Fisher Scientific Company on the date that this Order becomes final and which on said date are used by Hi-Pure in the manufacture or packaging of high-purity acid.

III

It is further ordered, That respondent, for a period of ten (10) years from the date this Order shall become final, shall not acquire, directly or indirectly, without the prior approval of the Federal Trade Commission, any assets of or any stock interest in any company engaged

in the manufacture of high-purity acid in the United States (other than products, machinery, and equipment sold by any such company in the normal course of business and nonexclusive patent and know-how licenses); *provided, however*, nothing in this Paragraph III prohibits respondent from acquiring stock for investment purposes only which does not exceed one (1) percent of the outstanding shares of equity securities in any such corporation. As used in the preceding sentence, the phrase *assets* shall refer to assets relating to the manufacture or sale of high-purity acid in or to the United States.

IV

It is further ordered, That within sixty (60) days after the date this Order becomes final, and every sixty (60) days thereafter until respondent has fully complied with the provisions of Paragraph I of this Order, respondent shall submit to the Federal Trade Commission a verified written report setting forth in detail the manner and form in which it intends to comply with, is complying with, or has complied with that provision. All such reports shall include, among other things that are required from time to time, a full description of contacts or negotiations with any party for the sale of properties specified in Paragraph I of this Order, and the identity of all such parties. Respondent shall furnish to the Commission copies of all written communications to and from such parties, and all internal memoranda, reports, and recommendations concerning divestiture.

On the first anniversary of the date this Order becomes final and on every anniversary date thereafter for the following nine (9) years, respondent shall submit to the Commission a verified written report setting forth the manner and form in which it has complied or is complying with this Order.

V

It is further ordered, That respondent 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, or any other proposed change in the corporation, which may affect compliance obligations arising out of this Order.

Commissioner Douglas did not participate. Chairman Miller voted in the negative.

IN THE MATTER OF

E. & J. GALLO WINERY

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

Docket C-2836. Consent Order, Aug. 26, 1976—Modifying Order, May 18, 1983

This order reopens the proceeding and vacates in its entirety the order issued on Aug. 26, 1976 (88 F.T.C. 256). The order, which was due to expire by its terms on Aug. 26, 1986, prohibited respondent from engaging in exclusionary marketing practices.

ORDER REOPENING AND SETTING ASIDE ORDER

ISSUED ON AUGUST 26, 1976

On September 23, 1982, respondent E. & J. Gallo Winery ("Gallo") filed a Petition requesting that the Commission reopen the proceeding in Docket No. C-2836 and set aside the Order. Absent Commission action, the Order would expire by its terms on August 26, 1986. The Petition was placed on the public record pursuant to Section 2.51 of the Commission's Rules of Practice, 16 C.F.R. 2.51. Four timely comments were received requesting that the Commission deny Gallo's Petition. Thereafter, in response to requests of various parties, the Commission allowed further opportunity for comment upon all matters, including information released only after the first comment period had closed. Five comments have been received in the latest comment period which expired on April 29, 1983. Although Rule 2.51 and Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), require that the Commission decide petitions to reopen within 120 days of filing Gallo has voluntarily waived this deadline.

The complaint and Consent Order in this matter were issued in 1976. They were based on the belief that Gallo had a dominant position in the sale and distribution of wine in the United States and had used its market power to lessen or restrain competition in violation of Section 5 of the Federal Trade Commission Act. After the complaint and Consent Order in this matter were issued, the Commission issued decisions in *Coca-Cola Bottling Co.*, 93 F.T.C. 110 (1979), and *Heublein, Inc.*, 96 F.T.C. 385 (1980), concerning the domestic wine market. The records in these cases predated the factual information which gave rise to the complaint in Gallo.

The complaint and resulting Consent Order against Gallo reflected the Commission's concern that the domestic wine market in the mid-1970's was sufficiently concentrated to warrant close scrutiny, par-