

IN THE MATTER OF

ILLINOIS CEREAL MILLS, INC.

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

Docket 9213. Complaint, June 30, 1988—Decision, March 12, 1990

This consent order prohibits, among other things, a manufacturer and seller of industrial dry corn milling products from acquiring industrial dry corn milling assets in the U.S., or any interest in a U.S. industrial dry corn milling company, for a period of ten (10) years, without prior Commission approval.

Appearances

For the Commission: *Joseph S. Brownman and Ronald B. Rowe.*

For the respondent: *James Sneed, Steven P. Murphy, and Lizbeth R. Levinson, McDermott, Will & Emery, Washington, D.C. Eugene J. Meigher, Joyce L. Bartoo, and Randall J. Boe, Arent, Fox, Kitner, Plotkin & Kahn, Washington, D.C. Dennis R. Rilinger, Watson, Ess, Marshall & Enggas, Kansas City, MO. Kael B. Kennedy, Matrov, Salzman, Madoff & Gunn, Chicago, IL.*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent Illinois Cereal Mills, Inc., a corporation subject to the jurisdiction of the Commission, has entered into an agreement to acquire, took actions to implement the agreement to acquire, and did in fact acquire, certain assets from respondent Elders Grain, Inc. in violation of the provisions of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and it appearing to the Commission that a proceeding by it 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. DEFINITIONS

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

a. "*ICM*" means Illinois Cereal Mills, Inc., its subsidiaries, divisions and groups controlled by ICM and its directors, officers, employees, agents and representatives, and their successors and assigns.

b. "*Elders*" means Elders Grain, Inc., its subsidiaries, divisions and groups controlled by Elders and its directors, officers, employees, agents and representatives, and their successors and assigns.

c. "*Industrial dry corn milling*" means the milling process whereby degerminated, milled and sifted corn prime products are produced at large volume dry corn mills that are able to produce a variety of prime products required by buyers in several different product applications. Prime products include flaking grits, brewer's grits, corn meal, corn flour, pregelatinized corn flour and corn-soy-milk. Dry corn mills that produce milled corn products in small packages sold at retail to the consuming public are not industrial dry corn mills and the products they produce are generally not used for the same purposes.

d. "*Flaking grits*" are the largest size prime products or corn grits that are produced by the dry-milled process. They are used principally for the production of corn flakes by cereal manufacturers. Flaking grits are also referred to as number 4 grits.

e. "*Brewer's grits*," the next largest size corn grits produced by the dry-milled process, are used principally as an adjunct in the brewing of beer.

f. "*Corn meal*," smaller in size than brewer's grits, is an ingredient in a wide variety of food uses, such as in snack foods, pancake mixes, bakery mixes and in muffin and breadmaking applications.

g. "*Corn flour*" is the smallest size prime corn grits, ground to a fine consistency. Corn flour has a wide variety of food applications.

h. "*Pregelatinized corn flour*" is corn flour that has been further processed by dry corn millers. It is generally used as a binder in the production of some cereals.

i. "*Corn-soy-milk*" is a further processed, blended and vitamin-enriched product consisting of corn grits, soy and milk. It is sold to the United States Department of Agriculture for donation to overseas relief organizations. Corn-soy-milk is also referred to as CSM.

II. THE PARTIES

2. Respondent ICM is a Delaware Corporation with its principal place of business located in Paris, Illinois.

3. Over the past several years, ICM has had annual net sales in excess of \$100 million.

4. ICM is, and at all times relevant herein has been, engaged in commerce as the term "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

5. Respondent Elders is a subsidiary of Elders IXL Limited, a foreign corporation located in Australia. Elders' dry corn mill and grain elevator facilities are located in Atchison, Kansas, which it operated as the Lincoln Grain Co.

6. Elders and its related companies have annual net sales and assets far in excess of \$100 million.

7. Elders is, and at all times relevant herein has been, engaged in commerce as the term "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

III. THE ACQUISITION

8. In or about May 1988, ICM entered into an agreement with Elders to purchase its dry corn milling assets. These assets had been operated by Elders through the Lincoln Grain Co. The transaction closed on June 5, 1988.

9. The acquisition included a dry corn mill, approximately 91 rail cars, a lease for a portion of the grain elevator attached to the mill and a five-year option to purchase the grain elevator.

IV. TRADE AND COMMERCE

10. The relevant lines of commerce in which to assess the effects of ICM's acquisition of Elders' dry corn milling assets are (1) industrial dry corn milling for food use and (2) the specific prime products produced by dry corn mills for food use, such as flaking grits, brewer's grits, corn meal, corn flour, pregelatinized corn flour and corn-soy-milk.

11. The relevant section of the country in which to assess the effects of ICM's acquisition of Elders' dry corn milling assets is the United States as a whole.

V. MARKET STRUCTURE

12. The production and sale of industrial dry corn milling products is highly concentrated, whether measured by the Herfindahl-Hirschmann indices or two-firm and four-firm concentration ratios.

VI. ENTRY CONDITIONS

13. Entry into the relevant markets is difficult or unlikely.

VII. COMPETITION

14. ICM and Elders were (1) actual competitors in industrial dry corn milling and the production and sale of industrial dry corn milling products, (2) actual competitors in the production and sale of brewer's grits, corn meal, corn flour and pregelatinized corn flour and (3) actual potential competitors in the production and sale of flaking grits and corn-soy-milk, in the United States.

VIII. EFFECTS

15. The effect of the acquisition may be substantially to lessen competition in each of the relevant lines of commerce in the United States, in the following ways, among others:

- a. By eliminating direct and actual competition between ICM and Elders;
- b. By eliminating potential competition between ICM and Elders; and
- c. By increasing the likelihood of, or facilitating, actual or tacit collusion.

16. All of the above increase the likelihood that firms will increase prices and restrict output both in the near future and in the long term.

IX. VIOLATIONS CHARGED

17. The acquisition agreement between ICM and Elders for Elders' dry corn milling assets violates Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and the acquisition violates Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging respondent Illinois Cereal Mills, Inc. ("Illinois Cereal") with violations of Section 5 of the Federal Trade Commission Act, as amended, and Section 7 of the Clayton Act, as amended, and respondent Illinois Cereal having been served with a copy of that complaint, together with a notice of contemplated relief; and

Respondent Illinois Cereal, its attorney, and counsel for the

Commission having thereafter executed an agreement containing a consent order, an admission by the respondent Illinois Cereal 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 Illinois Cereal 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 Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now, in further conformity with the procedure prescribed in Section 3.25 (f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Illinois Cereal Mills, Inc. 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 616 Jefferson Avenue, Paris, Illinois.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of respondent Illinois Cereal Mills, Inc. and the proceeding is in the public interest.

ORDER

I. DEFINITIONS

It is ordered, That, for purposes of this order, the following definitions apply:

1. "*Industrial dry corn milling industry*" means firms engaged in the United States in the dry milling of yellow corn whereby degermed, milled and sifted grits of different sizes are produced for resale to food processors, brewers and industrial users. Dry corn mills that produce corn products in small packages solely for retail sale or in-the-home use are not in the industrial dry corn milling industry.

2. "*Industrial dry corn milling assets*" mean dry corn mills, equipment, machinery and rail hopper cars used to mill, sift or transport corn in connection with an industrial dry corn mill, and grain storage elevators that are owned or leased by the operator of an

industrial dry corn mill. Corn is not an industrial dry corn milling asset.

3. "*Respondent Illinois Cereal Mills, Inc.*" means Illinois Cereal Mills, Inc., its foreign and domestic parents, predecessors, subsidiaries, divisions, affiliates, partnerships and joint ventures controlled by Illinois Cereal Mills, Inc., and their respective directors, officers, employees, agents, and representatives, and their respective successors and assigns.

II. PRIOR APPROVAL FOR ACQUISITIONS

It is further ordered, That respondent Illinois Cereal Mills, Inc., for a period of ten (10) years from the date this order becomes final, shall not acquire or lease, directly or indirectly, without the prior approval of the Commission, industrial dry corn milling assets of any company in the industrial dry corn milling industry, or the whole or any part of the stock, share capital or equity interest of any company in the industrial dry corn milling industry;

Provided, however, that prior approval is not required for the acquisition by respondent Illinois Cereal Mills, Inc. of industrial dry corn milling assets that are either:

(1) Acquired from a single seller (including all parents, predecessors, subsidiaries, divisions, partnerships, joint ventures and affiliates thereof) if the total price of such assets acquired in any twelve-month period is less than one hundred thousand dollars (\$100,000); or

(2) Acquired from a single seller (including all parents, predecessors, subsidiaries, divisions, partnerships, joint ventures and affiliates thereof) if the total price of such assets acquired is less than five hundred thousand dollars (\$500,000), and thirty (30) days prior written notice of the details of the proposed transaction is given to the Commission. The prior notice shall include the following information: (a) a full description of the assets to be acquired, (b) an identification of the proposed seller, (c) copies of all management documents discussing the proposed acquisition, and (d) copies of all proposed acquisition agreements and all drafts thereof. In the event representatives of the Federal Trade Commission request additional documents or information in writing within the thirty (30) day waiting period, respondent Illinois Cereal Mills, Inc. shall not consummate the proposed acquisition until twenty (20) days after submitting the requested additional documents or information. Respondent Illinois

Cereal Mills, Inc. may request early termination of either waiting period.

III. OTHER OBLIGATIONS

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

It is further ordered, That respondent Illinois Cereal Mills, Inc., shall file with the Commission a verified report in writing within thirty (30) days after the date this order becomes final, setting forth in detail:

(1) The manner and form in which it has complied and is complying with this order; and

(2) The manner and form in which it has complied with the rescission order of the United States District Court for the Northern District of Illinois in Civil Action No. 88-2494.

Commissioner Owen not participating.

IN THE MATTER OF

THE AMERICAN COLLEGE OF RADIOLOGY

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-2871. Consent Order, Mar. 1, 1977—Modifying Order, Mar. 29, 1985*¹

This order reopens the proceeding and modifies the Commission's consent order issued March 1, 1977 (89 FTC 144) by allowing respondent to participate in discussions concerning other organizations' development of new or alternative types of health care financing, including those using relative value scales.

ORDER REOPENING AND MODIFYING FINAL ORDER

By petition filed December 3, 1984, the American College of Radiology ("ACR") asked the Commission to reopen and modify the Commission order in Docket No. C-2871 entered by consent against ACR on March 1, 1977 ("order"). ACR requested that the Commission modify the order by a) deleting paragraph II(B) of the order, which prohibits ACR from advising in favor of or against any relative value scale developed by third parties (except that ACR is permitted to provide historical data), and b) inserting a provision identical to a provision contained in the Commission's order in *Michigan State Medical Society*, Docket No. 9129, 101 FTC 191 (1983) ("*Michigan State*") that would allow ACR more freedom to discuss issues relating to reimbursement with third-party payers and governmental entities. ACR's petition was placed on the public record and no comments were received.

Upon consideration of ACR's petition and other relevant information, the Commission finds that the public interest would be served by deleting paragraph II(B) of the order and by inserting the relevant provision contained in the order in *Michigan State*. The Commission's order against the American College of Obstetricians and Gynecologists ("ACOG") in Docket No. 2855 is similar to the ACR order, and the Commission recently reopened and modified the ACOG order, finding that its restriction on ACOG's ability to discuss relative value scales with third-party payers and governmental entities has caused injury to ACOG and the public that outweighed any benefit that might

¹ This matter was inadvertently omitted from the Federal Trade Commission Decisions-Volume 105.