

IN THE MATTER OF

E-Z-EM, INC., ET AL.

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

Docket C-3311. Complaint, Oct. 29, 1990—Decision, Oct. 29, 1990

This consent order requires, among other things, a Westbury, N.Y., based corporation and certain officers to divest, within twelve months of the issuance of this order, the Lafayette Pharmacal barium business and assets to a Commission-approved acquirer. Respondents are prohibited, for a period of ten years, from acquiring any interest in any other firm in the relevant market without prior Commission approval, and from selling or otherwise disposing of any interest in or assets of respondents to such a firm without providing thirty days prior notice to the Commission.

Appearances

For the Commission: *Susan P. Pettie* and *Steven A. Newborn*.

For the respondents: *Terry M. Gordon, Lasky, Haas, Cohler & Munter, P.C.*, San Francisco, CA.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondent, E-Z-EM, Inc. ("EZM"), a corporation subject to the jurisdiction of the Federal Trade Commission, has acquired the barium diagnostic products business and assets of Lafayette Pharmacal, Inc., ("Lafayette"), 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 ("FTC Act"), 15 U.S.C. 45; and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. E-Z-EM, INC.

1. Respondent EZM is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 7 Portland Avenue, Westbury, New York.

2. EZM is, and at all times relevant herein has been, engaged in commerce as "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 FTC Act, as amended, 15 U.S.C. 44.

II. LAFAYETTE PHARMACAL, INC.

3. Lafayette is a corporation organized and existing under the laws of the State of Delaware, with its headquarters at 4200 S. Hulen, Fort Worth, Texas.

4. Lafayette is, and at all times relevant herein has been engaged in commerce as "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 FTC Act, as amended, 15 U.S.C. 44.

III. THE ACQUISITION

5. On or about December 22, 1988, EZM entered into a purchase agreement with Lafayette pursuant to which EZM agreed to purchase the barium business of Lafayette for approximately \$16.9 million and issued stock warrants worth at least \$2.5 million to the remaining entity of Lafayette.

IV. THE RELEVANT MARKET

6. The relevant line of commerce in which to analyze EZM's acquisition of Lafayette is the business of formulating, manufacturing, marketing and selling barium diagnostic products and related accessories.

7. The relevant area of the country is the United States.

V. MARKET STRUCTURE

8. The market for barium diagnostic products and related accessories is highly concentrated, whether measured by Herfindahl-Hirschmann Indices ("HHI") or two-firm and four-firm concentration ratios.

VI. BARRIERS TO ENTRY

9. Entry into the relevant market set forth in paragraphs 6 and 7 is very difficult.

VII. ACTUAL COMPETITION

10. EZM and Lafayette were actual competitors in the relevant market.

VIII. EFFECTS OF THE ACQUISITION

11. The effect of the acquisition may be substantially to lessen competition in the relevant market in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the FTC Act, 15 U.S.C. 45, in the following ways, among others:

- a. Actual competition between EZM and Lafayette has been eliminated;
- b. EZM has acquired a monopoly in the relevant market in the barium business in the United States; and
- c. The resulting monopoly in the relevant market would increase the likelihood of collusion if another firm should enter the market.

IX. VIOLATIONS CHARGED

12. The acquisition agreement described in paragraph 5 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

13. The acquisition agreement described in paragraph 5 constitutes a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents 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 respondents with 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

Respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents 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 respondents 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 respondents have 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 comment filed thereafter by an interested person 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. Respondent EZM 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 at 7 Portland Avenue, Westbury, New York.

2. Respondent Howard S. Stern is a Director, Chairman of the Board, and Chief Executive Officer of EZM, and the beneficial owner of approximately 34 percent of the outstanding shares of common stock of EZM, with his business address at 7 Portland Avenue, Westbury, New York.

3. Respondent Phillip H. Meyers is a Director, Senior Vice President, and Medical Director of EZM, and the beneficial owner, jointly with Betty S. Meyers, of approximately 34 percent of the outstanding common stock of EZM, with his business address at 7 Portland Avenue, Westbury, New York.

4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I.

As used in this order, the following definitions shall apply:

A. "*EZM*" means E-Z-EM, Inc., its predecessors, successors and assigns, parents, subsidiaries, divisions, groups controlled by EZM, and affiliates, and their respective directors, officers, employees,

agents and representatives, and their respective successors and assigns.

B. "*Lafayette*" means Lafayette Pharmacal, Inc. as it was constituted prior to the acquisition, its predecessors, parents, subsidiaries, divisions, groups controlled by Lafayette, and affiliates, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

C. "*Acquisition*" means acquisition by EZM of the barium diagnostic products business and related assets of Lafayette.

D. "*Barium diagnostic products business*" means the business of either manufacturing or importing barium diagnostic products and marketing and selling those products to distributors and or end-users, except that it does not extend to the distribution and selling, by one primarily engaged in distributing and selling x-ray supplies, of barium diagnostic products produced or imported by another firm, to end-users.

E. "*Barium diagnostic products manufacturing plant*" means the premises described in numbered paragraph 1 of Schedule A of this order.

F. "*Schedule A Properties*" means the assets and manufacturing plant listed in Schedule A of this order.

II.

It is ordered, That:

A. EZM shall divest, absolutely and in good faith, within twelve (12) months of the date this order becomes final, the Schedule A Properties, as well as any additional assets relating to the barium diagnostic products business that EZM may at its discretion include as a part of the assets to be divested and that are acceptable to the acquiring entity.

B. Divestiture of the Schedule A Properties shall be made only to an acquirer or acquirers that receive the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture of the Schedule A Properties is to ensure the continuation of the assets as an ongoing, viable enterprise engaged in the barium diagnostic products business and to remedy the lessening of competition resulting from the acquisition as alleged in the Commission's complaint.

C. On or before the date six weeks prior to the closing by which the

Schedule A Properties will be divested, EZM shall make available to the acquirer or acquirers of the Schedule A Properties the names, addresses, titles, job descriptions, and salary histories of two-thirds of its employees concerned with the barium diagnostic products business and EZM shall not interfere in any way with the hiring of any of those employees by the acquirer or acquirers of the Schedule A Properties.

D. On or before the date six weeks prior to the closing by which the Schedule A Properties will be divested, EZM shall make available all records it has of the names and most recent addresses and telephone numbers of all former Lafayette employees to the acquirer of the Schedule A Properties.

E. Respondents shall maintain the viability and marketability of the Schedule A Properties and shall not cause or permit the destruction, removal, wasting, deterioration, or impairment of any assets or businesses to be divested except in the ordinary course of business and except for ordinary wear and tear that does not affect the viability and marketability of the Schedule A Properties. In this regard:

1. Respondents shall maintain the Schedule A Properties, including both premises and assets to the extent and in the manner maintained by Lafayette prior to the acquisition.

2. Respondents shall maintain and perform in good faith all contracts for products sold under the trade names transferred to EZM by the acquisition, and will refrain from taking any action toward terminating such contracts other than that which would be commercially reasonable under the terms of those agreements.

3. Respondents shall, at the option of the acquirer of the Schedule A Properties, continue to maintain in good faith, on identical terms, conditions and stipulations, all contracts for barium products sold under the trade names transferred to EZM by the acquisition that expire by their terms prior to divestiture for a period lasting until such divestiture is completed.

III.

It is further ordered, That:

- A. If EZM has not divested, absolutely and in good faith and with the Commission's approval, the Schedule A Properties within twelve (12) months of the date this order becomes final, EZM shall consent to the appointment by the Commission of a trustee to divest the Schedule

A Properties. In the event the Commission or the Attorney General brings an action pursuant to Section 5 (l) of the Federal Trade Commission Act, 15 U.S.C. 45 (l), or any other statute enforced by the Commission, respondents shall consent to the appointment of a trustee to divest the Schedule A Properties. Neither the appointment of a trustee nor a decision not to appoint a trustee shall constitute a waiver by the Commission or the Attorney General of its right to seek civil penalties and other relief available to it, including a court-appointed trustee, for any violation of this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph III.A. of this order, respondents shall consent to the following terms and conditions regarding the trustee's powers, duties, authorities, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of EZM, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures.

2. The trustee shall have the power and authority to divest the Schedule A Properties. The trustee shall have twelve (12) months from the date of appointment to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period the trustee has submitted a plan of divestiture or believes that divestiture can be accomplished within a reasonable time, the divestiture period may be extended by the Commission or by the court for a court-appointed trustee, *provided, however*, that the Commission or the court for a court-appointed trustee may only extend the divestiture period two (2) times.

3. The trustee shall have full and complete access to the personnel, books, records, and facilities of EZM relating to the schedule A Properties, and EZM shall develop such financial or other information relevant to the assets to be divested as such trustee may reasonably request. Respondents shall cooperate with the trustee and shall take no action to interfere with or impede the trustee's accomplishment of the divestiture.

4. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to EZM's absolute and unconditional obligation to divest at no minimum price and the purpose of the divestiture as stated in paragraphs II.A. and II.B. of this order.

5. The trustee shall serve, without bond or other security at the cost

and expense of EZM, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have authority to employ, at the cost and expense of EZM, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as may be reasonably necessary. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid to EZM and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement (percentage of price) that is contingent on the trustee's divesting the Schedule A Properties. Nothing herein shall be construed to limit the trustee's compensation to an amount not in excess of the monies derived from the divestiture.

6. Within fifteen (15) days after appointment of the trustee and subject to the Commission's prior approval and, if the trustee was appointed by a court, subject also to the prior approval of the court, EZM shall execute a trust agreement that transfers to the trustee all rights and powers necessary to permit the trustee to cause divestiture of the Schedule A Properties and sign agreements.

7. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraphs III.A. and III.B., for the balance of the time periods specified in paragraph III.B.2 or any extensions thereof. EZM shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, or liabilities arising in any manner out of, or in connection with, the trustee's duties under this order. The trustee shall have no obligation or authority to operate or maintain the Schedule A Properties.

8. The trustee shall report in writing to EZM and the Commission every sixty (60) days from the date the trust agreement is executed concerning the trustee's efforts to accomplish divestiture.

9. If EZM and the trustee are unable to resolve a dispute regarding the reasonable value of his/her services or the reasonableness of an expenditure or obligation incurred by the trustee in connection with his/her efforts to divest the assets, then EZM and the trustee shall submit the dispute to the Commission for resolution, but the time periods shall continue to run. The trust agreement shall recite that the

Commission's determination of the reasonable value of the trustee's services or the reasonableness of expenditures and other obligations incurred by the trustee shall be binding upon EZM and the trustee.

IV.

It is further ordered, That, within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until EZM has fully complied with the provisions of paragraphs II and III of this order, EZM shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying with, or has complied with those provisions. EZM shall include in its compliance reports, among other things that are required from time to time, a full description of the contacts or negotiations for the divestiture of the Schedule A Properties, including the identity of all parties contacted. EZM also shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

V.

It is further ordered, That:

A. Until divestiture of the Schedule A properties is final, respondents are prohibited from acquiring, directly or indirectly, any interest in any person or business that is engaged in the barium diagnostic products business in the United States.

B. For a ten (10) year period commencing on the date this order becomes final, EZM shall cease and desist from selling or disposing of in any other way, without the prior approval of the Federal Trade Commission, directly or indirectly, through subsidiaries or otherwise, any assets, related to, or used or previously used in (and still suitable for use in) the barium diagnostic products business or the whole or any part of EZM stock or share capital to any person or business engaged in the barium diagnostic products business in the United States, except that EZM may continue to sell barium diagnostic products and dispose of used equipment in the ordinary course of business.

C. For a ten (10) year period commencing on the date this order becomes final EZM shall cease and desist from acquiring, without the

prior approval of the Federal Trade Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise, any stock or share capital of, or interest in, any person that is engaged in the barium diagnostic products business in the United States, or any assets related to, or currently or previously used in (and still suitable for use in) the barium diagnostic products business in the United States except raw material and new equipment purchased in the ordinary course of business. *Provided, however,* that paragraph V.C. shall not apply to the construction of new facilities.

D. For a ten (10) year period commencing on the date this order becomes final, respondents Stern and Meyers (but only so long as they remain shareholders, officers, or directors of EZM) shall give thirty (30) days' prior notice to the Federal Trade Commission before selling or disposing of in any other way, individually or jointly, directly or indirectly, through subsidiaries or otherwise, the whole or any part of their holdings of EZM stock or share capital to any person or business that is engaged in the barium diagnostic products business in the United States.

VI.

It is further ordered, That one year from the date this order becomes final, annually thereafter for nine (9) years, and at such other times as the Commission or its staff may request, respondents shall each file with the Commission a verified written report of their compliance with paragraph V.

VII.

It is further ordered, That EZM shall notify the Commission at least thirty (30) days prior to any change in the corporation 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.

SCHEDULE A

The properties to be divested by EZM, as provided in the Agreement and Consent Order, are the following assets:

1. The manufacturing plant located at 526 North Earl Avenue, Lafayette, Indiana, including all the land, all buildings and improvements on the land, and all machinery and other equipment used in the testing, formulation, production, packing, shipping, or for any other purpose relating to the barium diagnostic products business that were transferred by the December 22, 1988 acquisition agreement between EZM and Lafayette ("the premises").

2. All other assets of Lafayette transferred by the December 22, 1988, acquisition agreement, including all of Lafayette's right, title and interest in and to all corporate names, trade names, service marks, know-how, trade secrets, product formulas, and other intellectual property (including all applications relating thereto) of the Lafayette barium diagnostic products business and all customer lists, sales and credit reports, sales literature, manuals, regulatory permits and other filings with and approvals by regulatory authorities and product formulas. The assets include all assets and rights relating to the business acquired by Lafayette from Mallinckrodt, Inc., Alcon Laboratories, Inc., C.B. Fleet Company, Incorporated and their respective subsidiaries and affiliates ("the assets").

IN THE MATTER OF
BOISE CASCADE CORP.

Docket 9133. Interlocutory Order, November 1, 1990

ORDER REISSUING FINAL ORDER

This matter has been remanded to the Commission for further proceedings by the United States Court of Appeals for the District of Columbia Circuit. *Boise Cascade Corp. v. FTC*, 837 F.2d 1127 (D.C. Cir. 1988). The remand directs the Commission to determine whether Boise Cascade Corporation's rebuttal evidence overcomes the inference of competitive injury previously drawn by the Commission. Having reviewed the record and considered the briefs and oral arguments of the parties, the Commission has determined that Boise Cascade Corporation has failed to overcome the inference of competitive injury established by the evidence. Accordingly,

It is ordered, That paragraphs I to V of the Commission's order dated February 11, 1986, are reissued. See *Boise Cascade Corp.*, 107 FTC 76, 224-25 (1986).

Chairman Steiger abstaining and Commissioner Owen not participating.*

OPINION OF THE COMMISSION

BY CALVANI, *Commissioner*:¹

* Prior to leaving the Commission, former Commissioner Calvani registered his vote in the affirmative for the Final Order and Opinion of the Commission in this matter.

¹ The following abbreviations are used throughout this opinion.

RFFF	— Respondent Boise Cascade Corporation's Proposed Findings of Fact and Conclusions of Law.
CRRPFF	— Complaint Counsel's Reply to Respondent's Proposed Findings of Fact and Conclusions of Law.
IDF	— Initial Decision, February 14, 1984 (cited by finding number).
BOP	— Brief of Petitioner Boise Cascade Corporation to the United States Court of Appeals for the District of Columbia Circuit dated August 15, 1986.
BRC	— Brief for Respondent Federal Trade Commission to the United States Court of Appeals for the District of Columbia Circuit dated October 15, 1986.
BOR	— Brief of Respondent dated May 18, 1988.
BOC	— Brief of Complaint Counsel dated June 15, 1988.
RBR	— Reply Brief of Respondent dated June 27, 1988.
TR	— Transcript of July 28, 1988 hearing before the Commission on remand from the United States Court of Appeals for the District of Columbia Circuit.