

IN THE MATTER OF
LAFARGE, S.A., ET AL.

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 C-3852. Complaint, Feb. 12, 1999--Decision, Feb. 12, 1999

This consent order, among other things, prohibits the respondents from entering into any contract or agreement relating to the acquisition by Lafarge of any of the Holnam Acquisition Assets, in which the amount of any payment made after the closing of the acquisition is calculated by reference to or dependent upon the quantity of cement produced or sold by Lafarge in any market in the states of Washington or Oregon.

Participants

For the Commission: *Joseph Lipinsky, John Kirkwood, Patricia Hensley, Shane Woods, Maxine Stansell, Virginia Davidson, Robert Schroeder, Charles Harwood, Kenneth Libby, Daniel Ducore, William Baer, Daniel O'Brien, J. Elizabeth Callison and Roger Boner.*

For the respondents: *Richard Favretto, Mayer, Brown & Platt, Washington, D.C.*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that Lafarge, S.A., through an entity it controls, Lafarge Corporation (collectively "respondents"), has entered into an agreement to acquire cement production assets of Holnam, Inc., that the agreement violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that the acquisition, if consummated, would result in a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, 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:

A. THE RESPONDENTS

1. Respondent Lafarge, S.A., is a corporation organized, existing and doing business under and by virtue of the laws of France with its principal executive offices located at 61 rue des Belles Feuilles, F-

75782 Paris, France. Lafarge, S.A., is an international corporation engaged in the manufacture and sale of building materials: cement, aggregates, concrete and concrete admixtures.

2. Respondent Lafarge Corporation ("Lafarge") is a corporation controlled by Lafarge, S.A., with its principal executive offices located at 11130 Sunrise Valley Drive, Reston, Virginia. Lafarge is one of North America's largest suppliers of cement for residential, commercial, institutional and public works construction. Lafarge operates 14 cement plants in the United States and Canada and had sales of \$1.6 billion in 1996.

3. Holnam, Inc. ("Holnam"), headquartered in Dundee, MI, is the number one supplier of cement for residential, commercial, institutional and public works construction in the United States. It operates 19 cement plants in North America and had sales of \$983 million in 1996. Holnam is a wholly-owned subsidiary of Holderbank Financiere Glaris, Ltd., a Swiss-based holding company.

4. At all times relevant herein, respondents have been and are now engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, 15 U.S.C. 12, and are corporations 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.

B. THE PROPOSED ACQUISITION

5. On February 4, 1998, Lafarge and Holnam signed a Letter of Intent setting out the principal elements of a proposed transaction, whereby Lafarge would acquire Holnam's Seattle, Washington cement plant and related assets.

C. RELEVANT MARKET

6. The relevant line of commerce in which to analyze the effects of Lafarge's proposed acquisition of Holnam's Seattle cement plant and related assets is the manufacture, marketing and sale of portland cement.

7. Portland cement is the essential binding ingredient in concrete. Portland cement is a construction raw material that users mix with water and aggregates (crushed stone, sand, or gravel) to form concrete. Portland cement is a closely controlled chemical combination of calcium (normally from limestone), silicon, aluminum, iron and small amounts of other ingredients. It is made by quarrying, crushing and grinding the raw materials, burning them in

huge kilns at extremely high temperatures and finely grinding the resulting marble-size pellets (called "clinker") with gypsum into an extremely fine, usually gray, powder. Portland cement produced by one manufacturer is virtually indistinguishable from that manufactured by another.

8. The relevant geographic market in which to analyze the effects of Lafarge's proposed acquisition of Holnam's Seattle cement plant and related assets is the Puget Sound area of the state of Washington. This area, whose commercial center is the city of Seattle, consists of the portion of Washington state south from the Canadian border to the area just south of the state capital of Olympia (roughly halfway between Seattle and Portland, Oregon) and east from the Pacific Ocean to the Cascade mountains, plus two adjacent counties just east of the Cascade Mountains. The 13 counties in this market west of the Cascades are Clallum, Grays Harbor, Island, Jefferson, King, Kitsap, Mason, Pierce, San Juan, Skagit, Snohomish, Thurston, and Whatcom, and the two counties east of the mountains are Chelan and Kittitas.

D. MARKET STRUCTURE

9. The Puget Sound market for portland cement is highly concentrated with only five suppliers -- Lafarge, Holnam, Ash Grove Cement Company, CBR Cement Corporation and Lone Star Northwest. The first four companies operate cement plants in or contiguous to the Puget Sound market. The fifth company, Lone Star Northwest, which is also a large user of cement, does not operate a cement plant in this area; instead, it imports cement into the market from Asia and South America and purchases cement from other suppliers in the market. Based on 1997 sales, the acquisition would increase the Herfindahl-Hirschman Index by 329 points from 2260 to 2589.

E. CONDITIONS OF ENTRY

10. Entry under any of the three methods that an entrant could use to enter the Puget Sound cement market -- building a cement plant, building a rail terminal or building a deep-sea importing terminal -- would not be timely, likely or sufficient to offset reductions in competition resulting from the acquisition.

11. The minimum viable scale of a cement plant likely precludes new entry. The prevailing cement production technology demands large-scale production, relative to market size, in order to operate efficiently. This technology has but a single use -- *i.e.*, the production of cement. It cannot economically be shifted toward another use. Therefore, all returns on investment must be derived from cement sales. Because economic entry would require that a new producer capture a significant market share from existing producers, and because the costs of such entry would be sunk, such entry is inherently risky. Current overcapacity, as well as announced expansions by existing producers, serve as additional deterrents to new entry.

12. *De novo* entry into the Puget Sound cement market by building a rail terminal is also very unlikely. Cement producers that are not currently in the Puget Sound market are at least 800 miles away. If these producers shipped cement to Puget Sound via rail, they would encounter a freight cost of approximately \$20 per ton. This cost, which is not faced by the current suppliers, would put the new entrant at a severe cost disadvantage. Moreover, these producers are currently operating their cement production plants at full capacity and selling this production near their plants. For these reasons, the price of cement would need to rise substantially from existing levels before another producer would find building a rail terminal economically attractive.

13. In order to enter the Puget Sound market via a deep-sea terminal, the entrant needs a terminal that can receive deep-drafting ocean-going vessels. Currently, and for the foreseeable future (more than two years), the commercial ports in the Puget Sound area do not have such sites available. Thus, *de novo* entry via a deep-sea terminal is unlikely.

F. EFFECTS OF THE PROPOSED ACQUISITION

14. The effects of the acquisition, if consummated, may be to substantially lessen competition in the Puget Sound cement market. Absent the proposed acquisition, Holnam likely would significantly increase the supply of cement to the market resulting in a decrease in cement prices. As originally structured, the proposed acquisition contains a contractual provision that imposes a significant cost penalty on Lafarge for quantities of cement produced at the Holnam cement plant in excess of the amount Holnam currently supplies to

the market. The proposed acquisition thus would give Lafarge the incentive to unilaterally restrict the output of cement at the Holnam plant in order to avoid the additional contractual cost. This would prevent any increase in supply of cement to the market and thus avoid a significant decrease in the price of cement in the Puget Sound market.

G. VIOLATIONS CHARGED

15. Lafarge's agreement to acquire Holnam's Seattle cement plant and related assets violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and the proposed acquisition would, if consummated, violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition by Lafarge Corporation, a corporation controlled by Lafarge, S.A. (collectively "Lafarge"), of the Seattle cement plant and related assets of Holnam, Inc. ("Holnam"), and respondents having been furnished with a copy of a draft of complaint which, if issued by the Commission, would charge respondents with violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the 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 the 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 a 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, 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 Lafarge, S.A., is a corporation organized, existing and doing business under and by virtue of the laws of France with its principal executive offices located at 61 rue des Belles Feuilles, F-75782 Paris, France.

2. Respondent Lafarge Corporation is a corporation controlled by Lafarge, S.A., with its principal executive offices located at 11130 Sunrise Valley Drive, Reston, Virginia.

3. 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.

It is ordered, That, as used in this order, the following definitions shall apply:

A. "*Respondents*" or "*Lafarge*" means Lafarge Corporation and Lafarge, S.A., their directors, officers, employees, agents, representatives, predecessors, successors, and assigns; their subsidiaries, divisions, groups and affiliates controlled by Lafarge Corporation and Lafarge, S.A., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "*Commission*" means the Federal Trade Commission.

C. "*Holnam Acquisition Assets*" means the cement plant in Seattle, Washington, the cement distribution terminal in Vancouver, Washington, and the rock quarry in Twin Rivers, Washington, owned by Holnam, Inc., which has its office and principal place of business located at 6211 Ann Arbor Road, Dundee, Michigan; and the rock quarry on Texada Island, British Columbia, and the cement distribution terminal in New Westminster, British Columbia, owned by Holnam West Materials, Ltd., a subsidiary of Holnam, Inc.

II.

It is further ordered, That respondents shall not enter into any contract, agreement, or understanding, relating to the acquisition by Lafarge of any or all of the Holnam Acquisition Assets, in which the

amount of any payment by Lafarge or Holnam made after the closing of the acquisition is calculated by reference to, affected by, or dependent upon, directly or indirectly, the quantity of cement produced or sold by Lafarge in any market in the states of Washington or Oregon.

III.

It is further ordered, That, within thirty (30) days after the date this order becomes final or within thirty (30) days after the date on which respondents consummate the acquisition of any or all of the Holnam Acquisition Assets, whichever is later, respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they have complied with paragraph II of this order. Respondents shall include in their compliance report, among other things, a full description of the efforts made to comply with paragraph II of the order.

IV.

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

V.

It is further ordered, That, for the purpose of determining or securing compliance with this order, upon written request, respondents shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of respondents relating to any matters contained in this order; and

B. Upon five days' notice to respondents and without restraint or interference from them, to interview officers, directors, or employees of respondents.

Complaint

127 F.T.C.

IN THE MATTER OF
MERCK & CO., INC., ET AL.

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 C-3853. Complaint, Feb. 18, 1999--Decision, Feb. 18, 1999

This consent order, among other things, requires Merck & Co., Inc., a leading pharmaceutical manufacturer, and its subsidiary to maintain and make available an open formulary, containing information concerning the relative costs of drugs, and the respondents shall appoint or reappoint an independent committee with the authority to maintain an open formulary. In addition, the consent order prohibits Merck and Medco from sharing proprietary or other non-public information.

Participants

For the Commission: *Karen Berg, Veronica Kayne, Michael McNeely, Naomi Licker, Roberta Baruch, Willard Tom, William Baer, Charissa Wellford, J. Elizabeth Callison, Leslie Farber and Geary Gessler.*

For the respondents: *Michael Sohn, Arnold & Porter*, Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondent Merck & Co., Inc. ("Merck"), a corporation subject to the jurisdiction of the Commission, acquired Medco Containment Services, Inc., a corporation, now respondent Merck-Medco Managed Care, L.L.C. ("Medco"), a limited liability company subject to the jurisdiction of the Commission, that such acquisition violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and 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, as amended, 15 U.S.C. 45, stating its charges as follows:

PARAGRAPH 1. Respondent Merck & Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office located at One Merck Drive, Whitehouse Station, New Jersey.