

# FEDERAL TRADE COMMISSION DECISIONS

## Findings, Opinions and Orders

IN THE MATTER OF

ALBERTSON'S, INC.

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF THE CLAYTON  
AND THE FEDERAL TRADE COMMISSION ACTS

*Docket C-3064. Consent Order, April 21, 1981—Set Aside Order, July 1, 1987*

The Federal Trade Commission has set aside a 1981 consent order with Albertson's, Inc., (97 F.T.C. 343), thus removing the Commission's prior approval requirement because there no longer appears to be a trend toward concentration in the relevant market.

### ORDER REOPENING AND SETTING ASIDE ORDER ISSUED ON APRIL 21, 1981

On March 3, 1987, Albertson's, Inc. ("Albertson's") filed a "Petition To Reopen And Set Aside Consent Order" ("Request"), pursuant to section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and section 2.51 of the Commission's Rules of Practice. The request asked the Commission to reopen and set aside the consent order issued on April 21, 1981 ("the order"). Albertson's request was placed on the public record for thirty days, pursuant to section 2.51 of the Commission's Rules. No comments were received.

The complaint in this case was issued under Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act and alleged anticompetitive effects arising from Albertson's acquisition of Fazio's, the California Division of Fisher Foods, Inc., in July 1978. According to the complaint, the relevant product line in which to assess the acquisition was retail sales by retail grocery stores and the relevant geographic market was Los Angeles County and Orange County, California. The order prohibits Albertson's for a ten year period from acquiring, without prior Commission approval, five or more retail grocery stores in fifteen designated states and certain other geographic areas. *Albertson's, Inc.*, 97 FTC 343, 345, 347-348 (1981).

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be altered, modified, or set aside, in whole or in part, if the respondent makes a satisfactory showing that changed

conditions of law or fact require the order to be modified or set aside. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of the order inequitable or harmful to competition. *Louisiana-Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4.

Section 5(b) also provides that the Commission may modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. Respondents are invited in petitions to reopen to show how the public interest warrants the requested modification. 16 CFR 2.51. To obtain review on this ground, the respondent must demonstrate as a threshold matter some affirmative need to modify the order. *Damon Corp.*, Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 24, 1984), at 2 ("Damon Letter"). For example, it may be in the public interest to modify an order "to relieve any impediment to effective competition that may result from the order." *Damon Corp.*, Docket No. C-2916, 101 FTC 689, 692 (1983). Once such a showing of need is made, the Commission will balance the reasons favoring the modification requested against any reasons not to make the modification. Damon Letter at 2.

After reviewing Albertson's request, the Commission has concluded that respondent has not made a satisfactory showing that changed circumstances require that the order be set aside. The only real change that respondent has shown is that there is no longer a trend toward concentration in the relevant market. That change by itself does not establish that there is no further need for the order.

The Commission has concluded, however, that it is in the public interest to reopen and set aside the order. Albertson's has shown that the prior approval requirements of the order impose costs on respondent and put it at a disadvantage with respect to its competitors who are not under similar restraints. This affirmative need to modify the order must be weighed against the need for continuing the order. The costs shown by Albertson's were foreseeable at the time respondent agreed to the order and would not ordinarily provide a sufficient basis to justify termination of the order. However, respondent has also demonstrated that there is no continuing competitive need for the order in the Los Angeles/Orange County market that was the focus of the Commission's complaint. The respondent has shown that the relevant market is relatively unconcentrated and that any trend toward concentration that may have existed at the time the order issued appears to have been arrested. Accordingly, the reasons for setting aside the order outweigh the reasons for retaining the order.

The Commission has likewise concluded that it is in the public interest to set aside the prior approval requirements of the order with respect to the fifteen states and other geographic areas which are designated therein. The allegations of the complaint related exclusively to the Los Angeles/Orange County market and with the setting aside of the primary relief, the ancillary relief should also be set aside.

Accordingly, *It is ordered*, That this matter be, and it hereby is reopened and that the Commission's order issued on April 21, 1981, shall be set aside as of the effective date of this order.

Commissioner Bailey was recorded as voting in the negative.

IN THE MATTER OF  
AMERICAN HOECHST CORPORATION, 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-3215. Complaint, July 2, 1987—Decision, July 2, 1987*

This consent order permits, among other things, American Hoechst Corp. to divest certain polyester fiber businesses. The respondent must make the divestiture to a Commission-approved acquirer within one year and must obtain the Commission's prior approval for certain acquisitions for the next ten years.

*Appearances*

For the Commission: *Rhett Krulla, Ronald B. Rowe, and Jeffrey I. Zuckerman.*

For the respondents: *William R. Norfolk, Sullivan & Cromwell, Washington, D.C. and William Pelster, Skadden, Arps, Slate, Meagher, & Flom, New York City.*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondents, American Hoechst Corporation, Hoechst Aktiengesellschaft, referred to herein collectively as "Hoechst," and Celanese Corporation, corporations subject to the jurisdiction of the Commission, have entered into an agreement, described in paragraph 15 herein, that, if consummated, would violate 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, as amended, 15 U.S.C. 45; that said agreement and the actions of respondents to implement that agreement constitute violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, the Commission 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: [2]

I. DEFINITIONS

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

a. "*Hoechst*" means American Hoechst Corporation, its parent, Hoechst Aktiengesellschaft, its predecessors, subsidiaries (including, but not limited to, Hostachem Acquisition Incorporated), divisions, groups, affiliate entities (including, but not limited to, Wacker and related entities), and each of their past or present directors, officers, employees, agents, and representatives; and each partnership, joint venture, joint stock company, or concession in which Hoechst is a participant. The words "subsidiary," "affiliate," and "joint venture" refer to any partial (10 percent or more), as well as total, ownership or control.

b. "*Celanese*" means Celanese Corporation, its predecessors, subsidiaries, divisions, groups, affiliate entities, and each of their past or present directors, officers, employees, agents, and representatives; and each partnership, joint venture, joint stock company, or concession in which Celanese is a participant. The words "subsidiary," "affiliate," and "joint venture" refer to any partial (10 percent or more), as well as total, ownership or control.

c. The "*acquisition*" means the transaction described, in whole or in part, in paragraph 15 of this complaint.

d. "*Polyester fibers*" or "*polyester*" means manufactured fibers in which the fiber-forming substance is any long-chain synthetic polymer composed of polyethylene terephthalate, a chemical polymer derived from the polycondensation of ethylene glycol with either dimethyl terephthalate or [3] terephthalic acid. "Polyester fibers" include polyester staple and polyester filament.

e. "*Textile polyester fibers*" means any polyester fibers used in the production of textiles, which includes fabrics and yarns used primarily in apparel, carpeting, home furnishings, and automotive applications.

f. "*Textile polyester filament*" means continuous threads, or "filaments," of polyester produced for textile applications. "Textile polyester filament" does not include polyester staple.

g. "*Polyester staple*" means any short fiber of polyester that is cut from spun polyester. "Polyester staple" includes fiberfill and tow.

## II. AMERICAN HOECHST CORPORATION

2. Respondent American Hoechst Corporation ("American Hoechst") is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business located at 1041 Route 202-206 North, Somerville, New Jersey. American Hoechst is a wholly-owned subsidiary of the West German corporation, Hoechst Aktiengesellschaft.

3. American Hoechst is one of the largest producers of textile polyester fibers, including both polyester staple and textile polyester

filament, in the United States. Overall operations of American Hoechst in the United States include the production and sale of various petrochemicals, plastics, and pharmaceuticals. [4]

4. Respondent American Hoechst had sales of approximately \$1.6 billion in 1985 on overall operations of the company in the United States.

5. American Hoechst's indirect wholly-owned subsidiary, Hostachem Acquisition Incorporated, a corporation organized and existing under the laws of the State of Delaware, is a holding company that has been formed to purchase the capital stock of Celanese.

6. American Hoechst 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 Federal Trade Commission Act, as amended, 15 U.S.C. 44.

### III. HOECHST AKTIENGESELLSCHAFT

7. Respondent Hoechst Aktiengesellschaft ("Hoechst AG") is a foreign corporation organized and existing under the laws of the Federal Republic of Germany, with its principal place of business located at D-6230 (Main) 80, Frankfurt, Federal Republic of Germany. Hoechst AG is the corporate parent of American Hoechst.

8. The Hoechst group of companies produces a diverse range of products, including polyester and polyester raw materials. Respondent Hoechst AG is one of the largest producers of polyester fibers in the world.

9. Net income for respondent Hoechst AG overall in 1985 was approximately \$499 million on sales of \$14.5 billion. The fibers and fiber raw materials business [5] segment of the company accounted for 10 percent of total corporate sales.

10. Hoechst AG 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 Federal Trade Commission Act, as amended, 15 U.S.C. 44.

### IV. CELANESE CORPORATION

11. Respondent Celanese Corporation ("Celanese") is a corporation organized and existing under the laws of the State of Delaware, with its principal executive offices and place of business located at 1211 Avenue of the Americas, New York, New York.

12. Celanese produces polyester fibers at manufacturing facilities

in the United States, Canada, and Mexico. Celanese is the second largest producer of textile polyester fibers, including both polyester staple and textile polyester filament, in the United States, and is the only producer of textile polyester fibers in Canada.

13. Respondent Celanese's overall net income was \$178 million in 1985 on sales of approximately \$3 billion.

14. Celanese 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 Federal Trade Commission Act, as amended, 15 U.S.C. 44. [6]

#### V. THE ACQUISITION

15. On or about November 3, 1986, Hoechst commenced a cash tender offer for up to 100 percent of the issued and outstanding shares of Celanese common stock and preferred stock, with the intent of effecting a merger of Hostachem Acquisition Incorporated, a Delaware corporation wholly-owned by Hoechst, into Celanese, all as contemplated in the Agreement of Merger entered into among Hoechst, its subsidiary, and Celanese, on November 2, 1986. Pursuant to that Agreement, Celanese's Board of Directors has approved Hoechst's tender offer, has recommended its acceptance by Celanese stockholders, and has agreed to approve the merger of Hostachem Acquisition Incorporated into Celanese following the tender offer. If the acquisition is consummated as presently contemplated, the total value of the transaction will be approximately \$2.7 billion. Through this proposed stock acquisition, Hoechst will effectively acquire the polyester business of Celanese.

#### VI. TRADE AND COMMERCE

16. For purposes of this complaint, relevant lines of commerce in which to evaluate the effects of the acquisition are:

- a. the manufacture, distribution, and sale of polyester staple; and
- b. the manufacture, distribution, and sale of textile polyester filament. [7]

17. For purposes of this complaint, the relevant section of the country in which to evaluate the effects of the acquisition with respect to each of the relevant lines of commerce is the United States as a whole.

#### VII. MARKET STRUCTURE

18. In 1986, approximately 2.1 billion pounds of polyester staple was produced in the United States. The polyester staple market is highly

concentrated, whether measured by the Herfindahl-Hirschmann Index ("HHI") or by four-firm and eight-firm concentration ratios.

19. In 1986, approximately 844 million pounds of textile polyester filament was produced in the United States. The textile polyester filament market is highly concentrated, whether measured by the HHI or by four-firm and eight-firm concentration ratios.

#### VIII. ENTRY CONDITIONS

20. It is difficult to enter into the manufacture, distribution, and sale of polyester staple or of textile polyester filament.

#### XI. ACTUAL COMPETITION

21. Hoechst and Celanese are actual competitors in the manufacture, distribution, and sale of polyester staple and of textile polyester filament. [8]

#### X. EFFECTS

22. The aforesaid acquisition, if consummated, will significantly increase the levels of concentration in the relevant markets.

23. The effect of the aforesaid acquisition, if consummated, may be substantially to lessen competition in each of the relevant markets 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, in the following ways, among others:

- a. it will eliminate actual competition between Hoechst and Celanese and between Celanese and others in the relevant markets; and
- b. it will significantly enhance the possibility of collusion or interdependent coordination among the remaining firms in the relevant markets.

#### XI. VIOLATIONS CHARGED

24. The proposed acquisition of the capital stock of Celanese by Hoechst would, if consummated, violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

25. The Agreement of Merger described in paragraph 15 constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

26. The proposed acquisition of the capital stock of Celanese by Hoechst would, if consummated, violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45. [9]

Chairman Oliver was recorded as voting in the negative.

