

Complaint

72 F.T.C.

in commerce, of wool products, as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from misbranding wool products by:

1. Falsely and deceptively stamping, tagging, labeling, or otherwise identifying such products as to the character or amount of the constituent fibers contained therein.

2. Failing to securely affix to, or place on, each such product a stamp, tag, label, or other means of identification showing in a clear and conspicuous manner each element of information required to be disclosed by Section 4(a) (2) of the Wool Products Labeling Act of 1939.

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF
DIAMOND ALKALI COMPANY

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC.
7 OF THE CLAYTON ACT

Docket 8572. Complaint, May 16, 1963—Decision, Oct. 2, 1967

Order requiring a Cleveland, Ohio, manufacturer of industrial chemical products to divest itself within one year of a Youngstown, Ohio, manufacturer of portland cement to a purchaser approved by the Commission.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter more particularly designated and described, has violated and is now violating the provisions of Section 7 of the Clayton Act (U.S.C., Title 15, Sec. 18), as amended, hereby issues its complaint pursuant to Section 11 of the aforesaid Act (U.S.C., Title 15, Sec. 21) charging as follows:

PARAGRAPH 1. Respondent, Diamond Alkali Company, hereinafter sometimes referred to as "Diamond Alkali," is a corporation organized and existing under the laws of the State of Delaware, with its office and principal place of business located at 300 Union Commerce Building, Cleveland 14, Ohio.

PAR. 2. Respondent is now and has been for many years prior to August 31, 1961, engaged in the business of manufacturing

and selling portland cement under the brand name "Standard Portland Cement."

Its cement manufacturing plant is located in Painesville Township, Ohio, and has an annual capacity now rated at about 2,700,000 barrels.

In addition to manufacturing and selling cement, respondent is engaged nationally in the production and marketing of a wide variety of basic chemicals and plastics.

PAR. 3. For many years prior to August 31, 1961, the Bessemer Limestone and Cement Company, hereinafter sometimes referred to as "Bessemer," was a corporation organized and existing under the laws of the State of Ohio, with its office and principal place of business located at 800 Stambough Building, Youngstown, Ohio.

During said period of time, Bessemer was engaged in the business of manufacturing and selling portland cement, marketing its product under the brand name "Bessemer."

Its cement manufacturing plant, located in the Borough of Bessemer, Lawrence County, Pennsylvania, has an annual rated capacity of about 3,000,000 barrels.

In connection with an as an integral part of its cement manufacturing business, Bessemer quarried and processed limestone, an essential raw material in the manufacture of cement, at facilities adjacent to its cement plant.

PAR. 4. On or about August 31, 1961, Diamond Alkali acquired all of the outstanding stock of Bessemer, which consisted solely of Common Stock, by exchanging therefor 270,322 shares of its \$4 Preferred Stock on the basis of one share thereof for three shares of Bessemer's Common Stock, and by making an aggregate payment of about \$48,000 to holders of Bessemer's Common Stock who, on the basis of said exchange, were entitled to a fractional share of Diamond's Preferred Stock.

Each share of Diamond Alkali's Preferred Stock is convertible, at the option of the holder, into 1.3 shares of its Common Stock which at the time of said exchange was selling for approximately \$72 per share.

PAR. 5. Bessemer, in the course and conduct of its business prior to said acquisition, and Diamond Alkali in the course and conduct of its business prior to said acquisition, at the time thereof, and continuously thereafter, were, respectively, engaged in commerce as defined in the Clayton Act as amended, each of them having sold or shipped portland cement, or having caused it to be sold or shipped, from the state in which it was manufactured to customers located in other states.

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PAR. 6. In 1960, the last full year prior to said acquisition on August 31, 1961, the cement sales and the total sales of respondent and of Bessemer were, in millions of dollars, approximately as follows:

	1960 Sales	
	Cement	Total
Respondent	\$7.1	\$138.3
Bessemer	\$6.4	\$ 9.7

In 1961, the cement sales and the total sales of respondent, including said sales of Bessemer for that entire year were, in millions of dollars, approximately as follows:

	1961 Combined Sales	
	Cement	Total
Respondent and Bessemer	\$13.2	\$148.9

The net income of respondent and of Bessemer for the year 1960 were, in millions of dollars, approximately as follows:

	1960
	Net Income
Respondent	\$11.7
Bessemer	\$ 1.5

As of December 31, 1960, the current assets and the total assets of respondent and of Bessemer were, in millions of dollars, approximately as follows:

	Assets of December 31, 1960	
	Current	Total
Respondent	\$47.9	\$142.9
Bessemer	\$ 5.5	\$ 12.2

PAR. 7. For many years prior to and until the time of said acquisition respondent sold substantially all of its production of portland cement within the section of the country consisting of northeastern Ohio and northwestern Pennsylvania, hereinafter referred to as the relevant geographic area and more specifically defined as including Erie, Huron, Richland, Lorain, Ashland, Cuyahoga, Medina, Wayne, Summit, Stark, Lake, Geauga, Portage, Ashtabula, Trumbull, Mahoning and Columbiana counties in Ohio and the counties of Erie, Crawford, Mercer, Lawrence, Warren and Venango in Pennsylvania.

Bessemer, in 1960, sold approximately sixty-five percent of its portland cement in the relevant geographic area. Its remaining

portland cement sales were made in adjacent areas of eastern Ohio, western Pennsylvania, northern West Virginia and north-eastern Maryland.

PAR. 8. For many years prior to the acquisition, respondent and Bessemer were competitively engaged with each other and eleven other concerns in the sale of portland cement in the relevant geographic area.

All of these thirteen concerns, except Bessemer, were either multi-plant producers of cement, or, like respondent, producers with only one cement plant but which plant was a part of a larger industrial enterprise. Bessemer was the last independent, single-plant cement producer in the relevant geographic area.

Of the total unit sales of portland cement in the relevant geographic area in 1960, respondent, with more than 20 percent thereof, had the largest share; and Bessemer, with about 15 percent thereof, had the third, if not the second largest share. As a result of said acquisition, respondent's share of portland cement sales in the relevant geographic area is in excess of one-third.

PAR. 9. The effect of respondent's acquisition of Bessemer, as above alleged, may be substantially to lessen competition or tend to create a monopoly in the manufacture and sale of portland cement in the relevant geographic area in the following ways, among others:

(1) Bessemer, with the third, if not the second largest market share, and the last remaining independent firm, has been eliminated;

(2) Respondent, with the largest market share, has substantially increased its dominant position;

(3) Respondent has substantially enhanced its competitive position by acquiring essential raw material reserves of Bessemer;

(4) Concentration has been so substantially increased that respondent's market share is more than one-third;

(5) Actual and potential substantial competition between Bessemer and respondent and between Bessemer and other competitors in said geographic area has been destroyed;

(6) Purchasers of cement for use in the preparation of ready-mixed concrete and in other products and materials have been deprived of a substantial and independent source of supply; and

(7) Entry of new competitors may be inhibited or prevented.

Prior to the acquisition of Bessemer, respondent had, and subsequent to the divestiture of Bessemer will have, such a dominant competitive position in the sale of portland cement in the

relevant geographic area that the effect of any acquisition by respondent of any of the stock or assets of any other corporation engaged in commerce and in the sale of portland cement in the said area may also be as above alleged.

PAR. 10. The acquisition of Bessemer by respondent, as above alleged, constitutes a violation of Section 7 of the Clayton Act (U.S.C., Title 15, Sec. 18), as amended.

Mr. Michael G. Kushnick, Mr. Robert L. Heggen and Mr. George A. Mathewson supporting the complaint.

Jones, Day, Cockley & Reavis, Cleveland, Ohio, by Mr. Allen C. Holmes, Mr. Richard W. Pogue, Mr. Ernest A. E. Gellhorn, Mr. David L. Foster, and Mr. John S. Walker; and Mr. John A. Wilson, Cleveland, Ohio, for respondent.

INITIAL DECISION BY EDWARD CREEL, HEARING EXAMINER

MAY 15, 1964

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The complaint herein, issued May 16, 1963, charged that Diamond Alkali Company violated Section 7 of the Clayton Act by its acquisition, in August 1961, of all the outstanding stock of The Bessemer Limestone and Cement Company. The complaint alleged that the effect of Diamond's acquisition of Bessemer may be substantially to lessen competition, or to tend to create a

monopoly in the manufacture and sale of portland cement in an area comprised of 17 counties in northeastern Ohio and 6 counties in northwestern Pennsylvania, and alleged certain specific adverse effects on competition flowing from this acquisition.

Respondent's answer, filed June 20, 1963, denied the charges of the complaint, particularly as to the claimed relevant geographic market and the alleged effects of the acquisition; the answer also set forth a summary of the history of Diamond's manufacture of portland cement, including the financial and physical plight of that operation, which conducts its cement business under the name "Standard Portland Cement," sometimes hereinafter referred to as "Standard."

Three prehearing conferences were held at which procedures were developed for obtaining statistical information, and the parties agreed to file trial briefs which they were directed to exchange. Substantially continuous hearings were held from November 4, 1963, to January 6, 1964.

This proceeding is before the hearing examiner for final consideration upon the complaint, answer, testimony and other evidence, and proposed findings of fact and conclusions filed by counsel for respondent and by counsel supporting the complaint. Consideration has been given to the proposed findings of fact and conclusions submitted by both parties, and all proposed findings of fact and conclusions not hereinafter specifically found or concluded are rejected as being inaccurate or as not being material, and the hearing examiner, having considered the entire record herein, makes the following findings of fact, conclusions drawn therefrom, and issues the following order:

FINDINGS OF FACT

The Respondent

Respondent, Diamond Alkali Company (hereinafter sometimes referred to as "respondent," "Diamond Alkali," or "Diamond"), is a corporation organized and existing under the laws of the State of Delaware, with its office and principal place of business located at 300 Union Commerce Building, Cleveland 14, Ohio. The company was organized under the laws of Delaware on December 28, 1928. (Answer; CX 3.)

Diamond Alkali manufactures and sells a number of industrial chemical products, which are generally classified as basic chemicals, organic chemical products, plastics, and miscellaneous non-chemical products, including cement. In 1961, Diamond Alkali

operated 15 manufacturing plants located in various parts of the United States. (CX 3; Tr. 1228.)

Respondent is and has been in a sound financial condition. In 1960 its assets were above \$142 million, and in 1962 its assets were above \$175 million. In 1960 its sales were above \$138 million, and in 1962 its sales were above \$158 million. (CX 1A and C.)

Respondent manufactures its "Standard" brand portland cement at its Painesville, Ohio, cement plant, described below, which is part of its Cement-Coke Division. Apart from The Bessemer Limestone and Cement Company, respondent has never owned or operated any cement plant other than the Standard plant at Painesville, and it has never made any other corporate acquisition relating to cement (Tr. 236).

Less than 10 percent of respondent's 1962 sales of \$158,731,000 was derived from the sale of cement (Tr. 1228; CX 7A). Respondent does not sell concrete, and it does not sell other products to the purchasers of cement, nor does it buy other than very small amounts of products from such purchasers (CX 1; Tr. 2162).

Respondent's Standard cement plant, composed of two plants designated as Plant A and Plant B at Painesville (about 30 miles northeast of Cleveland) is part of respondent's Painesville Works, a facility which also contains certain of respondent's chemical manufacturing operations (Tr. 236, 1229, 1233). The cement plant occupies only a small part of the approximately 100 acres at the Painesville Works (Tr. 1619).

Respondent entered into the manufacture and sale of cement in 1924 because of the availability at the Painesville Works of a limestone sludge which was a waste product of the caustic soda manufacturing operation there (Tr. 1602-03, 1628). The limestone sludge had no commercial value, could not be stored, and presented a serious disposal problem (Tr. 1603, 1628-29). However, it was usable as the primary raw material in the manufacture of cement, thereby reducing respondent's overall cost of cement (Tr. 1603).

As a result of a change in the technology of producing chemical caustic soda, about 1936, the limestone sludge which was formerly a waste product was no longer available for the Standard plant (Tr. 1606). Since that time, respondent has obtained its basic raw material, limestone, from quarries in northern Michigan, approximately 350 miles from Painesville (Tr. 242-45), at a high cost compared to the costs incurred by some of its competitors obtaining limestone from quarries immediately adjacent to their plants (Tr. 242-44, 1232-33, 1670-71, 1775, 1915-17).

