CONCLUSIONS

I. The Acquisition of Ballard Violated Section 7 of the Clayton Act

It is concluded that the acquisition of the Ballard company by Pillsbury in 1951, as hereinbefore described and found, violated Section 7 of the Clayton Act, in that the effect of the acquisition may be to suppress competition in the family flour industry and in the flour-base home mix industry in the principal towns and cities located in that part of the United States generally lying east of the Mississippi River and south of the Ohio and Potomac Rivers, herein referred to as the Southeast, and for the further reason that this acquisition may tend to create a monopoly in Pillsbury in these two industries in that area.

Section 7 of the Clayton Act, as amended December 29, 1950, provides in relevant part:

> That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.[59]

Without giving a detailed summary of the history of Section 7 of the Clayton Act as it was originally enacted in 1914, it might be well to point out that Congress in passing this act intended it to be a preventive to check anticompetitive acts such as the acquisition of competitors in their incipiency before they reached the dimensions of Sherman Act violations. As stated in the Senate Report on the original bill:

> Broadly stated, the bill, in its treatment of unlawful restraints and monopolies, seeks to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by [the Sherman Act], or other existing antitrust acts, and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation.[60]

As recognized by the Supreme Court of the United States, in a recent decision,[61] the purpose and objectives of the original Section 7 of the Clayton Act have never been fully realized for the following reasons: (1) the statute applied only to acquisitions of stock and did not apply to acquisitions of assets, even where this stock was used to acquire assets, and (2) it was generally assumed

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[59] 64 Stat. 1125, 15 U.S.C. Sec. 18.

[60] Senate Rep. No. 698, 63d Congress, 2d Session 1 (1914).

[61] *U.S. v. E. I. duPont de Nemours & Co.* 353 U.S. 586, 589 (1957).

that the original Section 7 did not apply to vertical mergers. For many years the Federal Trade Commission recommended to Congress that Section 7 be amended because of the Commission's inability to attain the objectives of the original act.

As pointed out in a recent decision of the United States District Court for the Southern District of New York in the case United States v. Bethlehem Steel Corporation, et al.,[62] involving the Bethlehem Steel Corporation's acquisition of The Youngstown Sheet and Tube Company, the 1950 amendment to Section 7 expanded its scope as follows:

> * * * (1) to prohibit the acquisition of assets as well as stock; (2) to broaden the area in which competition may be adversely affected by eliminating the test of whether the effect of the acquisition may be substantially to lessen competition *between the acquiring corporation and the acquired corporation;* (3) to eliminate the prior tests of whether the acquisition might restrain commerce 'in any community' and instead, to make the test whether 'in any line of commerce in any section of the country' the acquisition may substantially lessen competition, or tend to create a monopoly; and (4) to cover vertical as well as horizontal mergers.

This Court also held that according to Congressional Committee Reports the major objectives of Section 7 as amended are:

> * * * (1) to limit future increase in the level of economic concentration resulting from corporate mergers and acquisitions; (2) to meet the threat posed by the merger movement to small business fields and thereby aid in preserving small business as an important competitive factor in the American economy; (3) to cope with monopolistic tendencies in their incipiency and before they attain Sherman Act proportions; and (4) to avoid a Sherman Act test in deciding the effects of a merger.

The United States Court of Appeals for the Second Circuit in the American Sugar Company v. The Cuban-American Sugar Company,[63] held that Section 7 of the Clayton Act was designed "to halt in their incipiency undue concentrations of economic power or monopoly". The essential issues which the Commission is called upon to determine in this case, and to which the attorneys in support of the complaint have the burden of proof, are (1) the line or lines of commerce, (2) the section or sections of the country in which the effects of the merger may be felt—in other words the relevant market with respect to both products and geographic areas —and (3) whether there is a reasonable probability that the effect of the merger may be substantially to lessen competition or to tend to create a monopoly within the relevant markets by undue concentration of economic power, or the use of methods tending to prevent or lessen competition of smaller units in the industry.

62 Not reported.
63 259 Fed. 2d 524.

A. *Relevant Markets*

1. *Line of Commerce or Product Market.* As set forth in the foregoing findings of fact it has been established in this case that there are four lines of commerce involved: (1) family flour, particularly the premium grades, (2) bakery flour, (3) flour-base home mixes and (4) formula feeds.

2. *The Section of the Country—the Geographic Market.* The evidence in the record also indicates that as to the Ballard acquisition, the section of the country, or the geographic market, is the Southeast insofar as family flour, bakery flour, flour-base home mixes and formula feeds are concerned, all four products being involved in the Ballard acquisition. However, the evidence also indicates that although Pillsbury and Ballard both sold family flour and all of the other products involved in the acquisition in that geographic section of the country, there were certain subdivisions thereof, such as metropolitan areas, where competition between Pillsbury and Ballard in family flour and mixes was more pronounced, and as a result, the competitive effect of the acquisition was more pronounced.

B. *The Effect of the Acquisition*

In determining the effect of the acquisition of Ballard in the family flour and mix markets in the Southeast, it is important to consider the opinion of the House Committee at the time it reported out this amended Section 7 when it stated the purpose of the amendment as follows:

> [Section 7] is intended [to apply] when the effect of an acquisition may be a significant reduction in the vigor of competition, even though its effect may not be so far-reaching as to amount to a combination in restraint of trade, create a monopoly, or constitute an attempt to monopolize.[64]

The United States District Court in the Bethlehem Steel case, supra, in interpreting the amended Section 7 in this respect stated:

> A horizontal merger can affect competition in at least two ways. It can have an impact not only on the competitors of the merged companies but also on the buyers who must rely upon the merged companies and their competitors as sources of supply. The purpose of section 7 is to guard against either or both effects of a merger—if the likely consequence is substantially to lessen competition or to tend to create a monopoly. The section 7 market must therefore be considered with reference to the two groups: (1) the competitors of the merged companies and (2) the buyers who would be dependent upon the merged companies and their competitors as sources of supply.

The Court then referred to the House Committee Report as follows:

[64] H.R. Rep. No. 1191, p. 8.

[The proscribed] effect may arise in various ways: [1] such as elimination in whole or in material part of the competitive activity of an enterprise which has been a substantial factor in competition, [2] increase in the relative size of the enterprise making the acquisition to such a point that its advantage over its competitors threatens to be decisive, [3] undue reduction in the number of competing enterprises, or [4] establishment of relationships between buyers and sellers which deprive their rivals of a fair opportunity to compete.[65]

In the present case, to determine the full effect of the acquisition the relevant markets involved are subdivided as follows:

(a) The family flour market, particularly premium grades, in the Southeast into two areas, (1) urban metropolitan trading areas and (2) country or rural trading areas and

(b) The flour-base home mix market (1) throughout the United States insofar as it applies to the Duff acquisition and (2) in the Southeast insofar as it applies to the Ballard acquisition.

1. *Family Flour in Urban Markets.*

(a) Removal of a substantial competitor. Taking up first the impact of the acquisition upon the family flour market in the urban trading areas, the facts in the record indicate that by the acquisition of Ballard, the third largest distributor of family flour in the Southeast, Pillsbury removed one of its principal competitors having a popular brand of soft wheat flour with excellent consumer acceptance, and that chain stores and supermarkets in these urban market areas, and the consuming public buying through them, were deprived of the benefit of the preexisting competition. The two companies followed the same general methods in advertising and promoting their respective brands of flour, both of which were premium grade, aiming their sales efforts at the housewife who was willing to pay a high price for premium quality and who shopped in chains and supermarkets in the urban centers. Ballard and General Mills were the only sellers of family flour that were directly competitive with Pillsbury in the sale of premium grades *throughout* the Southeast. Ballard's Obelisk was probably the most popular single brand in the Southeast with the possible exception of Gold Medal and was at the time of the acquisition more popular than Pillsbury's Best. In eliminating Ballard from the family flour market in the Southeast, a very substantial competitor was removed from that market.

(b) Increased Pillsbury share of market. Not only did the acquisition result in the removal of a substantial competitor, but it also enabled Pillsbury immediately to double its competitive volume of family flour sales in the Southeast and has been a major factor in Pillsbury's advance from fifth position to first position in

[65] H.R. Rep. No. 1191, p. 8.

the volume of sales of family flour in that area. By virtue of the competitive advantage resulting from the acquisition of the flour mill in Louisville, Kentucky, at a strategic location to take advantage of milling-in-transit rates, and the popularity of the Obelisk brand, coupled with its financial ability to advertise and promote these two brands of flour, Pillsbury has been enabled to increase its share of the market in family flour in that area from the time of the acquisition until 1956, when the last testimony was taken. In the more than five years that has expired since the acquisition in a declining flour market, no other competitor in the Southeast, either local or regional, has been able to replace the Ballard company in the chain and supermarket stores in the urban areas.

At the time of the acquisition of Ballard, both Pillsbury and Ballard were important factors in certain metropolitan areas in the Southeast; in some cities Pillsbury was more of a factor and in other cities Ballard was more of a factor. As hereinbefore indicated, Pillsbury and Ballard as well as General Mills confined their sales primarily to chain stores and supermarkets in the metropolitan areas of the Southeast.

The record shows that in the two principal chain stores of the city of Jacksonville, Florida, as a result of the acquisition, the combined deliveries of Pillsbury's Best and Ballard's Obelisk in the Jacksonville and surrounding marketing area, represented approximately 44% of the total sales of flour, that is, all brands, standard or low-priced brands as well as premium brands; and 73% of the sales of premium brands only.

Also in the New Orleans metropolitan area, as a result of the acquisition, the bulk of the sales of family flour was concentrated in the Obelisk and Pillsbury's Best brands. The same is true of Mobile, Alabama.

Another metropolitan marketing area, in which, as a result of the acquisition, the sales of family flour were concentrated in Ballard's Obelisk and Pillsbury's Best, is Louisville, Kentucky, where the Ballard plant was located. In other cities, although the combined sales of Ballard and Pillsbury did not place Pillsbury first in popularity, there was a definite advance in percentage of sales through chain stores and supermarkets as a result of the acquisition. That is true in such cities as Atlanta, where a local mill had the most popular brand, and also in Birmingham. The record shows that Pillsbury benefited most in the way of the added volume of sales of the Ballard Obelisk brand and in an increase in share of market in the metropolitan areas surrounding and including the following cities: Atlanta, Georgia; Augusta, Georgia; Birmingham, Alabama; Charleston, South Carolina; Jacksonville, Florida; Louis-

ville, Kentucky; Mobile, Alabama; Montgomery, Alabama; New Orleans, Louisiana; Raleigh, North Carolina; Savannah, Georgia; Thomasville, Georgia; and Winston-Salem, North Carolina. The acquisition also increased the relative position of Pillsbury in the Norfolk, Virginia, market.

(c) No new entries in the market. While local mills have gradually been disappearing from the market, no new mills have taken their place and the family flour sales of the regional mills that are still in business have, for the most part, declined substantially, partly because of the aggressive competitive practices employed by the respondent Pillsbury in that area since the date of the acquisition.

(d) Competition has been lessened. While there are quite a large number of small flour mills selling family flour in the Southeast, they do not furnish the competition to Pillsbury that Ballard did prior to the acquisition, for the reason that the sales of the small local mills in the Southeast are principally in standard or lower grades, and are in the country territory where Pillsbury has never been a strong competitive factor until recently. Very few of the local millers sell substantial quantities of premium grades of family flour in the urban areas. It is the policy of the chain stores and supermarkets to carry the two leading national brands, Gold Medal and Pillsbury's Best, and also Obelisk, the most popular regional brand now owned by Pillsbury, and one or two local brands, that is, brands of local mills located in the immediate area, and one or two lower-priced brands of standard or inferior grades of family flour, including usually a private brand of the chain store.

Since the acquisition, Pillsbury has continued its national advertising by television, radio, regional magazines and newspapers and by other similar media, designed to keep the Pillsbury name before the public, and to make Pillsbury-owned brands a common household word for commodities to which they are attached. It has thus been enabled to build up a consumer demand, not only for the Pillsbury Best brand, but also for Obelisk, the Ballard brand.

Because of the size of the organizations and the far-reaching effects of the acquisition, it is difficult to measure the full effect, but one definite fact is established—the number of independent competing brands of premium flour being offered for sale by the chain stores and supermarkets has been reduced, and the principal brands now on the shelves of such retail outlets throughout the Southeast in the urban market areas consist of brands owned by Pillsbury and General Mills, who are in a position financially through substantial expenditures for advertising and promotion to prevent other manufacturers of family flour from successfully competing for the preference of the consumers being served by these chain stores and

supermarkets, with the possible exception of a few local mills in the immediate areas surrounding some of the urban centers that have built up a local prestige over the years.

(e) Oligopolistic competition developed. As a result of the acquisition of Ballard, Pillsbury has assisted in the development of oligopolistic competition in the Southeast family flour market, which is competition among a few sellers, and consists in this industry primarily of General Mills and Pillsbury, the two largest units in the industry who are enabled, by virtue of their national advertising and promotional schemes, to lead the industry into competitive practices which make it difficult for small competitors to compete and which gradually force the small competitors out of the market. In some of the larger metropolitan markets the oligopoly also includes one or more regional mills who because of their location are factors in the market. Prior to the acquisition of Ballard, Pillsbury was unable to exert its influence in the market, since it did not have a soft wheat flour to meet the competition of Ballard or General Mills. Now, according to evidence in the record, it is enabled to carry on aggressive competitive methods, such as offering one bag free with ten and one bag free with five deals and other discounts which have resulted in the sale of Pillsbury's Best and Ballard's Obelisk at prices which are, in some instances, below its small competitors' costs; and has used promotion practices of gifts of aprons, pillow slips, appliances and similar devices, which has enabled it to secure more favorable treatment in the chain stores and supermarkets with respect to shelf space. Such methods are sometimes termed by economists as "predatory" or "guerilla" competition, and are characteristic of oligopolistic competition when indulged in by a few large units in an industry.[66] The record contains the testimony of many small competitors who have been unable to meet these competitive tactics and have sustained substantial losses of volume of sales in family flour. Thus the acquisition of Ballard in this case has hastened the development of oligopolistic competition in the urban areas with the adverse competitive results Congress had in mind when the amendment to Section 7 was enacted, and which the Commission was fearful of when it previously considered this case.

2. *Family Flour in Country or Rural Markets.* In the country or rural areas a different situation exists; there was at the time of the acquisition, and even five years later there appears to be, a substantial number of local mills manufacturing soft wheat flour for the most part, catering to the country trade within a radius of

[66] Tr. 28.551-4.

75 to 100 miles from the mill, and a number of western flour mills manufacturing hard wheat flour and shipping into the Southeast and selling their product through jobbers to the rural trade. It is rather significant that this larger group of mills, smaller in size for the most part than the Ballard mill, with few exceptions has been unable to break into the urban chain stores or supermarkets because of their financial inability to compete with Pillsbury and General Mills in advertising and promotion. It is significant, also, that during the period of time subsequent to the merger until as late as 1956, in some instances these other mills, the smaller mills and the western mills, have been unable to keep their share of the market in the country or rural areas. There have been complaints, and evidence has been received, of recent attempts by Pillsbury to increase its market share in the rural areas by utilizing the same methods of advertising and promotion it had been using in the urban areas. It is quite apparent from these facts that the respondent is now in a position, not only to prevent further competition in the urban areas, where that market is under the control of an oligopoly consisting of itself, General Mills and one or two other large regional mills, in certain metropolitan areas, but also by virtue of its favorable position with the Ballard mill at Louisville manufacturing a soft wheat flour and selling this flour under the popular trade name, Obelisk, along with Pillsbury's Best, through wholesalers in the country areas, to create a competitive situation there on premium grades of family flour similar to the one now existing in the urban areas. It will just be a matter of time.

It is contended by counsel for respondent in their brief in support of their proposed findings, that there is no proof in the record showing that there was a probable lessening of competition or tendency to monopoly caused by the acquisition with respect to family flour. It is to be remembered in this connection, that the ultimate question under Section 7 is whether the acquisition *may be* substantially to lessen competition or tend to create a monopoly within the relevant market. The Commission is not required to establish with a *certainty* whether competition in fact has been substantially lessened. "Its burden is met if it establishes a reasonable probability that the proposed merger will substantially lessen competition or tend to create a monopoly." [67] As pointed out in the Senate Committee Report:

> A requirement of certainty and actuality of injury to competition is incompatible with an effort to supplement the Sherman Act by reaching incipient restraints.

[67] Senate Rep. No. 1775, p. 6; *U.S. v. duPont de Nemours & Co.*, supra; *American Sugar Company v. The Cuban-American Sugar Company*, supra; *U.S. v. Bethlehem Steel Corporation*, supra.

The United States District Court in the Bethlehem Steel case, supra, held

There may be a substantial lessening of competition or tendency to monopoly when a merger substantially increases concentration, eliminates a substantial factor in competition, eliminates a substantial source of supply, or results in establishment of relationships between buyers and sellers which deprive their rivals of a fair opportunity to compete.[68]

3. *Increase in Economic Concentration Generally.* It was also held by the Court in the Bethlehem Steel case, supra, that "A major purpose of section 7 is to ward off the anti-competitive effects of increases 'in the level of economic concentration resulting from corporate mergers and acquisitions'."[69] That decision further held "Both the Senate and House Committee Reports emphasize the deep concern of the Congress with the continued trend towards concentration of economic power through mergers and acquisitions." In the present case there is a definite tdency toward concentration in the family flour market in the Southeast, for in 1956, as a direct result of the acquisition of Ballard by Pillsbury, the percentage of the total sales controlled by Pillsbury and General Mills, the next largest distributor in the Southeast in that year, is over 20%; and if the sales of the Colorado Milling & Elevator Company and Dixie-Portland Flour Co. are included, more than 32% of the family flour business is concentrated in these four millers. The significant fact in this particular phase of the situation is, however, that the combined percentage of Pillsbury and General Mills of the total industry, including both urban and country territory, has increased from slightly over 19% in 1952 to nearly 21% in 1956, whereas the percentage of the Colorado Milling & Elevator Company, the other western miller in this group, has declined from 7.32% in 1952 to 6% in 1956; and that the Dixie-Portland company, the only regional mill in the group, made a smaller gain in percentage than either Pillsbury or General Mills.

4. *As to Bakery Flour.* As hereinbefore indicated, it is not believed that the effect of the acquisition of Ballard in the bakery flour industry is sufficient to warrant the conclusion that Section 7 of the Clayton Act has been violated in those market areas. Ballard was virtually out of the bakery flour business, whereas Pillsbury was quite a strong factor throughout the United States in that industry. However, it catered primarily to the larger bakeries and Ballard to the smaller bakeries and since Ballard was gradually changing its system of distribution from its own warehouse to wholesalers, it did not have, and would not have in the future, the salesmen to call on the small bakeries.

[68] H.R. Rep. No. 1191, p. 8.
[69] Senate Rep. No. 1775, p. 3.

5. *As to Formula Feeds.* In the formula feed industry Pillsbury had never been a factor prior to the acquisition, while Ballard had been in certain areas. Ballard had built a large feed mill in Louisville, had converted another mill in Nashville and had elaborate plans in the formula feed industry. However, even before the acquisition it was found that the new feed mill which had been built at Louisville was not adapted to the formula feed business that Ballard was able to get. Likewise, after the acquisition Pillsbury found the same condition to exist; the feed mill was built to handle large orders where they could run a large order through without interference, whereas the business both Ballard and Pillsbury were able to get, in view of the competition they had to meet, were small orders. As a result, Pillsbury has shut down the Ballard feed mill at Louisville and has continued to operate from the smaller mill in Nashville. It never has been a factor in the formula feed business in the Southeast, since the volume of its sales has gradually declined since the date of its acquisition.

II. The Acquisition of Duff Also Violated Section 7 of the Clayton Act

It is also concluded that the acquisition of the Duff plant at Hamilton, Ohio, and the business theretofore conducted under the Duff label by the American Home Foods, Inc., as disclosed in the foregoing findings, was in violation of Section 7 of the Clayton Act. At the time Pillsbury acquired the Duff assets in 1952, it was operating its mix plants, including the Ballard plant in Louisville, to full capacity and its sales were increasing very rapidly.

Duff had built a new plant in Hamilton, Ohio, in 1947, but it had never been able to operate it to full capacity, although it had nationwide distribution. Pillsbury and General Mills had been the two leading factors in the industry for two or three years, although Duff at one time was one of the two largest manufacturers and distributors of cake mixes. The primary result of the acquisition of the Duff plant by Pillsbury was the immediate increase in its share of the mix market throughout the United States as well as in the Southeast. By virtue of the acquisition of Duff, respondent not only eliminated the competition of Duff, it also was able, through the added manufacturing facilities and new formulae, to increase the volume of sales of Pillsbury-owned brands of mixes, until it displaced General Mills as the leader in the cake mix industry in the United States, advancing from 16% of the market in 1949–50 to 31% in 1952.

The mix business in the United States in 1952, after the acquisition of Duff, was concentrated in Pillsbury, General Mills and

General Foods. At that time it is estimated these three companies controlled 60% of the mix business. The concentration was even more pronounced in the cake mix business, which represented nearly half of the sales of flour-base home mixes.

From the standpoint of exits and entries in the mix industry, more manufacturers have disappeared from the market than new ones have entered since the acquisition.

There is an abundance of evidence of aggressive competitive practices on the part of Pillsbury which are indicative of the power of Pillsbury, after the acquisition, to engage in an aggressive campaign of advertising and promotion to popularize its brand of mixes with the public, and thus obtain more shelf space in the chain stores and supermarkets, resulting in an increase in its sales of mixes, which could not be equaled by any other mix manufacturer with the exception of General Mills and possibly General Foods and the present owner of the Duncan Hines brand—Procter & Gamble. The necessary tendency of such activities is to prevent the smaller mix manufacturers from selling their products to chain stores and supermarkets.

III. Remedial Action To Be Taken

The only legal remedy for the competitive situation now existing in the family flour market in the Southeast and flour-base home mix market throughout the United States, as developed in the record in this case, and set forth in the foregoing findings, is a complete and bona fide divestiture of the assets illegally acquired by the respondent. Section 11 of the Clayton Act provides:

> * * * If upon such hearing the Commission * * * shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and *divest itself of the stock, or other share capital, or assets, held or rid itself of the directors chosen contrary to the provisions of sections 7 and 8 of this Act, if any there be, in the manner and within the time fixed by said order.* [Emphasis supplied.]

Such sale of assets should, of course, be made only to smaller units than Pillsbury in the family flour and mix industries.

In this connection, it is not believed that the sale of goodwill, trade-marks, patents, formulae, etc., of the Duff products by respondent to the new Duff Baking Mix Corporation in December 1953 satisfies the requirements of the statute. It is quite apparent from the terms of the conditional sale to the new Duff corporation, that respondent intended to maintain effective control of competition with the new Duff corporation, since the provisions of the orig-

inal agreement in 1953, and the amended agreement in 1956, between Pillsbury and the new Duff corporation, are such that in the event that the new Duff corporation does not conform to the provisions of the agreements and make payments as required, Pillsbury could declare the entire unpaid balance due and thereby recover the business of the new Duff corporation. Furthermore, Pillsbury retained the right to use any Duff formulae in the manufacture of Pillsbury label mixes.

Based upon the foregoing Findings of Fact and Conclusions and pursuant to and in accordance with the provisions of Section 11 of the Clayton Act, the following Order of Divestiture is issued

ORDER OF DIVESTITURE

It is ordered, That respondent The Pillsbury Company (formerly Pillsbury Mills, Inc.), a corporation, and its subsidiaries, officers, directors, agents, representatives and employees shall cease and desist from violating Section 7 of the Clayton Act, as hereinbefore set forth in the findings hereof, and shall divest itself of all assets, properties, rights or privileges, tangible or intangible, including but not limited to all plants, machinery, equipment, trade names, trademarks and goodwill acquired by said respondent as a result of the acquisition of the assets of the Ballard and Ballard Company, together with the plant, machinery, buildings, improvements, equipment and other property of whatever description that has been added to them, in such a manner as to restore it as a going concern in the manufacture and sale of family flour and flour-base home mixes in which the former Ballard and Ballard Company was engaged. Provided, however, that nothing in this order shall require the divestiture of assets, properties, rights or privileges, tangible or intangible, including plants, machinery, equipment, trade names, trade-marks and goodwill of the said Ballard and Ballard Company pertaining to the manufacture and sale of formula feeds, or the manufacture and sale of Oven-Ready biscuits.

It is further ordered, That respondent The Pillsbury Company, a corporation, and its subsidiaries, officers, directors, agents, representatives and employees shall divest itself absolutely in good faith of all assets, properties, rights or privileges, tangible or intangible, including but not limited to all plants, machinery, equipment, trade names, trade-marks and goodwill acquired by said Pillsbury as a result of the acquisition of the assets of the Duff Baking Mix Division of American Home Foods, Inc. (a subsidiary of American Home Products Corporation), together with the plants, machinery, buildings, improvements, equipment and other property of whatever

description that has been added to them, in such a manner as to restore it as a going concern in all the lines of commerce in which the former said Duff Baking Mix Division was engaged.

It is further ordered, That in such divestitures hereinbefore mentioned, none of the said assets, properties, rights or privileges, tangible or intangible, shall be sold or transferred, directly or indirectly, to anyone, who at the time of the divestiture or within a year prior thereto, was a stockholder, officer, director, employee or agent of, or otherwise, directly or indirectly, connected with, or under the control of, respondent or any of respondent's subsidiaries or affiliated companies.

It is further ordered, That in such divestitures hereinbefore mentioned, none of said assets, properties, rights or privileges, tangible or intangible, shall be sold or transferred, directly or indirectly, to any corporation, or to anyone, who at the time of the divestitures, is an officer, director, employee or agent of such corporation, which, at the time of such sale or transfer is a substantial factor in either the family flour industry or the flour-base home mix industry, so that the effect of such divestiture might be to substantially lessen competition or tend to create a monopoly in the family flour or the flour-base home mix industry in any section of the country.

It is further ordered, That respondent The Pillsbury Company, shall, within six months from the date of the service upon it of this order, submit in writing for the consideration and approval of the Federal Trade Commission, its plan for carrying out the provisions of this order, such plan to include the date within which compliance may be effected, the time for such compliance to be hereafter fixed by order of the Commission.

OPINION OF THE COMMISSION

By KINTNER, *Chairman:*

Pillsbury Mills, Inc. (now the Pillsbury Company) acquired the assets of the Ballard and Ballard Company in 1951 and the Duff Baking Mix Division of American Home Foods, Inc., in 1952. The issue now ripe for decision is whether these acquisitions violated Section 7 of the amended Clayton Act. 38 Stat. 731 (1914), as amended by 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1958). The hearing examiner has so held, and his initial decision contains an order of divestiture.

Both respondent and counsel supporting the complaint appeal from the examiner's decision. The major thrust of respondent's appeal is directed at matters of procedure and the weight of the evidence. It broadly assails the initial decision and the order, and

contends generally that the findings are not supported by reliable, probative and substantial evidence.[70] The major contention of counsel supporting the complaint is that the order is too narrow in scope.

The Companies

Pillsbury is a Delaware Corporation having its principal place of business in Minneapolis, Minnesota. It is the second largest flour milling company in the United States. Pillsbury is broadly engaged in commerce in the production and sale of a variety of products including family and bakery flour, formula feeds and flour-base packaged mixes. It is also engaged in the purchase, sale and storage of grain. Its premium brand of family flour is "Pillsbury's Best".

During the fiscal year ending May 31, 1950, Pillsbury's sales of family flour in the United States amounted to approximately $38,000,000, its sales of bakery flour to about $62,000,000, and its sales of flour-base mixes to approximately $26,000,000. In the ten-year period from May 31, 1940, to May 31, 1950, Pillsbury's net sales of all products increased from approximately $47,000,000 to about $201,000,000 and its total assets increased from approximately $30,000,000 to about $62,000,000.

On June 1, 1951, just prior to the acquisition of Ballard and Ballard Company, Pillsbury owned or operated eight flour mills located in the states of Oregon, Kansas, New York, Oklahoma, Minnesota, Utah, California and Illinois; three flour-base mix plants located in the states of California, Utah and Illinois; and ten formula feed plants located in the states of Kansas, Iowa, California, Minnesota and Utah.

[70] In one of its arguments concerning an asserted denial of due process, respondent urges that the Commission is disqualified from hearing this case because of alleged interference by Committees of the Congress. The same issue was previously raised and disposed of in our order of September 26, 1956. No additional facts are cited, but it appears that some further comment is appropriate. Respondent does not request disqualification because of any alleged personal bias on the part of individual Commissioners, nor does it appear that respondent contends that the Commission as a body corporate is biased. Rather, it seems to be suggesting a possibility of prejudice because the Commission must look to Congress for funds and to the Senate for confirmation of the appointments of its members. The objection is not to anything the Commission has done; rather it is to the inquiries of Committees of Congress over which the Commission has no control. We do not believe that such is a basis for disqualification. The relationship between the events alleged and this case are distant and remote. The events occurred many years in the past and mainly concerned Commission members who have since departed from the Commission. Several of the present Commissioners were in attendance at the Congressional hearings, but they were involved only in a very minor way. There is no indication that these members or any present members of the Commission have expressed opinions or prejudgments on issues in this case. Moreover, it has been held that even a previously formed opinion by the Commission on the general subject matter of a case is not such a factor as to disqualify it in the proceedings. *Federal Trade Commission v. Cement Institute,* 333 U.S. 683 (1948). Respondent's contentions on this question are therefore rejected.

Respondent has increased its size partly through acquisition of the stock or assets of other companies. In the eleven years immediately prior to the mergers under scrutiny here, Pillsbury acquired a number of grain elevators, a formula feed plant, a soy bean processing plant and other properties in addition to all the assets of the Globe Grain and Milling Co., of Los Angeles, California. The latter company owned a number of flour mills and feed plants in various western cities and a blending plant in Little Rock, Arkansas.

The Acquired Properties

Ballard and Ballard Company (hereafter referred to as Ballard), prior to June 12, 1951, was a corporation engaged in commerce and doing business under the laws of the state of Kentucky. It had its principal place of business in Louisville, Kentucky. Most of Ballard's business was confined to the Southeastern states. There it was broadly and generally engaged in the grain milling field. It produced and sold family flour, bakery flour, prepared mixes, a refrigerated dough product called "Oven-Ready Biscuits" and formula feeds. Ballard also sold cake mixes and pie crust mixes which were manufactured to its formula by other companies. It sold its family flour under the "Obelisk" brand.

Ballard's net sales between June 30, 1940, and June 30, 1950, grew from about $8,000,000 to about $30,000,000; its total assets increased from approximately $2,600,000 to about $11,300,000; and its net worth grew from approximately $2,400,000 to about $5,800,000.

Pillsbury, on June 12, 1951, acquired the assets of Ballard for approximately $5,171,000. It has since operated the business of Ballard as a part of the Pillsbury organization.

The complaint also challenges the acquisition of the Duff Baking Mix Division of American Home Foods, Inc., a New Jersey corporation and a wholly-owned subsidiary of American Home Products Corporation, a Delaware corporation (hereafter referred to as Duff). American Home Foods in 1944 acquired the business of P. Duff & Sons, Inc., a company which was engaged in the manufacture and sale of cake mixes, hot roll mixes, and other such products. American Home Foods operated this business as the Duff Division. In 1947 it built a new mix plant in Hamilton, Ohio. It also maintained six manufacturing and packaging lines in its plant at San Jose, California.

Duff sold its mixes on a nationwide basis. Its products bore the brand name "Duff's". During 1950 Duff sold 2,878,868 dozens of packages of its mixes for $7,962,202. In 1951, the year prior to its acquisition by Pillsbury, it sold 2,325,569 dozens of packages of its mixes for $6,828,373.

In March, 1952, Pillsbury, through a subsidiary, acquired the baking mix plant at Hamilton, Ohio, and the goodwill, franchise and other assets of the Duff Baking Mix Division from American Home Foods. In December, 1953, after the issuance of the complaint, Pillsbury sold some of the assets so acquired to the Duff Baking Mix Corporation, a New Jersey corporation organized in December, 1953, by Frederick J. Briefer and Edward J. Baker. The sale included Duff's goodwill, trade-marks, patents, formulae and other assets, but it did not include the mix plant at Hamilton, Ohio.

The Relevant Markets

A market under Section 7 of the Clayton Act consists of a "line of commerce", or the product market, and an appropriate "section of the country", or the geographic market. A market so defined does not necessarily comport with an economist's definition of a market. *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576 (S.D.N.Y. 1958). Apparently the respondent does not challenge the delineation of certain broad markets as the appropriate arenas in which to test the lawfulness of the acquisitions challenged here.

Referring to the Ballard acquisition, these markets are (1) family flour, (2) bakery flour, (3) flour-base home mixes, and, (4) formula feeds, all in the Southeast section of the country. As to Duff, the undisputed markets are flour-base home mixes in (a) the Southeast, and (b) the entire United States. The complaint defines the "Southeast" as "that part of the United States generally lying east of the Mississippi River and south of the Ohio and Potomac Rivers."

The examiner further subdivided the whole Southeast into urban and country or rural trading areas. He did not find a number of separate small markets; rather, he found two economically significant subdivisions of the Southeast—a rural market and an urban market. Respondent objects to this determination on the grounds that it is not responsive to the complaint and not supported by the evidence. The terms of the complaint are clearly sufficient to cover any proper subdivision of the Southeast. And the record supports the examiner's finding. There are no exactly identified areas in the case which can be termed urban or rural, but the general boundaries from a competitive standpoint are indicated. For instance, some of the major companies selling family flour in the Southeast concentrated on the rural trade and sold relatively little in metropolitan areas. Among them were Colorado Milling & Elevator Company, International Milling Co., Yukon Mill & Grain Co., Dixie Portland Flour Co., and General Foods Corporation. William P. Craig of Colorado Milling & Elevator Company testified:

We have always concentrated on what is referred to as the larger size packages, and the consuming public that uses those packages are principally the people out in the country.

* * * * * * *

We make no effort [to sell flour in cities] because we know there is big service and a lot of advertising required, and those things, and we were so late in considering the importance of the small package that it is too late now to try to get them.

A distinction in competition between the rural and the urban trade was demonstrated. Because of this difference, the examiner subdivided the market to determine the full effect of the acquisition. We believe he was correct in so doing. It is not necessary to determine the economically significant areas in an industry with the precision of a surveyor. Moreover, the effects of an acquisition can be considered in a general geographic area as well as in various subdivisions of the area. *United States* v. *Bethlehem Steel Corp.*, *supra; United States* v. *Brown Shoe Co.*, 179 F. Supp. 721 (E.D. Mo. 1959).

There is a further line of commerce in this proceeding relating to the Ballard acquisition. It might be termed the wheat flour milling product industry. This is the general flour milling industry in which such firms as Pillsbury and General Mills are engaged. As with the other lines of commerce examined here an appropriate "section of the country" is the Southeast. The wheat flour milling products industry includes companies engaged in the milling of wheat flour for sale as family flour and bakery flour, the manufacture and sale of flour-base mixes for home and institution use, and the manufacture and sale of commercial feed and feed products. Ballard and Pillsbury were both engaged in this general flour milling field. The complaint, charging as it does violations of Section 7 in the lines of commerce in which the acquired companies were engaged, clearly includes the wheat flour milling products industry within its compass. The evidence adduced here reveals the configuration of the industry with sufficient clarity to permit an analysis of the effects of the Ballard merger in this line of commerce.

The Market Share Data

Respondent sharply controverts the examiner's assignment of probative values to the market share data of record. Since the market shares and market positions of the acquired and acquiring firms are significant indicia in the measurement of competitive effect the major sources of this data must be plumbed.

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The Mintener Letters

In 1951, prior to the Ballard acquisition, Mr. Bradshaw Mintener, then vice-president and general counsel of Pillsbury, submitted to the Commission certain figures as Pillsbury's "best estimates" of the total industry sales of family flour and flour-base home mixes and the sales and shares of markets of Pillsbury, Ballard, Duff and other companies for the fiscal year ended May 31, 1950. The admissibility of the Mintener letters is not a subject of dispute. The sole issue is the weight to be assigned to them. We recognize that the statistical data in these letters are at most estimates. But this does not mean that they lack probative worth. Even though they might be comparatively rough estimates, such as a businessman might rely upon in making decisions in the usual course, they are valuable in a case of this character. In a Section 7 proceeding it is not essential that market positions be ascertained with absolute mathematical precision. Reliable, probative evidence demonstrating the unreliability of the Mintener statistics would, of course, destroy their probative value, but no evidence of record rises to that dignity.

The possibility that the Mintener letters may not have listed all important competitors is not greatly significant. Any such gaps that may have existed have been filled by other evidence. In passing upon the correctness of the examiner's conclusions on market structure it must be remembered that his findings were not premised solely upon the data in the Mintener letters. Other evidence figuring prominently in the findings includes the Commission surveys and the testimony of various competitors. In these circumstances we cannot say that the examiner gave undue weight to the Mintener letters. We sustain his assessment of their probative value.

The Detlefsen Estimates

Respondent put in evidence the estimates of Mr. G. R. Detlefsen, director of Pillsbury's Commercial Research and Development Department, covering the family flour, bakery flour and flour-base home mix markets, the shares of Pillsbury and Ballard of such markets and Duff's share of the flour-base home mix markets. As with the Mintener letters, the question is not one of admissibility but the weight to be assigned. The examiner gave these estimates little or no weight. We concur in his ruling. The Detlefsen estimates were developed by the use of complicated and apparently novel methods. Mr. Detlefsen himself referred to the statistics as involved and complex. The novelty was such that the examiner was initially requested to receive the materials *in camera*. The data from which the estimates were prepared apparently included Bu-

reau of Census statistics showing the total United States civilian family flour consumption for 1945 and 1947 and total United States civilian bakery flour consumption for 1947, and certain Department of Agriculture total United States civilian flour consumption statistics. In connection with Department of Agriculture statistics, Mr. Detlefsen sought to develop household and per capita consumption rates of family flour and flour-base home mixes for both the United States and the Southeast for the fiscal years 1945–46 and 1951–52. The rates were derived from two Pillsbury surveys which were allegedly designed to measure consumer buying and baking habits. With the results, he made estimates of both total and southeastern consumption of family flour and flour-base home mixes. Using an estimating equation which in his judgment gave correct effect to the various factors and variables influencing flour and mix consumption, he then obtained his estimates for family flour and mix consumption for the entire period 1945–46 through 1952–53 by interpolating between his estimates for 1945–46 and 1951–52 and extrapolating beyond the latter. Other estimating procedures were used for additional results.

The estimates so obtained may be compared with the respondent's estimates contained in the Mintener letters. A comparison shows:

Item	Estimates in Mintener letters		Detlefsen estimates	
	Cwts.	Percent of market	Cwts.	Percent of market
U.S.:				
Total family flour	60,000,000		74,984,323	
Total flour-base home mixes	7,627,000		10,301,010	
Pillsbury family flour	4,700,000	9.4	4,909,311	6.5
Southeast:				
Total family flour	20,000,000		27,093,211	
Total flour-base home mixes	666,000		1,704,144	
Pillsbury family flour	732,475	3.66	739,967	2.7
Pillsbury flour-base home mixes	151,000	22.7	147,489	8.7
Ballard family flour	930,000	4.65	962,773	3.6
Ballard flour-base home mixes	80,000	12.0	76,846	4.5
Duff flour-base home mixes	68,000	10.2	71,753	4.2

Obviously, the net effect of the Detlefsen estimates is to decrease the market positions of Pillsbury, Ballard and Duff especially in the Southeast from those otherwise shown. This results in part from the much higher figures arrived at for the total markets than were contained in the earlier estimates.

We do not lightly refuse to assign a significant probative value to these estimates. Proper estimating procedures may be used in Section 7 cases and in some instances will no doubt be as accurate as an actual survey of industry sales. Our principal objection to Mr. Detlefsen's procedures is to the wide use of his personal judg-

ment, rendered necessary, it seems, by the paucity of basic statistical data. The consumer surveys, for example, were not projectionable to quantities or market shares and apparently were projectionable only to consumer buying and baking habits. Applying his judgment to this data, and interpreting population statistics, Mr. Detlefsen estimated total United States and Southeastern consumption of family flour and flour-base mixes. The net effect seems to be estimates based as much on Mr. Detlefsen's judgment as upon statistical fact.

In parts of the procedure adjustments were used which appear inconsistent with adjustments made elsewhere and for which no sufficient justification was given. Since the estimates are based principally on Pillsbury's consumer surveys, and since these surveys were not conducted for the purpose of projecting market shares or quantities, therefore requiring considerable alteration and adjustment even to be used for Mr. Detlefsen's purposes, a large question arises as to the validity of the final results.

To illustrate, Mr. Detlefsen made the assumption that Southeastern housewives understated their consumption of all-purpose flour in 1952 and made adjustments to correct this assumed understatement. It appears that a differently designed survey would not require the same assumption, since this supposed understatement was not assumed throughout. Without necessarily disputing Mr. Detlefsen's judgment in making this assumption, we observe that it results in a steeper upward trend in flour consumption in the Southeast and lowers estimates of market shares of Pillsbury products in more recent years. Here the apparent inadequacy of the primary material required pure assumptions resulting in significant deviations in final estimates. When a number of such adjustments are necessary and when they cannot be or are not sufficiently explained, we believe that the final product has dubious probative value. In all the circumstances, we conclude that the examiner correctly disregarded the Detlefsen estimates in his resolution of the issues in this proceeding.

However, even if we accepted respondent's contention that the Detlefsen estimates have greater probative value for the purposes of this case, there would be no such showing here as to require dismissal of the complaint. Even if the smaller market shares established by the Detlefsen estimates be accepted as fact, nevertheless a finding of violation of Section 7 may be premised on these estimates when viewed in the total setting. Cf., *United States* v. *Brown Shoe Co.*, 179 F. Supp. 721, 735–740, esp. 739 (E.D. Mo. 1959). In that case Brown's share of shoe production constituted only 5% of the national market and the share of Kenney, the

acquired firm, was only .5% of the market. But the Court properly held that an analysis of the legality of a merger does not end with the determination of market percentages. Rather, the analysis must extend to a search for the meaning of those percentages in the factual setting of a particular case. In Section 7 cases the ultimate question to be resolved is not whether the acquiring and acquired firms had a quantitatively substantial share of the market or a large proportional share of the market. The ultimate question is whether the merger produces a likelihood of a substantial lessening of competition or a tendency toward monopoly in the future. That question cannot be resolved merely by measuring market shares against some rigid statistical standard of universal applicability.

The Commission Surveys

The record contains data from surveys conducted by the Commission's staff covering family flour sales in the Southeast and cake mix sales in the United States. Respondent objects to this evidence, contending that the surveys are unreliable and incomplete, that they were improperly admitted and that they have been misused and misapplied by the examiner.

To judge the admissibility and relative probative value of surveys by a standard of absolute accuracy and completeness would be unrealistic and unreasonable. If surveys are soundly conceived, well conducted and substantially complete the data so obtained is worthy of consideration.

It has been demonstrated that great care was used in the conduct of the Commission surveys. Checks on the accuracy and completeness of the data originally submitted were made, and in some instances these checks resulted in the revision of survey results. An effort was made to cover every significant company in the lines of commerce surveyed. The fact that the Commission's processes under Sections 6 and 9 of the Federal Trade Commission Act were utilized in making these surveys furnishes an earnest of completeness and trustworthiness. The information provided by each concern was, of course, independent of the data supplied by other firms; even if it be established that there were minor discrepancies in the raw data the probative value of the survey results would not be seriously diminished.

After due deliberation we conclude that the examiner correctly received these surveys and properly considered them in resolving the issues.

The Pillsbury Birmingham and Louisville Surveys

Respondent introduced in evidence surveys of the family flour and flour-base home mix markets in Birmingham, Alabama, and Louisville, Kentucky, wholesale trading areas and censuses of wholesalers located in the same cities. These surveys and censuses were conducted by Mr. Michael H. Halbert, who at the time was working as a market analyst and operations research specialist for Alderson & Sessions, a management consulting firm. The surveys, conducted in April, May and June, 1954, covered both consumers and retail stores. The consumer surveys were apparently designed to show in part the shares of market and market positions of brands of family flour and flour-base home mixes sold in the territories surveyed. The results are not projectionable to other trading areas. The hearing examiner found that the consumer surveys were without probative value.

The significance of these consumer surveys has not been made clear by respondent. Mr. Halbert testified that they show a total picture of flour and flour-base mix purchases, uses, brand preference, attitudes and opinions on the part of the consumer in the Birmingham area and in the Louisville area. These areas, however, constitute only several of the many trading territories in the Southeast and in the country as a whole. Any findings based on this evidence would not be dispositive of the question of the market positions of competitors in the broader relevant markets. Therefore, we do not believe, even if given weight, that this evidence would change the ultimate conclusions, but the examiner has made a thorough review of the factors which bear on the probative value of the consumer surveys and has decided not to give weight to this evidence in his determinations. We agree with his decision.

Competitive Effects

That a merger violates Section 7 if there is a reasonable probability that it will substantially lessen competition or tend to create a monopoly is well settled. *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576, 603 (S.D.N.Y. 1958). *United States* v. *Brown Shoe Co.*, 179 F. Supp. 721 (E.D. Mo. 1959). Cf., *United States* v. *E. I. duPont de Nemours & Co.*, 353 U.S. 586 (1957). In making the determination a variety of competitive factors must be exam-

ined. *Scott Paper Co.*, (D. 6559, on interlocutory appeal, January 5, 1959); *Pillsbury Mills, Inc.*, 50 F.T.C. 555 (1953).[71]

The question of whether there is a future likelihood of substantial lessening of competition or a tendency to monopoly cannot be answered on the basis of market statistics alone. In the *Brown Shoe* case the court, after reviewing the legislative history of amended Section 7, concluded that "certainly it is evident that Congress intended to encompass minute acquisitions which tend toward monopoly and to do so in the incipiency. Courts have recognized the necessity to act toward violations as they begin, rather than wait until it has become *fait accompli*." 179 F. Supp. at 737.

In the *Bethlehem Steel* case the court, citing the legislative history of amended Section 7, held that there may be a substantial lessening of competition or a tendency to monopoly when a merger substantially increases concentration or eliminates a substantial factor in competition, among other stated effects.

The utilization of this approach does not mean that Section 7 cases are to be considered dumping grounds for masses of economic data. In our previous consideration of this case we held that a prima facie case was established despite the fact that the development of the significant market factors in the record as it then existed was something less than exhaustive. We do not read our decision as standing for the proposition that broad economic inquiries into every conceivably relevant market factor are necessary or even desirable in Section 7 cases. If a general examination of a limited number of important market factors establishes the statutory requisites or compels a conclusion that the statutory tests have not been met then further economic detail is superfluous. To launch a minute scrutiny of unimportant market indicia is merely to pile Pelion upon Ossa.

Our analysis of this record is guided by these precepts.

We confine our consideration of probable competitive injury to these relevant markets: family flour in the Southeast, flour-base home mixes in the Southeast and in the country as a whole, as well as appropriate subdivisions of these markets; and the wheat flour milling products industry in the Southeast.

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[71] When this matter was before us on appeal from the hearing examiner's dismissal of the complaint at the close of the case-in-chief of counsel supporting the complaint, we held that Section 7 cases are not to be decided on the basis of *per se* tests. *Pillsbury Mills, Inc.*, 50 F.T.C. 555, 572 (1953). We stated that there must be a case-by-case examination of all relevant factors in order to ascertain the potential economic consequences of the challenged merger. In Section 7 cases decided since that decision the courts have examined a wide range of market factors in considerable detail and have avoided *per se* rulings. *American Crystal Sugar Co. v. The Cuban-American Sugar Co.*, 259 F. 2d 524 (2d Cir. 1958); *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576 (S.D.N.Y. 1958); *United States v. Brown Shoe Co.*, 179 F. Supp. 721 (E.D.Mo. 1959).

The Family Flour Market in the Southeast

One of the appropriate markets for determining the effect of the Ballard acquisition is the family flour market in the Southeast.

There were a considerable number of companies in the Southeast engaged in the milling and sale of family flour during the period that concerns us. A Commission survey of milling companies having a capacity of over 400 cwts. identified 124 companies making deliveries in the Southeast in one of the three years surveyed—1952, 1954 or 1956. It must be noted that many of these mills were not significant competitors. Most were very small and practically unknown outside of the local territories. Only 21 of the companies surveyed had as much as 1% of all the flour deliveries reported in 1952, and these 21 accounted for more than 70% of the total deliveries in the Southeast for that year.

As found by the Commission's family flour survey, the larger companies in the Southeast and their market shares were as follows:

Company	Percent of survey		
	1952	1954	1956
Pillsbury Mills, Inc. (including Ballard)	9.39	9.61	11.02
General Mills, Inc	9.57	9.29	9.86
Colorado Milling & Elevator Co	7.32	6.75	6.00
Dixie-Portland Flour Co	5.11	5.12	5.24
Martha White Mills	4.96	3.96	5.38
General Foods Corp	3.94	3.73	2.77
J. Allen Smith & Co	3.58	3.98	4.02
International Milling Co	3.56	3.45	4.31
Yukon Mill & Grain Co	3.47	3.28	1.86

The other companies among the first 21 had varying smaller percentages of the market.

The estimates contained in the Mintener letters give an indication of the market positions of the leading competitors in the family flour market in the Southeast in 1949–50, prior to the Ballard Acquisition:

Company	*Share of Market*
1. General Mills	9.05
2. Dixie-Portland Flour Mills	6.25
3. Ballard and Ballard	4.65
4. Cohen Williams [Martha White]	3.75
5. Pillsbury Mills	3.66

The extent of the direct competition which existed between Ballard and Pillsbury prior to the merger is best illustrated by a comparison of sales of the two companies in Ballard's warehouse areas:

Sales in cwts. between July 1, 1950 and May 31, 1951

Ballard warehouse area headquarters	*Pillsbury's Best*	*Ballard Obelisk*
Atlanta, Ga	6, 435	55, 669
Augusta, Ga	9, 153	27, 478
Birmingham, Ala	13, 510	51, 768
Bluefield, W. Va	39, 531	8, 329
Brookneal, Va	6, 142	1, 775
Charleston, S.C	10, 662	31, 041
Chattanooga, Tenn	1, 800	28, 432
Greenville, S.C	16, 140	8, 583
Gulfport, Miss	3, 871	28, 751
Jackson, Miss	3, 454	10, 812
Jacksonville, Fla	63, 927	53, 474
Louisville, Ky	10, 015	92, 229
Memphis, Tenn	30, 180	19, 742
Mobile, Ala	2, 144	46, 989
Montgomery, Ala	5, 482	30, 235
Nashville, Tenn	1, 543	2, 608
New Orleans, La	7, 025	61, 658
Norfolk, Va	104, 296	44, 114
Orlando, Fla	30, 866	11, 985
Raleigh, N.C	23, 681	17, 041
Richmond, Va	107, 520	6, 420
Savannah, Ga	3, 121	35, 381
Tampa, Fla	182, 176	24, 517
Thomasville, Ga	5, 731	24, 096
Wilmington, N.C	2, 174	7, 264
Winston-Salem, N.C	11, 563	30, 182
Unallocable	100, 890	---------
Mill Accounts	--------	56, 987
Total	803, 032	817, 560

Ballard was an old established firm engaged in business throughout the Southeastern states. It was highly diversified. Ballard competed with Pillsbury in a broad line of milling products. It produced and sold family flour, bakery flour, flour-base home mixes, formula feeds and other products. It maintained warehouses for the distribution of its own products and a variety of other products. Ballard was a competitor with aggressive management. It pioneered in the packaging of family flour in 2 and 5 pound boxes instead of sacks. It had been in the field of prepared dough products since 1931 with its "Oven-Ready Biscuits." Ballard's brands were well known and had high acceptance over the Southeast. Its "Obelisk" brand of family flour was a premium product and one of the important brands in the market. It outsold even "Pillsbury's Best."

Ballard was one of the few regional companies in the Southeast in a position to compete effectively with such large nationwide distributors as Pillsbury and General Mills, especially in the urban

centers where premium brands dominated sales. The few other regional companies of significant size having comparable premium flours either did not sell widely in the market or they emphasized sales in rural areas and thus were not generally as competitive in the cities as Ballard. J. Allen Smith's White Lily brand was sold in larger cities, but it was important mainly in a few centers such as Knoxville, Tennessee, and Atlanta, Georgia. Colorado Milling & Elevator Co. sold its premium family flours throughout the Southeast, but only in rural areas and to the large-bag trade. Dixie Portland Flour Co. sold many brands of premium flour throughout the market as exclusive brands, but mostly to rural trade. Martha White Mills' premium flour was sold in several urban markets but its flours were sold principally to the rural trade. International Milling Company sold Robin Hood and other premium flours in the Southeast, but these brands were more competitive in the rural areas than they were in the cities.

It is clear, therefore, that the acquisition of Ballard removed an important and effective competitor from the Southeastern market.

As for Pillsbury, the acquisition materially and significantly added to its competitive strength. Pillsbury is a substantial company in the milling industry. Bureau of Census figures show that it had in excess of 9% of flour production in the United States in the fiscal year ending May 31, 1951. Combining its strength in family flour sales in the Southeast with that of Ballard gave Pillsbury a position in the whole market exceeding even that of General Mills and put it in first place in this market. The Ballard acquisition added to or supplemented in many ways the competitive stature of Pillsbury in the Southeast, greatly increasing its importance in that market. The mill facilities of Ballard enabled Pillsbury to meet peculiar requirements for family flour products in the Southeast with greater ease. This acquisition gave Pillsbury a broader sales base and thus justified more intensive sales promotions in the area. It permitted Pillsbury to expand its family flour business in a territory in which it had not been so strong as in other sections of the country.

Respondent, therefore, by the Ballard merger, has substantially increased its position in the Southeastern area and has materially furthered concentration in that market. In 1956, Pillsbury and General Mills together had more than 20% of the sales of family flour in the Southeast.

This increase in concentration must be viewed from a perspective that envisions the history of mergers in the industry and the trend to fewer, larger firms. *United States* v. *Bethlehem Steel Corp.*, *supra; United States* v. *Brown Shoe Co.*, *supra.* Census statistics

shows a decline in the number of establishments in the United States engaged in the milling of flour and meal, from 11,601 in 1909 to 803 in 1954. There has been a definite concentration in the larger concerns. In about 1947 the four largest milling companies in the United States controlled about 23% of the total milling capacity; in 1952 the four largest had about 28% of the capacity. In 1947 the four largest companies accounted for 29% of the total value of the shipments of flour and meal; in 1954 the shipments of the four largest companies represented 40% of the total. A significant part of the concentration so shown has resulted from the merging of milling concerns.

A further factor in the concentration trend is the almost complete lack of new entries in the family flour business in the Southeast. There has been only one new flour mill built in the Southeast since 1940, the one constructed by Nebraska Consolidated Mills Co. of Omaha, Nebraska. In contrast, there have been many withdrawals. The evidence shows that a number of companies discontinued the milling, blending or selling of family flour since January 1, 1952.

Considering all these factors, we believe the examiner's findings that the Ballard acquisition may substantially lessen competition and tend to create a monopoly in the family flour market in the Southeast are supported by reliable, probative and substantial evidence.

The Wheat Flour Milling Products Industry in the Southeast

The acquisition of Ballard by Pillsbury removed one of the foremost competitors in the wheat flour milling products industry in the Southeast. Ballard's effectiveness as a competitor cannot be tested solely on the basis of its performance in the various sepaarte product markets in which it was engaged. Ballard was an effective competitor in significant part because it was widely engaged in the wheat flour milling field. This diversity contributed to Ballard's stature as an important and substantial competitor. The evidence in this record showing the trend toward concentration in the flour milling field, the great decrease in the number of wheat flour mills over the years, the increase in the control of milling capacity by a few large firms, and the enhanced position which Pillsbury obtained in the Southeast as a result of the Ballard acquisition, relates as much to the general flour milling field as it does to the family flour line of commerce. We conclude that the acquisition of Ballard may substantially lessen competition and tend to create a monopoly in the wheat flour milling products industry in the Southeast.

The Flour-Base Home Mix Markets

The nationwide market for flour-base home mixes is a proper arena for testing the competitive effects of the Duff acquisition. Both the Duff and Ballard acquisitions must be examined for effects upon the Southeastern flour-base home mix market. The relevant product line includes cake mixes, pie crust mixes and hot roll mixes, among other prepared home mixes. Respondent apparently does not challenge this definition of the relevant product line; rather it asserts that the examiner failed to apply the definition and erroneously premised his findings of anticompetitive effects in these markets upon a view of the cake mixes segment of the markets in isolation.

The evidence on cake mixes is only a part of the evidence relied upon by the examiner in framing his findings relating to these markets. Moreover, the record shows that cake mix is a significant and substantial part of the flour-base home mix business, if not the leading item in the field. A demonstration of adverse competitive effects in this portion of the mix market clearly must be accorded great weight in the determination of competitive effects upon the market as a whole. The impact of a merger upon competition in a multi-product line of commerce may not always be evenly distributed throughout the line. In Section 7 cases the determination looks to the future. If there has been a greater impact in some segments of the product line than in others those segments may well furnish a portent of the probable course of events in the whole industry. We think that the examiner correctly considered the cake mix evidence.

The market for flour-base home mixes is of comparatively recent origin. Mixes of this type, which are a blend of flour, shortening, sugar and other ingredients, were introduced in the 1930's. The manufacturers of "Duff's" mixes was one of the first companies in the field. However, it was not until after World War II that prepared mixes gained widespread public acceptance. By 1954 deliveries of cake mixes alone amounted to over four and one-half million hundredweights annually.

General Mills and Pillsbury were among the companies which early expanded into this new prepared mix market. Respondent's vice president, Samuel Gale, testified that these two companies and General Foods Corporation are the principal marketers of cake mixes throughout the country. Pillsbury is the leader in the mix industry in terms of packages sold, according to the testimony of Paul Gerot, respondent's director and president.

The Commission's cake mix survey shows the relative positions of leading companies in the cake mix field for 1952 and 1954:

Manufacturer	Percent of U.S. total deliveries		Percent of total deliveries in Southeast	
	1952	1954	1952	1954
Pillsbury	31.06	31.26	35.43	32.31
General Mills, Inc.	20.74	34.94	15.65	32.39
General Foods Corp.	13.69	9.82	16.48	11.72
Hills Bros. Co.	7.69	3.57	15.62	4.03
Nebraska Consolidated Mills Co.	6.77	12.34	5.07	7.26

Other companies such as Cinch Products, Inc., Quaker Oats Company and Kitchen Art Foods, Inc., had varying smaller percentages of the geographical markets.

The estimates contained in respondent's correspondence to the Commission (The Mintener Letters) disclose the approximate market positions of certain leading competitors in the mix field in about 1949–50:

Company	Percent of sales in United States	Percent of sales in Southeast
General Mills	21.29	10.5
Pillsbury	15.97	22.7
Quaker Oats	13.88	13.5
General Foods	6.48	10.2
American Home Foods (Duff)	5.93	10.2
Hills Bros. Co.	4.04	4.5
Flake Products Co.	2.41	1.4
Russel-Miller	1.98	.6
Sunnyfield (A & P Tea Co.)	1.96	1.7
Red-ee Foods, Inc.	1.79	
Albers Bros. Milling Co.	1.72	
Ballard and Ballard	1.13	12.0

The listings include other companies with varying smaller percentages of the geographical markets.

Mr. Gerot, director and president of Pillsbury, testified that Duff was in 6th to 8th place in the national mix market. Ballard, although not large in the sale of mixes in the national market, was an important factor in the Southeast.

The significance of the Duff acquisition cannot be measured by statistics alone. Duff was one of the oldest brands in the business. It had a recognized, well-established label with good consumer acceptance throughout the country. Duff was a highly effective competitor in a number of ways. It carried a full line of products in cake mixes and other flour-base mixes. It produced a variety of cake mixes including some that even Pillsbury did not make until after it acquired Duff. Duff products were distributed through the nationwide sales organization of American Home Foods. The line

was sold by American's sales force of approximately 400 salesmen to chains, wholesale accounts and other outlets. Stocks of Duff mixes were maintained in the warehouse facilities of American Home Foods at various locations. Duff had modern production facilities, especially in its new Hamilton, Ohio, plant. The total dollar volume of Duff mix sales in 1951 was $6,828,373. All of these considerations contribute to the conclusion that Duff was a well established and substantial competitor.

The acquisition of Duff by Pillsbury removed an effective competitor from an industry in which sales were already concentrated in a few leading companies. This acquisition greatly enhanced Pillsbury's standing in the market. It gave Pillsbury a wider market, access to formulae and procedures which Duff possessed and, most important, modern production facilities. Utilizing these new facilities, Pillsbury was able to immediately expand its operations in the flour-base home mixes markets.

The result was increased concentration in the mix industry. Pillsbury was one of the two top companies which together in 1954 controlled about 66% of the cake mix business in the United States and 64% of that business in the Southeast. The acquisition of Duff further accentuated this accumulation of competitive strength in the hands of the largest companies in the industry.

Pillsbury competed in the sale of flour-base home mixes with both Ballard and Duff in the Southeast. Duff was an effective competitor in this area just as it was an effective competitor nationally. The Southeast was an important market for Duff. As for Ballard, its sales of 80,000 hundredweights of mixes in the 1949–50 period prior to its acquisition were more than one-half of Pillsbury's sales of 151,000 hundredweights at that time in the Southeast.

The acquisition of Ballard and Duff had the same general effects on the mix market in the Southeast as the acquisition of Duff had on the mix market in the United States; if anything the effects were more serious. Respondent eliminated two effective and substantial competitors in this area. Its position as one of the major competitors in the Southeast was strengthened and improved. Concentration in this market was substantially increased, with the probable result of a serious detrimental effect on competition.

The record demonstrates that the effect of the Duff and the Ballard acquisitions may be substantially to lessen competition and tend to create a monopoly in the relevant flour-base home mix markets.

The Bakery Flour and Formula Feed Markets

The examiner concluded that the evidence of record did not warrant a finding that there was a probability that the Ballard acquisi-

tion would cause competitive injury in the bakery flour market in the Southeast and the formula feed market in the Southeast. Since we affirm the examiner's findings of probable competitive injury in the markets heretofore discussed and since these findings are sufficient to warrant a conclusion that the Ballard acquisition violated amended Section 7, we deem it unnecessary to assess the propriety of the examiner's findings as to these markets.

Ballard's Financial Condition

Respondent vigorously contends that Ballard was a "failing firm," and, therefore, that its acquisition by Pillsbury was not a violation of Section 7. Respondent also contends that the examiner erred in rejecting certain evidence of trends in Ballard's financial condition.

In passing upon the evidentiary issue we note that the financial condition of Ballard has been developed in this record in extensive detail. We note also that the vast bulk of the rejected testimony was not offered to alter or extend the objective record facts of financial condition (e.g., profit and loss history, total investment, net worth, current assets and current liabilities), but to interpret those facts or to project trends from them. Opinions and interpretations of this sort can become cumulative and repetitive at some point. The examiner must be allowed some discretion to prevent unnecessary proliferation. The respondent has failed to demonstrate that the examiner abused his discretion in excluding further evidence on this question.

Respondent relies primarily upon *International Shoe Co.* v. *Federal Trade Commission*, 280 U.S. 291 (1930), to support its failing company position. Because of the central importance of that single precedent we must examine the structure of the Court's opinion in some detail. In reviewing a Commission finding that International's acquisition of the capital stock of the McElwain Company violated old Section 7, the Court first held that the Commission's conclusion "to the effect that the acquisition of the capital stock in question would probably result in a substantial lessening of competition must fail for lack of a necessary basis upon which to rest." 280 U.S. at 299. The Court then reviewed the financial condition of the McElwain Company and noted the loss of $6,000,000 in the year prior to acquisition and that within a year a surplus of about $4,000,000 was not only exhausted but a deficit of over $4,000,000 had accrued. The company owed large sums, new orders were not coming in, and its factories were producing at a low percentage of capacity. The company could no longer pay its debts as they became due. Its next balance sheet would disclose a condition of insolvency

and bring the company to the point of involuntary liquidation under the applicable Massachusetts statute. Dividends on the second preferred and common stock had been discontinued, and the first preferred stockholders had received a notice of imminent discontinuance. During the period of McElwain's difficulties, International was operating profitably and expanding rapidly. International was the only prospective purchaser available. After reciting these facts the Court then framed this alternative holding:

> In the light of the case thus disclosed of a corporation with resources so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure with resulting loss to its stockholders and injury to the communities where its plants were operated, we hold that the purchase of its capital stock by a competitor (*there being no other prospective purchaser*), not with a purpose to lessen competition, but to facilitate the accumulated business of the purchaser and with the effect of mitigating seriously injurious consequences otherwise probable, is not in contemplation of law prejudicial to the public and does not substantially lessen competition or restrain commerce within the intent of the Clayton Act. [280 U.S. at 302–303. Emphasis supplied.]

Justices Stone, Holmes and Brandeis dissented. The dissenting opinion contained this statement: "Nor am I able to say that the McElwain Company, for the stock of which petitioner gave its own stock having a market value of $9,460,000, was then in such financial straits as to preclude the reasonable inference by the Commission that its business, conducted either through a receivership or a reorganized company, would probably continue to compete with that of petitioner." 288 U.S. at 306.

Any resemblance between the financial condition of Ballard at the time of acquisition and the financial position of the McElwain Company at the time of acquisition is so remote as to be well-nigh indiscernible. Ballard, although apparently under heavy financial obligation, was a profitable going concern. Ballard was insolvent neither in the equitable or bankruptcy sense. It was rated a prime credit risk and it was far removed from the brink of involuntary liquidation. It was operating profitably at the time of sale and it had earned a net profit in every year from 1940 to the time of sale. Ballard's total dollar sales rose from about $20,000,000 for the year ending June 30, 1945 to nearly $33,000,000 for the 11 months ending May 31, 1951. Earnings per dollar of sales were comparable with those of Pillsbury. Ballard's mills were operating at a high percentage of capacity. And unlike the situation at the time McElwain was acquired by International Shoe, another offer to purchase Ballard was outstanding at the time it was acquired by Pillsbury.

It is obvious, then, that the financial condition of Ballard at the time of acquisition cannot be equated with the condition of the

McElwain Company at the time of acquisition. But respondent has not anchored its failing firm defense solely on the then-current condition of Ballard. It has introduced a volume of evidence purporting to show adverse pressures on Ballard's financial position. This evidence tends to demonstrate that due to an extensive post-war expansion program Ballard needed additional working capital at the time of acquisition. A portion of this evidence plots Ballard's ratio of current assets to current liabilities, its ratio of net worth to total debt, and its net earnings and profit per dollar of sales over the five year period immediately preceding the merger. The plots for each of these factors generally demonstrate that, after a sharp advance in 1947–49, there was a decline in each of these measurements of financial condition in 1949–51. Respondent then argues that if this downward trend had continued and if the necessity for acquiring additional working capital was not obviated, then Ballard would have failed in the near future. Thus, respondent's "failing firm" position cannot rest upon the holding in *International Shoe* alone; the doctrine of that case must be extended radically if it is to cover the position of respondent. This would be so even if, as respondent contends, the *International Shoe* case establishes an absolute defense in Section 7 cases, rather than merely establishing imminent insolvency as one of the relevant factors in assessing competitive effect. Cf. Connor, *Section 7 of the Clayton Act: The "Failing Company" Myth*, 49 Georgetown L.J. 84 (1960).

We are not disposed to extend the rationale of *International Shoe* beyond the ambit of its facts and holding. Respondent states that the test of *International Shoe* is satisfied by proof of the probability of insolvency or bankruptcy. But the opinion in that case clearly states that the test is whether "a corporation with resources so depleted and the prospect of rehabilitation so remote that it faced the grave possibility of a business failure." 280 U.S. at 302. We are not persuaded that the Court's use of the word "grave" was mere surplusage, especially when it included a reference to the facts of the McElwain Company's position in this very sentence. Respondent refers us to the legislative history of the 1950 amendment. See H.R. Rep. No. 1191, 81st Cong., 1st Sess., (1949); Sen. Rep. No. 1775, 81st Cong., 2d Sess., (1950). But we find no Congressional intent in that history or in the text of the amendment to expand the *International Shoe* doctrine. Even if we follow all the signs set out by respondent, we see, at most, a profitable enterprise under some financial pressure. There was no "grave probability of a business failure."

Moreover, the Court placed a qualification on the *International Shoe* test. The Court noted that there was "no other prospective purchaser" available to salvage McElwain's going concern value in

its statement of the holding. Here, Ballard had received three offers of purchase in the five years preceding the merger and one offer was pending at the time of the Pillsbury acquisition.

We hold that Ballard was not a failing firm within the meaning of the *International Shoe* case at the time of acquisition.

Due Process Questions

Respondent asserts that after the close of the hearings counsel supporting the complaint submitted so-called *ex parte* material to the examiner and that this action deprived respondent of its right to due process. This seriousness of this charge demands that we examine the challenged action with great care.

At the conclusion of the testimony in this case, the examiner set a date (July 15, 1958) for the filing of proposed findings by counsel for both sides. In the proposed findings submitted by counsel supporting the complaint on that date there were a number of blank spaces where there were references to delivery figures contained in an exhibit received in evidence *in camera*. Evidently counsel supporting the complaint was not certain how reference was to be made to the *in camera* evidence. Later, apparently for the examiner's convenience, he submitted a copy of his proposed findings with the blanks filled in. Counsel supporting the complaint had duly furnished a copy of his original proposed findings to respondent, but there was no simultaneous service upon respondent at the time of his second submission, although respondent thereafter received the information.

It is important to note that the material submitted was not "*ex parte* material," if that term means "extra-record material." The figures furnished the examiner were all matters of record, except that several of them proved to be slightly in error. Thus we are not faced with an attempt to advise the examiner as to matters not in evidence or an attempt to exert naked influence. The mistake of counsel supporting the complaint's conduct was his failure promptly to transmit a copy of his submission to counsel for respondent. This omission while unfortunate and not condoned by the Commission has not been shown to have deprived respondent of due process. Counsel for Pillsbury were furnished a copy of the submission and had sufficient opportunity to be heard on all issues surrounding the information supplied since the initial decision was not filed until long after the incident.

Respondent excepts to what it terms an exchange of *ex parte* communications between the Commission and Dr. Kottke, an employee of the Commission and a witness in this proceeding. During the

course of the hearings before the examiner Dr. Kottke made a request to the Commission for permission to release certain files to the respondent for use in cross-examination. The written communications between Dr. Kottke and the Commission were concerned solely with this request. The Commission advised Dr. Kottke that it had no objection to the production of files for the purpose indicated but without prejudice to any rights available to counsel. We do not see any impropriety in this request to the Commission for permission to release confidential files, nor do we think that any right of respondent was violated.

We have not overlooked respondent's assertions that the examiner's actions during the course of the hearings amounted to a denial of due process. These exceptions recite rulings limiting the scope of issues, rulings on the relevancy of inquiries and rulings on the admissibility of evidence. In a marathon proceeding the examiner must impose some limits and establish some order. We have examined each of the rulings challenged by respondent, and we are satisfied that the examiner did not transgress any substantial right of the respondent.

THE ORDER

Both counsel supporting the complaint and respondent appeal from the scope or the form of the order contained in the initial decision.

Respondent challenges the provisions of the order which require divestiture "in such a manner as to restore [each company] as a going concern." Respondent's contention is that the Commission cannot exercise the powers of a court of equity in Section 7 proceedings and, therefore, cannot compel the restoration of an acquired firm. *Farm Journal, Inc.*, 53 F.T.C. 26 (1956), is cited in support of this contention, but that proceeding is distinguishable on its facts. There the impossibility of any effective restoration of the competing farm magazine was apparent at the time the order was entered.

Respondent's position is that the order can go no further than to require respondent to divest itself in good faith of assets acquired, and still held, in violation of Section 7; that the Commission cannot require respondent to divest itself of post-acquisition additions to the property acquired, to recapture acquired assets it has sold, to "restore" or organize "going concerns" for the purpose of purchasing assets to be divested, or prohibit respondent from selling such assets to any particular purchaser not connected with respondent.

This order is similar in many respects to orders previously entered by the Commission in other Section 7 cases. *Crown Zellerbach*

Corp., 54 F.T.C. 769 (1957); *Reynolds Metals Co.*, Docket 7009 (January 21, 1960); *A. G. Spalding & Bros., Inc.*, Docket 6478 (March 30, 1960). We believe that an order requiring the restoration of the acquired firms as competitors is fully within the Commission's authority and is justified here. Piecemeal divestiture will not correct the harm which has been rendered competition.

However, the scope of the initial order has not been justified to the extent that it may require the divestiture of all assets acquired subsequent to the mergers without regard to the necessity of divesting those assets in order to achieve restoration of the acquired firms. Respondent's appeal on this point is granted.

We observe that the order in the initial decision appears to require no more than the restoration of "going concerns." In each acquisition challenged here, the probable harm to competition is related significantly to the fact that substantial and effective competitors have been eliminated. Therefore, the order should provide for the restoration not only of going concerns but companies which will be substantial and effective competitors.

Since the initial order requires the submission of a plan setting forth the details of the method of compliance, it, in effect, provides respondent with an opportunity to be heard on the way in which compliance is to be achieved. The alternatives to an order of this character are: (a) an order which would defer any ruling on the divestiture, if any, to be required and expressly provide for further hearings on this question, a procedure followed by the court in *United States* v. *Brown Shoe Co.*, *supra*; and (b) an order containing the final detailed requirements for divestiture, including the method of compliance. We have considered and rejected both of these alternatives. The first entails a prolonged delay in correcting an established violation of law. The second does not appear to be practical because of the difficulty of determining at this time the course of action which will provide the most effective relief, and is not wholly fair to the respondent since it would have no opportunity to present objections and recommendations. The respondent may recommend an approach different from any now contemplated that would effectively restore the competitive situation existing at the time of the acquisition and at the same time allow respondent to retain its legitimate growth. We do not wish to preclude this possibility.

The appeal of counsel supporting the complaint raises two issues relating to the scope of the order.

A challenge is addressed to the provision which excludes from the required divestiture of Ballard the "assets, properties, rights

or privileges, tangible or intangible, including plants, machinery, equipment, trade names, trademarks, and good will of the said Ballard and Ballard Company pertaining to the manufacture and sale of formula feeds, or the manufacture and sale of Oven-Ready biscuits." The examiner apparently excepted these products from the order of divestiture because he had specifically found no probability of competitive injury as to formula feeds and because of his conclusion that no issue was raised in the complaint as to refrigerated dough products.

Section 7 prohibits in certain instances the acquisition of stock or assets "where *in any line of commerce in any section of the country*, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly." (Emphasis supplied.) The statute is violated if the forbidden effect or tendency is produced in one of many relevant lines of commerce. *Van Camp & Sons Co.* v. *American Can Co.*, 278 U.S. 245, 253 (1929); *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957). The remedy is divestiture of all the stock and assets involved in the acquisition. Even if this issue were not governed by precedent, the remedy here would be complete divestiture because we have found a violation of the statute in the wheat flour milling products line of commerce, which includes all of the products manufactured by Ballard and Duff.

In *Erie Sand & Gravel Co.*, Docket 6670 (October 26, 1959), an equivalent to a property acquired was not ordered divested, but this involved only the use of an allowable discretion in the fashioning of an appropriate remedy. See *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 612–613 (1946); *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470 (1952); *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419 (1957). The propriety of an exercise of discretion in a similar manner has not been demonstrated in this proceeding. We hold that the order of divestiture incorrectly excluded, as to the Ballard merger, the assets relating to Oven-Ready Biscuits and formula feeds. The order will be modified accordingly.

The second point raised by counsel supporting the complaint concerns the failure of the hearing examiner to grant their request for an order prohibiting respondent from future violations of Section 7. We rejected such a provision in *Reynolds Metals Co.*, *supra*. Counsel has not justified the need for such a prohibition here. Therefore, we do not reach the question of whether such a requirement properly may be included in the order in a Section 7 proceeding.

CONCLUSION

Other exceptions of respondent and counsel supporting the complaint have been considered and rejected. The appeal of respondent and the appeal of counsel supporting the complaint are granted in part and denied in part. The initial decision, to the extent that it is contrary to the views expressed in this opinion, is modified to conform with such views. An appropriate order will be entered.

Commissioner Mills did not participate in the decision of this matter for the reason that he did not hear oral argument herein.

FINAL ORDER

This matter having come on to be heard upon the cross-appeals of respondent and counsel in support of the complaint from the hearing examiner's initial decision filed February 19, 1959, and upon the briefs and oral argument of counsel in support thereof and in opposition thereto; and

The Commission having rendered its decision denying in part and granting in part the appeal of respondent and the appeal of counsel in support of the complaint, and having directed that the order contained in the initial decision be modified in accordance with its views expressed in the opinion:

It is ordered, That the order contained in the initial decision be, and it hereby is, modified to read as follows:

It is ordered, That respondent The Pillsbury Company (formerly Pillsbury Mills, Inc.), a corporation, and its subsidiaries, officers, directors, agents, representatives and employees, shall divest itself absolutely, in good faith, of all assets, properties, rights and privileges, tangible or intangible, including but not limited to all plants, machinery, equipment, trade names, trade-marks and good will acquired by said respondent as a result of the acquisition of the assets of the Ballard and Ballard Company, together with so much of the plants, machinery, buildings, improvements, equipment and other property of whatever description that has been added to them, as may be necessary to restore a substantial, going concern and an effective competitor in all the lines of commerce in which the former Ballard and Ballard Company was engaged.

It is further ordered, That respondent, The Pillsbury Company, a corporation, and its subsidiaries, officers, directors, agents, representatives and employees, shall divest itself absolutely, in good faith, of all assets, properties, rights and privileges, tangible or intangible, including but not limited to all plants, machinery, equipment, trade names, trade-marks and good will acquired by said

Pillsbury as a result of the acquisition of the assets of the Duff Baking Mix Division of American Home Foods, Inc. (a subsidiary of American Home Products Corporation), together with so much of the plants, machinery, buildings, improvements, equipment and other property of whatever description that has been added to them as may be necessary to restore a substantial, going concern and an effective competitor in all the lines of commerce in which the former said Duff Baking Mix Division was engaged.

It is further ordered, That in such divestitures hereinbefore mentioned, none of the said assets, properties, rights and privileges, tanglible or intangible, shall be sold or transferred, directly or indirectly, to anyone who, at the time of the divestiture, is a stockholder, officer, director, employee or agent of, or otherwise, directly or indirectly, connected with, or under the control of, respondent or any of respondent's subsidiaries or affiliated companies.

It is further ordered, That in such divestitures hereinbefore mentioned, none of said assets, properties, rights or privileges, tangible or intangible, shall be sold or transferred, directly or indirectly, to any corporation, or to anyone, who at the time of the divestiture, is an officer, director, employee or agent of such corporation, which is a substantial factor in any of the lines of commerce in this proceeding.

It is further ordered, That respondent The Pillsbury Company shall, within sixty (60) days from the date of the service upon it of this order, submit in writing for the consideration and approval of the Federal Trade Commission, its plan for carrying out the provisions of this order, including the date within which compliance can be effected.

It is further ordered, That the findings, conclusions and order contained in the initial decision, as modified, be, and they hereby are, adopted as those of the Commission.

Commissioner Mills not participating for the reason that he did not hear oral argument herein.

IN THE MATTER OF

SCOTT PAPER COMPANY

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

Docket 6559. Complaint, June 1, 1956—Decision, Dec. 16, 1960

Order requiring the nation's leading seller of sanitary paper products—including toilet and facial tissue, paper napkins and towels and household

waxed paper—to divest itself absolutely of three companies acquired in violation of Sec. 7 of the Clayton Act: Soundview Pulp Co., Everett, Wash., a bleached sulphite pulp producer merged into Scott Nov. 9, 1951; Detroit Sulphite Pulp and Paper Co., Detroit, Mich., manufacturer of base paper stock, acquired Sept. 2, 1954; and Hollingsworth & Whitney Co., Boston, Mass., producer of varied paper products, acquired Oct. 27, 1954.

Before *Mr. William L. Pack*, hearing examiner.

Mr. Lars Janson and *Mr. J. Wallace Adair* for the Commission.

Mr. Miles W. Kirkpatrick, of Philadelphia, Pa., *Mr. William R. Scott*, of Chester, Pa., and *Mr. J. David Mann, Jr.*, *Mr. John H. Schafer*, *Mr. Gerhard A. Gesell*, *Mr. David B. Isbell* and *Mr. Paul C. Warnke*, of Washington, D.C., for respondent.

Findings as to the Facts, Conclusions and Order

Pursuant to the provisions of the Clayton Act, as amended, and the Federal Trade Commission Act, the Commission on June 1, 1956, issued and subsequently served its complaint in this proceeding upon the respondent charging the respondent with violations of said Acts. Hearings were held before a hearing examiner of the Commission and testimony and other evidence in support of and in opposition to the allegations of the complaint were received into the record. In the initial decision filed January 13, 1960, the hearing examiner found that said charges of law violations were not sustained by the evidence and the order contained in the initial decision provided for dismissal of this proceeding.

The Commission, having considered the appeal filed by counsel supporting the complaint and the entire record and having determined that the initial decision should be vacated and set aside, now makes this its findings as to the facts and conclusions drawn therefrom and order, the same to be in lieu of those contained in said initial decision.

FINDINGS AS TO THE FACTS

Paragraph 1. The respondent, Scott Paper Company (referred to hereinafter as Scott), is a corporation organized under the laws of the State of Pennsylvania, with its principal offices located at Chester, Pennsylvania. The company continues a business started in 1879. It is engaged in the manufacture and sale of various paper products. Those of its products with which this proceeding is concerned are toilet tissues, facial tissues, paper napkins, paper towels, and household waxed paper. While only the first four of these fall within the technical meaning of the term sanitary paper products as used in the industry, that term as used herein will, for convenience, include household waxed paper as well.

PAR. 2. Scott's sanitary paper products, all of which are trade-marked, are divided into two general classifications: (1) resale or retail products, and (2) industrial products. The resale products are intended for resale to the public and are sold by Scott largely to retail stores, primarily grocery chains and supermarkets. The industrial products are intended for use in industrial plants, offices, hotels, etc., and are usually distributed through wholesalers.

PAR. 3. Scott is the leading producer of toilet tissues, paper towels and household waxed paper and one of the principal producers of facial tissues and paper napkins. Its trade-marked toilet tissues are sold under the names of ScotTissue, Waldorf and Soft-Weve. Other brand names include Cut-Rite (household waxed paper), ScotTowels and Scott (paper towels), Scotties (facial tissues), and Scotkins and Scott Family Napkins (paper napkins). Scott's sales in 1950 were $97,724,407 and its shipments of trade-marked sanitary paper products represented 317,213 tons. In 1955, the year prior to commencement of this proceeding, Scott's shipments of such products were 504,216 tons and sales were $188,000,000.

PAR. 4. The first of the three acquisitions which are challenged in the complaint was that of Soundview Pulp Company (hereinafter referred to as Soundview), located at Everett, Washington. On November 9, 1951, that company was merged into Scott by the issuance of 1,220,625 common shares of Scott, having on the date of issuance an aggregate market value of approximately 60 million dollars. Soundview's total capitalization at the time of merger was $25,902,820. Such book value notwithstanding, Soundview's assets included current assets of approximately 13 million dollars in cash and government securities. Moreover, then current replacement costs for the mill were estimated at 47 million dollars and 65 million dollars for Soundview's timber holdings. Scott's staff estimated the reasonable combined value of the mill and timber at $76,500,000. Soundview's timber holdings approximated three and one-half billion board feet plus 100,000 acres of logged land in second growth and were deemed sufficient by Soundview and Scott to provide the pulp mill with raw material at then production rates for the foreseeable future.

PAR. 5. (a) At the time of its acquisition, Soundview was engaged in producing and selling bleached sulphite pulp. It did not produce sanitary paper products or any other kind of paper products. Its pulp mill, located at Everett on Puget Sound in the State of Washington, had a rated capacity of 600 tons per day or 200,000 tons per year. The mill, the largest bleached chemical pulp mill in the world, was an efficient, low-cost producer. Immediately following the acquisition, Scott was able to obtain pulp at

a manufacturing cost of $77.50 per ton in contrast to Soundview's market price of $139.77 per ton. On the basis of 1951 costs and selling prices, Scott would have saved over 12 million dollars in pulp costs alone had it used all of Soundview's pulp production.

(b) The capacity of Soundview's pulp mill was expanded to 800 tons per day through improved operating procedures and construction of an addition to the pulp mill. Such increase was at a cost of $27,000 per day ton compared to $65,000 per day ton which would have been required for new construction; and the added facilities were to result in annual savings of approximately two million dollars on pulp supplied for Scott's Chester plant in the East.

PAR. 6. In 1950, respondent consumed 73,394 tons of bleached sulphite pulp. Of this amount 60,579 tons were purchased outside, 13,601 tons of which were bought from Soundview. In 1951, Scott purchased approximately 7.5 per cent of Soundview's total output of bleached sulphite pulp. Scott satisfied all commitments for Soundview pulp existing at the time of the acquisition, and has continued to sell Soundview pulp on the open market to other manufacturers. Scott sold 82,000 tons of pulp in 1955, and currently has Soundview pulp available for sale. By 1957, the amount of Soundview pulp used by Scott roughly equaled the pulp mill's capacity at the time of acquisition.

PAR. 7. Since acquiring Soundview, Scott has built at the Everett site a new paper mill containing four paper machines and a converting plant. The first of these machines went into commercial operation in January, 1954, and the second in July, 1954. By the middle of 1955, all four machines were in production. All types of Scott trade-marked products are now produced at Everett. In 1955, these four machines produced a total of 82,700 tons of Scott trade-marked products or 15 per cent of Scott's 1955 trade-marked production. Whenever Scott so elects, it can consume all the pulp produced at Soundview inasmuch as the paper plant is designed for six high-speed machines, whereas only four have been added. The total cost of the capital additions and improvements at Soundview from the time of acquisition through 1958 amounted to $49,828,926.

PAR. 8. The second of the three acquisitions was that of Detroit Sulphite Pulp & Paper Company of Detroit, Michigan (hereinafter referred to as Detroit). On September 2, 1954, this company was acquired by Scott through issuance of 125,092 shares of Scott common stock having an aggregate market value of approximately 11 million dollars. At that time, Detroit, including a wholly owned

subsidiary, had a total capitalization of $9,644,166. Its net sales in 1953 had been $12,905,231, and its net income after taxes $769,815.

PAR. 9. (a) Detroit was primarily engaged in the manufacture of paper stock and in the sale of such stock to manufacturers for further processing and converting into finished goods. The company made no sanitary paper, household waxed paper, or other consumer products.

(b) Base paper stock for waxing was the only material manufactured by Detroit which was also produced by Scott or its subsidiaries at the time of the acquisition. Prior to that time, Scott had purchased Detroit's entire output of wax base stock. The stock supplied to Scott by Detroit in 1953 represented approximately twice that produced by the respondent. Detroit had also supplied Scott with wrapper stock for the wrapping of Scott finished products. Scott was not at that time producing wrapper stock. In 1953, the last full year before the acquisition, Scott's total purchases from Detroit amounted to 53 per cent of Detroit's entire production for that year.

PAR. 10. (a) Detroit's only plant was located in Detroit, Michigan. It consisted of a bleached sulphite pulp mill of 150 tons per day capacity, six paper machines and related equipment. The pulp mill had a capacity equal to about 90 per cent of Detroit's pulp consumption. Detroit also had a wholly owned Canadian subsidiary, Driftwood Lands & Timber, Ltd., which owned more than 65,000 acres of timber land in Ontario, all of which land has been sold by Scott.

(b) Since the acquisition, Scott has rebuilt two paper machines at Detroit, and built and installed one new machine. The cost to Scott of the rebuilding of the first machine was $525,831; however, subsequent additions, plus the cost to Scott of the original machine itself, have brought the total cost of the rebuilt machine to $768,334. The cost to Scott of the rebuilding of the second machine was $572,716; subsequent additions, plus the cost to Scott of the original machine, have brought the total to $1,840,401. Converting equipment for both rebuilt machines costing approximately $1,100,000 also was installed, Detroit having no equipment for finishing Scott trade-marked products.

PAR. 11. Scott also built alongside the existing Detroit mill a completely new building for the new paper machine, pulp preparation equipment and finishing equipment. The new paper machine itself cost slightly over one million dollars, and its auxiliary equipment brought the cost to about two million dollars. The total cost of capital additions and improvements made by Scott at

Detroit from the time of acquisition through 1958 amounted to $11,252,589.

PAR. 12. The last of the three acquired companies was Hollingsworth & Whitney Company of Boston, Massachusetts (hereinafter referred to as Hollingsworth). On October 27, 1954, this company was acquired by Scott by the issuance of 770,000 common shares of Scott, having an aggregate market value of approximately 38 million dollars. Hollingsworth's total capitalization at that time was $43,645,662. Its net sales in 1953 were $39,923,309, producing a net income after taxes of $2,186,520.

PAR. 13. (a) Hollingsworth was in the business of manufacturing and selling an extensive line of paper stock for tabulating cards, multi-wall shipping sacks, food containers, drinking cups, heavy-duty envelopes, shipping tags and charts, safety check paper, sulphate and sulphite specialty products, and papers for the printing trade. Scott did not produce or sell any of the foregoing products and Hollingsworth produced none of the finished products sold by Scott.

(b) Hollingsworth's assets included pulp and paper mills at Mobile, Alabama, and Winslow, Maine, and a groundwood pulp mill at Madison, Maine, as well as substantial timberlands in the Mobile area and approximately one million acres of forest land located in Maine and eastern Canada. At the time of acquisition, Hollingsworth's rated production of pulp and paper were approximately in balance at about 700 tons per day. There were three paper machines at the Mobile plant and six paper machines at the Winslow plant.

PAR. 14. (a) Scott regarded the Hollingsworth Mobile plant "as one of the most modern in the world" and as affording economical access to the rapidly growing southern and mid-continent markets. None of the paper machines at the Mobile plant was suitable for conversion to the manufacture of Scott trade-marked products. Since the acquisition, a new building has been erected at Mobile capable of housing two new paper machines, together with buildings for finishing operations, warehousing, and the necessary attendant services. Two wholly new paper machines and converting equipment were constructed and installed in 1956 and 1957 to produce toweling and tissues. Production on them did not begin until the spring of 1959 because they were not needed. Total cost of new construction at Mobile was approximately 31 million dollars.

(b) At Hollingsworth's Winslow plant two paper machines were rebuilt for the manufacture of Scott trade-marked products and came into production in the fall of 1955. More recently a third

machine at Winslow has been rebuilt to produce wax base stock and a new paper machine also installed.

(c) A new building was constructed at Winslow for a new paper machine to make toilet tissue and this machine began production in February 1956. The total cost of improvements and additions made by Scott at former Hollingsworth properties through 1958 was $48,121,987.

PAR. 15. (a) Section 7 of the Clayton Act, as amended, makes corporate acquisitions unlawful if their effects in any line of commerce in any section of the country (1) may be substantially to lessen competition, or (2) may be to tend to create a monopoly.

(b) The lines of commerce here relevant consist of toilet tissues, paper towels, facial tissues, paper napkins and household waxed paper separately and collectively. These products are produced for specific purposes and the trade witnesses appearing in this proceeding have referred to them as distinct product categories.

(c) The sanitary paper products industry consisted of 122 producers in 1955. Six were selling all five of the relevant paper products and approximately fifty marketed but one product. Over a half dozen producers were selling throughout the United States. The group which did not sell nationwide included several who sold into substantial areas or regions of the United States, however. For example, one such producer had a trade area between Denver in the West and Pittsburgh in the East, extending down South, Southeast and into the Deep South, and over the Eastern Seaboard and into New England.

(d) The section of the country in which the effects of the acquisitions should be measured is the entire United States, that is, the national market. The industry's products are used in all sections of the country. Scott is doing business throughout the United States, as are several of its leading competitors. That the majority of respondent's competitors confine their sales to one or more areas or regions does not signify that no effective nationwide area of competition exists. Scott's advertising appeal is directed to the whole nation and its resulting success is inextricably tied to national merchandising efforts. In 1950, Scott and four other competitors selling nationally accounted for 39.02 per cent of the aggregate market for the relevant products (resale and industrial); and in 1955 they accounted for 45.96 per cent of that total market. Various other companies sell virtually on a national basis and the sales areas of certain others include extensive regions of the United States. Combining their shares with the five first mentioned others, it appears that approximately 68 per cent of the total market and approximately 79 per cent of its resale segment

for the relevant products were accounted for by producers distributing nationally or over extensive regions. The record, therefore, establishes the existence of an effective nationwide area of competition and the section of the country in which the effects of the acquisitions may be appropriately measured, accordingly, is the national market for the relevant products, individually and in the aggregate.

PAR. 16. In 1950, the year preceding the first of the challenged acquisitions, Scott was the leading producer in the sanitary paper products field. The following table summarizes certain of the marketing data received into the record respecting shipments by the industry for 1950 and 1955:

Shipments of respondent in tons, the percent of the market held by respondent, its industry rank, and the percent of the tonnage increase by product category for 1950 and 1955

	Shipments						Percent increase (in tons)
	Tons		Percent		Rank		
	1950	1955	1950	1955	1950	1955	
All products	317,213	504,216	26.76	32.72	1	1	58.59
All toilet tissue	194,029	280,125	37.27	40.39	1	1	44.37
Resale toilet tissue	185,199	267,423	41.57	44.83	1	1	44.39
Regular grade	146,735	205,127	45.05	49.45	1	1	39.79
Facial grade	38,464	62,296	31.95	34.23	1	1	61.95
Industrial toilet tissue	8,830	12,702	11.84	13.12	2	1	43.85
All paper towels	61,479	113,879	22.98	30.89	1	1	84.58
Resale	31,166	75,033	38.12	61.73	1	1	140.75
Industrial	30,313	38,846	16.32	15.72	2	3	28.14
Facial tissue	24,033	38,901	13.52	19.65	2	2	61.86
All paper napkins		17,509		10.02		2	
Resale paper napkins		17,509		17.32		2	
Regular grade							
Facial grade		17,509		56.55		1	
Industrial napkins							
Household waxed paper	37,672	53,802	38.84	50.75	1	1	42.81

PAR. 17. (a) Scott was the largest producer of eight categories and subcategories of products in 1950, and had second rank in three. By 1955, respondent had expanded its product lines and ranked as the top producer in ten categories and subcategories, second in three and third in one. Its position of third rank related to paper towels for industrial use wherein it fell from second place even though its tonnage for industrial towels increased over 25%. However, its sales dominance in towels intended for retail resale, where Scott concentrates its distribution, continued and respondent's tonnage rose 140.75%. Its share there was 61.73% in 1955, an increase from 38.12% in 1950, whereas that for the second ranking producers in those years declined from 9.83% to 7.44%.

(b) In household waxed paper, Scott's share of shipments increased from 38.84% to 50.75%. Only two companies besides Scott had market shares exceeding 7% in the market for household waxed

paper. The share of one declined from 14.04% in 1950 to 13.62% in 1955, and that for the other fell from 13.84% to 13.34%. Scott's shipments in tons of household waxed paper increased approximately 42% compared to tonnage increases of 6% and 5%, respectively, for those concerns.

(c) That the respondent's gain in market share for toilet tissue from 37.27% to 40.39% represented only three percentage points is only part of the picture. In that line of commerce, its tonnage increase of 44.37% exceeded the total toilet tissue shipped by the second largest producer in 1950 and in 1955. And Scott's increase in market share from 13.52% to 19.65% in facial tissue similarly represented a substantial gain especially when it is considered that Scott had not entered that product market until the late 1940's. The share of the leading producer rose from 43.70% to 49.80%. The respondent retained its second position and the third ranking company had only 5.91% of the market in 1955.

(d) Scott did not begin marketing paper napkins until 1953 but by 1955 ranked as the second largest producer of napkins with a market share of 10.02%. The respondent's ability to successfully penetrate the paper napkin market in such a relatively short time attests to the high degree of market control which it had achieved. In the total line of commerce for sanitary paper products and household waxed paper wherein respondent's share increased from 26.76% in 1950 to 32.72% in 1955, it similarly overshadowed competitors. Its principal competitor had 8% of that market in the earlier year and 8.63% in the latter year. In the resale market where the respondent's share was 32.11% in 1950, the combined shares of its four principal competitors were 26.73%; and in 1955, it was 40.29% for Scott, 31.41% for the four leading competitors. The record thus establishes, and the Commission accordingly finds, that the respondent in 1950 was the dominant producer in the sanitary paper products industry, and that in 1955 the respondent had successfully retained and enhanced its position in that respect.

Par. 18. (a) Other relevant economic evidence received of record relates to the respondent's pricing policies and its role as a pricing factor in the industry. Many of the producers set their prices at levels below those of respondent in order to market their products. On the other hand, other producers, particularly some of those who advertise extensively, do not sell at such lower prices. The sanitary paper products industry, however, uses Scott's prices as a gauge and companies are unlikely to make any price change, particularly an upward revision, without weighing the impact from Scott's prices. Scott markets its merchandise throughout the country at uniform delivered prices. Its power over prices in the resale field was re-

garded as decisive by certain of the witnesses in this proceeding who expressed views in effect that Scott can promulgate prices which will "stick," whereas others cannot.

(b) The record includes documentary expressions of policy by Scott officials which indicate that the respondent bases its prices primarily on its production costs and gears them to margins deemed conducive to maintaining the progressively higher volumes of business which it has been achieving. Illustrating this are the following excerpts from certain documentary exhibits:

We are extremely proud of our record in maintaining the general level of prices of Scott trade-marked products in the face of rising costs. Our selling prices are based primarily on manufacturing costs, with due allowance for promotional expenses, dividends to our shareholders and the retention of reasonable amounts of earnings for expansion purposes.

Our prices have not moved up since 1951—more than 4 years ago—despite ever higher wages and material prices. * * *

You could logically ask why don't we do something about it—why not move prices up, since other arms of the paper industry have?

Well our efforts to Broaden our markets, to sell all the new capacity we have developed, we feel a price increase would be a deterrent—not a help. There would be no point to higher prices which slowed down sales and piled up inventory, or conversely required additional promotional dollars which would offset the price increase. * * *

(c) Scott, therefore, is in no sense a price follower. It is clear from the record that the respondent's pricing policies have far-reaching effects in the component lines of commerce for sanitary paper products and that it is regarded by many of respondent's competitors as the price leader for the industry.

PAR. 19. The record conclusively establishes that the challenged acquisitions have been the direct cause of the respondent's progressively increasing market power and dominance in the relevant markets.

(a) As a result of the acquisitions, Scott became an entirely different competitive entity in 1955 from what it had been in 1950. One of the exhibits suggests that Scott thought that this transformaion occurred immediately upon Soundview's acquisition. Thus, the "Review of the Year" section of its annual report for 1951 stated that such merger "resulted in a major change in the nature and size of the business" and that it was "no longer realistic to attempt to compare the present Scott Paper Company with Scott as it existed prior to the merger."

(b) In 1950, its directors were told that the respondent was oversold on ScotTissue, towels and household waxed paper, and told in 1953 that demand for Scott towels exceeded production limits by a substantial margin. In January, 1954, they were informed that

Scott was oversold by 15.3%, representing over 800,000 cases. Distinct advantages still inured to rival producers because of respondent's oversold position, a situation of which Scott was fully aware. Exemplifying this was the statement in 1956 by a Scott vice president for dissemination in a company moving picture:

* * * having been in an oversold position for 14 years, we were determined to correct that situation in 1955 with Everett, Detroit and the H & W locations, machines and people to help out. A business should not be continuously oversold. Because our customers are inclined to feel they can't rely on us for the goods they need when they need them. So they feel obliged to carry one or more competitive lines for protection—to make sure they'll always have merchandise available for their customers. Those competitive lines take some business away from us * * *.

(c) Following the first acquisition, respondent proceeded gradually to expand its lines and brands of sanitary paper products and to broaden its selling programs and advertising. These lines and brands increased from ten in 1950 to fifty. Scott's sales of trademarked products in 1950 were $97,724,000, increased to $187,969,423 in 1955, and in 1958 were $231,500,000. The advantages afforded competitors by respondent's oversold position were disappearing by the end of 1955. Not only were production and sales coming in balance due to increased production, but such increase was due in major part to the improvements and additions made at properties of the acquired companies. The "Review of the Year" section of Scott's official annual report for 1955 stated, among other things:

Last year, three new paper machines were installed and began operations—one in February and another in June at Everett, Washington, and one in November at Detroit. A new machine at Winslow, Maine, has just been completed. As previously noted, conversion of three paper machines (one at Detroit and two at Winslow) made possible a further increase in the production of Scott trademarked brands.

* * * * * * *

The production arm of the business distinguished itself during the year not only by establishing new records each month but also in accomplishing six successful start-ups of new or rebuilt paper machines.

Additional output from new paper machines and those converted to Scott brands, together with increased production from existing machines, enabled the company to develop by the year end an inventory of finished products adequate for its needs in view of present product diversification.

PAR. 20. Other evidence of record corroborates conclusions that respondent's greatly expanded production and concomitant enhanced market position primarily resulted from improvements and additions made at properties acquired in the three challenged acquisitions.

(a) Scott's total shipments rose from 317,213 tons in 1950 to 504,216 in 1955, a tonnage increase of 58.59%. One exhibit indicates that 97,826 tons or 17.7% of respondent's 1955 production of fin-

ished trade-marked products were supplied by rebuilt and new machines located at the acquired facilities. Their contribution, the exhibit further shows, was 170,589 tons in 1956 (27.6% of total production for that year) and 175,014 for 1958 (30.7%). This is not the complete picture, however, inasmuch as the acquired facilities also produced large quantities of paper stock which were transferred to other Scott mills for converting into finished products.

(b) The following tabulation more accurately shows the total production manufactured at the acquired properties which went into Scott trade-marked products:

Year	*Tons*	*Percent of Scott's total production*
1954	37, 307	8. 0
1955	130, 284	23. 6
1956	200, 575	32. 5
1957	216, 534	36. 3
1958	217, 234	38. 1

Even the above figures are incomplete, however. They do not include the production of a third rebuilt machine at the Winslow plant or two new machines installed at Mobile, which were scheduled to come into production in 1959 at those former Hollingsworth properties.

(c) The 130,284 tons for 1955 which originated at the acquired properties represented a very strategic segment of respondent's increased share in the total sanitary paper products market for 1955. all market share of 32.72% in 1955; and without that tonnage respondent's market share might have declined to 24.27%, whereas it As prior noted, its total market share (resale and industrial) in 1955 of 504,216 tons and 32.72% of such market represented a very substantial increase over 1950 when it shipped 317,213 tons and had 26.76% of that market. The 130,284 ton increment from the acquired properties thus accounted for 8.45% of respondent's overall market share of 32.72% in 1955; and without that tonnage respondent's market share might have declined to 24.27%, where it had been 26.76% in 1950.

(d) The key production contributions by the acquired properties also are apparent from data respecting shipments by retail sales divisions of Scott. Out of Scott's 16 sales divisions, 13 have used products produced from the acquired facilities. Those 13 divisions have accounted for 75% or more of respondent's marketing of all resale products. In 1956, products marketed by six of the sales divisions which originated at the acquired facilities ranged from 74.7% up to 96.7% of their respective volumes; for two others they represented 21.9% and 33.3%; and for the remaining five, such merchandise so originating ranged from 10.1% up to 16.3%.

Par. 21. (a) The imminent production increases assured by the acquisitions also paved the way for an earlier entry by respondent into the paper napkin field. This came in 1953. In 1952, a Scott official stated:

> * * * We don't have the machine capacity to go into napkins on a large scale yet, without robbing our other established products, but we're getting ready for the day when we can really do a job in this field.

The paper napkins introduced by respondent were facial grade napkins of two types, namely, luncheon and dinner. These were not marketed in industrial channels but through resale only. By 1955, respondent's shipments were 17,509 tons or 10.02% of the total market for paper napkins. It was the second ranking producer, was virtually tied with the third ranking producer, and only slightly trailed the leading producer whose share was 10.85% or 18,952 tons. A substantial part of the latter's volume was in regular grade napkins which Scott did not produce. Whereas Scott's tonnage share in 1955 represented 56.58% of the facial grade napkins distributed for resale through retailers, its principal competitor's share was 11.33% and that for the third ranking producer 7.77%.

(b) Scott incurred substantial losses in gaining its high ranking position in the line of commerce for paper napkins. Its financial resources so permitted, however, and provisions for losses were duly budgeted by Scott in advance. The losses before taxes in 1955 were 49.4¢ per case on luncheon napkins and 16.4¢ on the dinner variety as against $3.455 and $3.409 per case, respectively, in 1953. These exceeded Scott's budgetary or anticipated losses, but losses on napkin sales in 1954 were less than its budget forecasts. In 1956, the dinner napkins were marketed at a loss of 17.2¢ per case and losses were reduced to 2.3¢ per case on luncheon napkins.

(c) Scott's achievement and technique employed in establishing itself in the line of commerce for paper napkins clearly attest to its dominant position in the line of commerce for sanitary paper products. Its advertising and promotional expenses for paper napkins were $161,940.22 for 1953, $1,374,655.41 for 1954 and $1,707,-704.76 for 1955. In contrast, respondent's total advertising and promotional expenditures in 1950 for all lines were $2,903,000. The record conclusively establishes that Scott's vast financial resources and the production contributions from the acquired properties combined to make this marketing expansion possible.

Par. 22. The acquisitions also afforded production and marketing economies and other advantages which could be reflected by the respondent in price, advertising, promotion or profit.

(a) Some of the competitive advantages attending the acquisitions were summarized in a report to the stockholders by respondent's president in 1955:

Modern facilities for paper and pulp making require large amounts of capital. We estimate that for each $1.00 of sales $2.00 of capital investment is required to build an up-to-date pulp and paper manufacturing plant suitable for Scott products. Additional amounts are required for timber reserves to support the operations and for working capital.

In 1955, Scott's investment in plant and timberlands (net of depletion), including its investment in certain companies which supplied it with pulp or pulpwood, was equivalent to 95 cents for each $1.00 of sales and, after deducting charges for depreciation of plant assets, amounted to 63 cents per dollar of sales. This advantageous capital cost was an important aid to Scott's skilled pulp and paper makers in the attainment of their outstanding performance last year.

(b) In 1951, Scott estimated the cost of the Soundview plant to be $35,000 per daily ton. Its expansion was planned by Scott at a cost of $27,000 per daily ton in contrast to $65,000 for new pulp construction. Other documentary recognition by the respondent respecting savings in time and money to be afforded by Soundview's acquisition include the following:

* * * in November [1951] we consummated the most significant move in our history when we merged the Soundview Pulp Company of Everett, Washington into Scott. * * * [it] will not only go a long way toward solving the raw material problem in our present paper mills these next 5 years, but in addition provides us with the long-desired location for a West Coast paper mill, and under the most advantageous and efficient conditions to * * *.

Invaluable assets contributed by Soundview to this merger are the high competence of its management and the demonstrated skill of its technicians and operating personnel. If Scott had to start from scratch in the building of such a large West Coast pulp plant, it would take years and large expenditures of money for the selection and training of such an organization.

(c) An evaluation of the competitive advantages including savings being furnished by the Detroit and Hollingsworth acquisitions which was made soon after those mergers appears in a 1955 report to the stockholders:

The additions of the Detroit and Hollingsworth & Whitney Divisions in 1954 brought us productive facilities at a cost far lower than that for new construction of comparable plants. We also joined forces with two experienced and trained organizations which could only have been developed to their present high degree of proficiency through the expenditure of thousands of dollars and many years of effort.

* * * * * * *

* * * The Detroit plant is already producing and successfully finishing one Scott brand in addition to the paper stock for Cut-Rite wax paper * * *.

(d) That the advantages afforded by the improvements and additions to the acquired properties included important operating econo-

mies and other benefits is evident from the following statements in Scott's annual report for 1955:

For better control of costs, improved customer service and more efficient operations, it is imperative to have integretad plants located near controlled timber reserves and with transportation facilities available to carry finished products economically to the principal markets of the country.

The strategic locations of the newly added plants provide the opportunity not only for improving the efficiency of the Company's operations but for its further development and growth. National advertising and sales activities are more effective with the support of production facilities located in key areas throughout the country. * * *

PAR. 23. With expanded production assured, Scott proceeded to strengthen its merchandising operations. The respondent was able to sell mixed or assorted carloads from different plant locations more conducive to rapid turnover by retailers than straight carloads. Thus the respondent has advertised "Only Scott offers a line that meets your paper department needs for variety, price range and individual customer preference—with one order!" The competitive importance attached by Scott to the expanded or longer line of trade-marked products being achieved by it is illustrated by the following statement in 1956 by a Scott official:

The industrial sales line has not been idle either. * * * studies have shown how difficult it is to develop a franchise with only *one* towel and *one* tissue to sell.

The customer has only two choices—take it or leave it—and such a narrow choice fails to fill the bill with industrial customers that vary in size from the corner gas station to the hotel or hospital to the industrial corporations of many assorted sizes.

As a result, the concept of an industrial "line" of paper products has been accepted * * *.

With a "line" of products—instead of just that single choice in each product field—it is expected that distributor salesmen will do much more of the selling than they do now, and our own industrial salesmen can concentrate on major accounts and servicing the distributors.

PAR. 24. As previously noted, consumer and trade demand for respondent's merchandise were exceeding its production capacity but those shortages were relieved when production at the acquired properties became available. That the superior consumer and trade acceptance enjoyed by Scott products had resulted in important part from long sustained and increasingly larger expenditures for advertising and promotional activities is evident from the record.

(a) Advertising's key role in the marketing of sanitary paper products in today's supermarket economy was explained in the testimony of the respondent's advertising director. He testified:

Our retail products are sold primarily through grocery store outlets and to a very large degree are sold through supermarkets where there is no contact at all between a selling agent and the consumer. * * * In the old days * * * the man behind the counter could influence a selection of a product * * *. Today in the supermarket there isn't that kind of contact and the customer is free to make her choice completely on her own.

This makes advertising the pre-selling of the product extremely important in the retail sale of our products or of any similar products * * *.

In an address to the stockholders in 1955, respondent's president emphasized the close interrelation between consumer acceptance and trade or retailer demand:

* * * it is our advertising which creates the demand to support our volume production, and that volume not only gives us our greater efficiency and cost savings, but also gives the dealer a sufficiently higher rate of turnover to permit him to operate on a lower profit margin.

(b) The respondent's advertising and promotional expenditures were $2,903,000 in 1950, declined to $2,651,000 in 1951, and increased each year thereafter through 1956 when they totaled $10,391,000. Scott has used all types of media, including television advertising. Its radio serials are on a national basis and spot radio on a regional basis. All television in 1956 was on a national basis. The company's programs have included "Father Knows Best," portions of Arthur Godfrey's daytime show, and it was a cosponsor of Omnibus.

(c) Brown Company, one of respondent's competitors, spent $100,000 in advertising its industrial line in 1956. When Brown tried to enter the resale field in 1955, it selected northern New England. It spent 79% of its sales of toilet tissues and towels in support of that advertising, but was unable to establish itself. Those expenditures for selling expenses, including advertising, totaled $201,637. In contrast, Scott spent approximately two and one-half million dollars for advertising and promoting those two products in that year. In 1953, Doeskin Products, Inc., another competitor, was sponsoring the Kate Smith program over 57 stations of a major network. Gross sales by Doeskin in that year were approximately thirteen and one-half million dollars. Scott's total advertising and promotional expenditures alone for that year exceeded six million dollars.

(d) A representative of another of respondent's competitors testified that Scott maintained a stronger program of advertising over a greater number of years than anyone else in the industry. In 1955, when Scott's shipments of sanitary paper products and household waxed paper were 504,216 tons as shown by the survey and sales of such trade-marked products totaled approximately $188,000,000, advertising and promotional expenditures were $8,480,000. Scott's

average receipts per ton thus were $372.85. A rival producer deriving similar average receipts per ton, accordingly, would have had to have annual tonnage sales of 22,743 to even equal the gross revenues expended by Scott for advertising and promotional activities in that year. Of the 122 companies reporting in the Commission's survey for 1955, only nine companies besides Scott had sales exceeding 22,743 tons. The disparities existing between respondent and its competitors in 1950 are similarly evident from computations based on advertising and promotional expenditures for that year. To take in sales receipts equivalent to Scott's advertising and promotional expenses for that year, a company would have needed the gross revenues from sales of 9,421 tons. Of the 129 companies reporting for that year, only 22 had sales in excess of 9,421 tons. The respondent clearly has been the industry's leader in advertising.

PAR. 25. (a) National advertising emphasizes pre-selling the consumer but many producers of sanitary paper products instead stress merchandising programs designed to assist the stores in their resale of products. These have included free goods, cooperative advertising allowances and coupons. Although Scott offered a cash rebate on its household waxed paper and used some couponing in 1953 when introducing napkins, Scott formerly did not make extensive use of special promotions among retailers. Since 1955, the respondent has intensified its use of coupons, deals and discounts and these sales tools, accordingly, are no longer the exclusive property of the smaller producers.

(b) However, respondent's use of one form of in-store promotion dates back beyond 1955. Typifying this is the Great Scott Sale calling for a large purchase by the retailer, combined with special display materials and intensified selling efforts by respondent and the retailer. One such sale in April, 1958, entailed purchase by a retail chain of 66 carloads of Scott products. The same customer participated in another sale in June, 1959, involving 86 carloads of Scott household paper products. The regular purchases from respondent by this particular customer averaged nine carloads a week. Hence, the respondent's emphasis on promotions of this type have tended to foreclose markets where participating stores are located from competition not only for the sales' periods but also for successive weeks while the consumers are using up their accelerated purchases.

PAR. 26. (a) Although they did not market products similar to Scott trade-marked products, all three of the acquired companies were potential competitors of Scott in the production and sale of finished sanitary paper products. Soundview's output of pulp in 1950 had attained a maximum rate consistent with a sound relationship be-

tween its wood consumption and timber reserves. Accordingly, its position was such that substantial increases in the company's revenues could be achieved only by further processing the pulp products into paper stock and finished products or duly affiliating with a producer engaged in such processing.

(b) Respondent and Detroit Sulphite Pulp & Paper Company were large producers of wax base stock and both produced pulp. The acquisition accordingly tended to foreclose Detroit as a potential supplier for respondent's competitors of wax paper stock. By nominal expenditures, Detroit could have added equipment for making finished paper from its wax base stock. Although there is no record showing that the company anticipated entering that field, Detroit nevertheless was a potential competitor in the production of household waxed paper.

(c) As to Hollingsworth & Whitney Company, there is evidence suggesting that its management had been "seriously thinking" of entering the field of consumer finished products. The Hollingsworth acquisition made the output of its pulp plants immediately available to the respondent. Scott's cost of converting three machines at the Winslow plant was approximately $4,000,000. Hollingsworth's capitalization exceeded $40,000,000 and it was a large company. By nominal expenditures, it also could have converted its facilities to the processing of certain categories of sanitary paper products.

CONCLUSIONS

The value of the stock issued by the respondent when effecting the three challenged acquisitions was approximately $109,000,000. Those acquisitions represented an increase in the levels of concentration prevailing in the industry. In 1950, Scott was the dominant producer in the lines of commerce for sanitary paper products and household waxed paper. Through the three acquisitions, it gained needed production and other facilities at substantial savings in time and money from what would have been required for constructing entirely new pulp and paper mills at one or more of the various suitable sites then available for purchase.

The acquired facilities also have afforded substantial economies and marketing advantages which the respondent can reflect in prices or profits, or in increased advertising, promotional activities or product diversification for further enhancing its market power. As a result of the acquisitions, the respondent's market shares have increased substantially over their prior high levels. In short, the challenged acquisitions have decisively strengthened the respondent's ability to compete and each has compounded its capacity to exert

the powers inherent in its dominant position in the line of commerce for sanitary paper products and household waxed paper. As a corollary effect, the acquisitions have tended to widen the great disparities in competitive resources which previously existed between the respondent and many of its rival producers.

It follows, and the Commission so finds, that the effects of the challenged acquisitions may be substantially to lessen competition and to tend to create a monopoly in the relevant lines of commerce and that each of such acquisitions by the respondent are in violation of Section 7 of the Clayton Act, as amended. As previously found, the acquired companies, though not actual competitors of the respondent in the sale of finished products, were potential competitors. The Commission's order of divestiture accordingly directs that the required divestitures of the acquired properties be made in such manner as to restore the acquired companies as competitive entities and going concerns.

Other allegations of the complaint charge the respondent with violation of the Federal Trade Commission Act. They allege that the respondent's constant and continuous acquisition of companies engaged in the pulp and paper manufacturing industry, together with their conversion to the manufacture of sanitary paper products by Scott as the dominant producer of such products, has been to the prejudice and injury of the public and constitutes an unfair method of competition and unfair acts and practices within the meaning of that Act. The respondent's plants at Everett, Detroit, Mobile, Winslow and Madison came to the respondent in the acquisitions found unlawful above and their divestitures are directed in the Commission's order. Scott's original plant is located at Chester, Pennsylvania, and it also owns a 50% interest in another concern which constructed its own plant facilities. All of the respondent's remaining plants and mills were acquired from others in acquisitions or purchases dating back to 1940.

The complaint's allegations as to constant and continuous acquisitions of companies lack adequate support in the record, however. As to the ten plants contended by counsel supporting the complaint to have been so obtained, the record indicates that five of them came to respondent or its subsidiaries by purchase, that the corporations owning the plants were not acquired and that such sellers continued to manufacture paper products at their other plants. Under a merger in 1945 with another manufacturer of waxed paper, the respondent acquired converting equipment used at three other plants referred to by counsel, two of which were operated but not owned by the acquired corporation. Although the latter two plants were bought by the respondent later on, there is no evidence that

such purchases also involved acquisitions of the plants' owners or that the corporation operating the third plant was acquired. The complaint's charges under the Federal Trade Commission Act are accordingly being dismissed.

ORDER

It is ordered, That respondent Scott Paper Company, a corporation, and its officers, directors, agents, representatives and employees, divest itself absolutely, in good faith, of all stock, assets, properties, rights and privileges, tangible and intangible, including but not limited to all timberlands, cutting rights, timber, plants, machinery, equipment, trade names, trade-marks and goodwill, acquired by Scott Paper Company as a result of the acquisition of the stock, share capital or assets of each of the acquired companies Soundview Pulp Company, Detroit Sulphite Pulp & Paper Company and the Hollingsworth & Whitney Company, together with such plants, machinery, buildings, improvements, equipment and other property of whatever description that has been added, modified, modernized or placed on the premises of each of the above-named companies by respondent as may be necessary to restore each of the three above-named companies as a competitive entity to substantially the same operating form and substantially equivalent productive capacity as existed at or about the time of acquisition.

It is further ordered, That by such divestitures none of the stock, assets, properties, rights and privileges, tangible and intangible, acquired, modified or added by respondent, shall be sold or transferred, directly or indirectly, to anyone who at the time of the divestiture is a stockholder, officer, director, employee or agent of, or otherwise directly or indirectly connected with or under the control or influence of, respondent or any of its subsidiaries or affiliated companies.

It is further ordered, That the charges contained in Paragraph 7 of the complaint be, and they hereby are, dismissed.

It is further ordered, That respondent, Scott Paper Company, shall within sixty (60) days from the date of the service upon it of this order, submit in writing, for the consideration and approval of the Federal Trade Commission, its plan for compliance with this order, the time for compliance to be hereafter fixed by order of the Commission, jurisdiction being retained for these purposes.

Commissioner Mills not participating for the reason he did not hear oral argument.

OPINION OF THE COMMISSION

By KERN, *Commissioner:*

The complaint in this matter charged Scott Paper Company, among other things, with violating Section 7 of the Clayton Act, as amended, through its acquisitions of Soundview Pulp Company, Detroit Sulphite Pulp & Paper Company, and Hollingsworth & Whitney Company. In the initial decision, the hearing examiner found that the evidence failed to establish that substantial lessening of competition or tendency to create a monopoly had resulted from the acquisitions or was likely to result. The matter has come before the Commission upon the appeal of counsel supporting the complaint from that decision, including its order for dismissal of the complaint. Having determined for reasons related hereafter that the challenged acquisitions were violative of the Act, we are vacating and setting aside the initial decision and are issuing herewith, in lieu of that decision, appropriate findings as to the facts, our conclusions, and an order of divestiture.

It is undisputed that the above-named corporations were merged with the respondent corporation, that the acquired and acquiring corporations were engaged in interstate commerce and that the acquired companies are now operated as divisions of Scott Paper Company. Scott manufactures toilet paper, paper towels, facial tissues, paper napkins and household waxed paper, hereafter referred to as sanitary paper products. In the processing of these products, timber is made into pulp, the pulp becomes paper stock, and paper stock is converted into the finished articles.

None of the acquired corporations produced finished sanitary paper products. Soundview had extensive timber holdings and made pulp which it sold to others in the paper industry, including the respondent and some of its competitors who made sanitary paper products. In addition to timber holdings since sold by Scott, Detroit had a pulp mill and made paper stock for sale to others for converting into finished products. The respondent was one of its customers and its purchases included Detroit's entire output of one type of paper stock for use in making Scott's household waxed paper. Hollingsworth's assets included timber holdings and two plants with pulp and paper mills. Therefore, instead of constituting horizontal acquisitions of corporations which produced and sold finished sanitary paper products in competition with respondent, the acquisitions were primarily vertical in that they supplied Scott with raw and semiprocessed materials and additionally afforded facilities for making finished products after conversions or improvements and new construction.

The respondent was substantially integrated in 1950. In that year, its requirements for pulp were approximately 296,000 tons, 47% being supplied by its own or controlled facilities. As of December 1950, its timber resources consisted of approximately 5,900 acres on the West Coast, and approximately 183,000 acres in the South owned by Brunswick Pulp & Paper Company, in which the respondent had a 50% stock interest. In 1955, on the other hand, the respondent was fully integrated. It produced approximately 775,000 tons of pulp, a production increase of over 400%. After the acquisitions, its added timber holdings included over 1,000,000 acres of East Coast and South Central timber, and over 150,000 acres of first-growth forests on the West Coast. Scott has spent approximately $109,000,000 for converting the machinery and plants, expanding the plants and constructing and equipping new plants at the acquired properties.

The economic evidence included tabulations of data secured from producers of sanitary paper products in the course of a survey conducted by the Commission. Those data concerned their shipments for 1950 and 1955. The survey clearly provides competent and accurate evidence [1] on matters relating, among other things, to the number of companies in the sanitary paper products industry in each of those years, producers' respective tonnages of the relevant products, sizes of the resale and industrial markets, and changes in market share relationships which had resulted in the latter year. The hearing examiner, however, erroneously concluded that such survey data as related to 1950 were irrelevant to the appraisal of the effects of the acquisitions and to the issues generally.

The year 1951, in which the first acquisition occurred, was a landmark year in Scott's industrial history. In 1950, the respondent produced less than half its pulp. Demand for Scott's products had outstripped its productive capacity and this condition persisted in varying degrees until facilities at certain of the acquired properties began to contribute substantial quantities of finished products. In 1951, the respondent gained timber resources and greatly increased its supplies of pulp, definitely assuring itself of expanded production near growing and strategic markets for its trade-marked finished products in the near future. By 1955, the improvements and facilities at the acquired properties were supplying substantial amounts

[1] Respondent conceded that the survey was systematically and conscientiously conducted and that the tabulations made by the Commission's staff correctly reflected the information received from producers answering the questionnaire. Respondent, however, contended that the survey data were deficient because, among other things, they did not separately identify the particular sections or regions of the country where the products were sold. Such identification is unnecessary, however, in view of our conclusion that the section of the country in which the effects of the acquisitions should be measured is the entire United States.

of finished products and paper stock as well as more pulp. 1950 and 1955 accordingly were proper bench mark years and the data showing market shares in the relevant markets in 1950 before the resources of the acquired corporations passed to respondent's control are clearly relevant.

Nor does the failure of the survey to supply marketing information for the years between 1950 and 1955 materially detract from its evidentiary weight. Even assuming that respondent's relative share of the market declined in 1955 from that held by it in 1954 or another intervening year, the survey data plainly constitute competent evidence as to shares of the relevant markets in 1955. Moreover, the record contains no substantial evidence that any new or revolutionary competitive factors began to operate in 1955 so as substantially to reduce the respondent's market shares.

Furthermore, it is appropriate that the effects of the acquisitions be measured in the entire United States, that is, in the national market. Not only are the industry's products sold and used nationwide, but Scott and certain of its leading competitors sell throughout the United States. Scott and four of its competitors selling nationally accounted in 1950 for 39.2% of the aggregate market for sanitary products. Their share in 1955 was 45.96%. Even though plants for making finished sanitary paper products are located at widely separated points, such production has closely interrelated geographical aspects. Thus, the pulp and semi-finished materials used by many of the non-integrated manufacturers of finished products are acquired from processors on the west coast or from those located in north central, northeastern and southern states. Even an integrated producer such as Scott has used substantial amounts of west coast pulp. That the local and regional markets which are components of the national market for finished sanitary paper products similarly are closely interrelated is evident from the fact that many of the buyers purchasing the industry's products for resale are large food chains who sell over extensive areas of the United States. Such buyers and many of their competitors are well informed respecting pricing trends in sanitary paper products industry. In some instances, regional divisions of the chains exercise independent judgment in selecting the sanitary paper products to be handled in their areas and the manufacturers soliciting their business may include those with national and regional distribution as well as others selling on a more limited basis. The record clearly establishes the existence of an effective nationwide area of competition and the hearing examiner erred in failing so to find.

The respondent's assets grew from $51,502,000 in 1950 to $304,-247,000 in 1958, and its sales of trademarked sanitary paper products

rose from $97,724,407 to $231,545,538. The survey data indicate that the respondent was the largest producer in 1950 in eight categories and subcategories of sanitary paper products and the second largest in three others. In 1955, respondent was the top producer in ten categories, the second in three, and the third in one. Its share of the total market increased from 26.76% to 32.72%; and in the distribution of products intended for resale by retailers, as distinguished from those sold for industrial use, its share rose from 32.11% to 40.29%. The record establishes, in short, that consumer demand for certain of Scott's products had been and continued to be unequaled by any of its competitors and that the commanding market position which it had achieved in 1950 had been substantially enhanced in 1955. The respondent's expenditures for advertising and promotion were $10,391,000 in 1956, and far exceeded those of its competitors. In concluding that the foregoing matters were not controlling to determinations of whether statutorily proscribed effects inhered in the acquisitions, the hearing examiner found that the sanitary paper products field was expanding and relatively easy to enter, that the quality of its products accounted principally for Scott's success, and that its pre-eminence in national advertising did not tend to foreclose its competitors from the relevant markets.

We believe that there are contravening circumstances to be taken into account. That the use of sanitary paper products is expanding is only one part of the marketing picture. "Easy of entry" implies *successful* entry and possibilities of growth. However, no producer entering the field since 1950 had succeeded in becoming a substantial market factory by 1955, and although there were approximately 120 producers in 1955, concentration in the industry was relatively high, particularly in the resale field where the four largest companies, including Scott, had approximately two-thirds of the business.

Furthermore, according to estimates reported by respondent for the information of its stockholders, to enter the field as an integrated producer requires a high plant investment in proportion to each dollar of sales, in addition to large outlays for timber reserves and working capital. The formidable barriers to successful opening of distributive channels by a newcomer with a single line or a short line of sanitary paper products are evident from the record and require no further comment. Granting that the recent acquisitions by two of America's largest industrial corporations of two of the larger producers of sanitary paper products [2] may attest to their faith in the economic future of that industry, those acquisitions can

[2] During 1957 Procter & Gamble Company acquired Charmin Paper Company and American Can Company acquired Marathon Corporation, which in turn had acquired Northern Paper Mills in 1953. See respondent's exhibits 60B, 64B and 69B.

hardly support the conclusion that there is ease of entry into the industry generally.

Respondent shares its status as a producer of quality products with others. Other companies similarly maintain quality and marketing research departments. The group of producers making lower-quality products includes those trying to penetrate the relevant markets by quoting commensurately lower prices. Nor has the respondent been an outstanding leader in developing new products. It has often waited to see whether innovations adopted by its competitors—color tissues, for example—would gain consumer acceptance. The contention that the unique quality of its products principally accounts for the respondent's pre-eminent position in the relevant markets is without support in the record.

In holding, in effect, that no substantial harm to competition resulted from the respondent's large expenditures for national advertising, the hearing examiner noted that local advertising and cooperative promotional activities with retailers also are effective merchandising aids and available to smaller competitors. Beginning in 1955, however, the respondent intensified its use of merchandising activities among retailers and integrated them with its national advertising. Hence, it can be seen that local merchandising activities are not exclusive trade tools of the smaller producers. The respondent's expenditures for advertising and promotional activities increased from $2,903,000 in 1950 to $10,391,000 in 1956. The magnitude of the competitive disparities and handicaps which will result if the respondent continues to increase its expenditures for advertising and promotional activities at their past rates of increase is obvious.

The crucial error in the initial decision is the finding that the record fails to establish any causal relationship between the acquisitions and the respondent's enhanced market position. The acquired properties became stepping stones to expanded production facilities sooner than would have been the case with entirely new construction. The additions and improvements at the acquired properties accounted in 1955 for approximately 23% of Scott's total shipments as shown in the survey. Without that increased production, respondent's share of the total market, instead of being 32.72% in 1955, might well have declined to 24.27%, whereas it had been 26.76% in 1950. The record indicates that the mergers contemplated extensive expansions and adaptations to satisfy the respondent's current and future production and other needs. It also indicates that an important consideration was respondent's belief that those needs would be more fully satisfied by means of the acquired prop-

erties and their personnel than through entirely new construction. Moreover, by respondent's own statements, expansion of this newly-acquired productive capacity was much more economical than the comparable cost of constructing entirely new plants. Thus the finished products manufactured on new machines at the newly constructed plants on the acquired properties are to be regarded as increments of the acquisitions, just as were those products turned out by the rebuilt machinery. Each helped Scott to meet the pent-up demand for its products.

The direct causal relationship between the acquired properties and the respondent's increasingly dominant market position also is evident from the fact that the additional production from those facilities assisted the respondent in greatly increasing its number of brands and otherwise diversifying its products. Our accompanying findings discuss the salient record facts respecting one episode of product diversification, namely, respondent's entry in 1953 into the market for paper napkins. This resulted in its gaining 10.02% of that market by the end of 1955. It produced only facial-grade paper napkins, and its tonnage in that year represented 56.58% of all facial-grade paper napkins marketed for resale by retailers. Losses by the respondent ranged from more than $3.00 per case in 1953 down to 2.3¢ and 17.2¢ per case on the two types of napkins being marketed in 1956. The decisive role of the respondent's large financial resources in contributing to this marketing expansion hence is clear.

Under Section 7, as amended, any acquisition whether it be vertical, conglomerate or horizontal is unlawful if the effect may be substantially to lessen competition or to tend to create a monopoly in any line of commerce. Of course, in order for a vertical acquisition to be illegal under Section 7 the forbidden effects necessarily must be present in some horizontal line or lines—that is, between or among competitors.[3] Such horizontal effects have been found by courts in both the "supplier" line and in the "customer" line.[4] Here, however, we shall evaluate the effects of the acquisitions di-

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[3] Adelman, *Comment, The DuPont-General Motors Decision,* 43 Va. L. Rev. 873 at 875 (1957).

[4] Thus in *United States v. Maryland and Virginia Milk Producers Assn., Inc.,* 167 F. Supp. 799 (D.D.C. 1958), the court was examining a forward vertical integration undertaken by an association of milk suppliers. That association had acquired the assets of a dairy distributing milk and other dairy products at retail and to government institutions under contract. In holding that the acquisition violated Section 7, the court relied principally upon an examination of the effect of the merger in the horizontal line composed of milk suppliers, noting that the acquisition eliminated the largest single outlet in the relevant market for milk produced by independent suppliers. The court also stressed an effect of the acquisition upon the horizontal line composed of dealers who competed for government contracts (the "customer" line). 167 F. Supp. at 806-807. The court's analysis was subsequently approved by the Supreme Court. *Maryland and Virginia Milk Producers Assn., Inc. v. United States,* 362 U.S. 458 (1960).

rectly in the line of commerce in which Scott and its competitors have been engaged and not the indirect effects in the "supplier" line of the indirect effects upon any customers of the acquired corporations. The statutory language "in any line of commerce" and the legislative history both so authorize.[5]

In judging the effects of acquisitions, findings of past actual lessening of competition are not required and the statute is violated if its proscribed effects are reasonably probable in the future. *United States* v. *duPont de Nemours & Co.*, 1353 U.S. 586, 592 (1957); *United States* v. *Brown Shoe Company*, 179 F. Supp. 721, 736, 737 (E.D. Mo. 1959). The Clayton Act expresses a national policy of curbing monopolistic tendencies in their incipiency, before they attain Sherman Act proportions. *Hamilton Watch Co.* v. *Benrus Watch Co.*, 206 F. 2d 738, 741, 742 (2d Cir., 1953). One of the major purposes of amended Section 7 was to ward off the anticompetitive effects of increases in the level of economic concentration resulting from corporate mergers and acquisitions. *U.S.* v. *Bethlehem Steel Corp.*, 168 Fed. Supp. 576, 604 (S.D.N.Y., 1958). Where not just one but a series of acquisitions is involved, as here, the statute does not require that the effects of each be weighed separately, but authorizes evaluation of their combined or cumulative effects.[6] *Cf. United States* v. *Jerrold Electronics Corporation*, 187 F. Supp. 545, 566 (E.D. Pa., 1960).

Before the acquisitions, the respondent produced less than half of its requirements for pulp. It now markets pulp. As noted in our accompanying findings as to the facts, the acquired companies, though not actual competitors of the respondent in the sale of finished products, were potential competitors. The timber resources, pulp mills, and other facilities which passed from the acquired companies to Scott were extensive and diversified and clearly tended to increase the levels of concentration which had prevailed in the sanitary paper products field. Market concentration in the sanitary

[5] ". . . the bill applies to all types of mergers and acquisitions, vertical and conglomerate as well as horizontal, which have the specified effects of substantially lessening competition * * * or tending to create a monopoly.

"If, for example, one or a number of raw material producers purchases firms in a fabricating field (i.e., a 'forward vertical' acquisition), and if as a result thereof competition in that fabricating field is substantially lessened in any section of the country, the law would be violated, even though there did not exist any competition between the acquiring (raw material) and the acquired (fabricating) firms.

"The same principle would, of course, apply to backward vertical and conglomerate acquisitions and mergers." (H.R. Rep. No. 1191, 81st Cong., 1st Sess. p. 11 (1949).)

[6] "Acquisitions of stock or assets have a cumulative effect, and control of the market sufficient to constitute a violation of the Sherman Act may be achieved not in a single acquisition but as a result of a series of acquisitions. The bill is intended to permit intervention in such a cumulative process when the effect of an acquisition may be a significant reduction in the vigor of competition * * *" (H.R. Rep. No. 1191, 81st Cong., 1st Sess. p. 8 (1949).)

paper products industry is high. In 1955, the four largest producers accounted for two-thirds of all products marketed for resale, as distinguished from those sold for industrial use.

In view of the respondent's dominant position in the line of commerce for sanitary paper products and certain of its component relevant markets before the acquisitions, any acquisition which tended to assist its distribution of trade-marked products could reasonably have repercussions in those markets. The present and reasonably probable future impacts of the challenged acquisitions are of much greater magnitude, however. In consequence of the acquisitions, the respondent (1) has decisively strengthened its ability to compete in that it gained needed materials and production facilities which also afforded economies and strategic marketing advantages that could be reflected in prices or profits, or in advertising and product diversification for further enhancing its position in the relevant markets, and (2) has substantially increased its shares in those markets over their prior high levels.

Such expanded market shares did not come automatically as legacies of horizontal acquisitions but were instead achieved in the market place with telling contributions out of the acquired properties. Each of the acquisitions has concomitantly increased and will continue to increase the respondent's capacity to exert the power inherent in its dominant market position. As a corollary effect, the acquisitions have tended to widen the great disparities in resources and ability to compete which previously existed between the respondent and many of its rivals.

From the foregoing, it follows that the effect of the acquisitions may be substantially to lessen competition and to tend to create a monopoly in the relevant lines of commerce. The hearing examiner erred in not so finding. The appeal of counsel supporting the complaint from the hearing examiner's dismissal of the charges under Section 7 of the Clayton Act, as amended, is accordingly granted.

Commissioner Mills did not participate in the decision herein for the reason he did not hear oral argument.

IN THE MATTER OF

J. B. HIRSCH CO., INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 7852. Complaint, Mar. 30, 1960—Decision, Dec. 20, 1960

Consent order requiring Brooklyn manufacturers of lamps composed in part of various kinds of figurines, to cease representing falsely in magazines

and catalogues, on tags and through other advertising, that figurines used in their lamps designated as "Collection Francaise" and "Collection Connoisseur" were manufactured or moulded in France using original French moulds, and that the figurines were made of bronze.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that J. B. Hirsch Co., Inc., a corporation, and Abraham Hirsch, Sol Ricklin, Jordan Koster and Stanley Hirsch, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent J. B. Hirsch Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 2425 Pacific Street, in the City of Brooklyn, State of New York.

Respondents Abraham Hirsch, Sol Ricklin, Jordan Koster and Stanley Hirsch are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the manufacturing, advertising, offering for sale, sale and distribution, among other things, of lamps, composed in part of various kinds of figurines, to retailers for resale to the public.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said products, when sold, to be shipped from their place of business in the State of New York to purchasers thereof located in various other states of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, and for the purpose of inducing the sale of their products, respondents made certain statements and representations concerning their products in magazines of national publication, catalogues, on tags and through other advertising media. Among and typical of the statements,

terms, words and depictions contained in said advertisements are the following:

* * * This catalogue brings to you a carefully selected group of imports which include finely cut crystal from Bohemia, Venetian and French glass, and the magnificent "COLLECTION FRANCAISE".

Each COLLECTION FRANCAISE lamp bears a gold place card denoting the name of the SCULPTOR, the SUBJECT and DATE OF ORIGIN. These cards point up the true "OBJECT D'ART" value of the "COLLECTION FRANÇAISE", and serve as excellent sales aids.

Through the use of "French Bronze", the delicate details and beauty of the subject are maintained without the risk of fragility as in other materials.

COLLECTION FRANCAISE

Lamps for today cast from the original moulds designed by famous 19th century French sculptors. Each piece handcrafted by skilled artisans and finished in contemporary decorator colors.

COLLECTION CONNOISSEUR

On respondents' catalogue a circular seal is printed upon which appear the words "Collection Francaise," a depiction of the fleur-de-lis, a symbol of France and a simulation of the tri-color flag of France. In said catalogue various French names or descriptions are used in connection with said lamps.

Par. 5. By and through the use of the aforesaid statements, and others of similar import but not specifically set forth herein, respondents represented, directly or by implication:

1. That the figurines used in respondents' lamps designated as "Collection Francaise" and "Collection Connoisseur" are manufactured in France.

2. That the figurines used in their said lamps are moulded in France, using original French moulds.

3. That said figurines are made of bronze.

Par. 6. The aforesaid statements and representations were false, deceptive and misleading. In truth and in fact:

1. None of the figurines used in respondents' said lamps are manufactured in France.

2. While some of said figurines may be moulded in the United States using French moulds imported into the United States and others are moulded in the United States using moulds made by the respondents, none of them are moulded in France using French moulds.

3. Said figurines are not made of bronze.

Par. 7. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals engaged in the sale

of products of the same general kind and nature as that sold by respondents.

PAR. 8. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements were and are true, and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief. As a consequence thereof, substantial trade in commerce has been, and is being, unfairly diverted to respondents from their competitors and substantial injury has thereby been, and is being, done to competition in commerce.

PAR. 9. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

Mr. Michael J. Vitale supporting the complaint.

Mr. Jacob Fogelson, of New York, N.Y., for respondents.

INITIAL DECISION OF JOHN LEWIS, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondents on March 30, 1960, charging them with the use of unfair and deceptive acts and practices and unfair methods of competition, in commerce, in violation of the Federal Trade Commission Act, by the use of false, deceptive and misleading statements concerning the place of manufacture of, the country of origin of the molds used in making, and the composition of, certain figurines used by respondents in the manufacture of lamps sold by them. After being served with said complaint, respondents appeared by counsel and entered into an agreement dated October 19, 1960, containing a consent order to cease and desist purporting to dispose of all of this proceeding as to all parties. Said agreement, which has been signed by respondents, by counsel for said respondents and by counsel supporting the complaint, and approved by the Director and Assistant Director of the Commission's Bureau of Litigation, has been submitted to the above-named hearing examiner for his consideration, in accordance with Section 3.25 of the Commission's Rules of Practice for Adjudicative Proceedings.

Respondents, pursuant to the aforesaid agreement, have admitted all the jurisdictional facts alleged in the complaint and agreed that the record may be taken as if findings of jurisdictional facts had

been duly made in accordance with such allegations. Said agreement further provides that respondents waive any further procedural steps before the hearing examiner and the Commission, the making of findings of fact or conclusions of law and all of the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with such agreement. It has been agreed that the order to cease and desist issued in accordance with said agreement shall have the same force and effect as if entered after a full hearing and that the complaint may be used in construing the terms of said order. It has also been agreed that the record herein shall consist solely of the complaint and said agreement, and that said agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

This proceeding having now come on for final consideration on the complaint and the aforesaid agreement containing consent order, and it appearing that the order provided for in said agreement covers all the allegations of the complaint and provides for an appropriate disposition of this proceeding as to all parties, said agreement is hereby accepted and is ordered filed upon this decision's becoming the decision of the Commission pursuant to Sections 3.21 and 3.25 of the Commission's Rules of Practice for Adjudicative Proceedings, and the hearing examiner, accordingly, makes the following jurisdictional findings and order:

1. Respondent J. B. Hirsch Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 2425 Pacific Street, in the City of Brooklyn, State of New York.

Respondents Abraham Hirsch, Sol Ricklin, Jordan Koster and Stanley Hirsch are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent. Their address is the same as that of the corporate respondent.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents hereinabove named. The complaint states a cause of action against said respondents under the Federal Trade Commission Act, and this proceeding is in the interest of the public.

ORDER

It is ordered, That respondent J. B. Hirsch Co., Inc., a corporation, and its officers, and respondents Abraham Hirsch, Sol Ricklin, Jordan Koster and Stanley Hirsch, individually and as officers of

said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with offering for sale, sale or distribution of lamps, composed in part of figurines, or any other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication:

(a) That figurines which are moulded in the United States are moulded in France or in any other country.

(b) That moulds originating in France and imported into the United States are used in moulding said figurines, unless such is the fact, and unless it is clearly and conspicuously disclosed that the figurines are moulded in the United States.

(c) That figurines which are moulded in moulds made in the United States or in any country other than France are moulded in French moulds.

(d) That any products or parts thereof are imported, when such is not the fact.

2. Using any French words, terms or depictions indicative of French origin in connection with figurines which are not manufactured in France, except that this shall not be deemed to prohibit the use thereof in connection with figurines manufactured in the United States in French moulds if it is clearly and conspicuously disclosed, in immediate connection and conjunction therewith, that such figurines are manufactured in the United States.

3. Using the term "French Bronze" to describe or refer to products not made of bronze; or otherwise misrepresenting the metal composition of any product.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 20th day of December 1960, become the decision of the Commission; and, accordingly:

It is 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 the order to cease and desist.

IN THE MATTER OF

JAMES NIKIDES, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE FUR PRODUCTS LABELING ACTS

Docket 7992. Complaint, June 24, 1960—Decision, Dec. 20, 1960

Consent order requiring New York City furriers to cease violating the Fur Products Labeling Act by invoicing furs deceptively with respect to the names of animals producing them and by failing in other respect to comply with invoicing requirements.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that James Nikides, Inc., a corporation, and James Nikides and Henrietta Nikides, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. James Nikides, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 245 West 29th Street, New York, New York.

James Nikides is president and Henrietta Nikides is secretary-treasurer of said corporate respondent. These individuals control, formulate and direct the acts, practices and policies of the said corporate respondent. Their office and principal place of business is the same as that of the said corporate respondent.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondents have been and are now engaged in the introduction into commerce, and in the manufacture for introduction into commerce, and in the sale, advertising, and offering for sale, in commerce, and in the transportation and distribution, in commerce, of fur products, and have manufactured for sale, sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of fur which had been shipped and received in commerce, and have introduced into commerce, sold, advertised, offered for sale, transported and

delivered, in commerce, fur, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur was falsely and deceptively invoiced by respondents in that such fur was not invoiced as required by Section 5(b)(1) of the Fur Products Labeling Act, and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

PAR. 4. Certain of said fur was falsely and deceptively invoiced or otherwise falsely or deceptively identified with respect to the name or names of the animal or animals that produced the fur in violation of Section 5(b)(2) of the Fur Products Labeling Act.

PAR. 5. Certain of said fur products were falsely and deceptively invoiced in violation of the Fur Products Labeling Act in that they were not invoiced in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) Information required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was set forth in abbreviated form, in violation of Rule 4 of said Rules and Regulations.

(b) Required item numbers were not set forth on invoices, in violation of Rule 40 of said Rules and Regulations.

PAR. 6. The aforesaid acts and practices of respondents, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair and deceptive acts and practices in commerce under the Federal Trade Commission Act.

Mr. Charles W. O'Connell for the Commission.

Mr. Joseph N. Dobrovir, of New York, N.Y., for respondents.

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

The complaint in this proceeding issued June 24, 1960, charges respondents James Nikides, Inc., a New York corporation, located at 245 West 29th Street, New York, New York, and James Nikides and Henrietta Nikides, individually and as officers of said corporate respondent and located at the same address as said corporation, with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of the Federal Trade Commission Act, and the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder.

After the issuance of said complaint, respondents entered into an agreement containing consent order to cease and desist with counsel in support of the complaint, disposing of all the issues as to all parties in this proceeding.

It was expressly provided in said agreement that the signing thereof is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

By the terms of said agreement, the respondents admitted all the jurisdictional facts alleged in the complaint and agreed that the record herein may be taken as if the Commission had made findings of jurisdictional facts in accordance with the allegations.

By said agreement, the parties expressly waived any further procedural steps before the hearing examiner and the Commission; the making of findings of fact or conclusions of law; and all the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with the agreement.

Respondents further agreed that the order to cease and desist, issued in accordance with said agreement, shall have the same force and effect as if made after a full hearing.

It was further provided that said agreement, together with the complaint, shall constitute the entire record herein; that the complaint herein may be used in construing the terms of the order issued pursuant to said agreement; and that said order may be altered, modified or set aside in the manner prescribed by the statute for orders of the Commission.

The hearing examiner has considered such agreement and the order therein contained, and, it appearing that said agreement and order provides for an appropriate disposition of this proceeding, the same is hereby accepted and is ordered filed upon becoming part of the Commission's decision in accordance with Sections 3.21 and 3.25 of the Rules of Practice, and, in consonance with the terms of said agreement, the hearing examiner finds that the Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents named herein, that this proceeding is in the interest of the public, and issues the following order:

ORDER

It is ordered, That respondents James Nikides, Inc., a corporation, and its officers, and James Nikides and Henrietta Nikides, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for introduction into commerce, or the sale, advertising, or offering for sale, or the transportation or distribution, in commerce, of fur products, or in connection with the sale, advertising, offering for sale, transportation or distribution of fur products which have been

made in whole or in part of fur which has been shipped and received in commerce, or in connection with the introduction into commerce, or the sale, advertising or offering for sale, or the transportation or distribution, in commerce, of fur, as "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Falsely or deceptively invoicing fur by:

1. Failing to furnish invoices to purchasers of fur, showing all the information required to be disclosed by each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.

2. Falsely or deceptively invoicing or otherwise identifying any such fur as to the name or names of the animal or animals that produced the fur.

B. Falsely or deceptively invoicing fur products by:

1. Setting forth information required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in abbreviated form.

2. Failing to set forth on invoices the item number or mark assigned to a fur product.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 20th day of December 1960, become the decision of the Commission; and, accordingly:

It is ordered, That 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 the order to cease and desist.

IN THE MATTER OF

MADEMOISELLE BLOUSE, LTD., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8044. Complaint, July 15, 1960—Decision, Dec. 20, 1960

Consent order requiring three affiliated New York City importers to cease offering for sale head warmers made in Japan without clearly disclosing the country of origin, and in any way representing such foreign products to be of domestic manufacture.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Mademoiselle Blouse, Ltd., a corporation, Marlene Blouse Corp., a corporation, Aclaw Corp., a corporation, and Charles Meltzer and Samuel Meltzer, individually and as officers of said corporations, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondents Mademoiselle Blouse, Ltd., Marlene Blouse Corp., and Aclaw Corp., are corporations organized, existing and doing business under and by virtue of the laws of the State of New York with their principal office and place of business located at 141 West 36th Street, New York, New York.

Respondents Charles Meltzer and Samuel Meltzer are officers of the corporate respondents. They formulate, direct and control the acts and practices of the corporate respondents, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondents.

PAR. 2. Respondents have been engaged in the importation into the United States of ladies' wearing apparel, including Japanese head warmers, in substantial quantities and selling and distributing this product to jobbers and retailers for resale to the public.

PAR. 3. In the course and conduct of their business, respondents cause, and for some time last past have caused, said product, when sold, to be shipped from their place of business in New York, New York, to purchasers thereof located in various other states of the United States and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said product in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. The fact that said head warmers are imported from Japan is not disclosed in any manner.

PAR. 5. When products, including head warmers, are not marked so as to disclose the country of origin, the purchasing public understands and believes such products to be of domestic origin.

PAR. 6. There is among the members of the purchasing public a decided preference for products of domestic manufacture, including head warmers.

PAR. 7. Respondents, by placing in the hands of others such imported products, provide means and instrumentalities whereby the

purchasing public may be misled as to the place of origin of such products.

PAR. 8. Respondents, in the conduct of their business, were and are in substantial competition, in commerce, with corporations, firms and individuals in the sale of head warmers.

PAR. 9. The use by respondents of the aforesaid misleading and deceptive practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that their head warmers are of domestic origin and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief. As a result thereof, trade in commerce has been unfairly diverted to respondents from their competitors and substantial injury has thereby been done to competition in commerce.

PAR. 10. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

Michael P. Hughes, Esq., for the Commission.

Frederick E. M. Ballon, Esq., of New York, N.Y., for respondents.

INITIAL DECISION BY ROBERT L. PIPER, HEARING EXAMINER

The Federal Trade Commission, on July 15, 1960, issued its complaint against the above-named respondents charging them with having violated the Federal Trade Commission Act, by misrepresenting the origin of their head warmers. Respondents appeared and entered into an agreement dated October 13, 1960, containing a consent order to cease and desist, disposing of all the issues in this proceeding without further hearings, which agreement has been duly approved by the appropriate officials of the Bureau of Litigation. Said agreement has been submitted to the undersigned, heretofore duly designated to act as hearing examiner herein, for his consideration in accordance with § 3.25 of the Rules of Practice of the Commission.

Respondents, pursuant to the aforesaid agreement, have admitted all of the jurisdictional allegations of the complaint and agreed that the record may be taken as if findings of jurisdictional facts had been made duly in accordance with such allegations. Said agreement further provides that respondents waive all further procedural steps before the hearing examiner or the Commission, including the making of findings of fact or conclusions of law and the right to

challenge or contest the validity of the order to cease and desist entered in accordance with such agreement. It has also been agreed that the record herein shall consist solely of the complaint and said agreement, that the agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission, that said agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint, that said order to cease and desist shall have the same force and effect as if entered after a full hearing and may be altered, modified or set aside in the manner provided for other orders, and that the complaint may be used in construing the terms of the order.

This proceeding having now come on for final consideration on the complaint and the aforesaid agreement containing the consent order, and it appearing that the order and agreement cover all of the allegations of the complaint and provide for appropriate disposition of this proceeding, the agreement is hereby accepted and ordered filed upon this decision and said agreement becoming part of the Commission's decision pursuant to §§ 3.21 and 3.25 of the Rules of Practice, and the hearing examiner accordingly makes the following findings, for jurisdictional purposes, and order:

1. Respondents Mademoiselle Blouse, Ltd., Marlene Blouse Corp., and Aclaw Corp. are corporations organized, existing and doing business under and by virtue of the laws of the State of New York with their principal office and place of business located at 141 West 36th Street, New York, New York.

2. Respondents Charles Meltzer and Samuel Meltzer are officers of the corporate respondents. They formulate, direct and control the acts and practices of the corporate respondents. Their address is the same as that of the corporate respondents.

3. The Federal Trade Commission has jurisdiction of the subject-matter of this proceeding and of the respondents hereinabove named. The complaint states a cause of action against said respondents under the Federal Trade Commission Act, and this proceeding is in the interest of the public.

It is ordered, That respondents, Mademoiselle Blouse, Ltd., a corporation, Marlene Blouse Corp., a corporation, Aclaw Corp., a corporation, and their respective officers, and Charles Meltzer and Samuel Meltzer, individually and as officers of said corporations, and respondents' representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of imported ladies' head warmers, or any other product of foreign origin, in commerce, as "commerce"

is defined in the Federal Trade Commission Act, do forthwith cease and desist from, directly or indirectly:

1. Offering for sale or selling any such product without clearly disclosing thereon, the country of origin;
2. Representing that any such product is of domestic origin.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 20th day of December 1960, become the decision of the Commission; and, accordingly:

It is ordered, That the above-named respondents 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 the order to cease and desist.

IN THE MATTER OF

ESQUIRE MFG. CO., INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 7653. Complaint, Nov. 9, 1959—Decision, Dec. 21, 1960

Consent order requiring Jersey City, N.J., manufacturers to cease representing falsely by such practices as stamping on wallets and billfolds and using on display cards the words "Top Grain Cowhide", "genuine leather", etc., that the products so advertised were made of the inferior split leather or of non-leather materials simulating leather; and to cease using the word "Manufacturing" as part of their corporate name used in dealing in products which they purchased from manufacturers for resale.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Esquire Manufacturing Co., Inc., a corporation, and Archie Struhl and Louis Struhl, individually and as officers of said corporation and Norman B. Matthews, individually, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Esquire Manufacturing 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 and place of business located at 164 Van Wagenen Avenue, in the City of Jersey City, postal zone 6, State of New Jersey.

Respondents Archie Struhl and Louis Struhl are officers of the corporate respondent. Respondent Norman B. Matthews is an officer of the holding company of corporate respondent and supervises its entire wallet and billfold operation. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been engaged in the advertising, offering for sale, sale and distribution of wallets and billfolds to retailers for resale to the public.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said products, when sold, to be shipped from their place of business in the State of New Jersey to purchasers thereof located in various other States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said product in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondents, for the purpose of inducing the purchase of their product, have misrepresented or failed to disclose the material of which their product is made, by the following methods and means:

1. By stamping or causing to be stamped on certain of their said wallets and billfolds the words "Top Grain Cowhide," thereby representing that said wallets were made of top grain leather. In truth and in fact, said wallets and billfolds are not made of top grain leather but of split leather which is inferior to top grain leather.

2. By stamping or causing to be stamped on certain of their wallets and billfolds the words "top grain cowhide," "genuine cowhide," "genuine leather" and "cowhide split leather," and by furnishing display cards to dealers upon which said wallets and billfolds were described as "genuine leather," without disclosing that said wallets and billfolds consist in substantial part of non-leather materials which simulate leather.

PAR. 5. Through the use of the word "manufacturing" as part of respondent's corporate name, respondents represent that they manufacture the wallets and billfolds being offered for sale and sold by them.

Said representation is false, misleading and deceptive. In truth and in fact, respondents do not manufacture the wallets or billfolds offered for sale and sold by them but they purchase said wallets and billfolds from manufacturers for resale.

PAR. 6. There is a preference on the part of many dealers to buy products direct from the manufacturer thereof, including such products as billfolds and wallets in the belief that by doing so, they obtain better prices and other advantages.

PAR. 7. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of wallets and billfolds of the same general kind and nature as those sold by respondents.

PAR. 8. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead retailers and members of the purchasing public into the erroneous and mistaken belief that said statements and representations were, and are, true and into the purchase of substantial quantities of respondents' product by reason of said erroneous and mistaken belief. As a consequence thereof, substantial trade in commerce has been, and is being, unfairly diverted to respondents from their competitors and substantial injury has thereby been, and is being, done to competition in commerce.

PAR. 9. The aforesaid acts and practices of respondents, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

Mr. Charles W. O'Connell for the Commission.

Mr. A. E. Robert Friedman, of New York, N.Y., for respondents.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

The complaint in this matter charges the respondents with violating the provisions of the Federal Trade Commission Act, in connection with the sale and distribution of wallets and billfolds. An agreement has now been entered into by respondents and counsel supporting the complaint which provides, among other things, that respondents admit all of the jurisdictional allegations in the complaint; that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and agreement; that the inclusion of findings of fact and

conclusions of law in the decision disposing of this matter is waived, together with any further procedural steps before the hearing examiner and the Commission; that the order hereinafter set forth may be entered in disposition of the proceeding, such order to have the same force and effect as if entered after a full hearing, respondents specifically waiving any and all rights to challenge or contest the validity of such order; that the order may be altered, modified, or set aside in the manner provided for other orders of the Commission; that the complaint may be used in construing the terms of the order; and that the agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

With respect to respondent Archie Struhl, an affidavit, which is attached to and made a part of said agreement, recites that the stock of said corporate respondent is owned by members of the Struhl family and that said respondent does not own or control the majority of such stock; that all financial and corporate business is conducted by other officers and employees of said corporation and said respondent does not participate in any such functions; that said respondent has nothing to do with any of the policies, policy making, or practices of said corporation; and that said respondent's acceptance of the presidency of said corporation was a family accommodation, and that in such capacity he does not exercise any of the executive or management duties of such office. For these reasons the agreement provides for the dismissal of the complaint as to respondent Archie Struhl in his individual capacity.

The hearing examiner having considered the agreement and proposed order and being of the opinion that they provide an adequate basis for appropriate disposition of the proceeding, the agreement is hereby accepted, the following jurisdictional findings made, and the following order issued:

1. Respondent Esquire Mfg. Co., Inc. (erroneously referred to in the complaint as Esquire Manufacturing Co., Inc.), is a New Jersey corporation with its principal office and place of business located at 164 Van Wagenen Avenue, Jersey City, New Jersey.

Respondents Archie Struhl and Louis Struhl are officers of said corporate respondent. Respondent Norman B. Matthews is an officer of the holding company of corporate respondent and supervises its entire wallet and billfold operation. Their address is the same as that of the corporate respondent.

2. 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

It is ordered, That respondent Esquire Mfg. Co., Inc., a corporation, and its officers, and respondents Archie Struhl as an officer of said corporation, Louis Struhl, individually and as an officer of said corporation, and Norman B. Matthews, individually, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of wallets or billfolds, or any other leather product, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the words, "Top Grain Cowhide" or any other words of similar import, in connection with leather goods made of split leather or misrepresenting in any manner the kind or quality of the materials of which their leather goods are composed.

2. Offering for sale or selling leather goods made in whole or in part of split leather without affirmatively disclosing such fact on or in immediate connection with such product in a clear and conspicuous manner.

3. Offering for sale or selling leather goods which consist in substantial part of materials other than leather and which simulate or imitate leather, unless such parts and the materials of which they are composed are clearly identified on or in immediate connection with such goods.

4. Using the word "Manufacturing," or any abbreviation thereof, or any word or term of the same import as a part of any corporate or trade name, or otherwise representing directly or by implication that respondents manufacture the leather products or any other product sold by them unless and until respondents own and operate or directly and absolutely control the plant wherein said products are manufactured.

It is further ordered, That the complaint herein be, and the same hereby is, dismissed as to respondent Archie Struhl in his individual capacity.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 21st day of December 1960, become the decision of the Commission; and, accordingly:

It is ordered, That respondent Esquire Mfg. Co., Inc., a corporation, and respondents Archie Struhl, as an officer of said corporation, Louis Struhl, individually and as an officer of said corpora-

tion, and Norman B. Matthews, individually, 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 the order to cease and desist.

IN THE MATTER OF

GLEN C. KELLY DOING BUSINESS AS KELLY CREAMERY COMPANY

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2(a) OF THE CLAYTON ACT

Docket 7783. Complaint, Feb. 15, 1960—Decision, Dec. 21, 1960

Consent order requiring a processor-distributor of fluid milk and other dairy products to retailer-purchasers in Oklahoma, Texas, and New Mexico, to cease discriminating in price by selling his products at different prices to different purchasers at the same trade level; for example, selling fluid milk to retailers in the Amarillo, Plainview, Dimmit, Lubbock, and Denver City, Tex., and Clovis, N. Mex., market areas at over 11¢ less per half gallon than to other Texas, Oklahoma, and New Mexico retailers, and selling milk at lower net prices with discounts of 10% and cash rebates of 5¢ per half gallon to purchasers in the aforesaid Texas towns and cities than to others competing with them.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party named in the caption hereof, and hereinafter more particularly designated and described, has violated and is now violating the provision of subsection (a) of Section 2 of the Clayton Act (U.S.C. Title 15, Section 13), as amended by the Robinson-Patman Act, approved June 19, 1936, hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Glen C. Kelly is an individual, trading and doing business as Kelly Creamery Company, with his office and principal place of business located at 225 West Fifth Street, Elk City, Oklahoma. Respondent formulates, directs and controls the policies, acts and practices hereinafter set forth.

PAR. 2. Respondent is engaged in the business of purchasing, processing, manufacturing, and selling fluid milk and other dairy products to retailer-purchasers located throughout the States of Oklahoma, Texas and New Mexico. Annual net sales of the Kelly Creamery Company are in excess of one and a half million dollars.

PAR. 3. In the course and conduct of its business, respondent is now, and for many years past has been, transporting fluid milk and

other dairy products, or causing the same to be transported, from dairy farms and other points of origin to respondent's processing and manufacturing plant and distribution depots located in states other than the state of origin.

Respondent is now, and for many years past has been, transporting fluid milk and other dairy products, or causing the same to be transported, from the state or states where such products are processed, manufactured or stored in anticipation of sale or shipment, to purchasers located in other States of the United States.

Respondent also sells and distributes its said fluid milk and other dairy products to purchasers located in the same states and places where such products are processed, manufactured or stored in anticipation of sale.

All of the matters and things, including the acts, practices, sales, and distribution by respondent of its said fluid milk and other dairy products, as hereinbefore alleged, were and are performed and done in a constant current of commerce, as "commerce" is defined in the Clayton Act.

PAR. 4. Respondent sells its fluid milk and other dairy products to retailers. Respondent's retailer-purchasers resell said products to consumers. Many of respondent's retailer-purchasers are in competition with other retailer-purchasers of respondent.

Respondent, in the sale of its fluid milk and other dairy products to retailers, is in substantial competition with other manufacturers, distributors and sellers of said products.

PAR. 5. In the course and conduct of his business in commerce, respondent has discriminated, and is now discriminating, in price in the sale of fluid milk and other dairy products by selling such products of like grade and quality at different prices to different purchasers at the same level of trade.

Included in, but not limited to, the discriminations in price, as above alleged, respondent has discriminated in price in the sale of said products to retailer-purchasers in the Amarillo, Plainview, Dimmit, Lubbock and Denver City, Texas; and Clovis, New Mexico market areas by charging said retailers substantially lower prices than charged by said respondent for the sale of said products of like grade and quality to purchasers located in Oklahoma and in other towns and cities in the States of Texas and New Mexico. Such differences in price have been in excess of 11 cents per half gallon of fluid milk.

Respondent has further discriminated in price in the sale of said products of like grade and quality by charging many retailer-purchasers substantially higher prices than respondent charged to

other retailer-purchasers, many of whom are competing with the unfavored purchasers. Such differences in price have been in excess of 8 cents per half gallon for fluid milk.

For example, many favored retailer-purchasers located in Amarillo, Plainview, Dimmit, Lubbock, and Denver City, Texas, and other towns and cities in Texas, were charged lower net prices than their competitors, and were granted discounts of 10% on their purchases and given cash rebates of five cents per half gallon of fluid milk. These discounts and rebates were not given to the competitors of these favored retailer-purchasers.

PAR. 6. The effect of such discriminations in price by respondent in the sale of fluid milk and other dairy products of like grade and quality has been or may be substantially to lessen, injure, destroy or prevent competition:

1. Between respondent and its competitors in the processing, manufacture, sale and distribution of such products.

2. Between retailers paying higher prices and competing retailers paying lower prices for respondent's said products.

PAR. 7. The discriminations in price, as herein alleged, are in violation of subsection (a) of Section 2 of the Clayton Act, as amended.

Mr. F. P. Favarella and *Mr. Herbert I. Rothbart* for the Commission.

Mr. Holland Meacham and *Mr. Donald Royse*, of *Royse and Meacham*, of Elk City, Okla., for respondent.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

The Federal Trade Commission (sometimes also hereinafter referred to as the Commission) on February 15, 1960, issued its complaint herein, charging the above-named respondents with having violated the provisions of subsection (a) of § 2 of the Clayton Act, as amended (U.S.C. Title 15, § 13), and the respondent was duly served with process.

On November 2, 1960, there was submitted to the undersigned hearing examiner of the Commission for his consideration and approval an "Agreement Containing Consent Order To Cease And Desist," which had been entered into by and between respondent, his counsel, and counsel supporting the complaint, under date of October 28, 1960, subject to the approval of the Bureau of Litigation of the Commission, which had subsequently duly approved the same.

On due consideration of such agreement, the hearing examiner finds that said agreement, both in form and in content, is in accord

with § 3.25 of the Commission's Rules of Practice for Adjudicative Proceedings, and that by said agreement the parties have specifically agreed to the following matters:

1. Respondent Glen C. Kelly is an individual, trading and doing business as Kelly Creamery Company, with his office and principal place of business at 225 West Fifth Street, Elk City, Oklahoma.

2. Respondent admits all the jurisdictional facts alleged in the complaint and agrees that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations.

3. This agreement disposes of all of this proceeding as to all parties.

4. Respondent waives:

(a) Any further procedural steps before the hearing examiner and the Commission;

(b) The making of findings of fact or conclusions of law; and

(c) All of the rights he may have to challenge or contest the validity of the order to cease and desist entered in accordance with this agreement.

5. The record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement.

6. This agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission.

7. This agreement is for settlement purposes only and does not constitute an admission by respondent that he has violated the law as alleged in the complaint.

8. The following order to cease and desist may be entered in this proceeding by the Commission without further notice to respondent. When so entered it shall have the same force and effect as if entered after a full hearing. It may be altered, modified or set aside in the manner provided for other orders. The complaint may be used in construing the terms of the order.

Upon due consideration of the complaint filed herein and the said "Agreement Containing Consent Order To Cease And Desist," the latter is hereby approved, accepted and ordered filed. The hearing examiner finds from the complaint and the said "Agreement Containing Consent Order To Cease And Desist" that the Commission has jurisdiction of the subject-matter of this proceeding and of the respondent herein; that the complaint states a legal cause for complaint under the Clayton Act as amended (U.S.C. Title 15, § 13) against the respondent both generally and in each of the particulars alleged therein; that this proceeding is in the interest of the public; that the following order as proposed in said agreement is appro-

priate for the just disposition of all the issues in this proceeding as to all of the parties hereto; and that said order therefore should be, and hereby is, entered as follows:

It is ordered, That respondent Glen C. Kelly, an individual, trading and doing business as Kelly Creamery Company, or trading and doing business under any other name or names, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the sale of fluid milk and other dairy products of like grade and quality, do forthwith cease and desist from discriminating, directly or indirectly, in price between different purchasers, where either or any of the purchases involved in such discrimination are in commerce, as "commerce" is defined in the Clayton Act:

1. By selling such products to any purchaser at net lower prices than those granted other purchasers who in fact compete with the favored purchaser in the resale of said products of respondent;

2. By selling such products to any purchaser at a price which is lower than the price charged any other purchaser at the same level of trade, where such lower price undercuts the price at which the purchaser charged the lower price may purchase such products of like grade and quality from another seller.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 21st day of December 1960, become the decision of the Commission; and, accordingly:

It is ordered, That respondent Glen C. Kelly, an individual trading and doing business as Kelly Creamery Company, shall, within sixty (60) days after service upon him of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which he has complied with the order to cease and desist.

IN THE MATTER OF

KIMBERLY PRODUCTS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 7862. Complaint, Apr. 8, 1960—Decision, Dec. 21, 1960

Consent order requiring three affiliated Chicago distributors of imported drill sets and index to cease advertising falsely that such products are manu-

factured from high speed steel and are high speed drills, that they contain a significant amount of tungsten, that they are unconditionally guaranteed, and that an excessive, fictitious amount is the regular retail price; and to cease offering such products for sale without clear disclosure of the foreign country of origin both on the article and on the container.

Complaint

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Kimberly Products, Inc., a corporation, H & S Importers, Inc., a corporation, Chicago H & S Associates, Ltd., a corporation, and Mitchell Handelman and Seymour Galter, individually and as officers of said corporations and as copartners doing business as H & S Associates, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

Paragraph 1. Respondents Kimberly Products, Inc., H & S Importers, Inc., and Chicago H & S Associates, Ltd., are corporations organized, existing and doing business under and by virtue of the laws of the State of Illinois, with their principal office and place of business located at 509 North LaSalle Street, in the City of Chicago, State of Illinois.

Individual respondents Mitchell Handelman and Seymour Galter are officers of the above said corporations. They formulate, direct and control the acts and practices of the corporate respondents, and also do business as copartners under the name of H & S Associates. Their address is the same as that of the corporate respondents.

Par. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution, among other things, of steel drill sets and index to wholesalers and retailers for resale to the purchasing public.

In the course and conduct of their said business, respondents cause, and have caused, said drill sets and index, when sold, to be transported from their place of business in the State of Illinois, or their importers' place of business in the State of New York, to purchasers located in various other States of the United States.

Respondents maintain, or cause to be maintained, and at all times mentioned herein have maintained, or have caused to be maintained, a substantial course of trade in said drill sets and index in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Par. 3. In the course and conduct of their business and for the purpose of inducing the sale of their products, respondents have

made certain statements with respect to the quality and price of their products in circulars and on the cartons in which the products are packaged, of which the following are typical:

H & S 29 piece Hy-Speed Twist Drill Outfit
29 Drills of Tungsten and Chrome Vanadium Steel
Index and Drills Fully Guaranteed
\$39$^{95}/_{100}$ JD 100

PAR. 4. Through the use of the aforesaid statements and representations, and others similar thereto but not specifically set out herein, respondents represent, and have represented, that:

1. Their said drills are manufactured from high speed steel and are high speed drills.

2. Said drills contain, among other things, a significant amount of tungsten.

3. They unconditionally guarantee their drill sets.

4. The usual retail price of their J-D 100, 29 piece drill set and index is \$39.95.

PAR. 5. Said statements and representations are, and were, false, misleading and deceptive. In truth and in fact:

1. Respondents' drills are not manufactured from high speed steel and are not high speed drills.

2. Respondents' drills contain an insignificant amount of tungsten.

3. Respondents do not furnish a guarantee certificate to the purchasers of their drills and index, and said purchasers, therefore, are not informed as to the nature and conditions of the advertised guarantee or the manner in which respondents will perform thereunder.

4. The amount of \$39.95 is a fictitious retail price and is greatly in excess of the price at which said drill sets and index are usually and customarily sold at retail.

PAR. 6. Respondents' said drill bits are imported. The package in which they are contained has only the legend "Made in Europe" printed thereon in an indistinct manner. No markings are placed on the drills to identify them as being of foreign origin or to show the country of origin thereof.

PAR. 7. The respondents by and through the use of the aforesaid acts and practices place the means and instrumentalities in the hands of retailers whereby said retailers may mislead and deceive the public in the manner herein alleged.

PAR. 8. A substantial portion of the purchasing public generally maintains a decided preference for products of domestic manufacture, including drills as involved herein, and when an imported product and its packaging are not clearly marked to show the coun-

try of origin the purchasing public understands and believes such a product to be of domestic origin.

PAR. 9. In the course and conduct of their business, and at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals likewise engaged in the sale of drills and index.

PAR. 10. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices and their failure to disclose the country of origin of their drills have had, and now have, the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said products are of domestic origin and that such statements and representations were true and into the purchase of substantial quantities of respondents' products because of such erroneous and mistaken belief. As a result thereof, trade has been unfairly diverted to respondents from their competitors and substantial injury has thereby been done to competition in commerce.

PAR. 11. The aforesaid acts and practices of respondents, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

Mr. William A. Somers for the Commission.

Mr. Sidney R. Marovitz, of *Marovitz, Powell and Pizer*, of Chicago, Ill., for respondent Kimberly Products, Inc.; *Mr. Charles N. Salzman*, of *Koven, Koven, Salzman & Homer*, of Chicago, Ill., for the remaining respondents.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

The Federal Trade Commission (sometimes also hereinafter referred to as the Commission) issued its complaint herein on April 8, 1960, charging the above-named respondents with having violated the provisions of the Federal Trade Commission Act in certain particulars.

On November 1, 1960, there was submitted to the undersigned hearing examiner of the Commission for his consideration and approval an "Agreement Containing Consent Order To Cease And Desist," which had been entered into by and between respondents and counsel for the respective parties, under date of October 24, 1960, subject to the approval of the Bureau of Litigation of the Commission, which had subsequently duly approved the same.

On due consideration of such agreement, the hearing examiner finds that said agreement, both in form and in content, is in accord with § 3.25 of the Commission's Rules of Practice for Adjudicative Proceedings, and that by said agreement the parties have specifically agreed to the following matters:

1. Respondents Kimberly Products, Inc., H & S Importers, Inc., and Chicago H & S Associates, Ltd., are corporations, and respondents Mitchell Handelman and Seymour Galter are individuals, officers of the above-named corporate respondents and are copartners doing business as H & S Associates, all of whom have their office and principal place of business located at 509 North LaSalle Street, Chicago, Illinois.

2. The respondents admit all the jurisdictional facts alleged in the complaint and agree that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations.

3. It is agreed that according to accepted industry standards, high speed steel and high speed drills are of a steel composed of 5% molybdenum, 4% chromium, 2% vanadium and 6% tungsten, and tungsten drills are of a steel composed of 18% tungsten, 4% chromium and 1% vanadium.

4. This agreement disposes of all this proceeding as to all parties.

5. The respondents waive:

(a) Any further procedural steps before the Hearing Examiner and the Commission;

(b) The making of findings of fact or conclusions of law; and

(c) All the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with this agreement.

6. The record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement.

7. This agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission.

8. This agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

9. The following order to cease and desist may be entered in this proceeding by the Commission without further notice to the respondents. When so entered it shall have the same force and effect as if entered after a full hearing. It may be altered, modified or set aside in the manner provided for other orders. The complaint may be used in construing the terms of the order.

Upon due consideration of the complaint filed herein and the said "Agreement Containing Consent Order To Cease And Desist," said agreement is hereby approved and accepted and is ordered filed. The hearing examiner finds from the complaint and the said agreement that the Commission has jurisdiction of the subject-matter of this proceeding and of the persons of each of the respondents herein; that the complaint states legal causes for complaint under the Federal Trade Commission Act against each of the respondents, both generally and in each of the particulars alleged therein; that this proceeding is in the interest of the public; that the following order as proposed in said agreement is appropriate for the just disposition of all the issues in this proceeding as to all of the parties hereto; and that said order, therefore, should be and hereby is entered as follows:

It is ordered, That respondents Kimberly Products, Inc., a corporation, H & S Importers, Inc., a corporation, Chicago H & S Associates, Ltd., a corporation, and their officers, and Mitchell Handelman and Seymour Galter, individually and as officers of said corporations and as copartners doing business as H & S Associates, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of drills and index, or any other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that:

(a) Their drills are manufactured of high speed steel or are high speed drills, unless the drills are manufactured from a steel which is composed of at least 5% molybdenum, 4% chromium, 2% vanadium and 6% tungsten;

(b) Their drills are tungsten drills, unless the drills are manufactured of a steel composed of at least 18% tungsten, 4% chromium and 1% vanadium;

(c) Their drills or any other products, are guaranteed, unless the nature and extent of the guarantee and the manner in which the guarantor will perform are clearly set forth;

(d) Any amount is the retail price of a product unless it is the price at which the product has been usually and customarily sold at retail in the trade area or areas where the representation is made;

2. Misrepresenting, in any manner, the grade or quality of any product or the material from which a product is manufactured;

3. Offering for sale or selling any article of foreign origin unless the country of origin thereof is clearly shown on the article and on the package or container thereof;

4. Placing any means or instrumentalities in the hands of retailers or others whereby the public may be misled or deceived as to any of the matters set out above.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 21st day of December 1960, become the decision of the Commission; and, accordingly:

It is ordered, That the above-named respondents 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 the order to cease and desist.

IN THE MATTER OF

DENNIS CHICKEN PRODUCTS COMPANY, INC.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2(d) OF THE CLAYTON ACT

Docket 8091. Complaint, Aug. 24, 1960—Decision, Dec. 21, 1960

Consent order requiring an Augusta, Ill., processor of food products including chicken and turkey, to cease paying discriminatory allowances to favored purchasers, in violation of Sec. 2(d) of the Clayton Act, by such practices as making annual payments of $150.00 to a retail grocery chain with headquarters in Burlington, Iowa, without making comparable allowances available to competitors of the chain.

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 subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C. Title 15, Section 13), hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Dennis Chicken Products Company, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located in Augusta, Illinois.

PAR. 2. Respondent is now and has been engaged in the processing, sale and distribution of food products, including chicken and turkey

products. Respondent sells and distributes its products to a large number of customers, including wholesalers and retail chain stores. Respondent's sales of its products are substantial, exceeding $2,-500,000 annually.

PAR. 3. Respondent sells and causes its products to be transported from its principal place of business in the State of Illinois to customers located in other States of the United States. There has been at all times mentioned herein a continuous course of trade in said products in commerce, as "commerce" is defined in the Clayton Act, as amended.

PAR. 4. In the course and conduct of its business in commerce, and particularly since 1958, respondent paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished by or through such customers in connection with their offering for sale or sale of products sold to them by respondent, and such payments were not made available on proportionally equal terms to all other customers competing in the sale and distribution of respondent's products.

PAR. 5. For example, in the years 1958 and 1959, respondent contracted to pay and did pay to Benner Tea Company, a retail grocery chain with headquarters in Burlington, Iowa, the amount of $150 in each of said years as compensation or as allowances for advertising or other services or facilities furnished by or through Benner Tea Company in connection with its offering for sale or sale of products sold to it by respondent. Such compensation or allowances were not made available on proportionally equal terms to all other customers competing with Benner Tea Company in the sale and distribution of products of like grade and quality purchased from respondent.

PAR. 6. The acts and practices of respondent, as alleged, are in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

Mr. John Perechinsky for the Commission.

Mr. Charles A. Scholz, of Quincy, Ill., for respondent.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

The Federal Trade Commission (sometimes also hereinafter referred to as the Commission) on August 24, 1960, issued its complaint herein, charging the respondent Dennis Chicken Products Company, Inc., a corporation, with having violated the provisions of § 2(d) of the Clayton Act, as amended by the Robinson-Patman

Act (U.S.C. Title 15, § 13), and respondent was duly served with process.

On October 25, 1960, there was submitted to the undersigned hearing examiner of the Commission, for his consideration and approval, an "Agreement Containing Consent Order To Cease And Desist," which had been entered into by and between respondent, its attorney, and the attorney supporting the complaint, under date of October 17, 1960, subject to the approval of the Bureau of Litigation of the Commission, which had subsequently duly approved the same.

On due consideration of such agreement, the hearing examiner finds that said agreement, both in form and in content, is in accord with § 3.25 of the Commission's Rules of Practice for Adjudicative Proceedings, and that by said agreement the parties have specifically agreed to the following matters:

1. Respondent Dennis Chicken Products Company, Inc., is a corporation existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located in Augusta, Illinois.

2. Respondent admits all the jurisdictional facts alleged in the complaint and agrees that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations.

3. This agreement disposes of all of this proceeding as to all parties.

4. Respondent waives:

a. Any further procedural steps before the hearing examiner and the Commission;

b. The making of findings of fact or conclusions of law; and

c. All of the rights it may have to challenge or contest the validity of the order to cease and desist entered in accordance with this agreement.

5. The record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement.

6. This agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission.

7. This agreement is for settlement purposes only and does not constitute an admission by respondent that it has violated the law as alleged in the complaint.

8. The following order to cease and desist may be entered in this proceeding by the Commission without further notice to respondent. When so entered it shall have the same force and effect as if entered

after a full hearing. It may be altered, modified or set aside in the manner provided for other orders. The complaint may be used in construing the terms of the order.

Upon due consideration of the complaint filed herein and the said "Agreement Containing Consent Order To Cease And Desist," this agreement is hereby approved, accepted and ordered filed. The hearing examiner finds from the complaint and the aforesaid "Agreement Containing Consent Order To Cease And Desist" that the Commission has jurisdiction of the subject-matter of this proceeding and of the respondent herein; that the complaint states a legal cause for complaint under the Clayton Act, as amended, against the respondent, both generally and in each of the particulars alleged therein; that this proceeding is in the interest of the public; that the following order as proposed in said agreement is appropriate for the just disposition of all the issues in this proceeding as to all of the parties hereto; and that said order therefore should be, and hereby is, entered as follows:

It is ordered, That respondent Dennis Chicken Products Company, Inc., a corporation, and its officers, employees, agents and representatives, directly or through any corporate or other device, in or in connection with the offering for sale, sale or distribution of any of its products in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

Paying or contracting for the payment of anything of value to, or for the benefit of, any customer of respondent as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the offering for sale, sale or distribution of respondent's products, unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such products.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 21st day of December 1960, become the decision of the Commission; and, accordingly:

It is ordered, That respondent Dennis Chicken Products Company, Inc., a corporation, shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist.

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IN THE MATTER OF

BALL BROTHERS COMPANY, INC.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2(d) OF THE CLAYTON ACT

Docket 8092. Complaint, Aug. 24, 1960—Decision, Dec. 21, 1960

Consent order requiring a Muncie, Ind., manufacturer of glass containers and closures and zinc products, to cease paying discriminatory allowances to favored purchasers, in violation of Sec. 2(d) of the Clayton Act, by such practices as making annual payments of $150.00 to a retail grocery chain with headquarters in Burlington, Iowa, without making comparable allowances available to competitors of the chain.

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 subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C. Title 15, Section 13), hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Ball Brothers Company, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana, with its office and principal place of business located at 1509 South Macedonia Avenue, Muncie, Indiana.

PAR. 2. Respondent is now and has been engaged in the manufacture, sale and distribution of glass containers and closures for said glass containers and rolled zinc and drawn zinc products. Respondent sells and distributes its products to wholesalers and retailers, including retail chain store organizations. Respondent's sales of its products are substantial, exceeding $1,000,000 annually.

PAR. 3. Respondent sells and causes its products to be transported from its principal place of business in the State of Indiana to customers located in other States of the United States. There has been at all times mentioned herein a continuous course of trade in said products in commerce, as "commerce" is defined in the Clayton Act, as amended.

PAR. 4. In the course and conduct of its business in commerce, and particularly since 1958, respondent paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished by or through such customers in connection with their

offering for sale or sale of products sold to them by respondent, and such payments were not made available on proportionally equal terms to all other customers competing in the sale and distribution of respondent's products.

PAR. 5. For example, in the year 1959, respondent contracted to pay and did pay to Benner Tea Company, a retail grocery chain with headquarters in Burlington, Iowa, the amount of $150.00 as compensation or as an allowance for advertising or other services or facilities furnished by or through Benner Tea Company in connection with its offering for sale or sale of products sold to it by respondent. Such compensation or allowance was not made available on proportionally equal terms to all other customers competing with Benner Tea Company in the sale and distribution of products of like grade and quality purchased from respondent.

PAR. 6. The acts and practices of respondent, as alleged, are in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

Mr. John Perechinsky for the Commission.

Bracken, DeFur, Voran & Hanley, by *Mr. Reed D. Voran*, of Muncie, Ind., for respondent.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

The Federal Trade Commission (sometimes also hereinafter referred to as the Commission) on August 24, 1960, issued its complaint herein, charging the respondent Ball Brothers Company, Inc., a corporation, with having violated the provisions of § 2(d) of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C. Title 15, § 13), and respondent was duly served with process.

On October 25, 1960, there was submitted to the undersigned hearing examiner of the Commission, for his consideration and approval, an "Agreement Containing Consent Order To Cease And Desist," which had been entered into by and between respondent, its attorneys, and the attorney supporting the complaint, under date of October 19, 1960, subject to the approval of the Bureau of Litigation of the Commission, which had subsequently duly approved the same.

On due consideration of such agreement, the hearing examiner finds that said agreement, both in form and in content, is in accord with § 3.25 of the Commission's Rules of Practice for Adjudicative Proceedings, and that by said agreement the parties have specifically agreed to the following matters:

1. Respondent Ball Brothers Company, Inc., is a corporation existing and doing business under and by virtue of the laws of the

State of Indiana, with its office and principal place of business located at 1509 South Macedonia Avenue, Muncie, Indiana.

2. Respondent admits all the jurisdictional facts alleged in the complaint and agrees that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations.

3. This agreement disposes of all of this proceeding as to all parties.

4. Respondent waives:

a. Any further procedural steps before the hearing examiner and the Commission;

b. The making of findings of fact or conclusions of law; and

c. All of the rights it may have to challenge or contest the validity of the order to cease and desist entered in accordance with this agreement.

5. The record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement.

6. This agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission.

7. This agreement is for settlement purposes only and does not constitute an admission by respondent that it has violated the law as alleged in the complaint.

8. The following order to cease and desist may be entered in this proceeding by the Commission without further notice to respondent. When so entered it shall have the same force and effect as if entered after a full hearing. It may be altered, modified or set aside in the manner provided for other orders. The complaint may be used in construing the terms of the order.

Upon due consideration of the complaint filed herein and the said "Agreement Containing Consent Order To Cease And Desist," this agreement is hereby approved, accepted and ordered filed. The hearing examiner finds from the complaint and the aforesaid "Agreement Containing Consent Order To Cease And Desist" that the Commission has jurisdiction of the subject-matter of this proceeding and of the respondent herein; that the complaint states a legal cause for complaint under the Clayton Act, as amended, against the respondent, both generally and in each of the particulars alleged therein; that this proceeding is in the interest of the public; that the following order as proposed in said agreement is appropriate for the just disposition of all the issues in this proceeding as to all of the parties hereto; and that said order therefore should be, and hereby is, entered as follows:

It is ordered, That respondent Ball Brothers Company, Inc., a corporation, and its officers, employees, agents and representatives, directly or through any corporate or other device, in or in connection with the offering for sale, sale or distribution of any of its products in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

Paying or contracting for the payment of anything of value to, or for the benefit of, any customer of respondent as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the offering for sale, sale or distribution of respondent's products, unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such products.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 21st day of December 1960, become the decision of the Commission; and, accordingly:

It is ordered, That respondent Ball Brothers Company, Inc., a corporation, shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist.

IN THE MATTER OF

EXPOSITION PRESS, INC., ET AL.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 7489. Complaint, May 15, 1959—Decision, Dec. 22, 1960

Order requiring a "vanity" publishing house in New York City to cease representing falsely, by use of the term "royalties" or otherwise, that it would make payments to an author based on sales of his book unless it was made clear that the author had to pay the publishing costs.

Before *Mr. Leon R. Gross*, hearing examiner.
Mr. Charles S. Cox for the Commission.
Mr. Philip Adler, of New York City, for respondents.

FINDINGS AS TO THE FACTS, CONCLUSIONS AND ORDER

The Federal Trade Commission issued its complaint against the above-named respondents on May 15, 1959, charging them with

violation of the Federal Trade Commission Act in soliciting contracts for the publication of books by authors and prospective authors. After the filing of answer by respondents, hearings were held before a duly designated hearing examiner of the Commission and testimony and other evidence in support of and in opposition to the allegations of the complaint were received into the record. In an initial decision filed April 18, 1960, the hearing examiner ordered respondents to cease and desist from the practice which he found to be in violation of the Federal Trade Commission Act.

Respondents filed an appeal from said initial decision and the Commission, after considering said appeal and the entire record, has determined that the appeal should be denied but that the initial decision is not appropriate in all respects to dispose of this matter and should be vacated and set aside. The Commission further finds that the proceeding is in the public interest and now makes its findings as to the facts, conclusions drawn therefrom and order to cease and desist, which, together with the accompanying opinion, shall be in lieu of the findings, conclusions and order contained in the initial decision.

FINDINGS AS TO THE FACTS

1. Respondent, Exposition Press, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 386 Fourth Avenue, New York, New York. Respondent, Edward Uhlan, is an individual and president of said corporate respondent. Mr. Uhlan formulates, directs and controls the acts, practices and policies of the corporate respondent.

2. In the course and conduct of their business, respondents are now and have been engaged in interstate commerce through the solicitation of contracts for the publication of books and through the sale of books throughout the various states, and by causing such contracts to be forwarded through the United States mail, and otherwise, to customers located in various states other than that in which respondents' business office is located.

3. Respondents are now and have been in substantial competition with other corporations, firms and individuals engaged in contracting for the publication of books in commerce.

4. Respondents' plan of publication is one whereby the authors subsidize the publication of their books with the authors paying all or a substantial portion of the cost of same. Respondents agree to pay the authors 40% of the retail price of all the authors' books which respondents sell. Respondents stipulated in the record that the money they have paid to their authors from the sale of the au-

thors' books has been less than the amount of the authors' subsidy in at least ninety per cent of the cases.

5. In soliciting contracts for the publication of books, respondents have published advertisements in newspapers and magazines wherein they have represented, among other things, that their authors "get 40% royalties."

6. A number of authors whose books were published by respondents testified that they did not know from reading respondents' advertisement that they would have to subsidize all or a substantial portion of the cost of the publication of their books, and that it was their understanding from the advertisement that they would be paid for having their books published.

7. Upon the basis of the foregoing testimony, the Commission finds that respondents, through the use of the aforesaid advertisements, have represented that the payments made to authors constitute a net return to the authors whereas, in truth and in fact, such payments in most cases are not sufficient for the authors to recoup their investments made with respondents for the publication of the authors' books and would under no circumstances represent a net return to the authors.

8. The practice of respondents, as hereinabove found, has had and now has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public with respect to the payment they will receive for the publication of their books and to induce them to enter into correspondence with respondents, leading in many instances to the acceptance of a contract for respondents' services. As a result thereof, trade has been unfairly diverted to respondents from their competitors and injury has thereby been done to competition in commerce.

CONCLUSIONS

The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents. The aforesaid acts and practices of respondents, as herein found, were all to the prejudice and injury of the public and of respondents' competitors and constituted unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That respondents, Exposition Press, Inc., a corporation, and its officers, and Edward Uhlan, individually and as an officer of said corporation, and respondents' agents, representa-

tives and employees, directly or through any corporate or other device, in connection with the solicitation of contracts for the printing, promotion, sale and distribution of books, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Representing through the use of the term "royalties" or in any other manner that they will make payments to an author based on sales of the author's book unless a disclosure is made in immediate conjunction therewith that such payments do not constitute a net return to the author but that the cost of printing, promoting, selling and distributing the book must be paid in whole or in substantial part by the author.

It is further ordered, That respondents, Exposition Press, Inc., a corporation, and its officers, and Edward Uhlan, individually and as an officer of said corporation, 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 the order to cease and desist.

Commissioner Mills not participating for the reason he did not hear oral argument.

OPINION OF THE COMMISSION

By ANDERSON, *Commissioner:*

Respondents in this matter are charged with violating Section 5 of the Federal Trade Commission Act in the solicitation of contracts for the publication of books by authors and prospective authors. The hearing examiner in his initial decision held that the allegations of the complaint were sustained by the evidence and ordered respondents to cease and desist from the practice found to be unlawful. Respondents have appealed from this decision.

The complaint charges that respondents' representation that they pay their authors a royalty on books published and sold by them is false, misleading and deceptive. It is alleged in this connection that respondents' plan of publication is one whereby the authors subsidize the publication of the books by paying for the cost thereof. It is further alleged that respondents agree to pay the authors 40% on the price of the books sold but that only in rare cases are the sales sufficient for the authors to recoup their investments. The hearing examiner's order would require respondents to cease representing that any payment made to an author based on sales of the author's book is a "royalty" unless respondents have repaid to the author all sums of money paid by the author for publication of his book.

Respondents' business is characterized in the record as "subsidy" or "vanity" publishing. The undisputed facts in this record show that respondents, in soliciting authors, have published an advertisement in magazines and newspapers which reads as follows:

Free to WRITERS seeking a book publisher
Two fact-filled, illustrated brochures tell how to publish your book, get 40% royalties, national advertising, publicity and promotion. Free editorial appraisal. Write Dept. STM-3.
Exposition Press / 386 4th Ave., N.Y. 16

To persons responding to this advertisement, respondents have customarily sent brochures entitled "You Can Publish Your Book" and "What Every Writer Should Know About Publishing His Own Book." Thereafter, respondents have entered into correspondence with the writer leading up to the submission of the writer's manuscript and to the acceptance of a contract. The contract designates the retail price to be charged for the book and respondents agree therein "to pay to the Author a royalty of $—— per copy (40% of the retail price)" on all copies sold. The details of the subsidy payment to be made by the author are also set forth in this contract. In this connection, respondents stipulated that the money they have paid to their authors from the sale of the author's books has been less than the amount of the author's subsidy in at least ninety per cent of the cases.

Respondents first contend that the complaint does not state a cause of action, that is, that the practices with which they are charged do not constitute an unfair method of competition or unfair and deceptive acts. They argue that in their contract with authors the parties agree that the payment of 40% of the retail price is a royalty and that there is no logical or legal connection between the presence of a subsidy and the payment of a royalty. This argument is based on an erroneous interpretation of the complaint. Properly construed, the complaint charges that respondents represent that their authors will receive a net return on their books, whereas the payments made by respondents are rarely ever sufficient to cover the author's investment. The use of such representations, if shown to be deceptive as alleged, clearly constitutes an unfair trade practice within the meaning of Section 5. Respondents' argument on this point must be rejected.

Witnesses who testified in this proceeding were trade publishers who do not require their authors to subsidize the cost of publication, professional writers, and writers whose books were published by respondents. Purportedly on the basis of the testimony of the trade publishers and professional writers, the hearing examiner found that any payment made to an author based on sales of the author's

book is not a "royalty" unless respondents have repaid to the authors all sums of money paid by the author for publication of his book. Under the hearing examiner's order, the term "royalty" could not be used to describe a payment made to an author of a percentage of the retail price of his book even though the author was put on notice that he would have to pay a subsidy which would not be recovered until a certain number of his books were sold. Payments which could not be described as a "royalty" until the subsidy was repaid would then become a royalty. Thus, in effect, the hearing examiner has ruled that the term "royalty" is absolute and cannot be qualified. Respondents argue that the finding upon which this order is purportedly based is not supported by the evidence.

An examination of the testimony of the trade publishers shows that it related in substantial part to the method in which they conduct their business and the manner in which they determine the amount of royalty paid their authors. In substance, they defined "royalty" as a compensation paid to an author, generally based on a percentage of the retail or wholesale price of the book sold, for the right to publish the book. With the possible exception of one trade publisher, none of these witnesses went so far as to state that the author would have to recoup his subsidy before payments by the publisher would constitute a royalty. In fact, three of the four trade publishers called by counsel supporting the complaint, in the course of cross-examination, acknowledged that if an author would reimburse them for manufacturing costs, they could raise their royalty rates above the maximum now given.

It is true that the testimony of two of the three professional authors supports the hearing examiner's finding. However, these authors have had experience only with trade publishers who pay all of the publication costs. Their understanding of a royalty is more restricted than that of the trade publishers themselves. Moreover, their testimony conflicts with that of the "non-professional" authors who had books published by respondents. These writers had received the brochures and correspondence from respondents before entering into the contract. It is apparent from their testimony that upon reading this material, they were aware that they would be required to pay respondents a subsidy for the publication of their books. In addition, their testimony discloses that upon receiving all of respondents' literature, they understood the term "royalty" to mean a percentage of the retail price of their books and that a certain number of their books would have to be sold before they could recoup their subsidy payments. Under the circumstances, we are not convinced from the testimony of the trade publishers and the

professional writers that writers solicited by these respondents would be misled by the use of the term "royalty" into believing that a payment of a percentage of the retail price of their book represents a net return to them if they are fully aware that they are required to subsidize the cost of publication.

In the absence of such knowledge on the part of the writers, it is our opinion that the use of the term "royalty" to describe payments made to the writers does have a tendency and capacity to mislead writers into believing that these payments actually constitute a net return. In fact, the testimony of certain of the authors whose books were published by respondents supports a finding of actual deception as a result of respondents' advertisement offering 40% royalties. In substance, these authors testified from reading respondents' advertisement that they did not know they would have to pay and that they expected to be paid for having their books published.

Respondents' argument on this point is that the advertisement, the brochures and the contract must be read together and that from them it is clear that the authors, knowing they have to pay a subsidy, understand that the payments they will receive do not constitute a profit to them. However, this argument ignores the fact that respondents use the advertisement as their first step in contacting writers who at that time have no means of knowing that they must pay a subsidy. As found by the hearing examiner, respondents' advertising practice falls squarely within the principle enunciated by the court in the *Carter* case [1] that "The law is violated if the first contact or interview is secured by deception (*Federal Trade Commission* v. *Standard Education Society, et al.*, 302 U.S. 112, 115 [25 F.T.C. 1715, 2 S.&D. 429]), even though the true facts are made known to the buyer before he enters into the contract of purchase (*Progress Tailoring Co., et al.* v. *Federal Trade Commission*, (7 Cir.), 153 F. 2d 103, 104, 105 [42 F.T.C. 882, 4 S.&D. 455])." In view of our conclusion on this point, an appropriate order prohibiting the practice will be entered.

Although not raised during the trial of this case, respondents on this appeal now allege bias and prejudice on the part of the hearing examiner. The fact that we have reached our decision in this matter upon a separate examination of the entire record serves to answer this allegation. However, we have given consideration to the grounds advanced by respondents and are of the opinion that their argument is without substance.

[1] *Carter Products, Inc.* v. *F.T.C.*, 186 F. 2d 821 (7 Cir. 1951).

In support of their argument, respondents contend that the hearing examiner erred in allowing irrelevant testimony; in taking official notice of a previous order against respondents for the purpose of giving further insight into their *modus operandi;* and in referring to cease and desist orders of the type sought herein against other subsidy publishers without stating that said orders were entered by consent agreements. In our view, these actions simply reflect the hearing examiner's determination as to the factors to be considered in this case and, at most, constitute nonreversible error from which bias cannot be presumed and which in no way constituted denial of a fair trial. Likewise the hearing examiner's comments in his initial decision concerning certain of respondents' literature and statements made by respondents' counsel, if in error, obviously are based on his honest interpretation of the record. Furthermore, respondents' contention that certain statements made during the course of the hearing to the individual respondent indicated bias, is without merit. These statements, read in the context in which they were made, reflect no animosity or bias toward respondents, but were made simply to impress on the individual the finality of a certain ruling and the importance of proper conduct in the course of the hearing.

Respondents also contend that the hearing examiner exhibited bias by denying the defense of *res judicata* raised in their answer without giving them a chance to be heard thereon. The record shows that the hearing examiner had examined the record in the prior proceeding upon which the defense was based and thus had sufficient knowledge upon which to make his decision. Moreover, on the basis of this knowledge, the hearing examiner's denial was proper. The issue presented in this case was not raised in the previous complaint (Docket No. 6638) and, furthermore, the issues in the previous complaint were not disposed of by a trial on the merits but were settled by the negotiation of agreement of the parties containing a consent order.

In view of the foregoing, the initial decision is vacated and set aside. We are entering our own findings as to the facts, conclusions and order to cease and desist in conformity with this opinion.

Commissioner Mills did not participate in the decision herein for the reason he did not hear oral argument.