with the words "U.S.A.," or "U.S.A. Pat. ________" or "U.S. Pat. ________" or packages, containers, display devices or guarantee forms in inventory as of said date imprinted with those words.

It is further ordered, That the foregoing shall be without prejudice to the rights of respondents (a) to seek a ruling from the Commission pursuant to § 3.61 of the Commission's Rules with respect to the use of push pin components in excess of the foregoing numbers, or (b) to seek advice from the Commission regarding the use in their products of parts thereof made in a foreign country.

It is further ordered, That the Initial Decision of the hearing examiner be, and it hereby is, vacated.

It is further ordered, For purposes of the reports of compliance to be filed in this matter that the country of origin or fabrication of the leather components of watchbands made in the United States from foreign skins (including alligator, sea turtle, seal, etc.) shall be deemed to be the country where such skins are finished but acceptance of such reports of compliance may be rescinded pursuant to § 3.61(d) of its Rules if the Commission subsequently determines that the country where the skins were taken and/or tanned are material facts and that they should be disclosed in the public interest; and in such event, the respondents shall be afforded 180 days after notice of such determination within which to comply therewith.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

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

IN THE MATTER OF

THE SEEBURG CORPORATION

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

*Docket 8682. Complaint, Apr. 22, 1966—Decision—Apr. 10, 1969**

Order requiring a Chicago, Ill., manufacturer of vending machines to

*Paragraph D of order modified pursuant to a decision of the Court of Appeals, Sixth Circuit, 425 F.2d 124 (8 S.&D. 1146), December 10, 1970, 77 F.T.C. 1540.

divest itself of a Chattanooga, Tenn., company in the same business, and refrain for a period of 10 years from acquiring any domestic vending equipment supplier without prior Commission approval.

COMPLAINT

The Federal Trade Commission has reason to believe that The Seeburg Corporation, a corporation, has acquired the assets of Cavalier Corporation, a corporation, in violation of Section 7 of the Clayton Act (15 U.S.C. Sec. 18), as amended, and therefore, pursuant to Section 11 of said Act (15 U.S.C. Sec. 21), it issues its complaint, stating its charges in that respect as follows:

I

Definitions

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

(a) "Vending machine" means any coin-operated electronic or mechanical device which dispenses a product.

(b) "Bottle vending machine" means any vending machine which dispenses bottled soft drinks.

II

The Seeburg Corporation

2. The Seeburg Corporation, respondent herein, is a corporation, organized and existing under the laws of the State of Delaware with its principal office located at 1500 North Dayton Street, Chicago, Illinois.

3. Respondent, directly or through its subsidiaries, is principally engaged in the manufacture and sale of coin-operated phonographs, various types of vending machines, background music systems, hearing aids, electronic organs and coin-operated amusement games. For the fiscal year ended October 31, 1963, respondent had sales of $54,581,306, assets of $36,258,288 and net income of $2,484,483.

4. Respondent, directly or through its subsidiaries, operates manufacturing plants located in Chicago and Niles, Illinois; Windsor Locks, Connecticut; Minneapolis, Minnesota; Haverhill, Massachusetts; Laconia, New Hampshire; and Chattanooga, Tennessee.

5. In 1958, respondent entered the vending machine manufacturing industry through the acquisition of certain assets of a

cigarette vending machine manufacturing company. The growth and expansion of respondent's line of vending machines have to a substantial extent been attributable to a series of acquisitions of all or part of the assets or stocks of other vending machine manufacturers. Respondent's sales of vending machines have grown from approximately $3.2 million in 1959 to over $23 million in 1963.

6. At the time of the challenged acquisition respondent was the fourth largest manufacturer of bottle vending machines. For the fiscal years ended October 31, 1960, through October 31, 1963, respondent's shipments of bottle vending machines were as follows:

Year	*Units*	*Dollar value*
1960	6,300	$3,114,000
1961	7,561	3,589,000
1962	10,016	5,537,000
1963	11,722	5,290,000

7. At all times relevant herein, respondent was a corporation subject to the jurisdiction of the Federal Trade Commission and engaged in commerce, as "commerce" is defined in the Clayton Act.

III

Cavalier Corporation

8. Prior to December 3, 1963, Cavalier Corporation (Cavalier) was a corporation organized and existing under the laws of the State of Tennessee with its office and principal place of business located at 1100 East 11th Street, Chattanooga, Tennessee.

9. At the time of the acquisition, Cavalier was principally engaged in the manufacture and sale of bottle vending machines and was the second largest manufacturer of such machines. For the years 1961, 1962 and the ten-month period ending October 31, 1963, Cavalier had sales of bottle vending machines as follows:

Year	*Units*	*Dollar value*
1961	22,152	$7,518,000
1962	17,658	6,441,000
1963	24,111	8,607,000

10. At all times relevant herein, Cavalier was a corporation engaged in commerce, as "commerce" is defined in the Clayton Act.

IV

Acquisition

11. On or about December 3, 1963, respondent acquired all of

the assets and business of Cavalier for a consideration of approximately $11,813,000.

V

The Nature of Trade and Commerce

12. The vending machine manufacturing business in the United States is substantial. In 1963, the dollar value of shipments of vending machines amounted to approximately $162,815,000.

13. Vending machines are the indispensable means of distribution for the automatic merchandising industry. There are no substitutes for vending machines in the performance of this function.

14. The demand for vending machines has increased sharply in recent years as the sale of goods through vending machines has expanded from an estimated $600 million in 1946 to $3.2 billion in 1963. At the same time, concentration in the manufacture of vending machines has substantially increased, in large part as a result of many mergers and acquisitions. In 1963, the four largest companies accounted for approximately 60% of the total dollar value of industry shipments of vending machines.

15. In 1963, respondent accounted for approximately 14.2%, and Cavalier for approximately 5%, of the total dollar value of shipments of vending machines in the United States.

16. Bottle vending machines are the most important single category, in terms of units and dollar value of shipments, in the vending machine manufacturing industry. In 1963, there were about twelve companies engaged in the manufacture and sale of bottle vending machines with total shipments of 131,296 units having a dollar value of approximately $50,572,000. In that year four companies accounted for over 84% of the total shipments of such vending machines.

17. Prior to the acquisition, respondent and Cavalier were substantial actual and potential competitors in the sale of bottle vending machines. In 1963, respondent accounted for approximately 9%, and Cavalier for approximately 18% of the total shipments of such machines.

18. As a result of the challenged acquisition respondent is now the second largest manufacturer of bottle vending machines and concentration has increased to the point where the two largest firms account for approximately 68% of the total shipments of such machines. At the same time, respondent has substantially enhanced its overall position in the vending machine

manufacturing industry and concentration has increased to the point where the two largest companies account for approximately 45% of the total dollar value of industry shipments.

VI

Violation of Section 7 of the Clayton Act

19. The effect of the acquisition of Cavalier Corporation by The Seeburg Corporation may be substantially to lessen competition or to tend to create a monopoly in the manufacture and sale of vending machines of all types and in the manufacture and sale of bottle vending machines, in the United States, in the following ways, among others:

(a) Substantial actual and potential competition between respondent and Cavalier has been eliminated.

(b) Cavalier has been eliminated as a substantial independent competitive factor.

(c) Concentration in the manufacture and sale of vending machines and bottle vending machines has been substantially increased.

(d) Respondent has substantially enhanced its competitive position to the detriment of actual and potential competition.

(e) The entry of new competitors into the manufacture and sale of vending machines and bottle vending machines may be inhibited or prevented.

Now, therefore, the acquisition of Cavalier Corporation by The Seeburg Corporation, as above alleged, constitutes a violation of Section 7 of the Clayton Act, as amended (15 U.S.C. Sec. 18).

Mr. Raymond L. Hays, Mr. Montgomery K. Hyun, Mr. William E. Barr, Mr. A Roy Lavik supporting the complaint.

Mr. Frederick M. Rowe, Mr. James M. Johnstone and *Mr. A. Paul Victor* for respondent.

INITIAL DECISION BY EDGAR A. BUTTLE, HEARING EXAMINER

MAY 22, 1967

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STATEMENT AND HISTORY OF PROCEEDINGS

The complaint herein was issued by the Federal Trade Commission on April 22, 1966, and challenges the legality under § 7 of the amended Clayton Act (15 U.S.C. § 18) of The Seeburg Corporation's acquisition of Cavalier Corporation in December 1963.

Specifically the complaint alleges that the acquisition's effect "may be substantially to lessen competition or to tend to create a monopoly in the manufacture and sale of vending machines of all types and in the manufacture and sale of bottle vending machines, in the United States" by (1) the elimination of "substantial actual and potential competition between" Seeburg and Cavalier, (2) the elimination of Cavalier "as a substantial independent competitive factor," (3) substantially increasing "concentration in the manufacture and sale of vending machines and bottle vending machines," (4) substantially enhancing Seeburg's "competitive position to the detriment of actual and potential competition," and (5) inhibiting or preventing "the entry of new competitors into the manufacture and sale of vending and bottle vending machines" (Complaint, par. 19).

By its answer, filed May 31, 1966, as amended August 4, 1966,

Seeburg denied the material allegations of the complaint, including particularly all of the alleged adverse competitive effects claimed to flow from the challenged acquisition (Answer, pars. 5, 6, 17, 19).

In addition, as an affirmative defense, Seeburg challenged the Commission's jurisdiction on the grounds that the complaint's issuance "was based on procedures violative of the letter and spirit of the Administrative Procedure Act, the Freedom of Information Act of 1966, and the canons of administrative due process of law" (Ans., par. 20). On July 15, 1966, Seeburg filed a Motion to Vacate the Commission's Complaint on these same grounds. Respondent's Motion to Vacate the Complaint certified to the Commission by the hearing examiner on August 4, 1966, was denied by the Commission on October 25, 1966. Respondent's court action seeking an injunction and declaratory relief was dismissed on November 28, 1966, by the United States District Court for the Eastern District of Tennessee (Western Division). Respondent's appeal from the District Court's said order is now pending before the U.S. Circuit Court of Appeals for the Sixth Circuit (*The Seeburg Corp.* v. *FTC*, appeal docketed, No. 17,606, 6th Cir., Dec. 12, 1966).

Beginning on June 16, 1966, and continuing until the hearings commenced on December 6, 1966, a total of eight prehearing conferences were held before the hearing examiner. During these conferences, conducted in part pursuant to agendas agreed upon by the parties beforehand, numerous preliminary matters were accomplished to facilitate the actual hearings and to make for an orderly proceeding.

For example, each party filed pretrial briefs (counsel supporting the complaint on June 30, 1966; Seeburg on August 12, 1966) and served upon the other side their proposed exhibits and a list of proposed witnesses. Both parties had ample opportunity to, and did, file objections in advance of trial to many of the proposed exhibits disclosed by the other side. Moreover, Seeburg conducted discovery of third parties by means of subpoenas issued by the hearing examiner.

Finally, underlying documents in support of sales data intended to be relied upon by the parties were made available for mutual verification in advance of trial, eventually enabling the parties to stipulate on January 11, 1967, as to certain sales data for Seeburg and other third party vending machine manufacturers (CX 247; RX 417). These stipulations obviated the necessity for

detailed statistical proof, including the testimony of six statistical witnesses originally scheduled by counsel supporting the complaint.

In addition, the parties entered into a number of stipulations during the prehearing proceedings which facilitated the hearings. Thus, stipulations were obtained as to the genuineness of documents to be offered in evidence from the files of Seeburg and certain other companies in the vending industry (Tr. 12–14), to encourage a summarization of statistical data in the form of tables, graphs, etc., insofar as possible and as to the availability of underlying data for examination by opposing counsel (Tr. 14–15). Finally, the parties agreed that the "relevant geographic market in which to assess the alleged competitive effects of the acquisition challenged in this proceeding is the United States as a whole" (Tr. 15).

Pursuant to the hearing examiner's direction, both parties filed categorical allocations of evidence reflective of the theory of their case, indicating categorically the purpose of the documentation to be relied upon, prior to the trial commencement of their respective cases (complaint counsel on November 9 and 10, 1966, revised on December 29, 1966; Seeburg on February 20, 1967). These categorical allocations contributed considerably to an organized presentation by the parties, and enabled the hearing examiner to more readily understand the purpose of the testimony and exhibits received in evidence.

The hearings in this case commenced on December 6, 1966. During the hearings, complaint counsel introduced approximately 118 exhibits which were received in evidence and adduced the testimony of 27 witnesses, all except two of whom were, or had been associated with companies that are, or were, in various segments of the vending industry.[1] The remaining two witnesses

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[1] The 27 witnesses and the pages at which their testimony appears in the transcript were: P. L. Hockman, president, Victor Products Corporation (Tr. 695–714, 744–76, 783–857; RX 461); Roy M. Small, executive vice president, Victor Products Corporation (Tr. 1254–1320; RX 418); Justin Funkhouser, chairman of the board, Victor Products Corporation (Tr. 1320–50); Robert O. McNearney, secretary, UMC Industries, Inc. (Tr. 1397–1412); Thomas B. Donahue, vice chairman of the board, UMC Industries, Inc. (Tr. 1413–48); Glenn I. Carbaugh, secretary and legal Counsel, Vendo Company (Tr. 1454–74, 1488–91); John L. Burlington, vice president, Sales and Marketing, Vendo Company (Tr. 1493–1509; 1515–30); Paul F. Selzer, vice president, Sales, Vendo Company (Tr. 1541–61); George W. Hansen, vice president in charge of engineering and vice president for Vendo International (Tr. 1562–77, 1580–1603); William F. Swingler, vice president, Canteen Corporation (Tr. 1616–40); Richard J. Mueller, vice president, Rowe Manufacturing Division, Canteen Corporation (Tr. 1651–83); Frank Newman, secretary, Canteen Corporation (Tr. 1683–86); Charles H. Brinkmann, formerly of Westinghouse Electric Corporation's Automatic Merchandising Division (Tr. 1699–1723); William A. Ebner, vice president, Sales, LaCrosse Cooler Company (Tr. 1728–34, 1742–46, 1758–64); Emmert T. Jansen, vice president in charge of International Operations

were members of trade associations connected with the vending industry.[2]

These industry witnesses explained the competitive realities of the vending industry, and particularly on the rapid changes developing therein in the years preceding and subsequent to the acquisition of Cavalier.

Also, during the hearings the examiner directed complaint counsel to make available to Seeburg's counsel certain correspondence in the Commission's files that may be "explanatory of some of the evidence adduced or which may be adduced" (Certification to the Commission, etc., Dkt. 8682, p. 2 (Feb. 3, 1967)). After complaint counsel declined to comply with the hearing examiner's direction, the matter, on February 3, 1967, was certified to the Commission, which by order of March 27, 1967, directed that the pertinent documentation be produced (Order Directing Production and Ruling on Request for Plenary Consideration of Certification, Dkt. 8682 (March 27, 1967)).

On February 8, 1967, complaint counsel rested their case-in-chief.

Immediately thereafter, Seeburg made an oral motion to dismiss this proceeding on the grounds that complaint counsel had failed to "prove a prima facie case of the charges alleged in the Commission's complaint" (Tr. 2274). Pursuant to Rule § 3.6 (e), the hearing examiner reserved decision on this motion pending completion of respondent's case-in-chief and the filing of proposed findings of fact and conclusions of law (Tr. 2275).

Thereafter, on February 15, 1967, Seeburg's counsel notified the hearing examiner and complaint counsel of respondent's decision not to present extended oral testimony in their defense "inasmuch as we believe that virtually all of the evidence which we originally contemplated in support of our defense, * * * has

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and secretary, Cornelius Company (Tr. 1765–72); Harold Teeter, president, Selectivend Inc. (Tr. 1776–97); Roy S. Steeley, vice president and general manager, Dixie-Narco Corp. (Tr. 1828–45); Frederic Dean, vice president, Castle Rubber Co. (Tr. 1904–19); J. E. Graham, vice president, Sales, Cavalier Division, Seeburg Corp. (Tr. 1945–79); Max Miller, president, Choice-Vend Division, Seeburg Corp. (Tr. 1983–2004); Robert J. Jordan, vice president, Sales, Choice-Vend Division, Seeburg Corp. (Tr. 2005–30); William J. Raoul, president, Cavalier Division, Seeburg Corp. (Tr. 2052–85); Delbert W. Coleman, chairman of the board, Seeburg Corp. (Tr. 2086–2115); William F. Adair, president, Seeburg Sales Corp. and executive vice president, Seeburg Corp. (Tr. 2116–46); Richard W. Funk, legislative counsel, National Automatic Merchandising Assn. (stipulated) (Tr. 2147–51); Dwight Reed, assistant executive vice president, National Soft Drink Assn. (Tr. 2163, 2172) ; Edward G. Doris, executive vice president, Rock-Ola Manufacturing Company (Tr. 2192–2210).

[2] The two witnesses were: Dwight Reed and Richard W. Funk. The testimony of Mr. Reed was stricken by the hearing examiner as irrelevant and immaterial to the issues in the case (Tr. 2220–22).

been brought out during the case-in-chief, by direct testimony and cross-examination * * * ," and of respondent's intentions of "rounding out the record in those areas where the evidence may warrant some corroboration and amplification" (Letter to the undersigned hearing examiner, Feb. 15, 1967).

Accordingly, Seeburg began its defense on March 1, 1967, consisting of a total of 171 exhibits which were received in evidence.

There being no rebuttal evidence adduced by complaint counsel, both sides rested their case on March 3, 1967.

On March 31, 1967, the hearing examiner granted motions requesting the examiner to permit the parties to supplement the record by the addition of certain documents.

The transcript of the entire proceedings totals 2,533 pages and 289 exhibits.

The hearing examiner has carefully considered the proposed findings of fact and conclusions supplemented by briefs and reply briefs of complaint counsel and counsel for respondent, and such proposed findings and conclusions if not herein adopted, either in the form proposed or in substance, are rejected as not supported by the record or as involving immaterial matters.

FINDINGS OF FACT*

I. Nature of the Business of Respondent

The Seeburg Corporation

1. The Seeburg Corporation, respondent herein, is a corporation organized and existing under the laws of the State of Dela-

*In view of the clarity of a substantial amount of uncontradicted evidence, and in view of the accuracy of certain findings, the hearing examiner has adopted a considerable number of respondent's proposed findings with some amendments, as well as some proposed findings of complaint counsel. In doing so, the examiner makes the observation that the purpose of requiring proposed findings is so that they may be ruled upon specifically. The adoption, deletion, or amendment, therefore, constitutes such a ruling. The following cases clearly hold that their adoption does not detract from the weight to be given to them provided the findings are adequate: *United States* v. *Crescent Amusement Co.*, 323 U.S. 173 (1944); *Edward Valves, Inc.* v. *Cameron Iron Works, Inc.*, 289 F.2d 355 (5th Cir. 1961), *cert. denied*, 368 U.S. 833 (1961); *Kinnear-Weed Corp.* v. *Humble Oil & Ref. Co.*, 259 F.2d 398 (5th Cir. 1958), *cert. denied*, 361 U.S. 903 (1959); *Penn-Texas Corp.* v. *Morse*, 242 F.2d 243, 247 (7th Cir. 1957).

The proposed findings of complaint counsel were rather limited in scope since complaint counsel apparently believe that a considerable number of the evidentiary facts received in evidence which have been proposd as findings by the respondent are immaterial even though complaint counsel made no objection thereto and in most instances offered the evidence themselves. However, it is observed that in filing a reply brief, complaint counsel did not seem to contest the accuracy of respondent's proposed findings, which in any event are supported by the record in every detail. The essential differences in the proposed findings filed are that complaint counsel appear to advocate resolution by means of abstract principles or rules of law unassociated with all of the specific market facts evidenced, as distinguished from

ware, with its principal office located at 1500 North Dayton Street, Chicago, Illinois (Cplt., par. 2; Ans., par. 2).[3]

2. Seeburg, directly or through its subsidiaries, is principally engaged in the manufacture and sale of coin-operated phonographs, various types of vending machines, background music systems, hearing aids, electronic organs, coin-operated amusement games and various string and band musical instruments (Cplt., par. 3; Ans., par. 3).

3. As of May 1964, Seeburg's subsidiary corporations and affiliated corporations were as follows:

Subsidiaries:

The Seeburg Sales Corporation, Chicago, Illinois.
Seeburg International, Inc., Chicago, Illinois.
International Bally Coffee Vending Co., Niles, Illinois.
The Seeburg Real Estate Corporation, Chicago, Illinois.
Seeburg Music Library, Inc., Chicago, Illinois.
American Sound Products, Inc., Minneapolis, Minnesota.
Universal Music Company, Ltd., St. James, Manitoba, Canada.

Subsidiaries of Seeburg Music Library:

Beatrice Music Co., Chicago, Illinois.
Fremont Music Co., Chicago, Illinois.

Affiliated companies:

Seeburg Automatic Products Pty. Ltd., Australia.
Serose Holding, Ltd., Switzerland.

Wholly owned subsidiaries of Serose Holding, Ltd.:

Seeben, S.A., Belgium.
Seerome, S.P.A., Italy.
Seevend, G.m.b.h., Germany.
Phoenix Apparate, G.m.b.h., Germany.
Seeburg Limited, England.

(CX 2A–B *in camera*.)

4. Seeburg manufactures vending machines at three separate locations. The Chicago division located in Chicago, Illinois, manufactures under the "Seeburg" trade name all vending machines which Seeburg sells with the exception of bottle vending machines and can vending machines. The Choice-Vend Division, located

respondent's counsel who asserts that all of the market facts are material to resolution. The issues, therefore, emanate mostly from disagreement as to legal theory rather than from disagreement as to the evidentiary facts.

[3] Seeburg is the successor in interest to a corporation which was incorporated in 1906 under the name Fort Pitt Brewing Co. In 1956, Fort Pitt Brewing Co. purchased the operating assets of J. P. Seeburg Corp., a manufacturer of coin-operated phonographs, and in 1958 changed its name to The Seeburg Corporation, a Pennsylvania corporation. On March 30, 1962, the Pennsylvania corporation was merged with its Delaware subsidiary corporation and became The Seeburg Corporation, a Delaware corporation.

in Windsor Locks, Connecticut, manufactures bottle vending machines and can vending machines; and the Cavalier Division, located in Chattanooga, Tennessee, also manufactures bottle vending machines and can vending machines (Adair, Tr. 2118, 2119, 2122, 2128–30, 2132, 2133; Miller, Tr. 1983; Raoul, Tr. 2054, 2055; CX 35B; CX 40, pp. 7, 9; CX 39, p. 8; CX 41A–C; RX 83).

5. The vending machines manufactured at the Chicago plant are marketed by The Seeburg Sales Corporation, a wholly owned sales subsidiary, through a nationwide network of distributors. For 1965, sales of vending machines by Seeburg Sales Corporation were approximately $14 million (CX 41A–C; CX 40, pp. 7, 9; CX 37A–C; CX 247, p. 2 *in camera*; Adair, Tr. 2118, 2119, 2122, 2129–40).

6. Bottle vending machines and can vending machines manufactured by Seeburg's Choice-Vend Division are sold under the "Choice-Vend" trade name, directly to customers throughout the United States. During 1965, sales of such vending machines by the Choice-Vend Division were approximately $8,130,000 (Jordan, Tr. 2009; CX 40, pp. 7, 9; CX 41A; CX 247, p. 2 *in camera*).

7. Bottle vending machines and can vending machines manufactured by Seeburg's Cavalier Division are sold under the "Cavalier" trade name, directly to customers throughout the United States. During 1965, sales of such vending machines by the Cavalier Division were approximately $9,248,000 (Graham, Tr. 1955–58, 1960, 1961; CX 40, pp. 7, 9; Raoul, Tr. 2054–55; CX 247, p. 2 *in camera*).

8. Products manufactured by Seeburg's various divisions and subsidiaries are sold to customers outside the United States and Canada by a wholly owned subsidiary, Seeburg International, Inc. (CX 41A).

9. Seeburg sells coin-operated vending machines to vending operators through The Seeburg Sales Corporation and to soft drink bottlers through its Choice-Vend and Cavalier Divisions (CX 40, pp. 7, 9–10).

10. For the period 1960–1965, Seeburg's net sales, assets and net income were as follows:

Year ended 10/31	Net sales	Assets	Net income
1960	$29,900,000	$20,000,000	$1,200,000
1961	35,200,000	27,500,000	1,100,000
1962	54,600,000	30,400,000	2,500,000
1963	59,900,000	36,300,000	2,800,000
1964	82,300,000	73,200,000	4,000,000
1965	89,700,000	85,900,000	600,000

(CX 7, pp. 7–9; CX 8, pp. 7–9; CX 9, pp. 9–11; CX 10, pp. 3–5; CX 33, pp. 13–15; CX 39, pp. 11–13.)

11. During the fiscal year ending October 31, 1963, the last fiscal year prior to the challenged acquisition, Seeburg's net sales of all products manufactured totaled $54,581,306, and the dollar value of its assets was $36,258,288 (CX 10, pp. 3–4). During that year, Seeburg's sales of all coin-operated vending machines sold in the United States amounted to 41% of Seeburg's total net sales of all products (CX 247; CX 10, p. 3).

12. Seeburg entered the vending industry in 1958 when it acquired the "bankrupt" Eastern Electric Company Inc.'s cigarette machine (Coleman, Tr. 2087).

13. Seeburg continued to expand its line of vending equipment, adding coffee machines, soft drink cup and bottle machines, and candy and pastry machines to its line as part of a program of diversification and, as also indicated by the testimony, "[i] n order to get competitive and compete, we found that we had to have a fuller line so as to satisfy the customer's requirements" (Coleman, Tr. 2092). In this connection, Seeburg made the following vending machine acquisitions, other than the one challenged by the instant complaint, between 1959 and 1964:

Year	Company	Product
1958	Eastern Electric Co., Inc.	Cigarette vending machine.
1959	Bert Mills Corporation	Batch brew coffee machine.
1959	Lyon Industries, Inc.	Cup vending machine.
1960	Choice-Vend Corporation	Bottle vending machines.
1961	Refrigeration Division, Brewer-Titchner Corp.	Manual selector cold drink vendor.
1961	Lion Manufacturing Corp. and subsidiary Bally Vending Corp.	Single cup coffee machine.[4]
1963	Pick-A-Pac, Vend-O-matic Sales, Inc.	Nonfood all-purpose merchandiser.
1964	Arthur H. DuGrenier, Inc.	Candy, pastry, snack, cigarette, cigar, cigarillo, laundry supply machines.[5]

(CX 11, pp. 8–9; Coleman, Tr. 2086–95, 2096–2100.)

14. Seeburg's diversification included the acquisition, in February 1960, of substantially all the assets of Choice-Vend Corporation, which manufactured bottle and can vending machines. As Delbert W. Coleman, chairman of the board of The Seeburg Corporation, testified "[w]e viewed the bottle vending industry as an adjunct to vending and envisioned something—that some day the bottler would be moving into full-line vending. And this would give us an opportunity to sell our equipment as well as the equipment Choice-Vend was making. Choice-Vend at the time was a very small company" (Coleman, Tr. 2094).[6]

[4] Purchase price approximately $3 million.

[5] Purchase price approximately $1,072,000.

[6] Purchase price approximately $1,016,000. Sales of Choice-Vend in the year prior to its acquisition were $1,600,000. Following its acquisition, the Choice-Vend Division moved into a new and substantially expanded plant with modernized production facilities at Windsor Locks, Connecticut. The expenditure for the construction and outfitting of the Windsor Locks plant was approximately $1.5 million.

15. None of the foregoing acquisitions are challenged by the instant complaint (Cplt., par. 19).

16. On December 3, 1963, Seeburg acquired all the assets and business of Cavalier Corporation for a consideration approximating $11.8 million (Cplt., par. 11; Ans., par. 11; CX 15 A–Z–36; 10, p. 8). It is this acquisition which is challenged.

17. Seeburg is engaged in interstate commerce and is a corporation subject to the jurisdiction of the Federal Trade Commission (Cplt., par. 7; Ans., par. 7).

II. Status of Cavalier Corporation Prior to Its Acquisition by The Seeburg Corporation

18. Prior to December 3, 1963, Cavalier Corporation was a corporation organized and existing under the laws of Tennessee, with its office and principal place of business located at 1100 East Eleventh Street, Chattanooga, Tennessee (Cplt., par. 8; Ans., par. 8).

19. At the time of the challenge acquisition in 1963, and for some years prior thereto, Cavalier was engaged in the manufacture of bottle and convertible bottle/can vending machines exclusively for sale to the company-owned and contract bottlers of Coca-Cola. In prior years, Cavalier had also manufactured certain furniture products and electric space heaters. Cavalier had discontinued these manufacturing activities by the time of the challenged transaction in 1963 (Graham, Tr. 1946–47; Raoul, Tr. 2053–61, 2064; CX 25; RX 83).

20. As of December 31, 1962, the last full year prior to the challenged acquisition, Cavalier reported net sales of $8,408,823 (CX 15Y) and assets totaling $7,199,070 (CX 21B).

21. Cavalier had been a supplier of "coolers" to the company-owned and contract bottlers of Coca-Cola since at least 1934, and had established a close relationship with the Coca-Cola parent syrup company over the years (Raoul, Tr. 2057–58, 2066). Cavalier's only attempt to sell to other than Coca-Cola bottlers, the so-called "trade" bottlers, which began in 1955, was unsuccessful, and it abandoned its efforts to sell to those bottlers in 1957, after two years (Graham, Tr. 1971–72; Raoul, Tr. 2066–75).

22. In November 1963, Cavalier, which was a defendant in a lawsuit alleging patent infringement instituted by The Vendo Co., settled this litigation out of court for $800,000 (CX 15–Z5).

23. Prior to the challenged acquisition in 1963, and at all times

pertinent to this proceeding, Cavalier was a corporation engaged in "commerce" (Cplt., par. 10; Ans., par. 10).

III. Relevant Geographic Market

24. As stipulated by the parties "The relevent geographic market in which to assess the alleged competitive effects of the acquisition challenged in this proceeding is the United States as a whole" (Stip., Tr. 15).

IV. Nature of the Vending Industry-Generally

25. The vending industry is a large and growing segment of the economy in which foods, drinks, cigarettes, and related products are distributed to the public through coin-operated vending equipment placed and serviced in numerous public and private locations by two basic types of organizations, vending operators and soft drink bottlers (Donahue, Tr. 1418–21; Swingler, Tr. 1623, 1630–33, 1637–39; RX 421A, E; 443, pp. 2, 4, 7–8; 444, pp. 2–4; 446, pp. 5, 17, 19–20; 442, p. 7; 441, p. 5; 388A–C; 397A–B; 398A–C; 389A–G; 390A–E; 487L–M; 395; 396A–D; 399).

26. This growth has been related to the development of efficient and attractive vending equipment which is increasingly used to more economically and conveniently serve the needs of the consuming public, particularly in locations where cafeteria operations were frequently "losing situations," such as industrial plants, schools and hospitals (Swingler, Tr. 1630). "Because of advancing technology and the combining of food services and vending skills, many institutional and industrial organizations are for the first time becoming prospects for the type of service" provided by vending operators and soft drink bottlers (RX 459, p. 7).

27. In 1963, the year of the challenged acquisition, total sales of all products through vending machines approximated $3.2 billion, up from some $600 million in 1946 (RX 421A).

A. *Manufacturing Segment of the Vending Industry*

28. According to Census data, there were at least 76 companies manufacturing coin-operated vending equipment at the time of the challenged acquisition in 1963 (CX 98). In that year these manufacturers reported sales of 606,665 vending machines with a dollar value of $163.5 million (CX 100).

29. Coin-operated vending machines have been described as "a cabinet with a vending mechanism and * * * storage there-

in which, with the insertion of a coin, * * * would release a product, unattended" (Small, Tr. 1258). Generally, all coin-operated vending machines have the same type of basic operating components. All coin-operated vending machines contain a cabinet with a door inside of which is storage space, a coin mechanism which accepts good coins and rejects slugs, and activates a circuit and produces the product to be vended. All coin-operated vending machines have a vend mechanism, which releases one product and holds back the other products in the storage area upon the insertion of a coin (Small, Tr. 1258–63; Donahue, Tr. 1424–25, 1427; Hansen, Tr. 1563–64; Mueller, Tr. 1655–56).

30. Some components of coin-operated vending machines differ depending upon the product being dispensed (Small, Tr. 1262–63; Donahue, Tr. 1422–23). For example, the vending mechanism for an instant coffee machine is a relatively simple device, whereas the vending mechanism for a batch brew coffee machine is somewhat more complicated because the former machine uses powered ingredients while the latter machine must actually brew freshly ground coffee (Mueller, Tr. 1660–61).

31. All coin-operated vending machines have the same basic physical characteristics and are a homogeneous category of equipment in terms of their basic function of dispensing the desired product to purchasers upon the insertion of a coin (Small, Tr. 1258–63; Hansen, Tr. 1563).

32. The following table shows the stipulated sales of all coin-operated vending machines in the United States in 1963 on a unit and dollar basis, by manufacturers of such equipment whose representatives testified at the hearing in this case:

Company	1963 unit sales	1963 dollar sales
The Vendo Company	82,248	$39,547,470
Universal Match Corp.	46,123	18,518,565
Canteen Corp.	33,393	20,095,378
The Seeburg Corp.	27,115	22,572,000
Cavalier Corp.	23,164	8,269,000
Westinghouse Electric Corp.	20,520	8,999,000
The Cornelius Co.	12,960	2,231,767
LaCrosse Cooler Co.	7,790	2,614,000
The Selectivend Corp.	5,463	2,248,489
Victor Products Corp.	4,586	2,654,077
Dixie-Narco, Inc.	1,879	1,391,236

(CX 226, 247; RX 468.)

33. *The Vendo Company.*—At the time of the challenged acquisition in 1963, Vendo was the only manufacturer of a complete line of vending equipment, including machines which dispense hot and cold drinks, hot and cold foods, candy, snacks,

cigarettes, coffee and pastry, that sold to all classes of vending machine customers (RX 457, pp. 18–19), with sales of $39,547,470 (CX 226) and 82,248 units (RX 468). Vendo also was the only approved manufacturer of upright bottle and can vending machines marketing those machines to all classes of soft drink bottler customers. In that year, Vendo's sales of all bottle vending machines sold in the United States totaled $16,705,300 (CX 225) and 46,836 units (RX 469).

34. *UMC Industries, Inc.*—Another important factor in the vending industry at the time of the challenged acquisition in 1963 was Universal Match Corporation (today UMC Industries, Inc.) which reported sales of coin-operated vending machines of $18,518,565 and 46,123 units (CX 226; RX 468). At the time of the challenged transaction, UMC, through its several vending machine manufacturing subsidiaries acquired since 1956, manufactured a relatively full line of vending machines, including those which dispense foods, cigarettes, candy, pastry, snacks and cold drinks, for sale to all classes of customers except non-Coca-Cola bottlers (Donahue, Tr. 1416, CX 66, p. 7; 67, p. 4; 71, pp. 8–9, 12).

35. *Canteen Corporation.*—Also in 1963, Automatic Canteen (today Canteen Corporation) was another manufacturer of coin-operated vending equipment. Canteen, which was also the largest vending operator in the United States (Swingler, Tr. 1619), had entered the manufacturing segment of the vending industry in 1955, when it acquired one of the industry's leading manufacturers, Rowe Manufacturing Company, which was primarily a manufacturer of cigarette and candy machines (Swingler, Tr. 1618). In 1963, Canteen's Rowe Manufacturing Division manufactured a full line of vending machines, including those which dispense hot and cold drinks, hot and cold food, snacks, candy, cigarettes and coffee, with the exception of bottle and can vending machines, and reported vending machine sales of $20,095,378 and 33,393 units (CX 226; RX 468).

36. *The Seeburg Corporation.*—In 1963, Seeburg reported $22,575,000 in sales of coin-operated vending machines, comprising 27,115 machines on a unit basis (CX 226; RX 468).

B. *Purchasers of Vending Equipment*

37. Traditionally, the many different types of vending machines manufactured have been purchased by two basic types of customers: (a) vending operating companies, and (b) soft

drink bottling firms (Hockman, Tr. 759–62; Funkhouser, Tr. 1344–45; Burlington, Tr. 1499; Selzer, Tr. 1553–54; Brinkmann, Tr. 1706–07).

1. *Vending Operating Companies*

38. Vending operating companies, often referred to as "operators" or "vendors," are organizations which purchase and place banks of vending machines "on locations of various types," such as "industrial plants, offices, institutions, hospitals and furnishes the product in these locations" (Swingler, Tr. 1620–21; Funkhouser, Tr. 1345), and provide the necessary food and mechanical service to these machines.

39. Among the prominent vending operator companies in the United States, at the time of the acquisition in 1963 and today, are the following:

Canteen Corporation (RX 446).
Servomation Corporation (RX 443).
Automatic Retailers of America, Inc. (RX 459).
ABC Consolidated Corporation (RX 490).
The Macke Company (RX 444).

40. These vending operating companies are substantial enterprises and have experienced a substantial growth in sales and operations over the past decade. For example, Canteen Corporation, the largest "vendor" in the United States (Swingler, Tr. 1619), reported an increase in sales from $224 million in 1962 to $313 million in 1966 (RX 446, p. 17). Similar rapid increases were recorded by other vending operating companies, such as Servomation Corporation (from $68 million in 1961 to $161 million in 1966, RX 443, p. 6), The Macke Company (from $20 million in 1961 to $68 million in 1966, RX 459, p. 4), and ABC Consolidated Corporation (from $91 million in 1956 to $140 million in 1965, RX 490, pp. 22–23).

41. Vending operating companies purchase substantial quantities of vending equipment in order to carry out their operations and serve their markets adequately. For example, in 1966, Servomation Corporation has 92,800 vending machines in operation, up from 71,200 in 1964 (RX 443, p. 2). Also, Automatic Retailers of America, Inc., had over 97,000 vending machines in operation in 1965 (RX 459, p. 9), and The Macke Company had over 45,000 machines "producing revenue daily" in 1966 (RX 444, p. 3).

2. *Soft Drink Bottlers*

42. Basically, soft drink bottling firms bottle and distribute

soft drinks made from syrup manufactured by the various soft drink syrup manufacturers (parent syrup companies) in bottles, cans and cups, through various means, including vending machines, in various locations. While most soft drink bottling firms are independent franchises, parent syrup companies also own bottling plant subsidiaries (Graham, Tr. 1968; RX 289C–D)

43. In connection with their vending operations, soft drink bottlers purchase vending equipment which dispenses soft drinks in bottles, cans, bottles and/or cans and through cups, and place them in various locations (Hockman, Tr. 747, 769; Small, Tr 1256; Donahue, Tr. 1417, 1429; Burlington, Tr. 1495; Selzer, Tr. 1546; Brinkmann, Tr. 1702; Raoul, Tr. 2064).

44. Representatives of vending machine manufacturers testified that many of the machines manufactured and used by soft drink bottlers to dispense bottled soft drinks are easily adaptable to dispense canned soft drinks in a short period of time and for very little cost (Hockman, Tr. 768–70; Small, Tr. 1266–67; Jordan, Tr. 2009; Brinkmann, Tr. 1704, 1707–08). Some of these machines are convertible through the simple adjustment of "risers" (Small, Tr. 1266–67) and others through the use of conversion kits (Brinkmann, Tr. 1707–08; RX 63 A–B, 57, 427 A, 139 A).

45. Selectivend Inc., in 1965 developed a "conversion kit for our visual selective models" which "will easily and inexpensively convert any row in these vendors to one way glass and cans. The unit can then accommodate returnables, one way glass or cans" (RX 139 A).

46. In 1965, Selectivend also "developed a new five-flavor automatic" which is "unique in that we can vend returnable glass, one way glass, or cans (12 oz. and 10 oz.). The additional cost for change-over is only twelve cents and five minutes" per shelf (RX 139 B, 140 A).

47. Soft drink bottlers have been, and still are, the largest single class of customers for bottle and bottle/can vending machines manufactured and sold in the United States (Hockman, Tr. 703; Burlington, Tr. 1500; Brinkmann, Tr. 1702; Miller, Tr. 1986; CX 247; RX 417).

48. Many soft drink bottling firms are substantial business enterprises with significant sales. For example, The Coca-Cola Bottling Company of Los Angeles reported total sales of $25 million in 1965, up from $21 million in 1961 (RX 439, p. 14). The Coca-Cola Bottling Company of New York reported sales of

$50 million in 1965, an increase from $36 million in 1961 (RX 142, p. 18). The Coca-Cola Company, *i.e.*, the parent syrup company, which reported sales of nearly $864 million in 1965 (RX 473, p. 3), owns some 40 soft drink bottling subsidiaries in the United States (Graham, Tr. 1968). Pepsi-Cola General Bottlers, Inc., which operates in four major marketing areas spread out over six States, has increased its sales from $14 million in 1956 to $45 million in 1965 (RX 441, pp. 9–10). In addition, many parent syrup companies make available financial assistance to their franchised soft drink bottling firms in connection with their purchases of vending equipment (Small, RX 418, p. 5; RX 436 A, 267, 128, 195 A, 424 A, 289 D).

49. According to the stipulated sales figures for manufacturers from whom witnesses testified at the hearing, soft drink bottlers purchased some $47 million worth of bottle or bottle/can vending machines in 1963, the year of the challenged acquisition (CX 247; RX 417).

a. *Historical Development of the Coca-Cola/"Trade" Bottler Customer Dichotomy*

50. Historically, Coca-Cola was the leader in the development of a program for the dispensing of soft drinks in bottles in vending machines. William G. Raoul, formerly president of Cavalier Corporation and now president of the Cavalier Division of The Seeburg Corporation, testified:

> Coca-Cola Company focused as long ago as 1930, in promoting the sale of the product chilled for consumption on the premises. What we call the cold-bottle market. So it had gone through a long development. The bottlers of Coca-Cola had service departments and a lot of their business was concentrated in this field and it was a regular thing with them (Raoul, Tr. 2072–73).

51. Development of this on the premises cold bottle market "was quite different" "in the rest of the trade" (Raoul, Tr. 2073). As Mr. Raoul testified, "some had sold a few coolers, some had not. It just followed a different evolution" (Raoul, Tr. 2073). Non-Coca-Cola, *i.e.*, "trade" bottlers, at first did not have the "orientation towards what we call the" cold bottle market "that we find in the Coca-Cola industry. Their attitude was just different" (Raoul, Tr. 2069).

52. Manufacturing considerations also contributed to this historic dichotomy. According to record evidence, received without objection from counsel supporting the complaint:

> Machines which are built in the design program of The Coca-Cola Company are not readily adaptable to the different appearance requirements of other

parent companies. Furthermore the general soft-drink trade is accustomed to somewhat different services from the manufacturer. Because of the wide variation in bottle sizes and shapes it is customary for the manufacturer to fit up the machine completely for specified bottles before shipment, and to install coin-handling equipment and advertising signs. The manufacturer serving this field must be prepared to finish his machines in a number of different color schemes, whereas the manufacturer serving Coca-Cola has only one basic scheme. Machines for Coca-Cola bottlers are not ordinarily fitted up for bottles before shipment nor equipped with coinage and signs. These are shipped separately, a system which grew up in the Coca-Cola field years ago and which has been followed ever since. The manufacturer serving the general soft-drink trade has totally different space requirements from his competitor who deals with Coca-Cola. The latter finishes and packs his machines as they come off the assembly line—in fact finishing is done *before* assembly. The supplier to the general trade holds a large part of his inventory in a base coat only, and uncrated, so that he can fit up the machines for the various franchises on receipt of orders (RX 450 B–C, cf. Raoul, Tr. 2072–73; Hansen, Tr. 1567–69; Hockman, Tr. 776).

53. Coca-Cola bottlers, of which there are approximately 1,000 (RX 289 A), are also deemed "the wealthy" and "more aggressive bottlers" (Coleman, Tr. 2113).

54. Industry witnesses have recognized this historical dichotomy among soft drink bottler customers, and customarily refer to them as Coca-Cola bottlers on the one hand, or "other than Coca-Cola bottlers" or "trade bottlers" on the other hand (Small, Tr. 1299; Selzer, Tr. 1546–48; Miller, Tr. 2002; Raoul, Tr. 2066–72; RX 457, p. 19).

55. According to the stipulated sales data, slightly over 53% of the bottle and can vending machines sold to all soft drink bottlers in 1963 on a unit and dollar basis were sold to Coca-Cola bottlers, with the balance sold to the non-Coca-Cola or so-called "trade" bottlers (CX 247; RX 417, 485, 486).

b. *Equipment Approval Programs for Bottle and Can Vending Machines*

56. Historically, in both the Coca-Cola and "trade" bottlers segments, vending equipment manufacturers have submitted their soft drink vending equipment to the parent syrup companies for their approval or acceptance prior to offering such equipment for sale to their wholly owned and franchised bottlers (Small, Tr. 1294–95; Hansen, Tr. 1591–92; Ebner, Tr. 1759).

b–1. *Coca-Cola Approval Program*

57. Coca-Cola's equipment approval program appears to have been the most formal and fully developed of such programs at

the time of the challenged acquisition (RX 289 A–D, 238 A–D, 239 A–B, 70 A–Y, 221, 225 A–C, 223 A–C, 226 A–C).

58. On August 6, 1957, Coca-Cola established the equipment acceptance program it had in effect at the time of the challenged acquisition in 1963 (RX 289 A). Under this program, when a bottle vending machine is found "acceptable," this "means to bottlers that such machines are considered satisfactory for their intended purpose, have been laboratory and/or field tested, and have been found acceptable to the standards established by The Coca-Cola Company" (RX 289 A–B).

59. The "purposes and objectives" of Coca-Cola's program were twofold: (a) "to provide several lines of vending equipment for Coca-Cola that are representative of the high quality characteristic of that product"; and (b) "to assure bottlers of Coca-Cola an advance evaluation of a broad selection of equipment having highest merchandising appeal, designed and built in a manner to operate with maximum efficiency and minimum maintenance and service costs" (RX 289 B).

60. In actual operation, even if a vending machine submitted for testing and approval was not objectionable for the standpoint of mechanical or engineering defects, Coca-Cola declined the approval of the machine when it felt there was "a limited market for equipment of this type and size, and an additional supplier was not required" (RX 166 A–B).

61. As of 1962, Coca-Cola applied its equipment approval program to limit the number of approved suppliers of bottle vending equipment to Coca-Cola bottlers. As Sam N. Gardner, Coca-Cola's vice president in charge of Bottler Sales Promotion, advised one supplier of machines on July 2, 1962:

> * * * we do not feel it would be to our advantage to further broaden the line of coolers now being offered by the several manufacturers unless a specific cooler fills a specific gap in the line, and therefore would be extremely reluctant to recommend approval of an additional cooler to the [Sales Equipment] Committee under any other circumstances (RX 162; RX 273, 166 A–B, 289 A–D, 434 B–C).

62. As part of its equipment approval program, it was customary for the Coca-Cola parent syrup company to work closely with its traditional approved suppliers to modify and correct any mechanical and engineering defects found in their bottle and can machines to facilitate approval (Brinkmann, Tr. 1715–16; Hansen, Tr. 1591; RX 289 C, 291 A–B, 238 A–D, 239 A–B, 44, 46, 47 A–B, 70 A–Y, 221, 225 A–C, 223 A–C, 226 A, 209, 334

A–B, 346 A–C). Thus, Coca-Cola transmitted to its traditional suppliers copies of its engineering evaluation of machines submitted for approval, which contain useful information identifying any defects discovered, offered possible solutions or modifications (RX 70 A–Y, 221, 225, A–C, 223 A–C, 238 A–D), and otherwise cooperated with these manufacturers to facilitate ultimate equipment approval (Brinkmann, Tr. 1715–16; Hansen, Tr. 1591; RX 334 A–C, 346 A–C, 291 A–B, 44, 46, 51, 226 A–B, 209).

63. In particular, Coca-Cola would customarily work with its traditional suppliers to correct any refrigeration and sweating problems in machines submitted for approval, and ultimately to work out such problems to the satisfaction of all concerned (Hansen, Tr. 1598–99; RX 346 A–C, 291 A–B, 70 A–C, 221, 225 A–C, 223 A–C, 226 A–B, 209, 200 A–B).

64. Coca-Cola approval resulted in important advantages for approved suppliers. For example, such approval entitled the manufacturers' equipment to be listed in Coca-Cola's "Catalog of Merchandising Equipment for Coca-Cola" (RX 173 A–B). In addition, Coca-Cola would send a formal notification to all its bottlers advising of approval of the specific machines (RX 67). Finally, the approved manufacturer was eligible to participate in Coca-Cola's "cold drink incentive program" designed to "increase the number of coolers * * * shipped and placed by bottlers" (RX 241 A–C).

65. Prior to the challenged acquisition, the only time Coca-Cola departed from its policy of approving only traditional, established suppliers was when the Cornelius Company developed a unique horizontal bottle vendor designed to serve a specific need in 1962 (RX 162, 173).

66. The Cornelius horizontal bottle vendor "is a small compact unit where the dispensing of the bottle is done by lifting a lid and moving the bottle through a track or—over a release mechanism and inserting a coin that will unlock the release mechanism and then the bottle is vertically withdrawn" (Jansen, Tr. 1768), and is a substantially different machine that the ordinary upright bottle vending machine (Ebner, Tr. 1761; RX 173 A–B).

67. Cornelius' horizontal bottle vendor was attractively styled, had "the appearance of fine furniture" (RX 173 A), and was particularly suitable for "prestige" or "style-conscious" locations not generally amenable to the larger upright bottle vendors (RX 173 A, 172 B, 308 E). Thus, this machine, which had the

advantages of "compactness and low cost" (RX 173 A) was frequently placed in such locations as beauty parlors, barber shops, offices, waiting rooms, medical clinics, and other locations "never before considered vendor prospects" (RX 173 A–B, 172 A–B, 308 E–G).

68. Recognizing the uniqueness of the Cornelius machine, Coca-Cola, "after considerable delay," finally approved this unit, anticipating "that its availability will serve to further stimulate cooler placements across the country" (RX 162).

69. When approving the Cornelius horizontal bottle vendor for sale to Coca-Cola bottlers and thereby "authorizing use of the [Coca-Cola] trade-mark on it," Coca-Cola made it clear that it was not altering its equipment acceptance program, which generally confined acceptance to machines of Coca-Cola's traditional suppliers (RX 162). As Sam N. Gardner, Coca-Cola's vice president of Bottler Sales Promotion, stated in the letter dated July 2, 1962, advising Cornelius of its approval of the horizontal bottle vendor:

> I do not believe it would be well for The Cornelius Company—or, for that matter, any other company—to assume that acceptance of this particular cooler, which fills a specific need, would in any way affect consideration of other models that might be designed by your company—or any other company—in the future. In other words, we do not feel it would be to our advantage to further broaden the line of coolers now being offered by the several manufacturers unless a specific cooler fills a specific gap in the line, and therefore would be extremely reluctant to recommend approval of an additional cooler to the [Sales Equipment] Committee under any other circumstances (RX 162; cf. RX 273).

70. Cornelius was not an approved supplier to Coca-Cola bottlers of automatic upright bottle and can vending machines (RX 434 C).

b–2. *"Trade" Bottler Approval Programs*

71. Similar equipment approval programs serving the same purpose as Coca-Cola's were conducted by the various "trade" bottler parent syrup companies, *i.e.*, Pepsi-Cola Company, Royal Crown Cola Company, Seven-Up Company, Canada Dry Corporation, and Dr. Pepper Company (Small, Tr. 1295; Ebner, Tr. 1759–60; Teeter, Tr. 1797; RX 122 A, 101, 105, 128, 119, 137 A–B, 195 A–B, 356, 424 A–B, 430 A–B, 429, 425, 422 A–B, 423). Thus, in the course of securing approval, traditional suppliers and parent syrup companies customarily cooperated in making corrections and modifications of engineering or mechanical defects which become apparent during testing of the vending equipment.

As Roy M. Small, executive vice president of Victor Products Corporation, testified, it was customary for parent syrup companies to cooperate with the supplier to iron out deficiencies in equipment (Small, RX 418, p. 9).

72. Once parent syrup company approval of their machines was secured, "trade" bottler suppliers had available the benefits flowing therefrom. As Justin Funkhouser, chairman of the board of Victor Products Corporation testified, upon approval the parent syrup company would release "notification to their franchised bottlers and in substance say, 'We can recommend this particular model unit manufactured by Victor Products Corporation for your use.' And, concurrently, make it known to their franchised bottlers that if they buy this equipment it would be eligible for parent company finances (sic) support" (Funkhouser, Tr. 1342). Similarly, William A. Ebner, vice president in charge of sales for LaCrosse Cooler Company, testified that without approval, "we are not able to manufacture a product in their (parent syrup companies') identification, and as a consequence, the bottlers would not be receptive to purchasing our product and, number two, we would not be a participant in the special incentive programs, or this type of thing that the parent company might put on as inducement for" a bottler to purchase machines (Ebner, Tr. 1759). Thus, parent syrup company approval gave suppliers assurance (RX 128, 151 A–C) that an approved machine would be eligible for participation in parent syrup companies' incentive programs (RX 128, 271 A–D, 195 A–B), and that parent syrup company financing would be available for the approved machine (RX 195 A).

b–3. *Necessity for Parent Syrup Company Approval*

73. Although failure to obtain parent syrup company approval does not entirely preclude an equipment manufacturer from soliciting sales of equipment to a particular class of bottlers, no company can "successfully market" such equipment without parent syrup company approval (Small, Tr. 1294–95, 1297–98; Brinkmann, Tr. 1717; Ebner, Tr. 1759; Teeter, Tr. 1797; Steeley, Tr. 1843–44; cf. RX 122 A, 101, 128, 137 A–B, 271 A–B, 195 A, 424 A, 423, 166 A, 66 A–B, 67, 162, 173 A–B).

c. *Coca-Cola and "Trade" Bottler Purchasing Patterns*

74. At the time of the challenged acquisition in 1963, soft drink bottlers purchased their bottle and can vending machines from manufacturers who generally served either one or the other of the two distinct classes of customers, Coca-Cola or "trade"

bottlers (Small, Tr. 1299; Donahue, Tr. 1433, Tr. 1429; Brinkmann, Tr. 1702–03; RX 40 C).

75. Typical of the industry's recognition of this historic split is the testimony of Roy M. Small, executive vice president of Victor Products Corporation, concerning the meaning of the term "other side of the street," as used in the industry with respect to the sale of vending machines. Mr. Small testified that "[d]epending on what side of the street you are on[,] [i]t is—has always referred to the industry as Coca-Cola suppliers, or other than Coca-Cola suppliers" (Small, Tr. 1299). In other words, "if you sell to Coca-Cola Company, you don't sell to other companies" (Small, Tr. 1299). This was corroborated by the testimony of many other industry witnesses who testified that their soft drink vending equipment customers were either Coca-Cola or "trade" bottlers (Hockman, Tr. 775; Donahue, Tr. 1429, 1433; Brinkmann, Tr. 1702–03; Ebner, Tr. 1758).

76. As of the time of the challenged acquisition in 1963, no manufacturer successfully marketed its conventional upright bottle and can machines to "both sides of the street" from the same manufacturing facilities and under the same trade name. The only departure was the Cornelius Company, whose low-cost unique horizontal bottle vendor was suitable for placement in new and specialized locations (Donahue, Tr. 1429; Burlington, Tr. 1519–21; Raoul, Tr. 2067–75; Small, Tr. 1299; RX 450 A–F, 316 C–D, 162, 40 C, 457, p. 19, 173 A–B, 172 A–B, 308 A–H, 175).

c–1. *Coca-Cola Bottler Suppliers*

77. At the time of the challenged acquisition in 1963, the Coca-Cola parent syrup company had approved the bottle and can vending equipment of five suppliers of upright bottle and can vending machines, with whom it worked cooperatively and closely over the years to perfect their machines.

78. As of 1962, Coca-Cola had approved the bottle and can vending equipment of only Vendo (Tr. 1518; RX 346 A–C), Cavalier (Tr. 2064; RX 66 A–B), Westinghouse (Tr. 1703; RX 239 A–B), Glasco (Tr. 1429; RX 226 A–B), and Dixie-Narco (Tr. 1843; RX 200 A–B).[7] Most of those companies had been approved Coca-Cola suppliers for over 30 years (Brinkmann, Tr. 1714–15; Donahue, Tr. 1419; Raoul, Tr. 2053, 2056–57; CX 65,

[7] Some of Vendorlator Mfg. Co.'s machines had been approved by Coca-Cola when the equipment approval program originated in 1957 (CX 250 F). However, shortly after its acquisition by Vendo in 1956, Vendorlator no longer solicited Coca-Cola bottlers, but sold bottle and can vending machines to "trade" bottlers only (Burlington, Tr. 1518–21, 1528–29; RX 457, p. 19, 318 B–C).

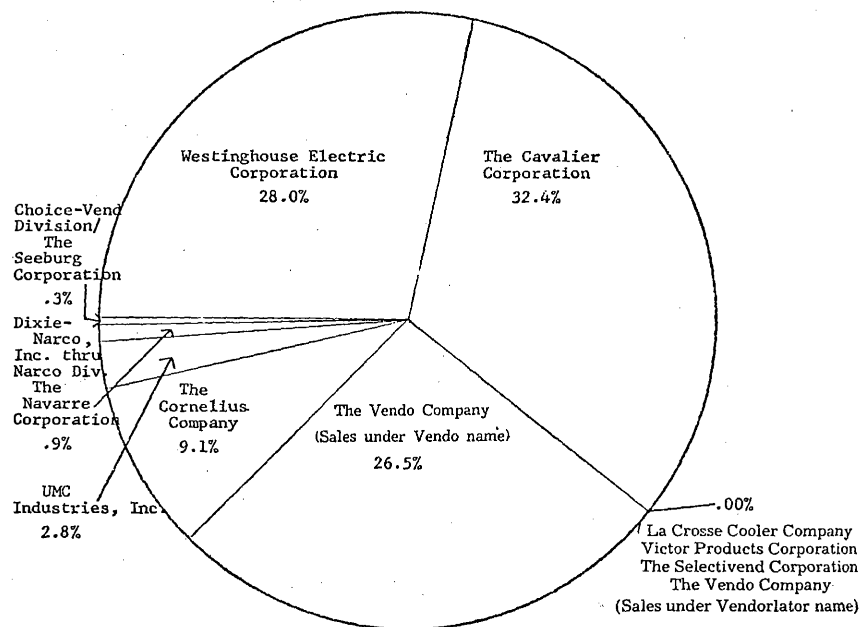
p. 7) and had solicited only the bottle and can vending machine business of Coca-Cola bottlers on an exclusive basis. Although Vendo also solicited the business of "trade" bottlers separately through its Vendorlator operations, it maintained separate facilities and a separate "specialized sales force" to sell an exclusive line of machines to Coca-Cola bottlers (Burlington, Tr. 1518–21; Selzer, Tr. 1546–49; RX 457, p. 19, 315, 316 C–D, 318 A–D).

79. As late as 1965, one and one-half years after the challenged acquisition, Coca-Cola's approval of soft drink bottle vending machines was limited to five suppliers (RX 492 A–B). Coca-Cola listed "Cavalier Corporation" as an approved supplier even though Cavalier had by that time become a Division of The Seeburg Corporation (RX 492 A).

80. The following charts, Respondent's Exhibits 474 and 475,

RESPONDENT'S EXHIBIT 474

SALES OF COIN-OPERATED BOTTLE VENDING MACHINES
(IN UNITS)
AS A PERCENTAGE OF STIPULATED SALES OF SUCH MACHINES
TO COCA COLA BOTTLERS
FOR 1963



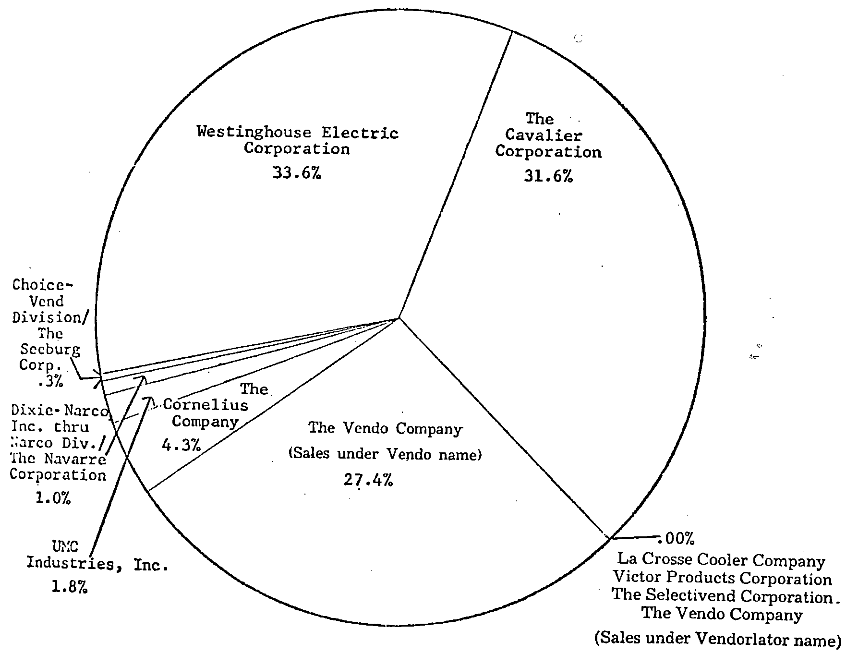
Source:

CX 247

RX 417

RESPONDENT'S EXHIBIT 475

SALES OF COIN-OPERATED BOTTLE VENDING MACHINES
(IN DOLLARS)
AS A PERCENTAGE OF STIPULATED SALES OF SUCH MACHINES
TO COCA COLA BOTTLERS
FOR 1963



Source:
CX 247
RX 417

reflect sales of coin-operated bottle vending machines as a percentage of stipulated sales of such machines to Coca-Cola bottlers on a unit and dollar basis in 1963, the year of the challenged acquisition:

81. According to the stipulated sales of bottle vending machines to Coca-Cola bottlers in 1963, the year of the challenged acquisition, over 90% of the sales of such machines to Coca-Cola bottlers were made by only three of the accepted suppliers, Vendo, Westinghouse, and Cavalier (RX 474–75).

82. In addition, according to stipulated sales data, sales of Cornelius' unique horizontal bottle vendor represented 9.1% of bottle vending machine sales to Coca-Cola bottlers on a unit basis and 4.3% on a dollar basis at the time of the challenged acquisition (RX 474–75).

83. On the other hand, at the time of the challenged acquisition, the traditional "trade" bottler suppliers, whose equipment was not approved by the Coca-Cola parent syrup company, made virtually no sales of bottle and can equipment to Coca-Cola bottlers and did not solicit the business of that class of customers (Hockman, Tr. 776; Small, Tr. 1300; Ebner, Tr. 1743–44; Teeter, Tr. 1784–85; Miller, Tr. 1986–87; Coleman, Tr. 2107; Selzer, Tr. 1544; CX 247; RX 474–75, 417).

84. Although Seeburg's Choice-Vend Division made a few sales of bottle vending machines to Coca-Cola bottlers at the time of the challenged acquisition, in 1963 these sales were negligible, amounting to .3% of stipulated sales of that type of machine made to that class of customers on a unit and dollar basis (Miller, Tr. 1987; Coleman, Tr. 2107; RX 474–75). Since it did not have Coca-Cola approval, Choice-Vend's "sales force did not solicit Coca-Cola bottlers," and "obtained what little business there was through conventions, meeting the bottlers at the conventions, their seeing our equipment, and word of mouth" (Miller, Tr. 1986–87, 1993; Selzer, Tr. 1544). Other "trade" bottler suppliers—*i.e.*, Victor Products, Selectivend, LaCrosse, Vendo, under the Vendorlator name, reported no sales of bottle and can vending machines to Coca-Cola bottlers in 1963 (RX 474–75).

c–2. *"Trade" Bottler Suppliers*

85. At the time of the challenged acquisition in 1963, "trade" bottlers, such as bottlers of "Pepsi-Cola, Royal Crown, Canada Dry, 7-Up and Dr. Pepper" (Miller, Tr. 1986), generally purchased their soft drink vending equipment from those manufacturers who worked closely with "trade" bottler parent syrup companies to secure approval of such equipment (Small, Tr. 1295, 1299; RX 418; Ebner, Tr. 1759–60; Teeter, Tr. 1797; RX 137 A–B, 122 A–B, 119, 105, 430 A–B, 429).

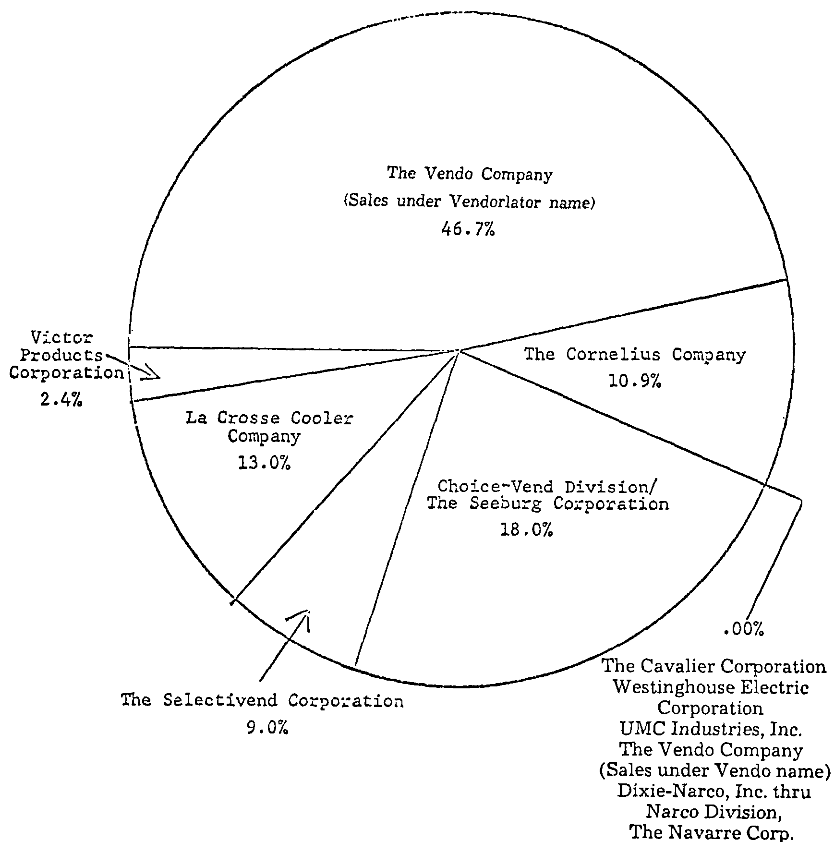
86. At the time of the challenged acquisition in 1963, "trade" bottlers were supplied their vending equipment by the following manufacturers: LaCrosse Cooler Company (Ebner, Tr. 1733); Selectivend, Inc. (Teeter, Tr. 1780–81); Victor Products Corporation (Hockman, Tr. 775; Small, Tr. 1295); Vendorlator Division of The Vendo Company (Burlington, Tr. 1520–21; Selzer, Tr. 1546–47); and the Choice-Vend Division of The Seeburg Corporation (Miller, Tr. 1986).

87. The following charts, Respondent's Exhibits 478 and 479, reflect sales of coin-operated bottle vending machines as a percentage of stipulated sales of such machines to "trade" bottlers

on a unit and dollar basis in 1963, the year of the challenged acquisition:

RESPONDENT'S EXHIBIT 478

SALES OF COIN-OPERATED BOTTLE VENDING MACHINES
(IN UNITS)
AS A PERCENTAGE OF STIPULATED SALES OF SUCH MACHINES
TO TRADE BOTTLERS (e.g. PEPSI COLA, ROYAL CROWN, ETC.)
FOR 1963

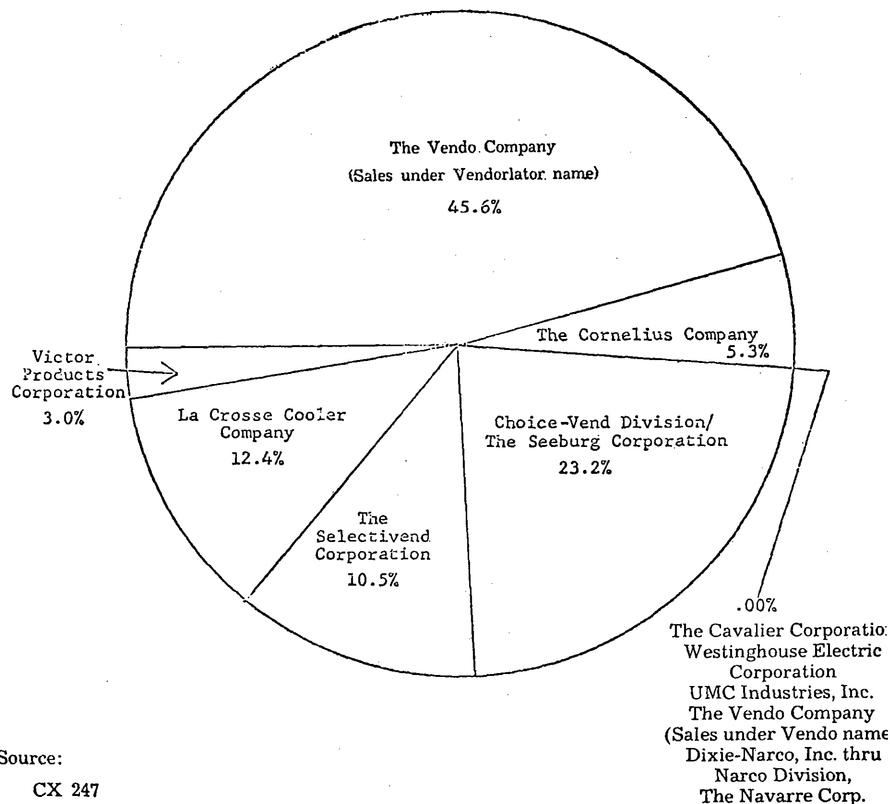


Source:
CX 247
RX 417

88. At the time of the challenged acquisition in 1963, the approved suppliers of Coca-Cola bottle and can vending machines (*e.g.,* Vendo, under the Vendo name, Cavalier, Westinghouse)

RESPONDENT'S EXHIBIT 479

SALES OF COIN-OPERATED BOTTLE VENDING MACHINES
(IN DOLLARS)
AS A PERCENTAGE OF STIPULATED SALES OF SUCH MACHINES
TO TRADE BOTTLERS (e.g. PEPSI COLA, ROYAL CROWN, ETC.)
FOR 1963



Source:
CX 247
RX 417

did not solicit "trade" bottlers and, in fact, made no sales to this class of equipment purchasers (*e.g.*, Graham, Tr. 1946–47; Brinkmann, Tr. 1702–03; Donahue, Tr. 1429; Selzer, Tr. 1546–49; Steeley, Tr. 1843; CX 247; RX 417, 478–79). These suppliers solicited Coca-Cola bottlers on an exclusive basis. The only exception involved Cornelius, which was an approved supplier of horizontal bottle vendors to both Coca-Cola and "trade" bottlers. (See Findings No. 65–70, 77–78.)

89. Cornelius was able to straddle both markets because its machine was unique and filled "a specific need" in that it was suitable for placement at locations which were not otherwise

economically served by ordinary upright bottle and can vending machines (RX 162, 173 A–B).

c–3. *Vendo's Ability to Serve Both Coca-Cola and "Trade" Bottlers*

90. Vendo, which prior to 1956 had been an exclusive supplier of bottle vending equipment to Coca-Cola bottlers, was able to serve the "trade" bottler segment of the vending industry after its acquisition of the Vendorlator Company in 1956 (Burlington, Tr. 1518; Selzer, Tr. 1546–49; CX 65, pp. 7–8; RX 315, A–D, 318 A–D).

91. Subsequent to Vendo's acquisition of Vendorlator, a "misunderstanding" developed between Vendo and the Coca-Cola bottlers, who had preferred Vendo as an exclusive supplier of Coca-Cola machines. The "misunderstanding" was caused by the confusion "that arose from the overlapping of our product lines and the differences in our policies" (RX 316 C). Vendo advised Coca-Cola bottlers that it would continue its exclusive and distinctive line of machines for Coca-Cola bottlers, would no longer sell the same machines through Vendorlator to "trade" bottlers that it was selling to Coca-Cola bottlers, and would continue to maintain its separate sales force calling exclusively on Coca-Cola bottlers as it always had in the past (RX 316 C–D). Vendo also emphasized the importance of making Coca-Cola bottlers realize that Vendorlator and Vendo machines will be "completely different * * * in exterior appearance" as well as price-wise (RX 318 C).

92. In addition to giving Vendo entry into the "trade" bottler segment of the vending industry, stipulated sales data demonstrate the importance of the Vendorlator acquisition to Vendo. For example, at the time of the challenged acquisition in 1963, sales of bottle and can vending machines sold under the Vendorlator name accounted for 59.7% of all such sales on a unit basis and 57.3% of all such sales on a dollar basis made by Vendo (RX 472). These sales accounted for 34.8% of all coin-operated vending machines sold by Vendo on a unit basis and 25.1% of such sales on a dollar basis in that year (RX 472).

93. Even though Vendo was thus able to serve both the Coca-Cola and "trade" bottler segments of the vending industry at the time of the challenged acquisition, it did so through separate "specialized sales forces" which sold differently styled equipment under separate trade names (Vendo and Vendorlator) (Burlington, Tr. 1518–21; Selzer, Tr. 1546–49; Hansen, Tr. 1566–69).

John L. Burlington, vice president of sales and marketing for Vendo, testified that neither the Vendo nor Vendorlator "specialized sales forces" solicited the other's customers, a long standing policy which Vendo considered necessary (Burlington, Tr. 1518–21; Selzer, Tr. 1546–49; RX 450 C, 315, 316 C–D, 318 A–D).

94. Even in the case of "cross-franchises," where a Coca-Cola bottler may "also have a Seven-Up franchise," Vendo would still have "specialized coverage" with "two men," one from each "specialized sales force" "calling on that account" (Burlington, Tr. 1520, 1528–29).

95. At the time of the challenged acquisition in 1963, the Vendorlator Division of The Vendo Company was the largest supplier of bottle vending machines to the "trade" bottler segment of the vending industry. According to the stipulated sales data for 1963, sales of coin-operated bottle vending machines to "trade" bottlers under the Vendorlator name amounted to 46.7% of all such sales on a unit basis and 45.6% on a dollar basis (RX 478–479).

96. At the same time, Vendo was one of the three major approved suppliers of soft drink vending equipment to Coca-Cola bottlers, to whom it supplied an exclusive line of equipment under the Vendo name, and accounted for 27.4% of stipulated dollar sales of bottle machines to those bottlers (RX 475), and 26.5% of such sales on a unit basis in 1963 (RX 474).

V. Trends and Developments in the Vending Industry

A. *Growth and Diversification in the Vending Industry*

97. Since the end of World War II, the vending industry has grown dramatically, with sales of products through vending machines rising from approximately $600-million in 1946 to $3.8 billion in 1965 (CX 64; RX 421 A).

98. This growth has been accompanied by rapidly improved technology, with a marketing transformation changing the image of the industry from simple penny machines, vending nuts and gum, to modern "banks" of sophisticated equipment vending a full range of foods and drinks catering to the needs and appetites of today's affluent consumer (Donahue, Tr. 1418–21; Swingler, Tr. 1622; CX 62, pp. 5, 10–11; 63, pp. 5, 10–11; 64, pp. 12–13; RX 421 E; 443, pp. 4–5, 7–8, 10; 444, pp. 2–5; 463, pp. 6–9; 459, pp. 7–8, 457, pp. 5–8).

99. As Thomas B. Donahue, vice chairman of the board of UMC Industries, Inc., testified on direct examination by com-

plaint counsel, prior to World War II the vending industry first "got started with little postage vendors and chewing gum and small candy bar vendors" (Tr. 1418). Thereafter, a series of developments produced cigarette vending machines, a type of soft drink bottle vending machine, and candy machines (Donahue, Tr. 1419). Then came World War II which acted as a "crystallization" period. "In other words, many people, especially the young men, were introduced to vending machines for the first time. In addition to that, it became apparent that many machines could do a job in the defense plants and in the shipyards where they served candy and cigarettes and cokes and began to perform services that were recognized as being essential, if you want to call it that, to the daily well being of the employees" (Donahue, Tr. 1420). "Then the industry began to expand. By that, I mean there was a much greater interest in vending other products, because the handwriting became apparent after a few years that we were going to be able to automatically feed people" (Donahue, Tr. 1421).

100. In addition to "vertical growth" of sales, the vending industry has also experienced a "lateral expansion as vending has moved into new fields of activity. Food vending, in particular, has opened up established markets to vastly greater sales opportunities, while at the same time creating new outlets never before accessible to the industry. High school students now buy noon time meals from batteries of automatic equipment; doctors and nurses and other staff people patronize hospital installations on a round-the-clock basis; visitors at parks and recreation spots find more and more products available through coin-operated equipment.

"Ever-increasing replacement markets, plus the new markets which are expanding the industry's scope of operations, give every indication vending will continue to grow in the years ahead" (CX 62, p. 5).

101. This "lateral expansion" of the industry in terms of new outlets and new products has in turn generated a demand for vending equipment compatible with the "full-line vending" concept.

102. Richard J. Mueller, vice president of Rowe Manufacturing Division of Canteen Corporation, the country's largest vending operator, testified that "the term 'full-line' is usually interpreted to mean to be able to put in a bank of vending equipment of various types in a row which are more or less compatable (sic)

with each other for—from the selling standpoint" and which will sell all of the products available for distribution through a vending machine, including "cold drinks, coffee, candy, sandwiches, pastry, cigarettes, [and] hot canned food" (Mueller, Tr. 1677; Selzer, Tr. 1554).

103. According to William F. Swingler, vice president of Canteen, the types of machines usually involved in a full-line vending operation include, among others, candy, beverage, coffee, milk, ice cream, soup, hot canned food, and general merchandiser vending machines (Swingler, Tr. 1638). Though these machines are also sold as individual units, "the operator will bank these machines together—" so that "they all blend together, just as one unit" (*Ibid.*). These "banks" of vending machines are "the same height [and] the same color" (*Ibid.*).

B. *Vending Operating Companies in Full-Line Vending*

104. At the time of the challenged acquisition in 1963, vending operating companies were fully engaged in full-line vending and were purchasing a wide variety of vending machines, including machines which dispense hot and cold beverages, hot and cold foods, sandwiches, pastry, coffee, ice cream and cold drinks to place "in a bank or multiple group" (Funkhouser, Tr. 1345) in such diverse locations as cafeterias and industrial plants, offices, hospitals, colleges and department stores (Burlington, Tr. 1494, 1499–1500; Funkhouser, Tr. 1345; Swingler, Tr. 1620–21, 1628–29, 1631–33; RX 443, pp. 4, 7, 10; 444, pp. 2, 4; 446, pp. 6–9, 19–20; 459, pp. 7–10). Recently, improved technology has enabled the development of a combination of vending machines and manual service to take place in the distribution of foods, thus permitting vending operators to expand into many new locations which engage in mass feeding (Swingler, Tr. 1628–30; RX 443, pp. 8–9; 444, p. 3; 446, pp. 5, 19; 459, p. 7; 421 B).

105. Vending operating companies have been increasingly purchasing canned soft drink vending machines for utilization in their operations and in their "banks" of equipment placed in various locations, finding this disposable container more amenable to their operations than bottles (Hockman, Tr. 789–90; Small, Tr. 1270; Selzer, Tr. 1546; Brinkmann, Tr. 1704–05, 1708–09, 1712; Jordan, Tr. 2028).

106. Vending operating companies are making increasing use of diversified banks of vending equipment in a variety of loca-

tions in order to satisfy changing consumer demands, and to accomplish their aim of providing complete vending and food service to their established and newly emerging customer markets (Swingler, Tr. 1620–21, 1628–33, 1635, 1637–38; RX 459, p. 7; 490, pp. 4, 8, 10; 446, p. 5).

C. *Soft Drink Bottlers Diversifying Into Full-Line Vending*

107. In addition to their bottle and can vending operations, both prior to and since the challenged acquisition in 1963, soft drink bottling firms were and are increasingly diversifying into full-line vending in order to satisfy changing consumer demand, and to protect their market position at locations where their soft drink products are being vended. William F. Swingler, vice president of Canteen, testified that soft drink bottlers had entered the full-line vending area and that this development "has been very active in the last ten years" (Swingler, Tr. 1638). Mr. Swingler further testified that full-line vending is a "growth segment" of the bottler business and that soft drink bottlers seek to place their vending machines in the same locations as vending operators (Tr. 1639). In addition, Mr. Coleman, chairman of the board of Seeburg, testified on direct examination by complaint counsel that there was an "increasing trend" of bottlers moving into full-line vending with "more bottlers moving into the industry full line every day" (Tr. 2112–15; see also Mueller, Tr. 1678–79; Swingler, Tr. 1638; Brinkmann, Tr. 1718). When a soft drink bottler entered into full-line vending, he would provide the same services as an operating company at the same or similar locations (Swingler, Tr. 1639; Adair, Tr. 2137).

Coca-Cola Bottler Activity in Full-Line Vending Operations

108. In addition to being the largest group of soft drink bottlers, and being the largest purchasers as a class of bottle and can vending machines for soft drink vending operations, Coca-Cola bottlers were rapidly moving into full-line vending at the time of the challenged acquisition (Coleman, Tr. 2105, 2112–15; Raoul, Tr. 2084; Brinkmann, Tr. 1718; RX 390 A).

109. Coca-Cola bottlers were particularly active in developing this new segment of bottler operations. As Delbert W. Coleman, chairman of the board of The Seeburg Corporation, testified on direct examination by complaint counsel, many Coca-Cola bottlers "were moving into full-line vending because here the institutions, plants, schools, and so forth, didn't want to deal with Coca-Cola bottlers for one thing and somebody else for a

coffee machine and somebody else for cigarette machines and somebody else for something else. They wanted one responsible person to come in and put in all the equipment. So you have a natural evolution of Coca-Cola bottlers to full-line vending" (Tr. 2105).

110. Mr. Coleman further testified that the Coca-Cola bottlers' activity in the area of full-line vending was encouraged and spurred on by The Coca-Cola Company, which was "very aggressive" in this field (Tr. 2114). He testified that The Coca-Cola Company recognized the necessity "to get Coca-Cola in all places" where a full-line of machines was being installed. If Coca-Cola were to "rely on a third–party operator, the parent company wouldn't know whether Coca-Cola was being vended in that plant or Pepsi-Cola or Seven-Up or anything else. They [Coca-Cola] weren't altruistic about selling coffee and milk, it was just an adjunct to sell Coca-Cola" (Tr. 2114).

111. By November 1961, 115 Coca-Cola bottlers were purchasing full-line vending equipment from Vendo, up from 42 in 1959 (RX 390 A). This represented some 12.8% of all Coca-Cola bottlers (on the basis of 900 Coca-Cola bottlers in the United States) as early as 1961 (RX 390 A). Sales of general products by Vendo to Coca-Cola bottlers amounted to $2,256,000 during January-November 1961, 12.4% of all Vendo general products sales to all customers (RX 390 A). In June 1961, The Vendo Company recognized a "very decided increase of interest with many of the Coca-Cola bottlers towards full-line vending" (RX 389 A) and concluded "if trends indicated by this information continue, bottlers of Coca-Cola should become increasingly important as customers for" vending machine products other than bottle and can vending equipment (RX 390 A).

112. Delbert W. Coleman, chairman of the board of The Seeburg Corporation, testified on direct examination by complaint counsel that at the time of the acquisition, "There was just one of our major competitors who sold Coca-Cola a full line and that was Vendo" (Tr. 2106).

D. *Development of National Users Vending Machine Programs*

113. A new and important marketing dimension in the vending industry came with the emergence in the early 1960's of a so-called National Users market. In this market, large national accounts, such as the major oil companies, primarily engaged in businesses other than vending, purchase diversified "banks" of

vending equipment for placement at various locations (Coleman, Tr. 2099–2100, 2106–07; Raoul, Tr. 2078–81; Brinkmann, Tr. 1718–21; RX 388 A–C, 219 A–F, 450 A–F, 434 D, 393 A–O, 399).[8]

114. The National Users development resulted in "a new channel of distribution for vending equipment" (RX 450 E, 487 L). The operation of this new distribution channel may be illustrated by describing the processes through which vending machines are placed on location in service stations. Before the National Users system developed, neither service stations nor their parent companies dealt with vending machine manufacturers. Vending machine manufacturers sold their soft drink machines directly to soft drink bottlers, who placed them on location with service station dealers. Similarly, the service stations' requirements for "full line" equipment (all coin-operated vending machines except those designed to dispense bottled and canned soft drinks) were satisfied not by the vending machine manufacturers directly, but primarily by local vending machine operators, who placed such machines on location in the service stations and furnished the product and mechanical service as needed. Frequently, these operators placed used vending equipment at the service stations which resulted in these locations being cluttered "with a hodgepodge of old equipment that detracts from the general appearance of the stations and reduces the appeal for the products being vended" (RX 450 F).

115. The National Users programs made it possible for national companies to purchase "uniform banks of vending equipment" directly from the vending machine manufacturer for placement in their filling stations or other locations, "with color schemes customized to the National Users' specification" (RX 450 A, 487 L).

116. At the time of the Seeburg acquisition of Cavalier in 1963, soft drink bottlers participated in the parent syrup companies' National Users programs in order to protect their markets in a changing vending industry (RX 434 D, 450 E–F, 487 L–M).

117. Soft drink bottlers do not technically sell vending equipment to National Users, but cooperate in such programs by providing necessary services, such as uncrating, checking out and in-

[8] Although much of the attention in this developing market has been focused on the large national and regional oil companies, business prospects are not confined only to service stations as they "are only one part of what is a very large field and there's many other possible branches," such as retail food store chains (Raoul, Tr. 2081; Brinkmann, Tr. 1719; Coleman, Tr. 2105; RX 434 D).

stalling equipment, and mechanical services as needed, in the hope of having their soft drink products vended through the bottle or can vending equipment placed at the National Users' locations (RX 434 D, 450 E–F, 487 L–M). As George M. Lawson, vice president of The Coca-Cola Company explained Coca-Cola's National Cooler Users Program, "[t]he equipment is shipped to the local bottler who uncrates it, tests it and delivers it to the chain. The bottler hopes through this service to enlist the good will of the national user and to sell him product (sic) to be vended through the equipment," although on occasion, the bottler, and not representatives of the manufacturer, may actually "solicit the business and deliver coolers from his own inventory to the chain, either billing the manufacturer for the cooler delivered, or obtaining replacement thereof from the manufacturer" (RX 434 D).

118. Thus, "[a] service-station dealer who wishes to install a bank of vending machines under the National User Program will contact the office of the oil company that supplies him with his petroleum products. He advises the oil company of the types of vending machines that he desires and the local bottler with whom he has arranged for mechanical service. The oil company places the order with the vending machine manufacturer. The machines are painted to the color specifications of the oil company, the bottle vender is equipped with a sign bearing the trademark of the cooperating bottler, and all equipment is shipped to the local bottler. The bottler uncrates, checks out the equipment and installs it in the service station. The service-station dealer obtains supplies from local wholesalers, fills the equipment and collects all revenue from the sale of the products. The vending machine manufacturer bills the oil company direct for the equipment and payment for the equipment is remitted by the service-station dealer to the oil company on a monthly basis" (RX 450 F).

119. Basically, the sales effort in the National Users market is carried on at the oil chain headquarters, where representatives from the vending machine manufacturers and parent syrup companies call on Users to acquaint them with the program and the availability of equipment (Selzer, Tr. 1558; RX 450 F, 388 A–3).

120. The machines most frequently used in the National Users market consist of a "bank" of soft drink (bottle, can or bottle/can), candy, cigarette and coffee machines, or any combination thereof which meets the needs of a particular location. Ac-

cording to evidence received without objection from complaint counsel, in order to "compete successfully for their business, the vending machine manufacturers must have a complete line of equipment, including bottles, candy, cigarette and coffee vendors" (RX 450 A; Raoul, Tr. 2083–84; Brinkmann, Tr. 1720–22).

121. Thus, under the National Users programs, as with the full-line vending concept, manufacturers need matched banks of vending equipment to serve the changing market's needs.

122. An additional requirement for the National Users business is the necessity "that the manufacturer have a working relationship with all bottlers in every community, because the cooperating bottler is selected by the service-station operator, and if the operator chooses a bottler who does not do business with a given manufacturer, the manufacturer is prohibited from placing equipment in that location" (RX 450 A).

Coca-Cola and Coca-Cola Bottler Activity in the National Users Market

123. The Coca-Cola Company was particularly active in the development of this National Users market. Coca-Cola was the soft drink most frequently demanded by oil company customers in this segment of the market (RX 388 B; Tr. 2107). Coca-Cola people and Coca-Cola bottlers were aggressively selling these National Users, and in the service stations "they wanted Coca-Cola" (Coleman, Tr. 2107). As Charles H. Brinkmann, formerly in charge of Westinghouse Electric Corporation's Automatic Merchandising Division, testified, "he knew" the Coca-Cola Company in Atlanta, Georgia "to be most active in this field" (Tr. 1720).

124. William G. Raoul, who was president of Cavalier Corporation and is now president of the Cavalier Division of The Seeburg Corporation, testified on direct examination by complaint counsel that he had first become aware of the "National Users Plan of The Coca-Cola Company" at a meeting with Coca-Cola in Atlanta "about five years ago," *i.e.*, 1962, although "it could have been longer than that" (Tr. 2078). Mr. Raoul further testified that this meeting was "[a] long time before the acquisition" (Tr. 2079). Coca-Cola "explained to us what the National Users Market was and what Coca-Cola's basic policy towards it would be; because it affected us as suppliers. It also affected the bottlers" (Tr. 2079). "The problem of selling accounts to transcend the normal territorial limits of the contract bottlers. And the Coca-Cola plan for doing it" was explained

(Raoul, Tr. 2079). Coca-Cola "had a Department for that purpose several years ago and have been working on it consistently ever since" (Raoul, Tr. 2079).

125. Coca-Cola's interest in the National Users market was outlined in a letter from Sam N. Gardner, vice president of Bottler Sales Promotion for The Coca-Cola Company, to Mr. John T. Pierson, Jr., of The Vendo Company, on November 4, 1963, summarizing the "conclusions and viewpoints expressed" at a meeting between Coca-Cola and Vendo officials held to discuss the changing nature of the vending industry in this regard. Mr. Gardner acknowledged "the recent trend toward multiple vending in service stations," and the "increasing tendency toward centralized buying of unitized vending batteries at chain headquarters level" (RX 388 A). He also recognized "the vital importance of this market to the Coca-Cola bottlers," and expressed concern about protecting the bottlers' interest, which could only be done "through a cooperative effort between the Bottlers, the Company, and the vendor manufacturer soliciting business at headquarters level" (RX 388 A). Accordingly, Mr. Gardner indicated Coca-Cola's "intention to support the efforts of The Vendo Company—and other approved manufacturers—to sell unitized vendor batteries to the oil chains as a means of protecting the existing position established by the Bottlers" (RX 388 A). Furthermore, Mr. Gardner noted the active efforts Coca-Cola would take to protect the interest of its bottlers by contacting these national chains in an effort to "sell the chain on the advantages of working with the Coca-Cola Bottlers" (RX 388 A).

126. Mr. Gardner also stated that "[i]n view of the long-term relationship between Vendo," Coca-Cola Company and Coca-Cola bottlers, Vendo "should make every effort to support the sales efforts of the Coca-Cola representative" in this new segment of the vending industry (RX 388 B). The "importance of this support" was stated to be "enhanced by the existing prestige status of Coca-Cola in the market, the greater consumer preference, plus the fact that the Coca-Cola Bottler can usually provide the best mechanical service in town" (RX 388 B).

127. Recognizing that "from the viewpoint of the Bottler, a direct sales approach to the chain represents a new departure from the long-established policy of selling coolers only to the Bottler, " Coca-Cola promised to "support" Vendo's maintenance

of satisfactory customer relations by endeavoring to create a clear understanding throughout the industry of this change in policy, its necessity, and the plus values that should accrue to the Bottler" (RX 388 B).

128. Since the equipment under the National Users program would not be sold by the bottler, but rather directly from the manufacturer, Coca-Cola undertook the responsibility to "attempt to sell the chain on the advantages of working with Coca-Cola Bottlers" (RX 388 A). Coca-Cola actively took steps "to insure that Coca-Cola is represented" in the National Users sales picture, and made arrangements to assure participation by Coca-Cola bottlers in this new enterprise and to protect their interest (RX 219 A–C, 388 A–C).

129. In connection with the sale of "unitized batteries" to National Users, Mr. Gardner advised Vendo that Coca-Cola "will authorize the use of script trade-mark on Coca-Cola coolers" in such batteries "on request from you" (RX 388 B).

130. Coca-Cola's permission to approved vending machine manufacturers to utilize its script trade-mark on Coca-Cola coolers was made necessary since "as more companies—including oil chains—have become engaged in full-line or diversified vending, it has been important to set up approved cooler manufacturers to sell directly to such accounts," as they "find it necessary to make national contacts and sales" "in order to meet their own competition within the vending machine manufacturing industry" (RX 219 B).

131. Prior to the Seeburg acquisition of Cavalier in 1963, The Vendo Company was the only major approved supplier of bottle and can vending machines to Coca-Cola bottlers in a position to supply a complete line of other equipment under the National Users program. At that time Vendo sold the coffee, cigarette and candy machines used in conjunction with Coca-Cola approved bottle and can vending equipment in the National Users market (RX 457, pp. 18–19; RX 450 A). Charles H. Brinkmann, the general manager of Westinghouse Electric Corporation's Automatic Merchandising Division, testified that the company "doing the most of" selling in this area "was The Vendo Company" (Brinkmann, Tr. 1719). As a result, Vendo had the Coca-Cola National Users business virtually "locked up" (Raoul, Tr. 2080; Coleman, Tr. 2106–07).

E. *Broadening and Diversification of Vending Machine Manufacturers' Line of Vending Equipment in Order to Satisfy Their Customers' Changing Requirements*

132. As heretofore indicated, the requirements of the vending industry rapidly moved in the direction of full-line vending, and National Users began to directly purchase "banks" of vending equipment, vending equipment manufacturers found it necessary to broaden and diversify their line of machines in order to satisfy these changing consumer demands. As Delbert W. Coleman, chairman of the board of The Seeburg Corporation, testified on direct examination by complaint counsel, "[i]f you handle the meat, you've got to handle the peas and fruit, * * * . This became our problem * * * . There were no operators that were just operating one machine by itself. This is what began to happen in the field. In order to get competitive and compete, we found that we had to have a fuller line so as to satisfy the customer's requirements. Obviously, if we didn't have a coffee machine we might not sell them the cold drink vending machine" (Tr. 2092).

133. The importance of a full line of machines by the manufacturer was underscored by William F. Swingler, vice president of Canteen, the largest vending operating company in the United States, who testified that Canteen rarely uses alternate machines manufactured by different corporations when placing a bank of coin-operated vending machines (Tr. 1635).

134. Vending machine manufacturers were constantly seeking to augment their product line in order to remain competitive in a changing market.

135. Vendo early recognized the trend toward diversification in the vending industry, and "[s]ince World War II," approximately 15 years before Seeburg entered the vending industry, "it has been the policy of Vendo to expand its product line to achieve diversification and a broader base for expansion" (CX 65, p. 7).

136. Diversification was the purpose of Vendo's acquisition of Vendorlator, a large manufacturer of bottle vending equipment, in 1956. According to E. F. Pierson, chairman of the board of The Vendo Company in 1956, Vendo's acquisition of Vendorlator was dictated by "[t]he demands of growth and expansion * * *" (RX 315). Also, Thomas A. Buckley, vice president of sales and marketing of The Vendo Company in 1956, advised all Coca-Cola bottlers that "the expanding markets for automatic

merchandising equipment had already forced us to embark on a plan of extensive diversification of our product line and this affiliation was but a further step in this direction" (RX 316 D).

137. The Vendorlator acquisition, pursuant to a program of diversification, enabled Vendo to make "use of combined production facilities as the demand for food vending equipment is added to beverage machines" (RX 315; CX 65, pp. 7–8).

138. In 1957, the Federal Trade Commission entered into a consent disposition with The Vendo Company regarding its acquisition of Vendorlator, which permitted Vendo to retain the Vendorlator operations, while requiring it to make available to competitors certain of the patents it acquired (*In the Matter of The Vendo Company,* 54 F.T.C. 253 (1957)).

139. As early as 1961, The Vendo Company manufactured "the most complete line of vending equipment of any manufacturer in the industry," including "venders for fresh brew coffee, * * *; automatic coin-operated dispensers for milk, fruit juices, fruit, ice cream, cookies and nuts, and versatile Visi-Vend line that can accommodate virtually any product—hot, cold, or frozen—than (sic) can be packaged for vending" (RX 457, p. 18). In addition, Vendo produced "an entire line of beverage vending equipment sold exclusively to the bottlers of Coca-Cola," including "both cup and bottle venders," and its "Vendorlator division" made vending equipment "for the carbonated beverage industry—Pepsi-Cola, 7-Up, Nehi, Royal Crown—and other 'trade' bottlers" (RX 457, p. 19).

140. Prior to Seeburg's acquisition of Cavalier in 1963, The Vendo Company was the largest and dominant manufacturer of coin-operated vending equipment in the United States, and was the only full-line supplier of vending machines to all customers in the vending industry (Brinkmann, Tr. 1722; Coleman, Tr. 2106; Selzer, Tr. 1554; CX 226; 65, pp. 7–9, 11; RX 468; 457 pp. 18–19; 454, pp. 19–22).

141. According to the stipulated sales data, in 1963, Vendo's sales of coin-operated vending machines amounted to 24.2% of all such sales on a dollar basis ($39,547,470) (CX 226) and 13.6% of such sales on a unit basis (82,248 units) (RX 468), almost twice as large as its nearest competitor.

142. Also, in 1963, Vendo was the dominant factor in the "trade" bottler segment of the vending industry, which it served separately under the Vendorlator name, with 45.6% of the dollar value of all bottle vending machines sold to that class of cus-

tomers ($9,572,137) (RX 479, 417), and 46.7% of such sales on a unit basis (27,961 units) (RX 478, 417).

143. At the same time, Vendo was one of the three major approved suppliers of soft drink vending equipment to Coca-Cola bottlers, to whom it supplied an exclusive line of equipment under the Vendo name, and accounted for 27.4% of stipulated dollar sales of bottle machines to this class of customers ($7,133,163) (RX 475, 417), and 26.5% of such sales on a unit basis in 1963 (18,875 units) (RX 474, 417).

144. In addition to Vendo, other major manufacturers of vending equipment were also developing a full line of vending equipment prior to the challenged acquisition. For example, Canteen Corporation, the largest vending "operator" in the United States, was permitted to acquire and retain Rowe Manufacturing Company as a result of a Federal Trade Commission consent settlement in 1958 (*Automatic Canteen Co.*, 54 F.T.C. 1831 (1958)). In 1962, Canteen introduced its "Celebrity Line" of vending equipment, developed for "extended-line" or full-line vending, which included machines for hot and cold drinks, sandwiches, candy, pastry, hot foods, salads and desserts, cigarettes and the like (RX 454, pp. 9–14). According to the record evidence, "[t]his equipment is modular in design and each vending machine is matched and engineered so that all seven of the basic types of machines can be placed in a continuous bank in any multiple or combination to look substantially as a single unit" (RX 463, p. 6). From a marketing standpoint, the availability of matched panels and banks of machines is desirable (Mueller, Tr. 1680–81).

145. According to stipulated sales data, prior to the Seeburg acquisition of Cavalier in 1963, Canteen was the third largest manufacturer of vending equipment in the United States with 12.3% of all coin-operated vending machines sold on a dollar basis ($20,095,378) and 5.5% of such sales on a unit basis (33,393) (CX 226; RX 468).

146. Similarly, National Vendors, a subsidiary of the large and diversified Universal Match Corporation (today UMC Industries, Inc.), which was "the world's leading producer of cigaret and candy vendors," "emphasized development of a 'full line' of vending machines" in 1962 and indicated it would continue that as its "primary objective" in 1963 (CX 67, p. 4).

147. Acccording to stipulated sales data, UMC ranked second in the manufacture and sale of coin-operated vending machines

on a unit basis (46,123 units; 7.6% of such sales) and fourth on a dollar basis ($18,518,565; 11.3% of such sales) in 1963 (CX 226; RX 468).

148. Seeburg did not enter the vending industry until 1958, when it acquired the "bankrupt" Eastern Electric Company Inc.'s cigarette machine (Coleman, Tr. 2087). Delbert W. Coleman, chairman of the board of The Seeburg Corporation, explained Seeburg's entry into the vending industry on direct examination by complaint counsel as follows:

> Well, we were manufacturers of coin-operated phonographs which are commonly called "juke boxes". And it was our experience that these juke boxes normally go into bars, grills, taverns, diners, and so forth. And normally in that very same location you would find a cigarette machine. And we felt that this would be an opportunity for our present distributor force to have an opportunity to sell cigarette machines since basically the same locations were using them as were using our coin operated phonographs (Coleman, Tr. 2087–88).

149. Seeburg expanded its line of vending equipment as part of a program of diversification since, "[i]n order to get competitive and compete, we found that we had to have a fuller line so as to satisfy the customer's requirements" (Coleman, Tr. 2092).

150. At the time of the Seeburg acquisition of Cavalier in 1963, Seeburg manufactured several different types of vending equipment. Its line was principally devoted to post-mix cup, cigarette and coffee machines, as well as bottle and can equipment for "trade" bottlers (Coleman, Tr. 2086–95, 2096–97; CX 247, pp. 1–2; RX 466 A, 467, 478, 479, 417, pp. 1–3). It did not then, and does not now, manufacture machines designed to dispense various food products, *e.g.*, an all purpose food merchandiser, which is essential to serve customer needs in the rapidly developing vending markets today (Adair, Tr. 2122–23; RX 466 A, 467, 457, pp. 5–8, 463, pp. 6–7).

151. At the time of the challenged acquisition in 1963, Seeburg reported 13.8% of all sales of coin-operated vending machines on a dollar basis ($22,575,000) and 4.5% of such sales on a unit basis (27,115 units) (CX 226; RX 468).

152. Subsequent to the challenged acquisition, Westinghouse Electric Corporation's Automatic Merchandising Division also began manufacturing a range of full-line vending equipment. It introduced a "cup-drink vending machine with ice" (a post-mix type), and "a fresh brew coffee machine" (single cup) in 1965, "a candy machine" late in 1965 or early in 1966, and in the latter part of 1966 "a tandem candy machine which

was used only to vend cans" (Brinkmann, Tr. 1702–03). At the time of the acquisition in 1963, Westinghouse was one of the major approved suppliers of vending machines to Coca-Cola bottlers and manufactured only convertible bottle/can vending machines for sale to those bottlers (Brinkmann, Tr. 1702, 1704). As Charles H. Brinkmann, then general manager of Westinghouse's Automatic Merchandising Division, testified, Coca-Cola bottlers were engaged in full-line vending, and it was on the "increase" (Tr. 1718).

VI. The Seeburg Acquisition of Cavalier in 1963

A. *Description of the Acquiring and Acquired Corporations As of 1963*

1. *Acquiring Corporation (Seeburg)*

153. At the time of the challenged acquisition in 1963, Seeburg, directly or through its subsidiaries, was principally engaged in the manufacture and sale of coin-operated phonographs, various types of coin-operated vending machines, hearing aids and musical instruments (CX 9, pp. 4, 14; 10, pp. 1–2).

154. So far as pertinent to the instant proceeding, Seeburg entered the vending machine manufacturing industry in 1958 when it acquired the "bankrupt" Eastern Electric Company, Inc.'s cigarette machine and, as of 1963, manufactured and sold the following types of coin-operated vending machines: cigarette machine; batch brew coffee machine; cup vending machine; bottle and can vending machines; single-cup coffee machine; and a nonfood all purpose merchandiser (Coleman, Tr. 2086–98; CX 9, pp. 4, 14; 10, pp. 1–2; 11, pp. 8–9).

155. At the time of the acquisition, Seeburg, through its Choice-Vend Division, was an approved supplier of bottle and can vending machines only to "trade" bottlers, and its sales force did not solicit Coca-Cola bottlers for their bottle and can vending machine business (Miller, Tr. 1986–87, 1992–99).

2. *Acquired Corporation (Cavalier)*

156. At the time of the challenged acquisition in 1963, Cavalier was engaged in the manufacture and sale of only bottle and bottle/can vending machines to a single class of customers, the company owned and contract bottlers of Coca-Cola. Cavalier was an approved supplier of these machines, and did not solicit or sell such machines to "trade" bottlers (Findings No. 19, 77, 80).

B. *Background and Circumstances of the Challenged Acquisition*

1. *Considerations Prompting Seeburg's Acquisition of Cavalier*

157. As Delbert W. Coleman, chairman of the board of Seeburg, testified on direct examination by complaint counsel concerning the major considerations which prompted Seeburg's acquisition of Cavalier in 1963: since "Coca-Cola represented a very large segment of the bottle-vending industry" (Tr. 2105) and Seeburg wasn't "an approved source of supply" of bottle and can vending machines to Coca-Cola bottlers, Seeburg bought Cavalier to diversify into the Coca-Cola segment of the vending industry "because we were selling Coca-Cola very little merchandise at that time" (Tr. 2107).

158. The challenged acquisition in 1963 took place only after many years of fruitless effort by Choice-Vend Corporation, since 1960 Choice-Vend Division of The Seeburg Corporation, to obtain Coca-Cola approval of its vending machines (Miller, Tr. 1993–2000; Coleman, Tr. 2106–08; RX 283 A–B, 284 A–B, 1–4, 428 A–B, 5, 285 A–B, 6, 7 A–D, 286 A–B, 11, 13–14, 287 A–C, 15–19, 288 A–C, 20, 273).

159. As Max Miller, formerly president of Choice-Vend Corporation and now president of the Choice-Vend Division of The Seeburg Corporation, testified on direct examination by complaint counsel, prior to 1955, "when we first went into our production on our machine, I went to Atlanta myself to interview the Coca-Cola people with respect to getting our machine into their line with their bottlers. And was unsuccessful at that time and five or six times after that" (Tr. 1993).

160. Choice-Vend and Seeburg/Choice-Vend submitted vending machines for Coca-Cola testing and approval on numerous occasions since 1954 (Miller, Tr. 1994; RX 283 A–B, 284 A–B, 3, 285 A–B, 6, 286 A–B, 13, 287 A–C, 288 A–C). For example, in 1958, Choice-Vend sent a model 200 machine to Coca-Cola for testing. Mr. Miller testified that "I badgered them and asked them to please look it over and they allowed me to send it in * * * ." This machine was not accepted by Coca-Cola (Miller, Tr. 1995; RX 283 A–B). Mr. Miller further testified that Coca-Cola advised him of no reason for rejecting the model 200. "They just returned the machine to us and the only thing we got was that it was unacceptable. Did not meet their standards" (Tr. 1996), although they did mention "the possibility we didn't have financial status enough to maybe stay in business. And if

their bottlers bought any of our machines the possibility of us going out of business and they being unable to get parts at a future date, and so forth" (Tr. 1997).

161. On at least six occasions, Coca-Cola evaluated Choice-Vend or Seeburg/Choice-Vend bottle and can vending equipment, and on each occasion, perfunctorily rejected such equipment for various reasons, including inadequate refrigeration performance (RX 283 A–B, 284 A–B, 285 A–B, 286 A–B, 287 A–B, 288 A–C).

162. There is no evidence that Coca-Cola cooperated with Choice-Vend Corporation or the Choice-Vend Division of The Seeburg Corporation in connection with the machines they submitted for approval over the years, despite the willingness expressed by Choice-Vend to work out any necessary changes to their machines (RX 4, 6). Coca-Cola often gave Choice-Vend no reason "whatsoever" for rejecting Choice-Vend machines, "[t]hey just returned the machine to us and the only thing we got was that it was unacceptable. Did not meet their standards" (Miller, Tr. 1966). Coca-Cola did communicate with Choice-Vend when it rejected the latter's "Quart Vendor," but only commented that "from a refrigeration standpoint, this machine does not function satisfactorily to meet our temperature requirements" (RX 5), and did not suggest ways to modify or correct the apparent defects. There is no evidence that Coca-Cola ever transmitted its engineering evaluations of Choice-Vend machines to Choice-Vend as it did with its traditional suppliers (Finding No. 62).

163. Many of the same Choice-Vend machines that had been denied approval by The Coca-Cola Company had been approved for sale to the various "trade" bottlers, including those associated with the Pepsi-Cola Company. Among these machines were the Choice-Vend models 72 and 200 (RX 424 A–B; *cf.* Coca-Cola's rejection, RX 284 A–B and RX 283 A–B); Choice-Vend's model 120 Bottle Vendor, which had been approved by Pepsi-Cola after certain deficiencies in the refrigeration performance had been modified and corrected in accordance with Pepsi-Cola's suggestions (RX 430 A–B, 429; *cf.* Coca-Cola's rejection, RX 287 A–C); and Choice-Vend's model 235 Can Vendor (RX 425; cf. Coca-Cola's rejection, RX 288 A–C).

164. Pepsi-Cola's refrigeration standards were "as stringent" as those of Coca-Cola's (Brinkmann, Tr. 1717–18).

165. Choice-Vend and Seeburg/Choice-Vend experimented with

various approaches to Coca-Cola in an effort to achieve some form of Coca-Cola acceptance of its machines. In 1959, Choice-Vend Corporation prepared a draft patent license arrangement with Navarre Corporation, which already had an established relationship with The Coca-Cola Company (Steeley, Tr. 1841–43), whereby Choice-Vend proposed to grant Navarre the right "to manufacture, use and sell" coolers made under Choice-Vend patents "to Coca-Cola Bottlers and to The Coca-Cola Co." in return for certain royalties (RX 7 A). By the terms of the proposed license arrangement, both parties recognized "the necessity that before offering such coolers for sale to Coca-Cola Bottlers, Navarre must first obtain official written approval by The Coca-Cola Company of such coolers designed by Navarre for sale hereunder to Coca-Cola Bottlers" (RX 7 B).

166. In 1960, W. H. Clarke, vice president of Seeburg, contacted Carl A. Navarre, head of Navarre Corporation, to advise him of Seeburg's plan "to tackle the 'Coke' business" by setting up a "separate manufacturing plant in some strategically located area, and, with appropriate modification, manufacture solely for 'Coke' bottlers under another trade name" (CX 141 A). Mr. Clarke was approaching Mr. Navarre as to the possibility of having his "Narco sales force handle the line exclusively" (CX 141 A; RX 11).

167. Neither the proposed patent license arrangement nor the separate manufacturing facilities plan ever materialized (Coleman, Tr. 2108). As Delbert W. Coleman, chairman of the board of The Seeburg Corporation, testified on direct examination by complaint counsel, "I think we would have done anything to obtain Coca-Cola business. Because it was so necessary to our success" (Tr. 2108).

168. Seeburg/Choice-Vend's efforts to obtain Coca-Cola approval of their bottle and can vending machines reached a climax in December 1961, when it made a major sales presentation to high officials of The Coca-Cola Company. Mr. Miller testified that in 1961, Seeburg/Choice-Vend hired Mr. Joe Eckford, "a retired employee of the Coca-Cola Company" to arrange a sales presentation with the executive officers of The Coca-Cola Company (Tr. 1998). Prior to that presentation, which was held in December 1961, Seeburg/Choice-Vend contacted the "eight or ten" Coca-Cola bottlers (out of some 1000) who had purchased Seeburg/Choice-Vend equipment in an effort to get their "frank evaluation" "on the operation and performance" of its "bottle

vending units" "so that we may incorporate it in our presentation to the people in Atlanta," and received favorable reports (Miller, Tr. 1999; RX 14). Seeburg/Choice-Vend submitted one can and two bottle vending machines for Coca-Cola testing prior to the December 1961 presentation (Miller, Tr. 1998–99).

169. In December 1961, Seeburg/Choice-Vend made its sales presentation to high Coca-Cola officials, including Patrick L. O'Malley and Charles Adams (RX 17, 18, 20). Mr. Miller, at the request of John L. Douglas, purchasing agent for Coca-Cola, subsequently on December 14, 1961, provided Coca-Cola with additional information relating to Choice-Vend's finance plans, incentive programs, and freight programs, and indicated he would be "pleased to sit down and discuss with you any special type program that you would like tailored for your bottlers. I am certain that we can come up with a plan that will be satisfactory to you" (RX 16).

170. Seeburg/Choice-Vend's optimism (RX 20) regarding the outcome of its December 1961 presentation to Coca-Cola "for approval" (RX 19) was premature. In early January 1962, Seeburg was informally advised that "we have been turned down for approval by Coca-Cola Co." (CX 142).

171. On February 5, 1962, by letter from Charles W. Adams, vice president of Coca-Cola Company, to Delbert W. Coleman, president and chairman of The Seeburg Corporation, Coca-Cola officially advised Seeburg that after giving "serious consideration" to Seeburg's request that it "be approved as an additional supplier to Coca-Cola Bottlers for both bottle and can vendors," and "[w]hile we are confident Seeburg would make a good supplier to our Bottlers," Coca-Cola has "not approved" Seeburg since it did not meet "our requirements for approving new suppliers" (RX 273). These "requirements" were stated to be as follows:

(a) Make available equipment of same quality as now being purchased by Coca-Cola Bottlers, but at a lower price;

(b) Make available equipment of superior quality but at same price as equipment now being purchased;

(c) Supply needed equipment not now available from present suppliers; or

(d) By some other means save Coca-Cola Bottlers money on their equipment purchases (RX 273).

172. Thus, even though Coca-Cola was "confident Seeburg would make a good supplier" (RX 273) to its bottlers, and no longer raised any questions as to the sufficiency of Seeburg's

bottle and can vending equipment from an engineering standpoint, Coca-Cola rejected Seeburg's bid for approval, thereby precluding the opportunity for "successful marketing" of Seeburg/Choice-Vend's complete line of bottle and can vending equipment to Coca-Cola bottlers who, according to the stipulated sales data, purchased over 53% of all such machines sold in both the Coca-Cola and "trade" bottler segments of the vending industry on a unit and dollar basis in 1963 (RX 485–86).

173. Because of Coca-Cola's continued rejections of Seeburg/Choice-Vend equipment, even after there were no longer any apparent engineering defects with its machines, Seeburg/Choice-Vend "discontinued all approaches to them after 1961" (Miller, Tr. 1999).

174. The second consideration prompting Seeburg's decision to acquire Cavalier was the growing involvement of Coca-Cola bottlers in full-line vending and active participation of Coca-Cola and its bottlers in the National Users market, which was otherwise beyond Seeburg's reach.

175. As Mr. Coleman testified:

Coca-Cola represented a very large segment of the bottle-vending industry. Primarily because they were very on-premises-consumption minded. And in addition, many of their bottlers were moving into full-line vending because here the institutions, plants, schools, and so forth, didn't want to deal with Coca-Cola bottlers for one thing and somebody else for a coffee machine and somebody else for cigarette machines and somebody else for something else. They wanted one responsible person to come in and put in all the equipment.

So you had a natural evolution of Coca-Cola bottlers to full-line vending (Tr. 2105).

176. Mr. Coleman further testified:

We had these, what we call national users, where there were thousands and thousands of service stations, and so forth, throughout the nation. And I refer particularly to the larger major gasoline and oil companies which Coca-Cola was very aggressively working with. And unless we could find some way to sell the Coca-Cola bottlers, there was just one of our major competitors who sold Coca-Cola a full line and that was Vendo. We had tried on several occasions to have our Choice-Vend equipment approved by the Coca-Cola people. And at one time were told it just wasn't our machine, they didn't want any more suppliers than they had or words to that effect (Tr. 2106).

177. Accordingly, Mr. Coleman testified:

Consequently, for us to be out of the Coca-Cola market with these two things [Coca-Cola bottler activity in National Users program and full-line vending] happening in the industry would have virtually left all that

business to our major competitor which ultimately would have been a very serious problem for us.

So we have two problems. We had to move ourselves into full-line vending as quickly as we possibly could. And we had to find a way to sell the Coca-Cola bottlers which represented such a major portion of the business. Plus this other opportunity [National Users market] that wasn't open to us. And it appeared to us this would be an opportunity for us to sell the Coca-Cola bottlers so that we could properly compete with our competitor.

With our major competitor. Canteen wasn't making bottle vending equipment, so the only one we had to concern ourselves with was Vendo. So we concluded that the only way we were going to be a supplier to Coca-Cola was to buy Cavalier. So we did merge to further diversification. And that judgment has been correct (Coleman, Tr. 2106–07).

178. In light of Seeburg's failure to obtain Coca-Cola approval, and the importance of selling Coca-Cola bottlers to Seeburg's competitive position, Mr. Coleman testified that Seeburg, having "nowhere else to turn," acquired Cavalier "as a last resort" (Tr. 2108).

2. *Considerations Prompting Cavalier's Association with Seeburg*

179. At the time of the challenged acquisition in 1963, Cavalier was a single-line supplier of bottle and bottle/can vending machines which specialized in the sale of its Coca-Cola approved equipment exclusively to Coca-Cola bottlers (Graham, Tr. 1946–47; CX 25). As William G. Raoul, formerly president of Cavalier and now president of Cavalier Division of The Seeburg Corporation, testified on direct examination by complaint counsel, "[w]e didn't have any equipment associated with us. We were isolated with a specialized product, and our market was changing. The [Coca-Cola] bottlers were rapidly getting into full-line vending" (Tr. 2084).

180. Cavalier's efforts to sell bottlers other than Coca-Cola in the mid-1950's "weren't very successful" (Raoul, Tr. 2066–67). As Mr. Raoul testified, Cavalier's efforts to sell these other companies began in 1955, but by 1957 "it was pretty obvious that they weren't going to achieve success" (Tr. 2067; Graham, Tr. 1970–72). Cavalier tried to sell "trade" bottlers, including Dr. Pepper, Nehi, Seven-Up, and Pepsi-Cola (Raoul, Tr. 2066–75; Graham, Tr. 1971–72).

181. After 1957, Cavalier no longer solicited any "trade" bottlers (Raoul, Tr. 2072). In explaining this development, Mr. Raoul testified, since "our sales force would have to spend an inordinate amount of time cultivating a wholly different market for very uncertain results * * * . And the volume of

the business was quite uncertain," Cavalier once again specialized in sales exclusively to the Coca-Cola bottlers (Raoul, Tr. 2072).

182. In addition, manufacturing considerations affected Cavalier's decision to cultivate Coca-Cola bottlers exclusively. As Mr. Raoul testified:

On the manufacturing side there were considerations too which still apply. It would be very difficult for us if we had to do any volume of business with those other companies. It would mean making the machine which we now make on one basic form, we would have to make it in several different forms (Tr. 2073).

183. The different manufacturing problems involved in selling the "trade" bottlers involved "not only [the] type of paint and decorative trim, [but] in some cases the actual dies * * *" (Raoul, Tr. 2074). In addition, a different assembly and finishing sequence for bottle vending machines would have been necessary (Raoul, Tr. 2074–75).

184. The "natural evolution of Coca-Cola bottlers" into full-time vending "was the industry trend" (Coleman, Tr. 2105). At the time of the challenged acquisition, there "was a trend" toward full-line operations by Coca-Cola and "trade" bottlers "that started from nothing to where it is today. There are more bottlers moving into the industry full line every day" (Coleman, Tr. 2112). Other industry witnesses corroborated Mr. Coleman's testimony as to the rapid increase in full-line vending by soft drink bottlers, and particularly the active development in this field by Coca-Cola bottlers (Brinkmann, Coca-Cola bottlers were engaged in full-line vending and the number of bottlers so engaged was on the "increase," Tr. 1718; Raoul, "the bottlers were rapidly getting into full-line vending" (Tr. 2084)).

185. In addition, Coca-Cola and Coca-Cola bottlers were "aggressively" working with National Users, who purchased matched banks of equipment in their many locations (Coleman, Tr. 2106).

186. Prior to the Seeburg acquisition in 1963, "Cavalier had developed a working arrangement with the Coca-Cola bottlers over a number of years, but Cavalier did not sell equipment to bottlers other than Coca-Cola, nor did Cavalier produce candy, cigarette and coffee machines" (RX 450 A). Access to such machines was necessary if Cavalier was to remain competitive in a changing market where banks of equipment were required for use in Coca-Cola bottlers' full-line vending opera-

tions and participation in the growing National Users field (Finding No. 120).

187. Cavalier was quite concerned over its inability to achieve capacity to participate in the National Users market under the program established by The Coca-Cola Company. It "* * * was a source of great anxiety to us, because we could see the handwriting on the wall very clearly, because we had to participate in that market if we were going to remain a major supplier" and "we had no way of doing it. This was of great concern to myself and Mr. Lane who was chairman of the company at that time" (Raoul, Tr. 2080).

188. In light of this "great concern," Messrs. Raoul and Lane went "to attend a session of the American Management Association on the subject of mergers and acquisitions to see if there was any possible combination we could find that would give us an entry into this [National Users] field because Vendo had it locked up. And, of course, they were the only company able to do it" (Raoul, Tr. 2080). This testimony was corroborated by documentary evidence, received without objection from complaint counsel, which indicated that "[i]f Cavalier had not merged with Seeburg, the oil companies would have only one source of supply for the purchase of vending machines under the National User Program because only The Vendo Company would have had the combination of elements required to serve this market" (RX 450A, C–D; see also Brinkmann, Tr. 1722; Coleman, Tr. 2106).

189. Accordingly, Cavalier merged with Seeburg anticipating as the greatest benefit "[t]he fact that we would have, * * * access to a line of general vending equipment which would enable us to compete with Vendo effectively in the national user market. Vendo had no competition in the field at that time" (Raoul, Tr. 2083).

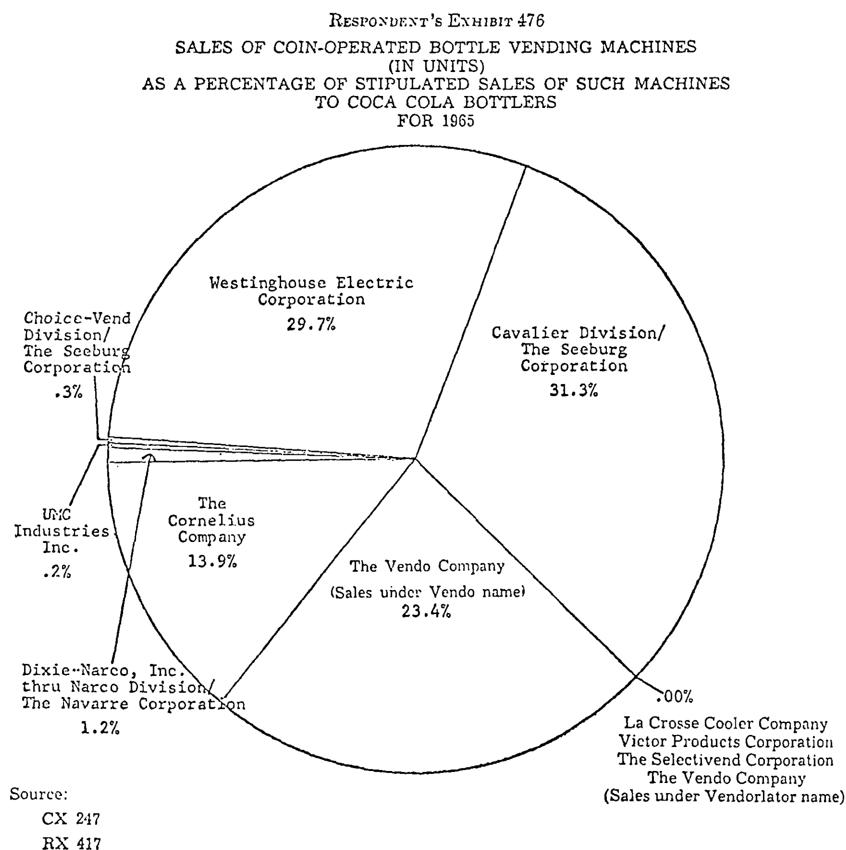
190. Subsequent to the challenged asquisition, Cavalier continued to operate under its previous management. Thus, Cavalier continued to sell its bottle and can vending machines only to Coca-Cola bottlers, through its own direct sales force (Raoul, Tr. 2055; Graham, Tr. 1947). Cavalier machines at no time were sold through Seeburg distributors to vending operators or to customers other than Coca-Cola bottlers. At all pertinent times Cavalier was operated as a separate Division of The Seeburg Corporation, and was not in any way integrated with the Choice-Vend Division, Seeburg's supplier of bottle and can vending

machines to non-Coca-Cola bottlers (Graham, Tr. 1947; Raoul, Tr. 2054–55; Adair, Tr. 2132–33, 2139; CX 10, p. 2; 11, p. 7; 39, p. 8).

VII. Consequences and Aftermath of Acquisition

A. *Widened Opportunity for Bottle and Can Vending Machines Sales to Coca-Cola and "Trade" Bottlers*

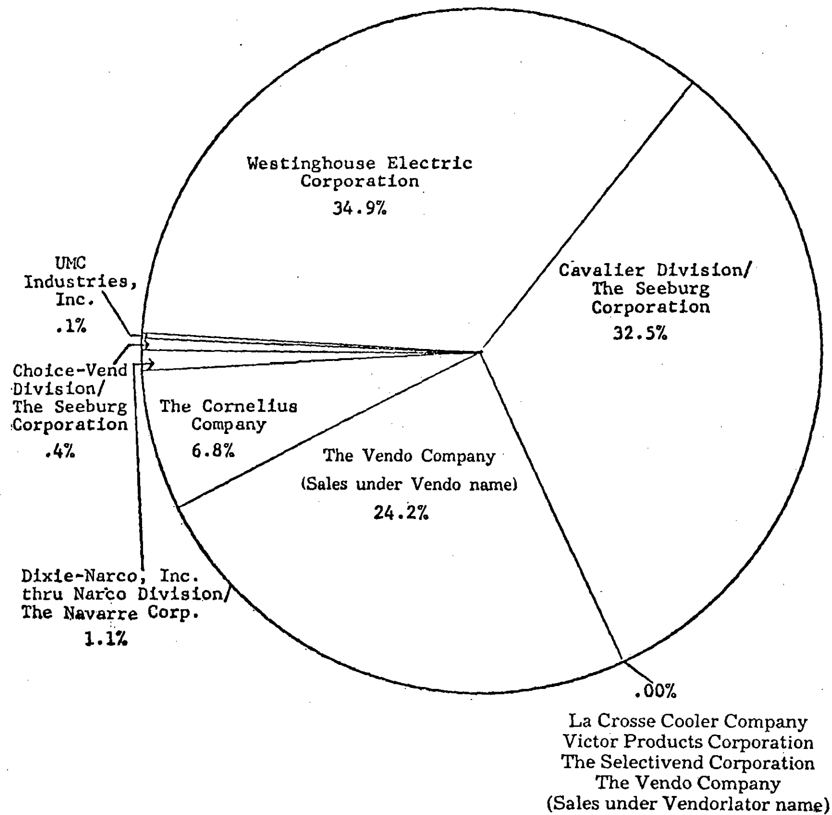
191. The following charts, Respondent's Exhibits 476 and 477, reflect the unit and dollar value of sales of coin-operated bottle vending machines as a percentage of stipulated sales of such machines in the Coca-Cola bottler segment of the vending industry in 1965, two years after the challenged acquisition.*



*Although the Cavalier Division of Seeburg appears by the charts to have attained first position in the sale of vending machines to Coca-Cola bottlers after the acquisition in question, its effect or potential effect anticompetitively under Paragraph 19 of the complaint

RESPONDENT'S EXHIBIT 477

SALES OF COIN-OPERATED BOTTLE VENDING MACHINES
(IN DOLLARS)
AS A PERCENTAGE OF STIPULATED SALES OF SUCH MACHINES
TO COCA COLA BOTTLERS
FOR 1965



Source:

CX 247

RX 417

192. In this segment of the vending industry, the stipulated sales data show that the established suppliers, Westinghouse,

seems totally obscure as related to the manufacture and sale of vending machines of all types and the manufacture and sale of bottle vending machines since both of the companies which merged were competing in segments only of the total market and not with each other. In other words, it was a uniting of uncompetitive segments in the overall markets alleged by which means the merged companies could reasonably be expected to create competition therein with vending machine manufacturers who were already competitive or potentially competitive in the diversified markets defined by the complaint and evidenced.

Vendo, and Cavalier, supplied 91.6% of the bottle vending machines to Coca-Cola bottlers on a dollar basis two years after the acquisition in 1965, down slightly from 92.6% in 1963 (RX 477, 475).

193. During those two years, Cavalier's own percentage of such sales remained static. At the same time, Cornelius, a smaller, more recent entrant in this field, was able to significantly improve its bottle vending machine sales to Coca-Cola bottlers, increasing its percentage of such sales from 4.3% to 6.8% on a dollar basis, and from 9.1% to 13.9% on a unit basis (RX 474–477).

194. These sales and market share statistics permit no inference that the challenged acquisition, which substituted Seeburg/Cavalier for Cavalier Corporation as an approved supplier of bottle and can vending equipment to Coca-Cola bottlers, adversely affected any company's opportunity for sale of bottle and can machines to Coca-Cola bottlers, or gave undue competitive advantages to Seeburg (RX 474–477).

195. Actual market behavior establishes that since the challenged acquisition, competition in the Coca-Cola bottler segment of the vending industry has increased and intensified.

196. In July 1966, Coca-Cola revised its equipment approval policy for bottle and/or can vending equipment, notified several formerly unaccepted vending machine manufacturers of this change, and invited them to submit equipment for testing, with the result that competition in the sale of vending equipment to the Coca-Cola bottler segment of the vending industry has actually opened up (Small, Tr. 1300–01; Ebner, Tr. 1733–34, 1741–42, 1744–46; Teeter, Tr. 1787, 1789; RX 434 A–D, 433 A–B, 432, 431).

197. Prompted by the desire "to improve the competitive position of Coca-Cola and our related products" (RX 432, 431, 433 B), Coca-Cola, in 1966, "made the basic policy decisions necessary to change both the emphasis of and the procedure for our evaluation tests [with respect to bottle vending equipment] in the future, and we are now setting up the procedures and criteria which will be required for the implementation of these policy decisions" (RX 434 C). Coca-Cola also plans "to discontinue the practice of simply accepting or rejecting bottle vendors. We will, instead, provide the bottlers with copies of our revised evaluation reports in order to better assist them in their individual purchases of bottle vendors" (RX 434 C).

198. Although full implementation of the new procedures was not anticipated by Coca-Cola until March 1967, the company took prompt steps in 1966 to notify equipment manufacturers of their new opportunity to compete for Coca-Cola bottlers' business (RX 434 C).

199. Specifically, in May 1966, "a task force" from Coca-Cola toured the United States to visit the plants and evaluate the capabilities of major vending machine manufacturers, including those not previously approved by Coca-Cola, such as Choice-Vend Division of The Seeburg Corporation, the Cornelius Company (which was not approved for automatic bottle vending equipment) and Selectivend Corporation (RX 434 C; Teeter, Tr. 1787, 1789).

200. On July 7, 1966, Coca-Cola notified manufacturers of vending equipment of its "new sales equipment valuation (sic) policy by letter from our Marketing Vice President," including "Choice Vend Division of the Seeburg Corporation, the Cornelius Company, the LaCrosse Cooler Company, and Selectivend Corporation" (RX 434 C, 435, 432, 433 A–B). For example, in its letter of July 7, 1966 to Max Miller, president of Choice-Vend Division of Seeburg, Coca-Cola advised that it will now "evaluate sales equipment submitted by reputable manufacturers which promises to serve our general marketing goals" and make the results "available to our Bottlers" (RX 432). In addition, Coca-Cola noted that the change was necessitated "to improve the competitive position of Coca-Cola" and related products and its hope that the program "will result in expanded markets" for its bottlers and suppliers (RX 432).

201. In addition, on July 12, 1966, Coca-Cola informed all its bottlers of the change in its equipment approval policy, stating that "[c]hanges always are necessary if we are to improve our competitive position and we trust that this program will result in increased sales and profits for us all" (RX 431).

202. As Coca-Cola stated in its letter to Mr. Charles Brinkmann, general manager of its long approved supplier Westinghouse, advising of the revision to Coca-Cola's equipment approval policy, the change will "inevitably make certain equipment available to our bottlers which has previously been available only to [Coca-Cola] competitors" (RX 433 A).

203. Pursuant to the 1966 Coca-Cola change of policy, "the following manufacturers have been invited to submit machines to The Coca-Cola Company": Choice-Vend Division of The

Seeburg Corporation, The Cornelius Company, The Selectivend Coporation and Steelmade, Inc., none of which—except for Cornelius' special horizontal models—were previously approved suppliers of Coca-Cola machines (RX 434 C–D). In this connection, Harold Teeter, president of Selectivend, testified that Selectivend had already submitted a machine for Coca-Cola approval in 1966 and that he understood it to have received a "favorable" report (Teeter, Tr. 1787, 1789). In addition, Mr. Small of Victor Products, and Mr. Ebner of LaCrosse, both testified that these "trade" bottler suppliers also had submitted machines to Coca-Cola for approval in 1966 (Small, Tr. 1300; Ebner, Tr. 1745). Finally, Rock-Ola Mfg. Corp., a recent entrant in the vending machine manufacturing industry, found the "Coca-Cola Company decision to revise its procedure format in the area of equipment evaluation" "most interesting," and is seeking "permission to participate" in order to obtain Coca-Cola approval (RX 435).

204. In sum, since the acquisition in 1963, Coca-Cola's 1966 revision in its equipment approval policy has created the framework for a significant change, opening up the vending machine supply picture in the Coca-Cola bottler segment of the industry, with increased competition already a reality, and an intensified competitive struggle in prospect for the future (Findings No. 196–203).

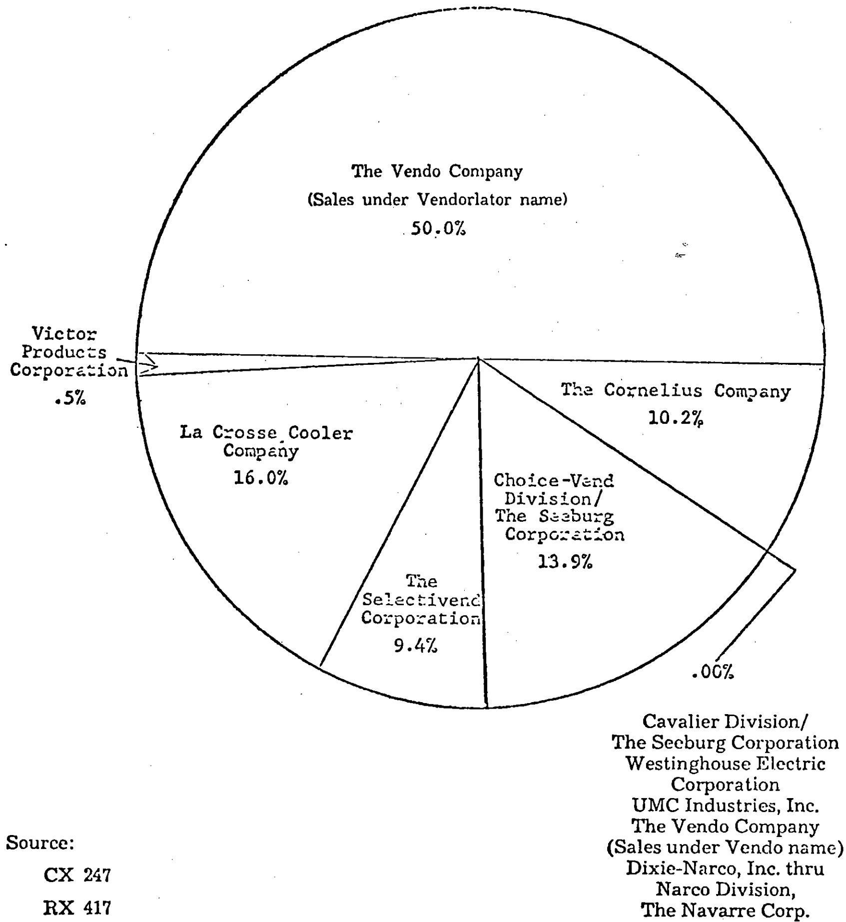
205. In the "trade" bottler segment of the vending industry, the following charts, Respondent's Exhibits No. 480 and 481, reflect the unit and dollar value of sales of coin-operated bottle vending machines as a percentage of stipulated sales of such machines in 1965, two years after the challenged acquisition.

206. According to the stipulated sales data, Vendorlator's dominance in this segment of the market actually increased since the acquisition, with its percentage of bottle vending machine sales to "trade" bottlers growing to 50% on a unit basis and 47.9% on a dollar basis in 1965, up from 46.7% on a unit basis and 45.6% on a dollar basis in 1963 (RX 478–81).

207. By contrast, on the basis of stipulated sales data, Seeburg has relatively lost ground as a "trade" bottler supplier since the challenged acquisition, as sales of coin-operated bottle vending machines by its Choice-Vend Division have declined from 18% to 13.9% on a unit basis (RX 478, 480) and 23.2% to 19.5% on a dollar basis between 1963 and 1965 (RX 479, 481).

RESPONDENT'S EXHIBIT 480

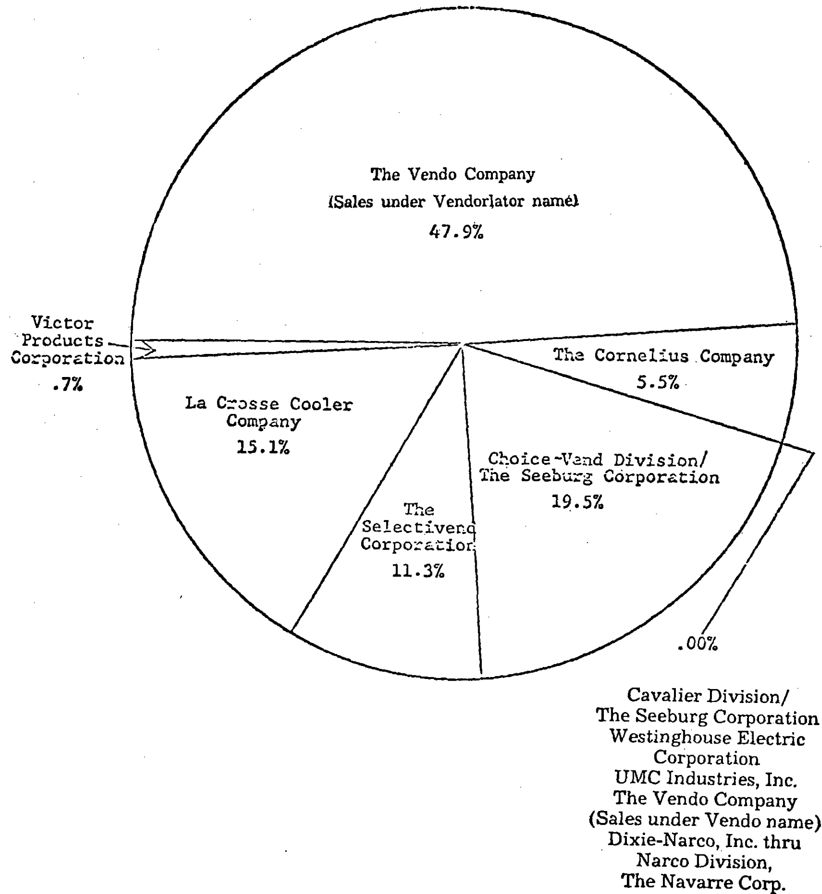
SALES OF COIN-OPERATED BOTTLE VENDING MACHINES
(IN UNITS)
AS A PERCENTAGE OF STIPULATED SALES OF SUCH MACHINES
TO TRADE BOTTLERS (e.g. PEPSI COLA, ROYAL CROWN, ETC.)
FOR 1965



208. Since the challenged acquisition, both LaCrosse and Selectivend, which are among the smaller firms serving this segment of the vending industry (CX 247; RX 417), have increased their share of sales of coin-operated bottle vending machines in the "trade" bottler segment of the vending industry. According to the stipulated sales data, LaCrosse has shown increases

RESPONDENT'S EXHIBIT 481

SALES OF COIN-OPERATED BOTTLE VENDING MACHINES
(IN DOLLARS)
AS A PERCENTAGE OF STIPULATED SALES OF SUCH MACHINES
TO TRADE BOTTLERS (e.g. PEPSI COLA, ROYAL CROWN, ETC.)
FOR 1965



Source:

CX 247

RX 417

from 13.0% to 16.0% on a unit basis and 12.4% to 15.1% on a dollar basis between 1963–1965, while Selectivend has shown sales gains from 9.0% to 9.4% on a unit basis and 10.5% to 11.3% on a dollar basis during the same period (RX 478–481). The

percentage of such sales by Cornelius during this period has remained approximately the same (RX 478–481).

209. Only Victor Products share of bottle vending machines to "trade" bottlers has declined since the challenged acquisition, from 3.0% to .7% on a dollar basis (RX 479, 481) and 2.4% to .5% on a unit basis (RX 478, 480). But these sales were not lost to Seeburg's Choice-Vend Division, whose own share of sales to this class of customers declined (RX 478–481). The record evidence refutes any inference that the challenged acquisition may have adversely affected Victor Products. Roy M. Small, executive vice president of Victor Products, testified that he observed "no" difference in the market conditions affecting his business after the Seeburg/Cavalier acquisition because Victor Products and Cavalier did not solicit each other's customers (Tr. 1303–04).

210. Paralleling developments in the Coca-Cola bottler segment of the vending industry, manufacturer participation in the "trade" bottler field has also broadened since the challenged acquisition. Westinghouse Electric Corporation, which supplied bottle/can vending equipment exclusively to Coca-Cola bottlers for over 35 years, in the latter half of 1966 "set up a general bottle (sic) sales organization to call on all other bottlers, like Pepsi-Cola, Dr. Pepper and 7-Up" (Brinkmann, Tr. 1703), after seeking and obtaining the approval of the parent syrup companies "before we went out and actually called on the bottlers," since approval "is very essential to successful marketing" of vending machines (Brinkmann, Tr. 1717).

211. The Dr. Pepper Company, in a notice to its bottlers regarding the approval of Westinghouse vendors on August 30, 1966, indicated that the "addition" of "the Westinghouse line" broadens "the base of our vendor supply structure," and "brings to Dr. Pepper Bottlers a new dimension of quality, experience and success in the vendor manufacturing field" (RX 436 A). Upon receiving approval from Dr. Pepper, Westinghouse vendors became eligible for all the benefits that flow therefrom, including qualifying for credits and other benefits under the "Dr. Pepper Bottler Vendor Incentive Programs," and for financing "under the Chemical Bank Vendor Finance Program for Dr. Pepper Bottlers" (*Ibid.*).

212. In addition, Thomas B. Donahue, vice chairman of the board of UMC Industries, Inc., testified that its Glasco subsidiary,

an approved supplier of vending equipment only to Coca-Cola bottlers, "may" in the future expand its facilities to solicit business in the "trade" bottler segment of the industry (Donahue, Tr. 1439).

213. In sum, competition in the "trade" bottler segment of the vending industry, as in the Coca-Cola bottler segment, has also intensified since the challenged acquisition, with additional manufacturers now soliciting "trade" bottler customers for their business (Findings No. 210–212).

214. While the ultimate outcome of these most recent competitive developments in the vending industry is not certain on this record, it is clear that today, three years after the challenged acquisition, bottlers of all types have a wider choice of vending equipment suppliers than before the acquisition in 1963, vending machines manufacturers have new and broader opportunities to serve new classes of customers, and all vending machine manufacturers face increased competition for the business of their traditional customers.

B. *Intensified Rivalry Among Manufacturers of Vending Machines*

215. The following tables, Respondent's Exhibit 468 and Commission's Exhibit 226, reflect stipulated sales in the United States during 1961-65, and percentage of census totals, of all coin-operated vending machines, on a unit and dollar basis, by manufacturers of such equipment whose representatives testified at the hearing in this case:

RESPONDENT'S EXHIBIT 468

Stipulated sales of manufacturers of coin-operated vending machines in the United States 1961-1965—unit sales and percent of Bureau of the Census total

1961

Company [10]	Sales [1] (units)	Percent of total [2]
The Vendo Co.	94,412	15.2
Sales under Vendorlator name 28,048		
Sales other than under Vendorlator name 66,364		
Universal Match Corp.[4]	51,401	8.3
Canteen Corp.	34,056	5.5
Cavalier Corp.	19,403	3.1
The Seeburg Corp.	16,053	2.6
Westinghouse Electric Corp.	10,211	1.6
La Crosse Cooler Company	9,860	1.6
Victor Products Corp.	3,729	.6
Dixie-Narco, Inc.	2,156	.3
The Selectivend Corp.	1,546	.2
Census total [5]	[6] 620,931	

1962

Company [11]	Sales [1] (units)	Percent of total [2]
The Vendo Co.	93,479	13.7
Sales under Vendorlator name 29,085		
Sales other than Vendorlator name 64,394		
Universal Match Corp.[4]	50,563	7.4
Canteen Corp.	43,349	6.3
The Seeburg Corp.	30,005	4.4
Cavalier Corp.	17,449	2.6
Westinghouse Electric Corp.	15,738	2.3
La Crosse Cooler Company	9,503	1.4
The Cornelius Company	5,906	.9
Victor Products Corp.	5,452	.8
The Selectivend Corp.	2,459	.4
Dixie-Narco, Inc.	1,667	.2
Census total [5]	[7] 682,687	

1963

Company [11]	Sales [1] (units)	Percent of total [2]
The Vendo Co.	82,248	13.6
Sales under Vendorlator name 28,634		
Sales other than under Vendorlator name 53,614		
Universal Match Corp.[4]	46,123	7.6
Canteen Corp.	33,393	5.5
The Seeburg Corp.	27,115	4.5
Cavalier Corp.	23,164	3.8
Westinghouse Electric Corp.	20,520	3.4
The Cornelius Company	12,960	2.1
La Crosse Cooler Company	7,790	1.3
The Selectivend Corp.	5,463	.9
Victor Products Corp.	4,586	.8
Dixie-Narco, Inc.	1,879	.3
Census total [5]	[8] 606,665	

1964

Company [12]	Sales [1] (units)	Percent of total [2]
The Vendo Co.	92,937	14.8
Sales under Vendorlator name 35,111		
Sales other than under Vendorlator name 57,826		
The Seeburg Corp.	59,005	9.4
Cavalier Division [3] 25,963		
Other 33,042		
Universal Match Corp.[4]	49,700	7.9
Canteen Corp.	28,750	4.6
Westinghouse Electric Corp.	28,366	4.5
The Cornelius Company	19,780	3.1
La Crosse Cooler Company	11,920	1.9
The Selectivend Corp.	8,619	1.4
Victor Products Corp.	3,878	.6
Dixie-Narco, Inc.	1,728	.3
Census total [5]	[9] 628,926	

1965

Company [13]	Sales [1] (units)	Percent of total [2]
The Vendo Co.	107,839	15.9
Sales under Vendorlator name 45,444		
Sales other than under Vendorlator name 62,395		
Universal Match Corp.[4]	55,249	8.2
The Seeburg Corp.	52,058	7.7
Cavalier Division [3] 22,534		
Other 29,524		
Canteen Corp.	29,445	4.3
Westinghouse Electric Corp.	26,708	3.9
The Cornelius Company	16,286	2.4
La Crosse Cooler Company	13,876	2.0
The Selectivend Corp.	10,969	1.6
Victor Products Corp.	2,370	.3
Dixie-Narco, Inc.	1,540	.2
Census total [5]	[9] 677,700	

[1] Unit sales of coin-operated vending machines in the United States by companies included in the stipulation with sales of same. Source—CX 247.

[2] Relationship of unit sales of coin-operated vending machines in the United States to the total units shipped (including export shipments) reported by the Bureau of the Census.

[3] Cavalier Corporation was acquired by The Seeburg Corporation on December 3, 1963.

[4] Universal Match Corporation changed its name to UMC Industries, Inc., in 1966.

[5] Unit total of manufacturers' shipment (including export shipments) as reported to the Bureau of the Census, Current Industrial Reports, Vending Machines, Series M35U.

[6] CX 96.

[7] CX 98.

[8] CX 100.

[9] CX 244.

[10] According to CX 95, there are at least 67 additional companies with sales of coin-operated vending machines that are not included on this exhibit.

[11] According to CX 99, there are at least 65 additional companies with sales of coin-operated vending machines which are not included on this exhibit.

[12] According to CX 244, there are at least 39 additional companies, with sales of coin-operated vending machines; however, CX 244 does not include companies with annual sales of less than $100,000.

[13] According to CX 244, there are at least 33 additional companies with sales of coin-operated vending machines; however, CX 244 does not include companies with annual sales of less than $100,000.

COMMISSION'S EXHIBIT 226

Manufacturers with over $5,000,000 annual sales of coin-operated vending machines in the United States 1961-1965—dollar sales and percent of Bureau of the Census total

Company	Sales [1]	Percent of total [2]
1961		
The Vendo Co.	$44,079,101	25.8
Canteen Corp.	21,347,859	12.5
Universal Match Corp.[4]	18,467,216	10.8
The Seeburg Corp.	9,828,000	5.7
Cavalier Corp.	6,652,000	3.9
Census total [5]	[6] 171,167,000	
1962		
The Vendo Co.	$44,712,355	25.9
Canteen Corp.	25,232,881	14.6
The Seeburg Corp.	21,751,000	12.6
Universal Match Corp.[4]	19,434,444	11.3
Cavalier Corp.	6,364,000	3.7
Westinghouse Electric Corp.	5,937,000	3.4
Census total [5]	[7] 172,335,000	
1963		
The Vendo Co.	$39,547,470	24.2
The Seeburg Corp.	22,572,000	13.8
Canteen Corp.	20,095,378	12.3
Universal Match Corp.[4]	18,518,565	11.3
Westinghouse Electric Corp.	8,999,000	5.5
Cavalier Corp.	8,269,000	5.1
Census total [5]	[8] 163,521,000	
1964		
The Vendo Co.	$47,669,338	26.0
The Seeburg Corp.	34,237,000	18.6
Cavalier Div.[3] $ 9,370,844		
Other 24,866,156		
Universal Match Corp.[4]	23,759,764	12.9
Canteen Corp.	17,291,343	9.4
Westinghouse Electric Corp.	12,487,000	6.8
Census total [5]	[9] 183,679,000	
1965		
The Vendo Co.	$57,019,329	28.5
The Seeburg Corp.	31,507,000	15.7
Cavalier Div.[3] $ 9,248,118		
Other 22,258,882		
Universal Match Corp.[4]	27,044,272	13.5
Canteen Corp.	18,360,857	9.2
Westinghouse Electric Corp.	13,658,000	6.8
Census total [5]	[9] 200,313,000	

[1] Net sales of coin-operated machines in the United States. Source—CX 247.
[2] Relationship of net sales of coin-operated vending machines in the United States to the dollar value of shipments (including export shipments) reported by the Bureau of the Census.
[3] Cavalier Corporation was acquired by The Seeburg Corporation December 3, 1963.
[4] Universal Match Corporation changed its name to UMC Industries, Inc., in 1966.
[5] Dollar value of manufacturers' shipments (including export shipments) as reported to the Bureau of the Census, Current Industrial Reports, Vending Machines, Series M35U.
[6] CX 96.
[7] CX 98.
[8] CX 100.
[9] CX 244.

216. In the overall coin-operated vending machine segment of the vending industry, there is no substantial evidence to support complaint counsel's allegation that the effect of this acquisition "may be substantially to lessen competition or tend to create a monopoly" (Cplt., par. 19). If anything, the statistical evidence adduced would appear to show that rivalry among manufacturers in this segment of the vending industry is healthier today than before (CX 226; RX 468).

217. While Seeburg's percentage of all coin-operated vending machines sold increased slightly between 1963 and 1965 (from 13.8% to 15.7% on a dollar basis, and 4.5% to 7.7% on a unit basis), more significantly, the stipulated sales data show that

the percentage of such sales by the combined Seeburg/Cavalier declined significantly in that period. Seeburg/Cavalier sales of all coin-operated vending machines amounted to 18.9% of all such sales on a dollar basis and 8.3% of such sales on a unit basis in 1963 (CX 226; RX 468). In 1965, Seeburg/Cavalier accounted for only 15.7% of all such sales on a dollar basis, and 7.7% of such sales on a unit basis, an absolute decline of 3.2% on a dollar basis and .6% on a unit basis, and a relative decline of 17% on a dollar basis and 7% on a unit basis (CX 226; RX 468). At the same time, Vendo, long the leading and dominant manufacturer of coin-operated vending machines, increased its percentage share of all such sales during this period from 24.2% to 28.5% on a dollar basis and 13.6% to 15.9% on a unit basis (CX 226; RX 468). Thus, after the acquisition, the decline in Seeburg/Cavalier's market share between 1963-1965 indicates that the acquisition conferred no undue competitive advantage on Seeburg/Cavalier to the detriment of other manufacturers.

218. Actually, most of the other manufacturers of coin-operated vending machines for whom record evidence was presented by complaint counsel increased their sales and market shares between 1963-1965, including particularly the smaller manufacturers, such as Cornelius (2.1% in 1963 to 2.4% in 1965 on a unit basis; 1.4% in 1963 to 1.6% in 1965 on a dollar basis); La-Crosse (1.3% in 1963 to 2.0% in 1965 on a unit basis; 1.6% in 1963 to 2.5% in 1965 on a dollar basis); and Selectivend (.9% in 1963 to 1.6% in 1965 on a unit basis; 1.4% in 1963 to 2.4% in 1965 on a dollar basis) (RX 468, 417; CX 247, 100, 244 B).

219. A few vending machine manufacturers' share of all coin-operated vending machines sold in the United States declined between 1963 and 1965 (*e.g.*, Canteen and Victor Products). However, their business was not lost to Seeburg/Cavalier, whose own combined share of such sales declined in that period (RX 468; CX 226). Victor Products' executive vice president testified that there was "no" difference in Victor's ability to solicit sales for its bottle and can vending machines due to the challenged acquisition, since Victor and Cavalier did not solicit the same class of customers (Small, Tr. 1303–04).

220. According to the record evidence, competition among manufacturers of vending machines appears to have been enhanced rather than inhibited following the challenged acquisition.

221. In response to complaint counsel's question as to what he deemed "the greater benefit of the merger" (Tr. 2083), William G. Raoul, president of the Cavalier Division of The Seeburg Corporation and former president of Cavalier Corporation, testified "[t]he fact that * * * Cavalier would have access to a line of general vending equipment which would enable us to compete with Vendo effectively in the National User market. Vendo had no competition in the field at that time" (Tr. 2083).

222. Likewise, Delbert W. Coleman, chairman of the board of The Seeburg Corporation, testified, on direct examination by complaint counsel, that the Cavalier acquisition appeared to us to "be an opportunity for us to sell the Coca-Cola bottlers so that we could properly compete with our competitor," Vendo (Coleman, Tr. 2106), since "there was just one of our major competitors who sold Coca-Cola a full line and that was Vendo" (*Ibid.*).

223. According to the uncontroverted evidence of record, new and intensive competitive rivalry now exists for Vendo in the segments of the vending business involved in this case. Prior to the acquisition, Vendo dominated the full-line vending field with Coca-Cola bottlers and had the National Users business virtually "locked up" (Raoul, Tr. 2080; Coleman, Tr. 2106; Brinkmann, Tr. 1722). But now Seeburg/Cavalier also has a fuller line of vending equipment for sale to Coca-Cola bottlers, who have diversified into full-line vending and the National Users market, bringing additional competition in these changing segments of the vending industry (RX 487 L; Findings No. 174–178, 189). As Mr. Raoul testified on direct examination by complaint counsel, Cavalier's position with Coca-Cola bottlers "has been strengthened in the field of being able to offer our equipment in association with Seeburg equipment in the national user program" (Tr. 2084).

224. Illustrative of Seeburg's efforts and increased competition, the record indicates that in 1965, among others, Sinclair Oil has "joined our [Seeburg's] list of new oil company customers and has decided to test our oil company banks" in various locations (RX 451). In addition, Mobil and Texaco are using Seeburg equipment today and "there are many others interested" (Raoul, Tr. 2081).

225. According to evidence of record received without objection by complaint counsel, "[i]f Cavalier had not merged with Seeburg, neither Seeburg nor Cavalier would have been equipped

to compete for this business, The Vendo Company would hav received the [Mobil] order without contest" (RX 450 D)

226. Even though Seeburg/Cavalier makes its own banks o vending machines available to oil companies, the "Vendo Beig color" is still frequently specified (RX 451 *cf.* Brinkmann, Tr 1721–22).

227. The Seeburg/Cavalier acquisition enabled Cavalier to "ex hibit an oil company bank at the International Convention tha [was] conducted by Coca-Cola" in 1965 (RX 452; *cf.* RX 39 A–B, 398 A–C). Along with the Cavalier cold drink machines the bank of machines to be exhibited included a candy, cigarett and soluble coffee vender, all of which would not have bee available to Cavalier prior to the challenged acquisition (RX 452).

228. Intensified competitive rivalry following the Seeburg/ Cavalier acquisition is reflected in a Vendo General Automati Products Bulletin No. 76, dated July 13, 1965, entitled "Oi Companies," stating that while "Vendo has the lead in the oi company market, * * * Our competitors want the oil compan business, and there isn't one of them who isn't calling on the oi companies trying to get it" (RX 399). It also indicated tha "Seeburg is the most active at the present time and has a modula bank consisting of a Choice-Vend (Pepsi-Cola) or Cavalie (Coca-Cola) bottle or can beverage vender * * * and the old Du Grenier (Williamsburg) cigarette, candy and instant coffee venders" (RX 399). Hence, in 1965, Vendo found it necessary to compare Seeburg/Cavalier and Vendo machines concerning prices to oil companies and other national accounts (RX 395).

229. Similarly, 1965 Vendo documents demonstrate Vendo's concern that "We now have serious competition * * * Seeburg Westinghouse and National are all calling on the oil companies Seeburg has supplied Coca-Cola with literature and slides describing their service station bank, and Coca-Cola intends to show our literature and Seeburg's to all oil companies large and small" (RX 396 B).

CONCLUSIONS

I. Observations Concerning Evidence Generally as Related to Complaint Counsel's Case Theory

Complaint counsel are correct in their assumption that all types of vending machines as a whole constitute a relevant line of commerce and that bottle vending machines alone con-

stitute a well-defined submarket within the overall vending machine market. As stated by complaint counsel in their brief in support of their proposed findings, within the broad market encompassing all types of coin-operated vending machines "well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes" *United States* v. *du Pont & Co.*, 353 U.S. at 593–595; *Brown Shoe Co.* v. *United States*, 370 U.S. at 325.

Complaint counsel are also especially correct in their further assumption that: "Because § 7 of the Clayton Act prohibits any merger which may substantially lessen competition in any line of commerce, it is necessary to examine the effects of a merger in each such economically significant submarket to determine if there is a reasonable probability that the merger will substantially lessen competition. If such a probability is found to exist, the merger is proscribed." (*Brown Shoe Co.* v. *United States, supra.*) However, complaint counsel overlook the fact that Cavalier, the acquired firm, was not mainly and principally engaged in the manufacture and sale of bottle vending machines prior to and at the time of the challenged acquisition except in the limited sense of manufacturing Coca-Cola bottle vending machines for sale to Coca-Cola bottlers exclusively. Whether or not one considers the manufacture and sale of vending machines to dispense bottled Coca-Cola as a submarket separate and apart from the bottle vending machine market, or as a segment of the same submarket, makes little difference economically or legalistically.

The evidence clearly indicates that before Seeburg's acquisition of Cavalier, Seeburg was partially excluded from competing in the bottle vending machine market since it could not obtain Coca-Cola's necessary approval to supply Coca-Cola bottle vending machines to Coca-Cola bottlers. In fact, Seeburg was totally excluded from competition in this segment of the market until its acquisition of Cavalier.

Having exhausted every effort to compete in the foregoing market through internal expansion, Seeburg was compelled to acquire Cavalier in order to overcome its partial exclusion from the overall coin-operated bottle vending machine market or its total exclusion from the coin-operated Coca-Cola bottle vending machine market, depending upon what semantics one applies to the nature of that market. The compelling need for the acquisition becomes even more crucial when one views this exclusion

from the standpoint of a changing overall vending machine market which also made it necessary to diversify product lines particularly including Coca-Cola that was evidenced to be an essential line in diversified vending. The result of the acquisition was, therefore, not only to enhance competition but to permit competition that heretofore had not existed, whereby Seeburg could compete with Vendo, among others, that had been able to establish themselves in varying degrees in the Coca-Cola bottle vending machine segment of the market. It is impossible to conclude, as complaint counsel suggest, that Seeburg acquired a company with which it had unrestricted competition. The competitive obstructions are unequivocally clear.

The foregoing conclusion is supported by the *Brown Shoe Co.* case, *supra,* cited by complaint counsel, which states as follows:

> The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

The court in enunciating this guide line is applying the same realities to the nature or condition of the market as the Commission by taking cognizance of the fact that some acquisitions may enhance competition to a desirable degree.

In the instant case, an examination of the competitive realities before and after the acquisition suggests that not only has competition been enhanced because of Seeburg's acquisition of Cavalier, but it has permitted competition in a crucial segment of the market that excluded respondent from effectively competing in the total market or markets at issue. Since Cavalier voluntarily limited itself to the manufacture and sale of Coca-Cola bottle vending machines, it had nothing to offer to respondent in the nature of making it more competitively effective in other segments of the bottle vending machine market except to permit it (respondent) to compete with other full-line vending machine manufacturers, such as Vendo, which appears to have been able to maintain its leadership in the market despite the acquisition. Significantly, other vending machine manufacturers appear to have maintained an approximate status quo with regard to their sales position in the market.

Complaint counsel appear to argue that all of the foregoing competitive realities are meaningless under *United States* v. *Bethlehem Steel Corporation,* 168 F. Supp. 576, 594 (S.D.N.Y. 1958), because the acquisition in that case reduced the number

f competitors despite the fact that the merger of the ninth and 3rd largest companies placed Bethlehem in a position to better ompete with those companies having a higher percentage posiion in the market than Bethlehem. This theory, however, overooks the fact that in the case before us (Seeburg) there was a ompelling need for the acquisition to permit competition preiously excluded. Furthermore, as heretofore stated, Seeburg's ompetitors were not reduced in competitive effectiveness since Seeburg only acquired competitive ability in an area of competiion evidenced to be closed to them prior to the acquisition. Proof of their efforts to pierce this anticompetitive obstruction hrough internal expansion before acquiring Cavalier is without contradiction. This evidence is particularly impressive in view of the fact, as heretofore stated, that the Coca-Cola bottle vending machine market was evidenced (also without contradiction) to be a crucial segment of the bottle vending machine market in the overall vending machine market, requiring full-line and diversified vending under the market leadership of The Vendo Company.

Complaint counsel's analysis to the effect that Seeburg had full-line vending as well as Vendo before Seeburg's acquisition of Cavalier is entirely without merit since, as heretofore stated, the evidenced realities of the market in question indicate, also without contradiction, that the Coca-Cola vending machine segment of the market was crucially important in affording full-line competition to meet diversified product demand by supplying complete banks of machines. Obviously, Seeburg (as a manufacturer and seller of vending machines) did not and could not compete in a full-line market since it was denied entry into the Coca-Cola bottle vending machine segment of the market before acquiring Cavalier.

Resolution of the legality or illegality of an acquisition challenged under the Clayton Act's Section 7 may not be premised upon legalistic abstractions. At the termination of the hearing, the hearing examiner urged that the proposed findings and conclusions of counsel be rationalized on the basis of showing actual competitive effect of the acquisition or the potential likelihood of such competitive effect in the specific market or markets at issue, supplemented, of course, by an application of the law in context with the evidenced material economic facts.

Complaint counsel urge that the same relief of divestiture be accorded in the Seeburg case as in many other cases cited.

However, complaint counsel's proposed findings and brief fail to establish a rationalized relationship between the proposed findings and material issues in this case or to rationalize the applicability of the cases cited to the market facts evidenced in this case. Aside from the lack of assistance in this regard, or discussion of the law as it applies to the material issues concerning the market facts before the hearing examiner, an independent examination of the evidence leads one to the conclusion that the evidence adduced by complaint counsel supports the assumption that Seeburg's acquisition of Cavalier enhanced competition rather than destroyed it, either actually or potentially. This will hereinafter be more specifically analyzed as accurately contended by respondent's counsel supplemented by hearing examiner augmentation with the observation that regardless of the probative weight one assigns to complaint counsel's rather questionable proof of over concentration (in view of the rapidly changing relevant market and otherwise), such proof is not augmented by evidence of probable anti-competitive effect emanating from the merger at issue aside from elusive abstractions such as respondent's post-merger dollar and percentage of business increase, a general trend of acquisitions and decline in the number of firms in what appears to be a changing market in response to consumer demand for full line diversified product equipment of homogenious design for installation in complete banks. (See page 106 [p. 648 herein].)

II. Required Consideration of Competitive Realities Rather Than *Per Se* Rule Application to Incomplete Evidentiary Facts

In the first place, "[i]n every Section 7 proceeding, the burden is on the complainant to prove that the merger will create a reasonable probability of a substantial lessening of competition or tendency to create a monopoly. This burden is not met, in any case, by invocation of a talismanic *per se* rule by which to dispense with the need for adducing evidence of probable anti-competitive effect. Congress declared neither that all mergers, nor that mergers of a particular size or type, are *per se* unlawful. In every case the determination of illegality, if made, must rest upon specific facts." (*Procter & Gamble Co.*, Dkt. 6901, p. 22 (Nov. 26, 1963) [63 F.T.C. 1465, 1548]; see also *Foremost Dairies, Inc.*, 60 F.T.C. 944, 1082 (1962).

Moreover, a merger must "be functionally viewed, in the con-

ext of its particular industry" (*Brown Shoe Co.* v. *United States.* 370 U.S. 294, 321–322 (1962)).

Accordingly, while market share statistics may be a useful ndex of so-called "market power" or "concentration" in ap-ropriate cases, "only a further examination of the particular narket—its structure, history and probable future—can provide he appropriate setting for judging the probable anticompetitive effect of the merger" (*Id.* at 322, n. 38).

Such market analysis presupposes identification and proof of a "relevant market" or "area of effective competition" since "substantiality [of competitive effect] can be determined only in terms of the market affected" (*United States* v. *E.I. duPont de Nemours & Co.*, 353 U.S. 586, 593 (1957)).

As the late Judge Dawson stated in an important Section 7 decision dismissing a merger case, which the Justice Department never appealed:

> Merely carving out a large segment of an industry as being the relevant line of commerce, without taking into account the competitive realities of submarkets, and merely adding the percentage of the business done by one company to the percentage done by another company does not establish that the effect of the acquisition may be substantially to lessen competition. (*United States* v. *Lever Bros. Co.*, 216 F. Supp. 887, 898 (S.D.N.Y. 1963))

See also *United States* v. *Columbia Pictures Corp.*, 189 F. Supp. 153, 196 (S.D.N.Y. 1960) ("Statistics dealing only with rank and percentages do not by themselves suffice to describe whether the vigor of competition has been affected"); Report of the Senate Committee on Antitrust and Monopoly, Concentration in American Industry, 85th Cong., 1st Sess. 4 (1957) ("Bare statistics necessarily omit many qualitative factors which are essential to a complete understanding of the competitive structure of the entire industrial economy or of an individual industry").

III. The Cavalier Acquisition as a Diversification Move Stimulating Competition

Measured against the foregoing principles, the testimony and other evidence of record in this case make it clear that whatever standards of proof may now apply where "horizontal" mergers of direct and substantial competitors are involved[9] this case, like the *Lever* case, cannot be adjudicated by

> Carving out a large segment of an industry as being a relevant line of

[9] Compare *United States* v. *Philadelphia National Bank*, 374 U.S. 321, (1963) (invalidating merger of second and third largest Philadelphia banks with combined assets of $1.75 billion); *United States* v. *Von's Grocery Co.*, 384 U.S. 270, 272 (1966) (invalidating merger of directly competing Los Angeles grocery chains with combined sales of $172.5 million annually.

commerce, without taking into account the comparative realities of submarkets, and merely adding the percentage of the business done by one company to the percentage done by another company * * * 216 F. Supp. at 898.

For here any realistic analysis of the actual market facts of record will demonstrate that:

(1) No actual or potential competition existed between Seeburg and Cavalier at the time of the challenged transaction in 1963;

(2) In light of observable industry trends, the acquisition strengthened rather than lessened competition by enabling both Seeburg and Cavalier to diversify so as to serve customers they previously could not reach;

(3) Complaint counsel's inconclusive statistical proof cannot establish any adverse competitive efforts; particularly when

(4) Competition in the vending machine manufacturing segment of the vending industry today is more vigorous than ever, with manufacturers enjoying a greater range of choice among customers, and customers, in turn, enjoying the benefits of wider choice among manufacturers.

IV. Status of Seeburg and Cavalier Competitively at the Time of Cavalier Acquisition in 1963

At the time of the challenged transaction in 1963, Cavalier and Seeburg served entirely different customer classes within the vending industry, each having long since been forced to recognize that they could not compete effectively for the class of customers served by the other.

Thus, as of 1963, Cavalier manufactured and sold bottle and/or convertible bottle/can vending machines exclusively to the bottlers of Coca-Cola, a specialized business which it had cultivated and enjoyed since 1934. (Findings No. 19, 21, 77, 88.)

By contrast, Seeburg, through its Choice-Vend Division, sold bottle and/or can vending equipment only to bottlers of soft drinks other than Coca-Cola—a distinct and separate group known as "trade bottlers" or "the other side of the street" in the industry. (Findings No. 50, 52, 54, 155.)

More specifically, Cavalier in 1963 was one of five suppliers of upright Coca-Cola bottle and/or can vending machines "approved" by the parent Coca-Cola syrup company, and had long shared with the much larger Vendo Company and Westinghouse Electric Corporation the bulk of the substantial business generated by Coca-Cola bottlers, who had aggressively pioneered the "cold bottle" vending machine market prior to and after

World War II. (Findings No. 50, 53, 65, 70, 141; see also RX 474 and 475.)

Moreover, the business of the Coca-Cola bottler customers was protected for these "approved" suppliers by Coca-Cola's equipment acceptance and approval policy as it existed from 1957 until 1966. That Coca-Cola's approval, which Vendo, Westinghouse, and Cavalier enjoyed, was essential to effective competition for the business of Coca-Cola bottlers, is shown by the fact that, on the basis of stipulated sales data, no nonapproved supplier of bottle or bottle/can vending equipment had more than token sales to Coca-Cola bottlers at any time between 1961 and 1965. (Findings No. 75, 76, 78, 83, 84.)

Westinghouse, until the latter half of 1966, sold no machines to non-Coca-Cola bottlers. Vendo sold exclusively to Coca-Cola bottlers prior to 1956, and after a brief period of confusion and "misunderstandings" following its 1956 acquisition of Vendorlator,[10] set up a separate sales force selling the Vendo line exclusively to Coca-Cola bottlers while Vendo's Vendorlator division handled "trade" bottler sales. (Findings No. 78, 90, 91, 93, 210; see also Burlington, Tr. 1518–21; Selzer, Tr. 1546–49; Hansen, Tr. 1567–69; CX 65, pp. 7–9; RX 457, p. 19; 315; 316 C–D; 318 A–D; 450 C.)

Unlike Vendo, Cavalier made no major acquisition of separate bottle vending manufacturing and sales facilities. Accordingly, Cavalier's 1955-57 attempt to sell to "trade" bottlers created sales and manufacturing problems which were too great in light of the meager results obtained. Cavalier therefore determined to and did concentrate its efforts after 1957 exclusively in the Coca-Cola field. (Findings No. 21, 180, 183.)

By contrast to Cavalier, Seeburg's Choice-Vend Division, from its inception in 1956 as Choice-Vend Corporation, had concentrated on the separate and distinct "trade" bottler segment of the vending industry—*i.e.*, sales to bottlers other than bottlers of Coca-Cola (Miller, Tr. 1984; Findings No. 75, 86, 155).

At the time of the challenged acquisition in 1963, the "trade" bottler field, like the Coca-Cola field, was marked by parent syrup company equipment approval programs, and the existence of a specialized group of manufacturers who concentrated on sales only to "trade" bottlers—*i.e.*, Choice-Vend, LaCrosse, Victor Products, Selectivend, and Vendorlator, which had in 1956 become a division of Vendo. (Findings No. 71, 72, 74, 75, 85, 86, 90.)

[10] See In the Matter of The Vendo Co., 54 F.T.C. 253 (1957).

Like Cavalier, Choice-Vend had made efforts to break out of its own field so as to be able to bid for the business of Coca-Cola bottlers. In fact, Choice-Vend and later Seeburg/Choice-Vend repeatedly sent its equipment to Atlanta for testing and approval by Coca-Cola, but was repeatedly rejected. Finally, after a major sales presentation by Seeburg/Choice-Vend to Coca-Cola in Atlanta in December 1961 led to a final turndown by Coca-Cola in February 1962 (RX 273), even though Coca-Cola was "confident" that "Seeburg would make a good supplier," Seeburg saw that it could not hope to compete for the business of Coca-Cola bottlers, and abandoned its efforts in this direction.

As of 1963, therefore, neither Seeburg/Choice-Vend nor Cavalier solicited the customers of the other. Moreover, the record refutes any inference or speculation that either would have or could have, after its past experience, attempted to reverse the competitive pattern, set by the large parent syrup companies, which effectively precluded such competition until 1966.

Furthermore, any contention that Seeburg/Choice-Vend and Cavalier as of 1963 were actual or potential competitors is entirely without merit since Seeburg was excluded from the market segment Cavalier sold to.

V. The Effect of Seeburg's Acquisition of Cavalier Competitively

Irrespective of the traditional Coca-Cola "trade" bottler split characterizing the industry until 1966, the record further shows the existence of trends in the vending industry which made diversification by vending machine manufacturers a competitive must. Indeed such growth was particularly important for a relative newcomer such as Seeburg which had first entered the industry in 1958, and a single-line independent facing larger rivals such as Cavalier. (Findings No. 50, 52, 97, 103, 113, 122, 204, 210, 12, 19, 179.)

Foremost among the important industry trends was the movement to "full-line vending" by both vending operators and soft drink bottlers. As detailed in the findings, this trend was based on the expansion of the vending industry generally in terms of total volume and number and type of items vended and favored the manufacturer who could provide matched banks of several machines vending different products, usually including, among others, soft drinks, candy, cigarettes, food and pastry. (Findings No. 97–112.)

Contemporaneous with the "full-line vending" trend was the developing "National Users" market, featuring direct sales efforts at the national headquarters level of such customers as oil companies and other nonvending businesses, by both vending machine manufacturers themselves and parent syrup companies such as Coca-Cola, in an effort to place in service stations and other outlets matched banks of vending machines adapted to the National Users' specifications. (Findings No. 113–122.)

Here again, to compete successfully for the business of "National Users," vending machine manufacturers need the same type of matched banks of soft drink vending machines and associated equipment necessary to service bottlers and operators engaged in full-line vending. Moreover, the manufacturers must also enjoy good relations with the parent soft-drink syrup companies, particularly Coca-Cola, which has been most aggressive in cultivating this market. (Findings No. 115, 120–123, 125.)

Underscoring the necessity of manufacturer diversification to meet the needs of their changing and expanding vending industry customers, Vendo recognized as early as 1956, even before respondent entered the industry, that "the expanding markets for automatic merchandising equipment had already forced us to embark on a plan of extensive diversification of our product line" (RX 316 D).

Accordingly, Vendo vigorously pursued a program of diversification, which included its 1956 acquisition of Vendorlator Company, a large bottle vending machine manufacturer (*In the Matter of The Vendo Co., supra,* at 254). By the time of the challenged acquisition in 1963, Vendo had the position of industry leader, with a market share nearly twice as great as that of its nearest competitor, no matter how measured (*i.e.,* on a dollar or unit sales basis). (Findings No. 90, 136–137.)

Other instances of diversification shown in the record include Canteen Corporation, which acquired Rowe Manufacturing Company in 1955, and introduced a new line of matched bank vending machines in 1962, UMC's National Vendors subsidiary, which by 1963 had expanded its line of machines to include a "new 'Moduline' series of uniformly-styled machines for cigarettes, candies, hot foods, sandwiches and pastries" (CX 66, p. 7), and was continuing its emphasis on the "development of a 'full line' of vending machines" (CX 67, p. 4) and Westinghouse, which entered the "full line vending" field with a post-mix cup machine, a fresh brew coffee machine, a candy machine, and a

tandem can vending machine in 1965 and 1966. (Finding No 152.)

Respondent also has participated in this trend toward di versification among manufacturers, largely through the acqui sition of "small," "unprofitable" and even "bankrupt" com panies, and by 1963 its line included cigarette machines, coffe machines, cup soft drink machines, and bottle and can vendin machines for non-Coca-Cola bottlers. (Findings No. 12–13, 3(148–150.)

Notwithstanding the competitive efforts of respondent and it other rivals, Vendo in 1963 still occupied a unique and dominan spot as the only manufacturer able to offer its full line of vend ing equipment to all segments of the vending industry. For, a of 1963, Vendo not only had the most complete line in the in dustry, but it was the only major full line manufacturer suc cessfully selling both to the important Coca-Cola bottler seg ment of the vending industry, and also to the growing "trade bottler segment, which Vendo served through its separate Ven dorlator division, acquired in 1956. (Findings No. 90, 95–9(140; see also Brinkmann, Tr. 1722; Coleman, Tr. 2106; Selzer Tr. 1553–54; CX 226; 65, pp. 7–9; 11; RX 457, pp. 18–19; 45 pp. 19–22.)

In fact, with Coca-Cola leading the way in the National Users program, and Vendo the only approved Coca-Cola supplie able to offer the necessary full line vending equipment, Vendo b 1963 had this phase of the vending machine business "locke up." (Findings No. 109, 131, 174, 177, 188.)

Thus, at the time of the challenged acquisition in 1963, See burg and Cavalier, which were not competitors, were faced wit serious problems in their attempts to compete effectively wit larger and longer entrenched competitors to serve the chang ing needs of customers in the vending industry.

For its part, Seeburg had been rebuffed in its attempts t serve Coca-Cola bottlers. Not only was Seeburg effectively bar red from selling bottle and can vending equipment to a larg segment of the industry which was served by the leading an dominant Vendo, but it also found that it could not sell its othe vending machines to Coca-Cola bottlers moving into full-lin vending, or to National Users, which chose Coca-Cola as the pre ferred soft drink. (Findings No. 123, 131, 171, 172, 174, 177.)

Thus precluded from effective access to Coca-Cola bottlers

Seeburg sought Cavalier only as "a last resort" (Tr. 2108; Finding No. 178).

Cavalier likewise foresaw a competitive dead end as a single line supplier of bottle/can vending machines with no "associated equipment" to offer its Coca-Cola bottler customers diversifying into full-line vending, or to participate in the National Users' market. Thus, in the early 1960's, Cavalier had begun to look into the possibility of an association which would give it the opportunity to participate in this business which Vendo at that time had secured. (Findings No. 131, 187, 189.)

Viewed in light of these industry realities, the Seeburg/Cavalier transaction in December 1963 was a natural and legitimate diversification attempt by the parties which could not, and did not, lessen competition.

From the standpoint of market structure immediately after the acquisition, the number of firms bidding for the bottle/can vending machine trade of Coca-Cola bottlers and "trade" bottlers remained the same. Vendo, Westinghouse, and Cavalier, which now operated under its same management as a completely separate and independent division of Seeburg, continued to share the Coca-Cola bottler business. At the same time, Choice-Vend, LaCrosse, Selectivend, Victor Products, and Vendorlator continued in their traditional roles as "trade" bottler suppliers.[11]

From a broader perspective, however, the acquisition created a more competitive market structure. For Seeburg/Cavalier was, for the first time, able to offer matched banks of machines to Coca-Cola bottlers engaged in full-line vending and to National Users, thus penetrating a field which Vendo had previously dominated. (Findings No. 131, 188–189, 223–229.)

VI. Complaint Counsel's Statistical Proof as Related to the Market Facts

With industry realities detailed in this record so clearly showing the legitimate diversification and procompetitive effects of the challenged acquisition, it is doubtful even a strong statistical case would enable complaint counsel to carry their burden of proof to establish anticompetitive or monopolistic aspects of the acquisition. But here the statistical proof is so inconclusive, if not totally invalid, that it is manifest that complaint counsel have totally failed to prove their case.

[11] Cornelius, with a unique, low-cost horizontal vendor, served both segments of the bottler trade.

Taking complaint counsel's own statistical exhibits at face value, notwithstanding their patent lack of relationship to the competitive realities shown in this record, they show that Seeburg was a distant second in the coin-operated vending machine field in 1963 with only 13.8% of dollar sales to Vendo-Vendorlator's 24.2%. During the same year, Cavalier Corporation had 5.1% of the dollar sales, for a combined Seeburg-Cavalier total of 18.9% (CX 226).[12] (Findings No. 141, 217; see also RX 468 re unit basis.)

Whatever significance such statistical recitations might have in some other competitive setting, the plain fact is that they are totally meaningless in the overall context of this case.

Viewed on a unit basis in 1963, respondent was only fourth in the sale of coin-operated vending machines, with 4.5% of total sales to first place Vendor-Vendorlator's 13.6%. Cavalier, in fifth place, had a share of 3.8%—a "combined market share" of 8.3% for Cavalier and respondent (RX 468).

Moreover, taking both the unit and dollar sales statistics at face value, it is readily apparent that the challenged acquisition had no lasting effect either in enhancing respondent's competitive position to the detriment of other competitors (Cplt., par. 19 (d)) or in increasing "concentration" (Cplt., par. 19 (c)).

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[12] Larger percentages can be obtained based on complaint counsel's exhibit showing data for "coin-operated bottle vending machine" sales on a dollar basis (CX 225). But, in light of the demonstrated lack of competition between Cavalier and Seeburg/Choice-Vend, such statistics provide no valid measure of the acquisition's competitive impact. See *United States v. Lever Bros. Co., supra*, at 897–898. And, in any event, the so-called "bottle vending machine" chart, which in fact includes data for convertible bottle/can machines, again emphasizes the leading and dominant position of the Vendo-Vendorlator combine first created in 1956.

Entirely separate and apart from the Coca-Cola/"trade" bottler split negating the competitive significance of "bottle vending machine" statistics, the record creates substantial doubt as to whether the so-called "bottle vending machine" market is a realistic "area of effective competition" in which to analyze the competitive effects of this acquisition. Thus bottle vending machines are merely one type of coin-operated machine regularly purchased and used by soft drink bottlers to dispense their products to the public. Moreover, many bottle and can machines are readily and inexpensively convertible to handle soft drinks packaged either in cans or in all types of bottles, and the same manufacturers both make and sell both bottle and can machines to the same class of customers (CX 247; RX 417). Under the recognized test of "reasonable interchangeability of use," *Brown Shoe Co. v. United States* 370 U.S. at 325, therefore, it appears unrealistic to isolate "bottle vending machines" as a separate market, an economically meaningful separate market, submarket, or "line of commerce." For there is no evidence that bottle vending machines possess "peculiar characteristics and uses" to distinguish them from can vending machines, or that they are sold at significantly "distinct prices" to "distinct customers" by "specialized vendors" using "unique production facilities," so that the "practical indicia" which might make "bottle vending machines" as much an appropriate "submarket" are also lacking here, particularly in the face of evidence that "distinct customers"—*i.e.*, Coca-Cola and "trade" bottlers—base their purchasing patterns on the identity of suppliers rather than the type of machines involved.

On a dollar basis, combined Seeburg-Cavalier coin-operated vending machine sales declined from 18.9% of complaint counsel's totals in 1963, to 15.7% in 1965—substantially smaller than Vendo-Vendorlator's 28.5%. (Finding No. 217.)

A parallel trend was apparent on a unit basis, where Seeburg-Cavalier declined from 8.3% of all coin-operated vending machine sales in 1963 to 7.7% in 1965, and dropped to third place in the industry behind Vendo-Vendorlator with 15.9%, and UMC with 8.2%.[13]

Thus it is apparent statistically, as well as from a realistic observation of market trends, that competition in the vending machine manufacturing segment of the vending industry today is more vigorous than ever, with manufacturers enjoying a greater range of choice among customers, and customers, in turn, enjoying the benefits of wider choice among manufacturers.

VII. Applicable Law in Context with Industry Facts[14]

In light of the industry facts revealed by the record, existing Section 7 precedents provide no basis for a finding of illegality.

In the first place, the cases involving "horizontal" mergers between large direct and actual competitors simply have no application to the facts of this case—where the acquired and acquiring companies not only did not compete, but were effectively foreclosed by customer policies and practices entirely beyond their own control from soliciting each other's customers.

And, in any event, from the viewpoint of realistic economic impact, it is difficult to compare this acquisition, involving relatively small fabricating companies with total 1963 sales and assets of $54.5 million and $36.2 million, respectively, for Seeburg and total 1962 sales and assets of $8.4 million and $7.2 million, respectively, for Cavalier,[15] in a small segment of the expanding $3.8 billion dollar vending industry (1965), with prior cases involving such mergers as those of the second and

[13] A similar decline for Seeburg and continued dominance by Vendo-Vendorlator is apparent from the so-called "bottle vending machine" statistics (CX 225; RX 469).

[14] *I.e.*, manufacture and sale of vending machines, including bottle vending machines or Coca-Cola bottle vending machines, which are either a submarket of the general vending machine market or a crucial segment of that market.

[15] Even using Seeburg's 1965 assets of $85,908,696, which reflects substantial internal expansion (*cf.* CX 10, p. 4 with CX 39, p. 12), it ranks it among the smaller respondents sued by the FTC under § 7 since 1950. Indeed, per Chairman Dixon, 75% of the Commission's merger complaints to date have involved larger companies. See Testimony of Paul Rand Dixon, Chairman, FTC, before the Select Committee on Small Business, U.S. Senate, pp. 5–6, March 15, 1967. Although sales dollar size is not a governing factor in and of itself, these statistics suggest that perhaps in some degree they do bear some relationship to economic impact in some industries.

sixth largest steel companies (combined sales of common products, $1.5 billion) *United States* v. *Bethlehem Steel Corporation*, 168 F. Supp. 576 (S.D.N.Y. 1958),[16] leading companies in the can and glass container industries, which actively competed for the business of the same customers (total sales $645 million) *United States* v. *Continental Can Co.*, 378 U.S. 441 (1964), the second and third largest banks in the city of Philadelphia (total assets $1.75 billion) *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963), the acquisition by Alcoa, an adjudged monopolist, of a competitor, *United States* v. *Aluminum Co. of America*, 377 U.S. 271 (1964), or even the merger of the third and sixth largest grocery chains in Los Angeles, whose total annual sales were $172.5 million, *United States* v. *Von's Grocery Co.*, 384 U.S. 270 (1966).

Furthermore, unlike the central facts underlying the Supreme Court's rulings in the *El Paso* and *Penn-Olin* cases, *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964); *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158 (1964), no trace exists in this case of impaired competition by the joinder of big "potential" competitors either "waiting in the wings" or sitting and "pondering" whether to move into competition in each other's markets (*cf.* 376 U.S. at 660–662; 378 U.S. at 173, 175–176; Supreme Court Brief for the United States in *Penn-Olin* case, p. 48).

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[16] Underscoring the inapposite nature of these "horizontal" merger precedents in this proceeding, a detailed analysis of the *Bethlehem Steel*, case, on which complaint counsel relied at the hearings (Tr. 2420), reveals the following salient facts:

1. The steel industry, involved in *Bethlehem*, is perhaps the most basic industry in the United States;

2. The merging companies in *Bethlehem* were the ninth and fifty-third largest companies in the United States in terms of sales;

3. In *Bethlehem* the merging companies both sold the same products largely to the same customers so that the merger eliminated substantial actual and direct competition;

4. *Bethlehem* also involved (a) adverse vertical effects; (b) a reduction in the number of fully integrated competitors; and (c) a great probability that the merged company would retain its share of the market; and

5. Finally, in *Bethlehem*, there was no compelling competitive need for Youngstown's absorption.

By contrast, in this case, the merging companies are small concerns acting as fabricators in a relatively small segment of the expanding and dynamic vending industry. They sold their products to different customer classes, so that no actual or direct competition was eliminated. Moreover, the acquisition created no adverse vertical effects, and, as part of a program for diversification to meet changing consumer needs, it actually increased the number of effectively diversified companies, rather than reducing the number of competitors as in *Bethlehem*. In addition, the decline in Seeburg/Cavalier's market share since 1963 refutes any probability that the company would, or could, retain its market position in the vending industry. Finally, Seeburg's need for the merger as a "last resort" to penetrate the Coca-Cola bottler market and Cavalier's need to associate with a more diversified company faced by five larger rivals, including Vendo which had diversified under the aegis of an FTC consent order, are far more compelling than any facts asserted in the Bethlehem-Youngstown situation.

In the first place, there can clearly be no comparison of El Paso—a billion dollar corporation protecting a monopoly position as the only out-of-state supplier for the $267 million annual natural gas business in the State of California—or of the rapidly expanding sodium chlorate business at stake in the Penn-Olin joint venture agglomerating assets of nearly one billion dollars, with the $11.8 million acquisition of Cavalier by Seeburg, then a $36 million corporation, in a market essentially dominated by Vendo.

More important, in this instance, the uncontroverted facts show that both Seeburg/Choice-Vend and Cavalier had long ceased "pondering" as to the desirability of broadening their lines by augmenting their distribution into the Coca-Cola and "trade" bottler business, respectively. As of 1963, Seeburg had unsuccessfully sought to enter the Coca-Cola vending machine business, and Cavalier's efforts to move outside the Coca-Cola field had totally failed.

Thus, here there is no need for speculation as to the "eagerness, resourcefulness, or nearness" of alleged "potential" competitors (Beatrice Foods Co., Dkt. 6653, p. 32, April 26, 1965, noting that "[m]uch potential competition is simply too remote, speculative, or improbable to have demonstrable competitive significance").

As stated by respondent's counsel, neither Cavalier nor Seeburg/Choice-Vend by 1963 was "waiting in the wings." Each had already been ousted from the competitive stage. (Compare *United States* v. *Penn-Olin Chemical Co.*, 246 F. Supp. 917, 934 (D. Del. 1965) *prob. juris noted,* 35 U.S.L.W. 3277 (U.S. Feb. 14, 1967) (No. 760) after reviewing evidence of Pennsalt's business planning, District Court concluded it was "unlikely" that Pennsalt would have entered the relevant market on its own, so that the government had failed to carry its burden of proof in this Section 7 case.)

Finally, in the Commission's *Procter & Gamble* proceeding (Dkt. 6901 (Nov. 26, 1963), *rev'd,* 358 F. 2d 74 (6th Cir. 1966), *cert. granted,* 385 U.S. 897 (1966)) concerning product diversification, the Commission's views in *Procter* provide no possible analogy to this case. (See also the decision of the Supreme Court, No. 342, October Term, 1966, dated April 11, 1967, affirming the Commission's order of divestiture.)

There the Commission predicated Section 7 illegality on the acquisition by Procter, the number one manufacturer in the

household soap and detergent industry (and a major factor in other consumer product fields), with annual sales of $1.16 billion, of Clorox, the number one supplier of liquid bleach, with annual sales of $40 million.

Among the earmarks of Section 7 vulnerability detailed by Commissioner Elman's analysis were: (1) "the very great discrepancy in size between Procter and, not only Clorox, but any firm in the liquid bleach industry" (Dkt. 6901, p. 53, Nov. 26, 1963) [63 F.T.C. at 1571]; (2) the unhealthy market structure of the bleach industry, already dominated by Clorox, which dwarfed its smaller competitors (*Id.* at 57–60) [63 F.T.C. at 1574–1577]; (3) Procter's position as the only significant potential competitor of Clorox (*Id.* at 61) [63 F.T.C. at 1577]; (4) Procter's "strong market position in other (and larger) industries, notably package detergents" which not only might enable it to transfer its "market power" to the sale of liquid bleach, but might also have an important adverse psychological effect on competitors and would-be entrants in the liquid bleach industry (*id.* at 62–64) [63 F.T.C. at 1578–1580]; and (5) the substantial advertising advantages to be gained by combining Clorox's advertising budget with Procter's to obtain maximum advertising and promotional savings (*id.* at 64–67) [63 F.T.C. at 1580–1582].

In this case, the evidence not only shows that at the time of the acquisition in 1963 Seeburg could not have entered the Coca-Cola bottler field on its own, but, in any event, every element perceived as crucial by the Commission's *Clorox* opinion is absent. Furthermore, there is no inconsistency herein with the standards indicated by Justice Douglas in his opinion at page 8 of the *Procter & Gamble Co.* Supreme Court decision to the effect that the court of appeals relied too heavily in that case on post-acquisition evidence rather than on a prediction of the merger's impact at the time of the acquisition. In the instant case (Seeburg), post-acquisition evidence adduced by both complaint counsel and respondent's counsel merely confirms and corroborates the improbability of an anticompetitive impact established by pre-acquisition evidence. Such proof reflects: (1) the nature of a changing market requiring diversified full-line vending equipment of which Coca-Cola bottle vending machines were an integral part and (2) the compelling need for competition in this market which the acquisition foreseeably could, and did, accomplish.

No theories of "potential competition" can invalidate this ac-

quisition, involving companies which operated in separate markets, and which had long since been excluded from each other's fields of competition.

The factually closest merger litigation, in some respects, resulted in a dismissal, which the Department of Justice did not even appeal.

Thus, in *United States* v. *Lever Brothers Co.,* 216 F. Supp. 887 (S.D.N.Y. 1963), the court accepted the Antitrust Division's contention that the challenged acquisition by Lever of Monsanto's heavy-duty detergent product "All" had increased Lever's share of the heavy-duty detergent market from 16.8% to 22.4% and the share of the three leading firms in that market from 85 to 90% (*id.* at 897).

Nevertheless, in light of the "competitive realities" shown in the *Lever* record, the court declined to base its judgment on these statistics, and exonerated the acquisition.

In this connection, the court recognized that Monsanto's "All" was a "low sudsing detergent" which competed in this more specialized field, or "sub-market," with comparable products of Procter & Gamble and Colgate-Palmolive, companies with a much wider range of consumer products than Monsanto. By contrast, Lever had no "low sudsing detergent," and its efforts to develop one internally had been unsuccessful and ceased the year prior to the acquisition. Therefore, Lever "needed a low sudsing detergent to round out its line of products" and "had the experience, expertise and organization to advertise, promote and sell a detergent product" in competition with Colgate and Procter, which Monsanto lacked (*U.S.* v. *Lever Bros. Co., supra,* at 897).

By the time of trial, nearly six years after the acquisition, the court found "no evidence to support the position that the acquisition of the "All" trademark by Lever Brothers or its introduction of new products has given it a dominant place in the detergent industry." (*id.* at 899–900). To the contrary, the combined Lever-Monsanto market share which was 22.0% in the year prior to the acquisition had declined to 21.1% by 1960, still much smaller than the industry leader Procter & Gamble (*id.* at 900).

Notwithstanding the decline in Lever's market share, the evidence also showed that "All" had contributed substantially to Lever's earnings and "enabled Lever to increase the advertising and promotional support of its existing brands and to

undertake the heavy expenditures required for the introduction of two new brands" (*id.* at 901).

As the court recognized, "[t]his is to the benefit of the consumer who may choose today among more and better detergents than were available in 1957" (*ibid*).

Similarly, in the Seeburg case, the market share statistics, which do not take into account "competitive realities," must give way to the facts which are strikingly parallel to those in the *Lever* situation.

Here, as in the *Lever* case, Seeburg needed Cavalier's Coca-Cola machines to round out its line after having tried and failed to enter this important segment of the business on its own (Findings No. 159–185). Moreover, like Lever, Seeburg faced a leading and dominant competitor, Vendo-Vendorlator, with a substantially greater market share (CX 226; RX 468).

Thus the Seeburg-Cavalier acquisition, like the Lever-Monsanto transaction, was essentially a diversification move which enhanced competition by making more different types of machines available to more classes of customers than ever before.

The decisive feature of this case (*i.e.* Seeburg) is the pattern of a rapidly growing and changing vending machine manufacturing industry because of consumer demand for increasingly diversified vended products. To prevent (through divestiture or otherwise) any manufacturer of vending machines from providing a full line of equipment (consistent with consumer requirements) through merger if confronted with impossible internal expansion (as here) is to deprive industry and the consuming public of a competitive market thereby contravening the major purpose of Section 7.

Therefore, on the facts evidenced, a Section 7 violation arising out of the Seeburg-Cavalier acquisition has not been established, either statistically or in the presence of market realities. Divestiture relief sought by complaint counsel would, if anything, inhibit competition rather than enhance it. Accordingly,

ORDER

It is ordered, That the complaint is herein and hereby dismissed.

OPINION OF THE COMMISSION

JULY 15, 1968

By MACINTYRE, *Commissioner:*

The Commission's complaint, issued April 22, 1966, challenged the acquisition of the Cavalier Corporation (Cavalier) by another

vending machine manufacturer, The Seeburg Corporation (Seeburg), as a violation of Section 7 of the Clayton Act, as amended. This matter is now before the Commission on complaint counsel's appeal from the initial decision dismissing the complaint.

It may be noted at the outset that the parties and the hearing examiner seem to have no fundamental disagreement on the basic facts shown by this record, but differ essentially on the legal significance of those facts and the inferences and conclusions which may be drawn therefrom. The examiner and respondent on the one hand and complaint counsel on the other also differ widely on the proper interpretation of Section 7.

Both Seeburg and Cavalier sell and manufacture vending machines defined in the complaint as "any coin-operated electronic or mechanical device which dispenses a product." Seeburg has a relatively broad line of vending machines, including can and bottle vending machines for dispensing soft drinks.[1] Cavalier on the other hand was a single line company concentrating on the production and sale of can and bottle vending machines for the soft drink trade.

Seeburg is a diversified company which, in addition to its vending machine operations, directly or indirectly through its subsidiaries is engaged in the manufacture and sale of coin-operated phonographs, background music systems, hearing aids, electronic organs, coin-operated amusement games, and various musical instruments. Its net sales for the fiscal year ending October 31, 1963, totaled $54,581,306. In the same year, the respondent reported sales of coin-operated vending machines comprising 27,115 units in the amount of $22,575,000.

Cavalier at the time of the acquisition was engaged solely in the manufacture and sale of bottle and convertible bottle/can vending machines. Its net sales for the last full year, prior to its acquisition by Seeburg were $8,408,823.

The vending industry as the examiner found is a large and growing segment of the economy distributing various foods, drinks, cigarettes and related products to the consuming public through coin-operated vending machines placed and serviced in numerous public and private locations by vending operators and soft drink bottlers.

In 1963, the acquisition year, there were approximately 76 companies manufacturing coin-operated vending equipment. These manufacturers in that period reported sales of 606,665 vending machines with a dollar value of 163.5 million dollars. Such

[1] Respondent does not manufacture an all purpose food merchandiser.

equipment has traditionally been purchased by two types of customers, vending operators and soft drink bottling firms.

Vending operators, as the initial decision found, are organizations purchasing and placing banks of vending machines in various locations such as industrial plants, offices and institutions, filling the machines with merchandise and providing the necessary mechanical services for this equipment. The business of certain of these operators is substantial. For example, the Canteen Corporation's sales in 1966, totaled $313,000,000, while those of the Servomation Corporation in the same year amounted to $161,000,000.

The purchases of vending operators of such equipment are also substantial "For example, in 1966, Servomation Corporation had 92,800 vending machines in operation, up from 71,200 in 1964 * * * Automatic Retailers of America, Inc., had over 97,000 vending machines in operation in 1965 * * * and The Macke Company had over 45,000 machines 'producing revenue daily' in 1966" (I.D. p. 579).

The second significant segment of the market for vending machines is comprised of soft drink bottling firms who bottle and distribute soft drinks made from syrup manufactured by various soft drink manufacturers, such as Coca-Cola, Pepsi-Cola, Royal Crown Cola, Dr. Pepper, etc., who are also referred to in the industry as "parent syrup companies." Most bottling firms are independent franchisees, but parent companies do own a number of bottling plant subsidiaries. Soft drink bottlers purchase vending equipment which they place in various places to dispense soft drinks, and they are the largest single class of customers for bottle and bottle/can vending machines manufactured and sold in the United States. The business of these firms is substantial. For example, the Coca-Cola Bottling Company of Los Angeles reported total sales of $25,000,000 in 1965. In the acquisition year, soft drink bottlers made bottle or bottle/can vending machine purchases of approximately $47,000,000 from manufacturers whose representatives testified in this proceeding.

The principal question presented on appeal appears to be the proper definition of the relevant market in which to assess the competitive impact of the merger. In this connection, the hearing examiner apparently sustained the allegation in the complaint that all types of vending machines constitute a relevant line of commerce and that bottle vending machines alone constitute

an appropriate submarket within the overall vending machine market.[2] As a practical matter, however, the examiner evidently divided the bottle vending machine submarket into two further submarkets, the first, a Coca-Cola bottler submarket, and the second, a "trade" bottler submarket consisting of the remaining soft drink bottlers such as Pepsi-Cola, Royal Crown, Canada Dry, and Dr. Pepper.[3] Finding, essentially that prior to the merger, Seeburg had confined its operations to "trade" bottlers, while Cavalier had sold exclusively to Coca-Cola bottlers, the examiner concluded because of barriers between these segments of the soft drink bottling industry that "No actual or potential competition existed between Seeburg and Cavalier at the time of the challenged transaction in 1963" (I.D. p. 636). The finding that the appropriate geographic market for the purposes of this proceeding is the United States, as a whole, is undisputed.

Complaint counsel on appeal strenuously urge that the challenged acquisition is a conventional horizontal merger of direct competitors which eliminated substantial competition in product markets already characterized by a high degree of concentration. The respondent on the other hand, argues that this case as a matter of law is analogous to the Commission's market and product extension cases, stating in effect that the precedents in this area will not support a finding of violation because the

[2] The examiner, however, confused the issue at a subsequent point in the initial decision when he expressed doubt that bottle vending machines constitute an effective area of competition, because bottle vending machines are only one type of coin-operated machine regularly purchased and used by soft drink bottlers to dispense their products to the public. The examiner's doubts on this point also arose from the fact that can and bottle machines in some instances are convertible to either type of soft drink container. It is impossible to reconcile these observations with his previous statement that "Complaint counsel are correct in their assumption that all types of vending machines, as a whole, constitute a relevant line of commerce and that bottle vending machines alone constitute a well-defined submarket within the overall vending machine market" (I.D. pp. 630 and 642, fn. 12). In the Commission's view, the examiner's initial conclusion was correct. Vending machines designed to dispense bottled soft drinks are a well-defined product evidently recognized by the trade as well as by Census classification. They constitute a commercially significant market within which to evaluate the impact of the acquisition. In this connection, it should be noted that Census figures for 1963, show that total sales of bottle vending machines were $52,722,000 while in 1963, total sales for bottle and can vending machines were $55,297,000. Although by 1965, the percentage of the total of can or bottle/can vending machines had increased, bottle vending machines still accounted for the predominant share of this production. Further, as noted below, the competitive picture would not vary significantly whether bottle vending machines alone are taken as a submarket or whether bottle-and can vending machines are considered together.

[3] The initial decision states somewhat ambiguously on this point "Whether or not one considers the manufacture and sale of vending machines to dispense bottled Coca-Cola as a submarket separate and apart from the bottle vending machine market, or as a segment of the same submarket, makes little difference economically or legalistically" (I.D. p. 631).

record demonstrates that there was no potential competition between the merged firms.

The threshold question presented therefore on this appeal is the issue of whether Seeburg and Cavalier at the time of the acquisition were actual and/or potential competitors at the time of the acquisition. The resolution of this issue depends largely on the appropriate definition of the bottle vending submarket, which complaint counsel asserts encompasses all bottler purchasers of bottle vending machines while respondent argues that the facts of record dictate that is be split into two segments, the Coca-Cola segment and the "trade" bottler segment. We turn first to that issue.

In support of his conclusion that Seeburg and Cavalier were not in actual or potential competition, the examiner laid stress on a number of factors. He found that historically the Coca-Cola segment of the bottling business had developed along different lines from those of the rest of the industry.[4] The examiner also found that the Coca-Cola bottlers numbering more than 1,000 are also deemed the more wealthy and aggressive bottlers. In fact, the Coca-Cola bottlers do constitute an important group of customers, who purchased 53% of the can and bottle vending machines sold to all bottlers in 1963.

The key factor apparently influencing the examiner in his determination that competition did not exist between the acquired and acquiring concern, was apparently the approval programs of the various parent syrup companies with respect to vending machines offered to their bottlers. In this connection, the examiner found that historically suppliers selling to Coca-Cola and "trade" bottlers have submitted their soft drink vending equipment to the parent syrup companies for their approval or acceptance prior to offering such equipment for sale to their wholly owned and franchised bottlers.

According to the examiner, Coca-Cola's equipment approval program appeared to have been the most formal and fully developed at the time of the acquisition. The purpose and objectives of Coca-Cola's program were twofold, namely, to provide several lines of vending equipment for Coca-Cola, "representative of the high quality characteristic of that product" and secondly, "to assure bottlers of Coca-Cola an advance evaluation of a broad selection of equipment having highest merchandising appeal, de-

[4] *E.g.*, " 'trade' bottlers, at first did not have the 'orientation towards what we call the' cold bottle market 'that we find in the Coca-Cola industry. Their attitude was just different' " (I.D. p. 581, par. 51).

signed, and built in a manner to operate with maximum efficiency and minimum maintenance and service costs" (RX 289 B, *in camera*).

The examiner further found that Coca-Cola applied its equipment approval program to limit the number of approved suppliers of bottle vending equipment to Coca-Cola bottlers. According to the examiner, under the approval program in effect at the time of and prior to the acquisition, Coca-Cola would work closely with its approved suppliers to modify mechanical and engineering defects found in their equipment to facilitate its approval. In addition, the examiner found that Coca-Cola approval resulted in important advantages for approved suppliers, such as a listing in Coca-Cola's catalog, notification of approval by the parent company to its bottlers, and finally eligibility to participate in promotions such as Coca-Cola's cold drink incentive program designed to increase the number of coolers shipped and placed by bottlers.

The record also demonstrates that other parent companies conducted approval programs similar to those of Coca-Cola, namely, Pepsi-Cola, Royal Crown, Seven-Up, Canada Dry, and Dr. Pepper. These companies too worked with their suppliers to facilitate modifications to remedy defects becoming apparent in the course of testing of vending equipment. As in the case of Coca-Cola, approval by other parent syrup companies gave vending machine suppliers various advantages such as notification that a certain piece of equipment was recommended by the parent company, and the opportunity to participate in a number of promotional programs.

On the basis of his finding that parent company approval is essential to successful sales of bottle vending machines to that firm's bottlers and the further finding that as of the time of the acquisition no vending machine manufacturer "successfully" marketed its upright bottle and can vending machines to both Coca-Cola and "trade" bottlers, the examiner segmentized the bottler market into Coca-Cola and "trade" bottler segments. Respondent unlike the acquired firm lacked Coca-Cola approval. As a result, as already noted, he concluded that Seeburg and Cavalier did not compete.

As a whole, the record supports the conclusion that parent company approval would be necessary for volume sales to the bottlers affiliated with a particular soft drink syrup manufacturer and the record also supports the finding that in general

prior to the time of the acquisition vending machine manufacturers concentrated their sales of bottle vending machines either to Coca-Cola or to "trade" bottlers. This, however, does not justify glossing over other evidence showing the essential unity of the bottle vending machine market or the evidence demonstrating that Seeburg's Choice-Vend Division, although it sold its products largely to "trade" bottlers prior to the challenged acquisition, did actively compete for Coca-Cola business. In the face of this uncontradicted evidence, it was error for the examiner to find no actual or potential competition existed between respondent and Cavalier.

It may be noted at this point, that except for trim and decor there are no basic differences between bottle vending machines sold to Coca-Cola and "trade" bottlers. The physical and engineering characteristics of the equipment sold to Coca-Cola and other bottlers are essentially the same.

The evidence shows that Seeburg's Choice-Vend Division [5] whose equipment at the time had not been approved by the parent Coca-Cola Company sold bottle and can vending machines to Coca-Cola bottlers as well as to other bottlers in the period 1961 through 1965. Choice-Vend, most of whose bottle vending machine business consisted of selling to the so-called "trade" bottlers, may well have preferred to sell more than it did to Coca-Cola bottlers upon approval by the parent company. The fact remains, nevertheless, that for the period 1961 through 1965, on an overall basis, its sales to Coca-Cola bottlers did increase. Although these sales approximated .3% of the total purchases of such equipment by Coca-Cola bottlers in 1963, transactions in excess of eighty thousand dollars [6] cannot be accurately characterized as negligible as they were by the initial decision. It was error for the hearing examiner to give no effect as a practical matter to evidence of competition where it exists.

As a matter of fact, Seeburg prior to the acquisition made strenuous efforts to secure approval of its machines by the Coca-Cola Company and to sell this equipment to Coca-Cola bottlers. Respondent does not deny that fact, but in effect contends, and the

[5] Seeburg acquired the Choice-Vend Company, a manufacturer of bottle vending machines, in 1960. After the acquisition challenged in this proceeding, Choice-Vend and Cavalier were operated as separate divisions by the respondent.

[6] RX 417, *in camera*. The fact that these sales were made at conventions and by word of mouth and that Seeburg/Choice-Vend may not have chosen to aggressively solicit these bottlers is immaterial. It does not vitiate the evidence of actual competition furnished by these figures.

examiner agrees, that because it was unsuccessful in securing approval from the parent company and because its sales to these bottlers were not as large as it might like, that it did not compete with Cavalier which had a substantial portion of the Coca-Cola bottler business. The examiner's finding that there was no competition between respondent and the acquired firm will be vacated. Where two firms sell essentially the same product to the same type of customers, even though one of the vendors by virtue of its relationship with a group of customers is more successful with that group than the other, then such suppliers must nevertheless be regarded as competing with each other. Although Coca-Cola in the period preceding the acquisition may have desired to limit the number of its "approved suppliers" this does not detract from our finding on this point. The fact that a supplier may meet a certain amount of sales resistance by some customers or groups of customers has never hitherto been considered as a justification for fragmenting the product market according to the customers sold by different suppliers. As the Supreme Court noted in another context "Unsuccessful bidders are no less competitors than the successful one." It is the purpose of Section 7 to preserve buyers the choice arising out of such competition.[7]

The evidence further indicates that Seeburg/Choice-Vend was able in the period preceding the acquisition to make its sales presentation to Coca-Cola officials and to have its machines tested by the Coca-Cola laboratories for their operational characteristics, such as refrigeration.

The record shows and the examiner so found that on February 5, 1962, Coca-Cola Company advised Seeburg that, although it was confident respondent would make a good supplier, approval had not been granted since Seeburg did not meet Coca-Cola's requirements for approval of new suppliers which were:

(a) Make available equipment of same quality as now being purchased by Coca-Cola Bottlers, but at a lower price;

(b) Make available equipment of superior quality but at same price as equipment now being purchased;

(c) Supply needed equipment not now available from present suppliers; or

(d) By some other means save Coca-Cola Bottlers money on their equipment purchases.

[7] *United States* v. *El Paso Gas Co.*, 376 U.S. 651, 661 (1964); see also *United States* v. *Provident National Bank*, 280 F. Supp. 1, 14 (E.D. Pa. 1968), holding "The mere fact that a customer chooses this one bank has nothing to do with competition, since the purpose of Section 7 and the Courts in enforcing this statute, is to preserve competition between the successful and unsuccessful providers of these banking services."

Seeburg/Choice-Vend apparently discouraged by this rejection discontinued its approaches to Coca-Cola after 1961. Coca-Cola's requirements for new suppliers, however, do not indicate that Seeburg faced insuperable obstacles in selling to Coca-Cola bottlers or in securing approval from the parent company. It is neither sinister nor unusual for a customer, before taking on a new supplier, to insist that the prospective seller improve upon the performance of existing sources of supply in terms of innovation, lower prices or superior quality. The fact that Seeburg apparently chose not to aggressively compete for this business on the basis of innovation, quality or lower prices, but rather to buy out an existing competitor, does not justify segregating Coca-Cola bottlers from the rest of the bottle vending machine market as the examiner has done here.[8]

The experience of the Cornelius Company which in the period 1963 through 1965, divided its sales among Coca-Cola and other bottlers in relatively equal amounts (RX 417, *in camera*) evidences that a vending machine manufacturer who developed new products for which bottlers had a need could sell his products both to Coca-Cola and other bottlers without hindrance. This again documents the essential unity of the market for bottle vending machines. Coca-Cola's indication to Cornelius that it did not intend to expand its line of approved equipment involving types of bottle vending machines already in use does not support splitting up the market by customer groups as the hearing examiner and respondent suggest.

Finally, in 1966, Coca-Cola announced a new policy to its

[8] The same conclusion is compelled by the testimony of Cavalier's officials relating to that firm's attempts to sell vending equipment to bottlers other than those affiliated with Coca-Cola in the period 1955–1957. At that time, Cavalier approached a number of parent syrup companies including Pepsi-Cola, Royal Crown Cola, Dr. Pepper, and Seven-Up. Of these companies, Dr. Pepper and Seven-Up were definitely interested in Cavalier's product and according to Cavalier's officials, helped that firm in every way they could (Tr. 2067–2068). Cavalier's decision to stop soliciting bottlers other than Coca-Cola in 1957, apparently arose primarily from considerations of its own business convenience rather than from economic conditions making such sales impossible. In this connection, Cavalier did not desire to focus its sales efforts on customers on whom it would have to spend considerable time to cultivate their business, at a time when the sales force had already been developed to do a thorough job with Coca-Cola and the effort to serve or solicit new customers would strain its sales force. Further, Cavalier did not desire to expand its manufacturing facilities to permit it to sell or make vending equipment for customers other than Coca-Cola. The import of this testimony is that Cavalier was satisfied with the business it already had with Coca-Cola and did not desire to make the necessary changes or additions to its sales force and manufacturing plant which would enable it to compete successfully for the business of these other customers. Here the record indicates that the decision not to pursue this business arose primarily from Cavalier's own internal conditions rather than the requirements of the market (Tr. 2072–2075). As one of Cavalier's officials conceded in response to the examiner's question, Coca-Cola did not prevent Cavalier from soliciting other bottlers but rather it was a matter of choice on Cavalier's part (Tr. 1970).

bottlers whereunder it advised that vending equipment would no longer simply be accepted or rejected for approval but that instead the parent company would evaluate such equipment submitted by reputable manufacturers and make such evaluations available to the bottlers. Coca-Cola noted in this connection "Changes always are necessary if we are to improve our competitive position and we trust this program will result in increased sales and profits for us all" (RX 431). This announcement suggesting Coca-Cola was taking steps to broaden the line of vending machine equipment available to its bottlers indicates that there is no economic imperative sundering Coca-Cola bottlers from "trade" bottlers as far as vending machine manufacturers are concerned. There is no indication in the record that market conditions were significantly different in the period preceding the acquisition and up to 1966, from the subsequent period when Coca-Cola decided to encourage greater competition for the business of its bottlers. As far as can be determined from this record, the implementation of Coca-Cola's approval program at the time of the acquisition as well as in 1966, was primarily an internal management matter. The evidence does not indicate that the possibly more restrictive approval program of Coca-Cola in the period preceding and up to the acquisition was dictated by economic imperatives from which the existence of two submarkets for bottle vending machines may be inferred. On the basis of the foregoing, we conclude that bottle vending machines whether sold to Coca-Cola or the so-called "trade" bottlers are an appropriate submarket within which to evaluate the effects of this acquisition. The hearing examiner's contrary finding will be vacated.

We turn to the structure of the vending machine markets wherein the competitive impact of the merger is to be assessed and the position of respondent and Cavalier in that setting. The overall market for all types of vending machines is highly concentrated as demonstrated by the following figures disclosing the market shares of those manufacturers with over $5,000,000 annual sales in the period 1961–1965: [9]

[9] Dollar figures rather than unit sales appear to be the more appropriate measure particularly in the case of the overall vending machine market where the diversity of products sold is significantly greater than in the bottle vending machine submarket. Where a variety of products is involved in the market under consideration the realistic measure of market position is sales volume of the reporting firms in terms of price. This is confirmed by a comparison of the sales figures for bottle vending machines where the market share in terms of unit and dollar sales is closely correlated as opposed to the figures for the vending equipment market generally where the disparity of market share figures based on unit and dollar sales is considerably greater.

COMMISSION'S EXHIBIT 226

Manufacturers with over $5,000,000 annual sales of coin-operated vending machines in the United States 1961-1965—dollar sales and percent of Bureau of the Census total

1961

Company	Sales [1]	Percent of Total [2]
The Vendo Co.	$44,079,101	25.8
Canteen Corp.	21,347,859	12.5
Universal Match Corp. [4]	18,467,216	10.8
The Seeburg Corp.	9,828,000	5.7
Cavalier Corp.	6,652,000	3.9
Census total [5]	[6] 171,167,000	

1962

Company	Sales [1]	Percent of Total [2]
The Vendo Co.	$44,712,355	25.9
Canteen Corp.	25,232,881	14.6
The Seeburg Corp.	21,751,000	12.6
Universal Match Corp. [4]	19,434,444	11.3
Cavalier Corp.	6,364,000	3.7
Westinghouse Electric Corp.	5,937,000	3.4
Census total [5]	[7] 172,335,000	

1963

Company	Sales [1]	Percent of Total [2]
The Vendo Co.	$39,547,470	24.2
The Seeburg Corp.	22,572,000	13.8
Canteen Corp.	20,095,378	12.3
Universal Match Corp. [4]	18,518,565	11.3
Westinghouse Electric Corp.	8,999,000	5.5
Cavalier Corp.	8,269,000	5.1
Census total [5]	[8] 163,521,000	

1964

Company	Sales [1]	Percent of Total [2]
The Vendo Co.	$47,669,338	26.0
The Seeburg Corp.	34,237,000	18.6
Cavalier Div. [3] 9,370,844		
Other 24,866,156		
Universal Match Corp. [4]	23,759,764	12.9
Canteen Corp.	17,291,343	9.4
Westinghouse Electric Corp.	12,487,000	6.8
Census total [5]	[9] 183,679,000	

1965

Company	Sales [1]	Percent of Total [2]
The Vendo Co.	$57,019,329	28.5
The Seeburg Corp.	31,507,000	15.7
Cavalier Div. [3] 9,248,118		
Other 22,258,882		
Universal Match Corp. [4]	27,044,272	13.5
Canteen Corp.	18,360,857	9.2
Westinghouse Electric Corp.	13,658,000	6.8
Census total [5]	[9] 200,313,000	

[1] Net sales of coin-operated vending machines in the United States. Source—CX 247.
[2] Relationship of net sales of coin-operated vending machines in the United States to the dollar value of shipments (including export shipments) reported by the Bureau of the Census.
[3] Cavalier Corporation was acquired by The Seeburg Corporation December 3, 1963.
[4] Universal Match Corporation changed its name to UMC Industries, Inc., in 1966.
[5] Dollar value of manufacturers' shipments (including export shipments) as reported to the Bureau of the Census, Current Industrial Reports, Vending Machines, Series M35U.
[6] CX 96.
[7] CX 98.
[8] CX 100.
[9] CX 244.

The record shows, therefore, that the five leading companies accounted for the following shares of total dollar shipments reported by the Bureau of the Census:

	Percent
1961	58.7
1962 [10]	68.1
1963 [11]	67.1
1964	73.7
1965	73.7

[10] In 1962, the record shows there were six companies with shipments of vending equipment of over $5,000,000. The share of these companies of Census totals was 71.5%.
[11] In 1963, there were also six companies with over $5,000,000. Their market share was 72.2%.

The record further demonstrates that the acquisition combined the second ranking company, Seeburg, with 13.8% of the market with Cavalier the sixth ranking firm whose market share in the acquisition year was 5.1%, the combined firms accounting for a market share of 18.9%. Furthermore, in the acquisition year, after the 67.1% market share of the five largest companies is accounted for, the balance of the sales in the industry was fragmented among 71 companies.

The extent of concentration in the submarket for bottle vending machines is even more significant than in the overall vending machine market. This is evidenced by the sales data for manufacturers with over $500,000 of annual sales of coin-operated bottle vending machines in the period 1961–65. The market share totals for bottle vending machines of the five top ranking companies are the following:

	Percent
1961	80.3
1962	82.7
1963	78.3
1964	84.0
1965	84.4

(CX 247, *in camera;* CXs 96, 98, 100, 244.)

In the bottle vending submarket the acquisition combined third ranking Cavalier with 15.6% of the market with fourth ranking Seeburg which had a market share of 9.4% moving the combined firm to the second spot with a market share approaching 25%.[12]

Another significant characteristic of the vending machine market bearing on the competitive impact of the merger is the fact that this industry has seen a steady decline in the number of manufacturers reporting their sales to the Bureau of the Census, indicating as a result that the number of at least the substantial manufacturers in this industry has sharply declined. In the period 1957-1964, the number of known manufacturers of

[12] The picture as far as the combined sales for can and bottle vending machines are concerned, does not significantly differ from the statistics for bottle vending machines alone. The concentration of market shares among the five largest firms in the case of bottle and can vending machines is the following:

	Percent
1961	79.3
1962	82.8
1963	78.8
1964	85.3
1965	88.8

Moreover, after the merger the respondent became the second ranking manufacturer of such equipment with a market share of approximately 25%.

these products reporting their sales to the Bureau of the Census dropped to 66 from 130 companies. The number of bottle vending machine manufacturers in the same period also decreased sharply, dropping to 10 in 1964, from 15 in 1957 (CX 88, 99). Mergers contributed to this trend.

The overall vending machine market and the bottle vending machine submarket are highly concentrated with their concentration ratios "characteristic of oligopoly." [13] This is significant, for the structure of a market is an important consideration in evaluating the prospective competitive impact of a merger. Judicial and Commission precedent recognize that industry structure will permit reasonable predictions as to the ultimate performance the industry is likely to turn in.[14] As Justice Harlan stated, "If § 7 is to serve the purposes Congress intended for it * * * [o]nly by focusing on market structure can we begin to formulate standards which will allow the responsible agencies to give proper consideration to such mergers and allow businessmen to plan their actions with a fair degree of certainty." [15] The examiner's analysis glossing over the relevant market structure in this proceeding as well as his dismissal of the standards promulgated by the pertinent precedents as "legalistic abstractions" constituted fundamental error. Further the initial decision erred by ignoring the central legislative purpose behind the Celler-Kefauver amendment, namely, the Congressional desire to stem further economic concentration. As the Supreme Court reconized "The dominant theme prevading congressional consideration of the 1950 amendments [to § 7] was a fear of what was considered to be a rising tide of economic concentration in the American economy." [16]

In this case, as already noted, the relevant pre-merger markets by virtue of the concentration of substantial sales among a few manufacturers may be characterized as oligopolistic. In this connection, the Supreme Court held "That '[c]ompetition is likely to be greatest when there are many sellers, none of which has any significant market share,' is common ground among most economists, and was undoubtedly a premise of congres-

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[13] See *The Proctor & Gamble Company,* F.T.C. Docket 6901 (Opinion of the Commission, November 26, 1963), p. 42 [63 F.T.C. 1465, 1562], *rev'd* 358 F. 2d 74 (6th Cir. 1966) *rev'd* 386 U.S. 568 (1967).

[14] *United States* v. *Provident National Bank, supra* note 7.

[15] *Federal Trade Commission* v. *Procter & Gamble Co.,* 386 U.S. 568, 592 (1967) Concurring opinion of Mr. Justice Harlan.

[16] *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 315 (1962); *United States* v. *Von's Grocery Co.,* 384 U.S. 270 (1966).

sional reasoning about the antimerger statute." [17] Of oligopoly the Court has stated "As that condition develops, the greater is the likelihood that parallel policies of mutual advantage, not competition will emerge." [18] In this case the degree of concentration in both the pre and post acquisition markets are characterized by levels of concentration recognized by the Commission, courts, and commentators as making likely the emergence of "policies of mutual advantage." [19] Clearly, we are confronted here with "the kind of further concentration in an oligopoly framework that Congress was concerned with" for " 'Tend to create a monopoly' clearly includes aggravation of an existing oligopoly situation." [20]

The market share statistics in this case bring the proceeding within the rule that "if concentration is already great, the importance of preventing even slight increases of concentration and so preserving the possibility of eventual deconcentration is correspondingly great." [21] Moreover, the post acquisition market share of the respondent in the submarket is close to 25% and accordingly "approaches that held presumptively bad in *United States* v. *Philadelphia National Bank*." [22] Furthermore, in view of the trend toward concentration evident in both markets, this case falls "within the principle that where there has been a 'history of tendency toward concentration in the industry' tendencies toward further concentration 'are to be curbed in their incipiency.' " [23] Finally, the acquisition violates Section 7 because it eliminates significant competition between major com-

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[17] *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 363 (1963).

[18] *United States* v. *Aluminum Co. of America*, 377 U.S. 271, 280 (1964). On this point see also the holding of the Commission in *Beatrice Foods Company*, F.T.C. Docket 6653 (Opinion April 26, 1965), pp. 27–28 [67 F.T.C. 473, 715]: "* * * In markets where one or a very few firms control a large part of the total sales, there is a tendency for all firms to refrain from vigorous price competition. Each large seller knows that if he makes an across-the-board price cut, the inroads on his major competitors' market shares will be so palpable that they will be compelled immediately to make a corresponding price cut—and that consequently there is little advantage to be gained from price cutting. The small firms in such a market are also inhibited from initiating price competition. They know that the majors will react promptly, perhaps with drastic effect, to any attempt to disturb the price structure."

[19] *United States* v. *Aluminum Co. of America*, *supra* note 18; these markets would be characterized by Professors Kaysen and Turner as a " 'Type One structural oligopoly,' wherein 'the first eight firms have at least 50 percent of total market sales and the first twenty firms have at least 75 percent of total market sales.' " *The Procter & Gamble Co.*, *supra* note 13 at 42 n. 40. According to Professors Kaysen and Turner "In Type One oligopoly, recognition of interdependence by the leading firms is extremely likely * * * [and it is unlikely] that the response of the small sellers will * * * limit the behavior of the larger firms." Kaysen and Turner, *Antitrust Policy* 27 (1959).

[20] *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576, 607 (S.D. N.Y., 1958).

[21] *United States* v. *Philadelphia National Bank*, *supra* note 17 at 365 n. 42.

[22] *United States* v. *Continental Can Co.*, 378 U.S. 441, 461 (1964).

[23] *Ibid.*

petitive factors in the relevant markets.[24] Such mergers constitute a violation of the Sherman Act and therefore *a fortiori* of Section 7 of the Clayton Act, "without reference to the strength or weakness of whatever competition remain[s]." [25]

The examiner, in addition to finding that the merger could not have the requisite anticompetitive effect because Seeburg and Cavalier were not actual or potential competitors, also concluded that the merger was positively beneficial. That conclusion rests apparently on his finding that the acquisition was a diversification move which increased competition between the combined firms and Vendo, which he termed as the dominant firm in the industry.

The contention of the examiner that Seeburg's acquisition of Cavalier amounted simply to a diversification of Seeburg's business by enabling respondent to compete for the business of the Coca-Cola bottlers is rejected since as heretofore noted Seeburg and Cavalier were actual competitors selling essentially the same products to the same general category of customers. In that context, the description of the challenged acquisition as a diversification move is at best a euphemism for the elimination of competition.

The real issue raised by respondent and the examiner is not whether the merger is harmless because it is simply a move for diversification, but, rather, whether the anticompetitive effect resulting from the elimination of competition between Seeburg and Cavalier is outweighed by the prospect that the combined firms could compete more effectively with Vendo, the leading firm in both the overall vending machine market and the bottle vending machine submarket.

Essentially, respondent and the hearing examiner contend that the vending machine industry is changing because of a trend to full line vending in which Coca-Cola bottlers play an important part. A part of or allied to this trend to full line vending are

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[24] In this proceeding, 72.2% of sales in the acquisition year were concentrated among the top ranking six companies in one market (the overall vending machine market) and 78.3% of sales were concentrated among the leading five firms in the submarket (bottle vending machines). Since both firms involved in the acquisition are in the one case in the top six and in the other in the top five, they must of necessity be considered major competitive factors.

[25] *United States* v. *First National Bank & Trust Co. of Lexington*, 376 U.S. 665, 670 (1964). *Fruehauf Trailer Company*, F.T.C. Docket No. 6608 (Commission Opinion, May 28, 1965) p. 6 [67 F.T.C. 878, 932].

the National Users' plans [26] in which, again, Coca-Cola plays an important part. The gist of the examiner's findings on this point is evidently that Cavalier is strong where Seeburg is weak and that Seeburg's strengths complement the weaknesses of Cavalier. Specifically, the examiner found that the acquisition strengthened Seeburg by giving it an assured entreé to Coca-Cola bottlers by virtue of the parent company's approval of Cavalier. On the other hand, the examiner found that Cavalier as a single line company specializing in bottle and can vending machines faced an uncertain future in the vending machine industry in view of the fact that full line vending is becoming more significant. He found, therefore, that Cavalier, by securing access through the merger to other types of vending machines to round out its line, was able to participate in the trend toward full line vending in the industry. The fact that the merger may have benefited both Seeburg and Cavalier in that it put the combined firms in a stronger position vis-a-vis Vendo does not, however, vitiate the anticompetitive effect flowing from the elimination of a major competitor in highly concentrated markets.

As already noted, the acquisition as far as Seeburg is concerned cannot be considered a diversification move since it was acquiring a competitor selling essentially the same product. Further, Seeburg, prior to the merger, already had a fairly complete line of vending machine equipment. As far as Seeburg is concerned, this merger did not broaden the line of vending equipment products available to it. Clearly, prior to the merger Seeburg already had a line of equipment enabling it to participate in full line vending. Moreover, while Coca-Cola bottlers may be a significant factor in the full line vending picture, as the hearing examiner found, the fact remains that the vending operators, as distinguished from bottlers, have traditionally engaged in full line vending and there is no indication in this record that Seeburg faced any disadvantage in selling to this class of customers vis-a-vis Vendo or any other competitor. Further, the hearing examiner's findings gloss over the fact that bottlers of soft drinks other than Coca-Cola have branched into full line vending.[27] As far as Seeburg is concerned, it is clear that the short-

[26] In the case of the National Users' programs, national companies such as oil companies purchase uniform banks of vending equipment direct from the manufacturer for placement in their filling stations or other locations. Color schemes are customized to the National Users' specifications.

[27] According to William F. Swingler, vice president of the Canteen Corporation,

"Well, Pepsi Cola bottlers, many of them are in full line vending. I believe Nehi in many

run benefits accruing to Seeburg as a result of the acquisition do not outweigh the long-range anticompetitive effect resulting from the elimination of Cavalier as an active participant in the vending machine market.

In the case of Cavalier, while access to a fuller line of vending machines would be to that firm's advantage, it does not appear that this lack prevented the acquired concern from maintaining a substantial position in the market, and certainly its profit picture towards the end of 1963 was a healthy one. At the time of the acquisition, when the trend toward full line vending upon which the examiner and respondent rely had already become evident, Cavalier was obviously a viable competitor. This record does not compel the conclusion that the merger was vital to Cavalier's survival as a significant participant in the vending machine market. Certainly, the experience of the Cornelius Company whose only coin-operated vending machines in the period 1961–65, were two basic models of a horizontal bottle vendor (Tr. 1768) demonstrates that a single line company sufficiently innovative to develop a product for which the industry feels a need, can be an effective and growing competitor. Nor does the evidence show that Cavalier's merger with the second ranking company in the 1963 overall vending machine market was necessarily the only avenue towards participation in full line vending. For example, the Westinghouse Corporation, when it did not have a full line of vending equipment, designated certain of its machines so that their appearance would be compatible with that of Vendo (Tr. 1722).

Moreover, permitting this merger on the ground that it permits increased competition with Vendo, the leading firm in the market, might well set off a wave of mergers in an industry already highly concentrated. "[T]he remaining large producers * * * could with equal logic urge that they, too, be permitted to join forces and to concentrate their economic resources in order to give more effective competition to the enhanced 'Big 2'; and so we reach a point of more intense concentration in an industry already highly concentrated—indeed we head in the

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places. Many of the bottlers have branched off into general vending. Any of the national companies." (Tr. 1640).

This is corroborated by the testimony of Delbert W. Coleman, Chairman of the Board of The Seeburg Corporation, who, although stressing the significance of the Coca-Cola segment in full line vending (Tr. 2114), did concede that "trade" bottlers who engaged in full line vending in 1963 were also on the increase (Tr. 2115). Similarly, the record indicates that Pepsi-Cola as well as Coca-Cola figures in the National Users' programs (RX 399, *in camera*).

direction of triopoly." [28] The argument must be rejected because to accede to it would "endanger a much broader anticompetitive effect by triggering other mergers by companies seeking the same competitive advantages sought by [the acquiring firm] in this case." [29]

The examiner, in finding that the merger did not have the requisite competitive effect, also laid considerable stress on the fact that the market share of the combined firms declined in the period 1963 through 1965. [30] His stress on this evidence is misplaced. Although post acquisition evidence may be considered, it should not be given conclusive weight or allowed to override all probabilities evident at the time of the merger since "the force of § 7 is still in probabilities, and not in what later transpired." [31] Although the combined firms by 1965, experienced a slight decline in the share of the market enjoyed by them, this must be evaluated in the context of the continued substantial increase in concentration among the five largest firms in both markets. Moreover, respondent's decrease of course did not restore rivalry between Seeburg and Cavalier. It is not relevant therefore to the question of the merger's probable competitive effect, for even a decline in concentration after an acquisition involving a substantial competitor does not dispel the presumption that competition would have benefited had that firm remained independent.[32]

The final issue presented on appeal is the question of the appropriate remedy. Complaint counsel argue strenuously that only divestiture will adequately restore competition while respondent contends that severing Seeburg and Cavalier would benefit only Vendo, the leading vending machine manufacturer, to the detriment of competition. Although we do not reach a final decision on this issue at this time, complaint counsel's argument appears to have considerable merit. Both the overall market for vending machines and the bottle vending machine submarket are characterized by a high degree of concentration in a setting where the trend towards concentration has been evident for some time.

We agree that in view of the respondent's tendency to expand

[28] *United States* v. *Bethlehem Steel Corporation, supra* note 20 at 618.

[29] *United States* v. *Continental Can Co., supra* note 22 at 464.

[30] In 1963, Seeburg and Cavalier accounted for 18.9% of the overall vending machine market and their share declined in 1965, to 15.7%. The corresponding figures for the bottle vending machine submarket are 25% and 23.7%, respectively.

[31] See *Federal Trade Commission* v. *Consolidated Foods Corp.,* 380 U.S. 592, 598 (1965).

[32] See *Crown Zellerbach Corporation* v. *Federal Trade Commission,* 296 F. 2d 800 (9th Cir. 1961), *cert. denied* 370 U.S. 937 (1962).

by acquisition, coupled with the high degree of concentration in the market, that Seeburg should be prohibited from acquiring vending equipment suppliers for a period of ten years unless such mergers are approved by the Commission. Under the circumstances of this case, preventive relief in addition to other relief is essential to effectively carry out the Congressional policy expressed in Section 7 of the Clayton Act.[33]

We turn now to respondent's argument that divestiture of Cavalier would eliminate "the 'real competition' which Vendo feels today from Seeburg/Cavalier." [34] On the present record this argument is unpersuasive. Respondent itself asserts that Coca-Cola's 1966 revision of its approval policy for bottle and can vending equipment opened that segment of the bottler market to competition by all vending equipment suppliers.[35] Although respondent made this argument in another context, this makes it clear on respondent's own admission that even without Cavalier Seeburg should be able to compete aggressively like any other vending equipment supplier for the Coca-Cola business [36] and to offer Vendo effective competition for the Coca-Cola business, as well as that of other soft drink bottlers.

In the case of the acquired firm, respondent argues, in effect, that Cavalier on its own would not be a viable competitor. Without access to Seeburg's full line of vending equipment, respondent contends it would be difficult for Cavalier to adequately serve Coca-Cola bottlers or to penetrate the National Users' market. For the reasons already stated, we are not persuaded that the merger with Seeburg was requisite to Cavalier's continuation as a successful competitor. However, as a result of the acquisition, Cavalier may have become dependent on access to Seeburg's vending equipment, other than can and bottle vending machines. Certainly, since the merger has been in effect, Cavalier has been unable to turn to alternative sources of full line vending equipment. On the basis of respondent's representation that Cavalier requires continued access to a full line of vending equipment to assure its viability, the Commission has determined that consideration should be given to a provision requiring Seeburg to make available for a number of years to the divested firm, a full line of

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[33] See *Beatrice Foods Company*, F.T.C. Docket No. 6653, Opinion Accompanying Final Order, December 10, 1965, p. 5 [68 F.T.C. 1003, 1006].

[34] Respondent's Answering Brief, p 53.

[35] Respondent's Answering Brief, p 32.

[36] In fact, certain of Seeburg's Choice-Vending equipment was approved by Coca-Cola in 1966 (Tr. 2000–1).

vending equipment excluding can and bottle vending machines. However, the Commission needs more information to permit it to draft an appropriate order. Accordingly, we direct the parties to submit proposed forms of order with supporting briefs presenting relevant views, data and argument within thirty days of the receipt of this opinion and order. When this information is before it, the Commission will issue its final order.

Commissioner Nicholson did not participate for the reason that oral argument was heard prior to his appointment to the Commisson.

ORDER ADOPTING FINDINGS AND CONCLUSIONS AND DEFERRING ENTRY OF FINAL ORDER

FINDINGS OF FACT

JULY 15, 1968

The Commission adopts the following findings contained in the initial decision:

1. The "STATEMENT AND HISTORY OF PROCEEDINGS" beginning on page 567 and ending with the first full paragraph on page 568.

2. The findings of fact contained in paragraphs 1 through 12 on pages 571 to 574 (the footnote on page 571 is excluded).

3. Paragraph 13 on page 574, which is modified by deleting therefrom that part beginning with the phrase "as part of" and ending with the phrase "(Coleman, Tr. 2092)."

4. Paragraph 14 on page 574 (including footnote 6 on page 574), which is modified to read as follows:

> Seeburg acquired in February 1960 substantially all the assets of the Choice-Vend Corporation, which manufactured bottle and can vending machines.

5. Paragraphs 15 through 20 on page 575.

6. Paragraph 21 on page 575, whose last sentence is modified to read as follows:

> Cavalier's only attempt to sell to other than Coca-Cola bottlers, the so-called "trade" bottlers, which began in 1955, was abandoned in 1957.

7. Paragraphs 22 through 32 on pages 575 to 577.

8. Paragraph 33 on page 577, which is modified to read as follows:

> 33. *The Vendo Company.* At the time of the challenged

acquisition in 1963, Vendo manufactured a complete line of vending equipment, including machines which dispense hot and cold drinks, hot and cold foods, candy, snacks, cigarettes, coffee and pastry that sold to all classes of vending machine customers with sales of $39,547,470 and 82,248 units. In the same year Vendo's sales of bottle vending machines in the United States totalled $16,705,300 and 46,836 units.

9. Paragraphs 34 through 49 on pages 578 through 581.

10. Paragraph 55 on page 582.

11. Paragraphs 56 through 72 on pages 582 to 586.

12. Paragraph 154 on page 608, which is modified to read as follows:

> Seeburg entered the vending machine manufacturing industry in 1958 when it acquired Eastern Electric Company, Inc.'s cigarette machine and, as of 1963, manufactured and sold the following types of coin-operated vending machines: cigarette machine, batch brew coffee machine, cup vending machine, single cup coffee machine, and a nonfood all purpose merchandiser.

13. Paragraph 156 on page 608.

14. Paragraph 160 on page 609.

15. Paragraph 161 on page 610, which is modified to read as follows:

> On at least six occasions Coca-Cola evaluated Choice-Vend or Seeburg/Choice-Vend bottle and can vending equipment and rejected such equipment for various reasons, including inadequate refrigeration performance.

16. Paragraphs 165 through 171 on pages 610 through 612.

17. Paragraph 196 on page 619, which is modified to read as follows:

> In July 1966, Coca-Cola revised its equipment approval policy for bottle and/or can vending equipment, notified several formerly unaccepted vending machine manufacturers of this change, and invited them to submit equipment for testing.

18. Paragraphs 197 through 203 on pages 619 through 621.

19. Paragraph 210 on page 624 which is modified to read as follows:

> Westinghouse Electric Corporation in the latter half of 1966 set up a sales organization to call on bottlers other than Coca-Cola bottlers.

20. Paragraphs 211 and 212 on pages 624 and 625.

'he Commission's other findings of fact are set forth in the acompany opinion. Those portions of the initial decision not pecifically adopted by this order are vacated.

CONCLUSIONS

1. The Commission has jurisdiction of the subject matter of this proceeding and of the respondent.

2. Section 7 of the Clayton Act, as amended, prohibits any merger or corporate acquisition where the effect in any line of commerce in any section of the country may be to substantially lessen competition or to tend to create a monopoly.

3. Vending machines in general and bottle vending machines are the appropriate lines of commerce within which to evaluate the probable competitive effect of the acquisition of the Cavalier Corporation by respondent.

4. The effect of the acquisition of the Cavalier Corporation by The Seeburg Corporation may be substantially to lessen competition in the production and sale of vending machines and bottle vending machines, in violation of Section 7 of the Clayton Act, as amended.

ORDER

It is ordered, That those findings of the initial decision specified in the Findings of Fact above be, and they hereby are, adopted by the Commission.

It is further ordered, That the findings of fact and conclusions of law contained in the accompanying opinion be, and they hereby are, adopted as additional findings and conclusions of the Commission.

It is further ordered, That all portions of the initial decision not specifically adopted above be, and they hereby are, vacated.

It is further ordered, That complaint counsel and counsel for respondent shall each file, within thirty (30) days after the receipt of this order, a proposed form of order and briefs in support thereof, in accordance with the directions contained in the accompanying opinion.

It is further ordered, That entry of a final order in this matter be deferred until further order by the Commission;

Commissioner Nicholson did not participate for the reason that oral argument was heard prior to his appointment to the Commission.

OPINION OF THE COMMISSION

APRIL 10, 1969

The Commission on July 15, 1968 [p. 648 herein], issued its opinion and order finding that Seeburg's acquisition of the Cavalier Corporation in 1963, violated Section 7 of the Clayton Act, as amended. At that time the Commission deferred the entry of a final order to permit respondent and complaint counsel to file proposed forms of order and briefs in support thereof since additional information might assist the Commission in framing an appropriate remedy.

Both complaint counsel and respondent have filed their proposals for the final order with supporting memoranda. Respondent, in conjunction with its proposed order and supporting memorandum, also filed a motion requesting withdrawal of the proceeding from adjudication for the purpose of permitting settlement by entry of a consent order. Although denying respondent's motion for withdrawal from adjudication, the Commission did by order of November 26, 1968, afford the parties the opportunity to present oral argument, which was held on December 9, 1968. Prior to oral argument respondent also submitted a number of affidavits containing confidential business and financial data which were put *in camera* at respondent's request.

In view of respondent's request for *in camera* treatment of the financial and business data relied upon to support its motion to withdraw, this opinion will not discuss that information in detail but focus primarily on the broad issues raised by respondent on the public record. The Commission nevertheless has taken these affidavits into consideration in reaching its decision. Although preserving the *in camera* status of such information in the preparation of this decision, the Commission reserves the right to utilize it on the public record should this become necessary during the course of judicial or administrative proceedings subsequent to the entry of this order.

It is evident that the position of the parties has not changed since the Commission first considered this matter on the appeal from the hearing examiner's initial decision. Complaint counsel still insists that only divestiture will compensate for the disappearance of Cavalier as an independent competitor. Respondent, on the other hand, continues to argue that requiring divestiture in this instance would harm rather than promote competition. It may be noted in this connection that the Commission solicited

the views of complaint counsel and respondent on whether consideration should be given to requiring Seeburg to make available to Cavalier a full line of vending equipment excluding can and bottle vending machines to cushion the impact of divestiture on the acquired firm. Both parties adhering to their original views on the divestiture issue have failed to make recommendations designed to implement this suggestion.

We first turn to respondent's contentions set forth in its motion to withdraw this matter from adjudication filed September 25, 1968.[1] Essentially respondent makes three arguments: First that divestiture is either inappropriate or unnecessary because natural forces have increased competition in the market. Second, that divestiture may lessen competition "by setting Cavalier adrift as a less than viable competitor." And third, that divestiture might result in "punitive financial loss to Seeburg which could impair its ability to remain an effective competitor of dominant Vendo." As an alternative to divestiture, respondent proposes an order which would ban Seeburg for ten years from acquiring firms engaged in the manufacture or sale of coin-operated packaged soft drink vending equipment without obtaining prior Commission approval. In addition, respondent's proposed order would require Seeburg to license on a non-exclusive non-discriminatory basis, all vending machine patents owned by its Cavalier Division.

Certain of respondent's contentions, we have previously considered. The contention that natural forces have increased and are continuing to increase competition seems in large part to be a repetition of the argument in opposition to complaint counsel's appeal that Coca-Cola's changed policies making its bottlers accessible to more manufacturers enhanced competition. While there may be additional competition for the business of Coca-Cola bottlers, this is largely irrelevant to the question of restoring competition in the overall vending machine market and the bottle vending machine submarket. Whatever the facts may be as to one group of customers, it is clear that competition in both markets diminished because of Cavalier's disappearance as a major independent competitive entity. Moreover, we cannot agree with respondent's view that the merger between the Selectivend Corporation and the Cornelius Company as well as other mergers in the bottle and can equipment vending field is evidence

[1] Although the Commission's Order and Opinion of July 15, 1968, did not authorize such a motion, the respondent's supporting memorandum will be treated as if it were a brief in support of its proposed order which was filed on October 1, 1968.

of increased competition justifying the continued combination of Cavalier and Seeburg. We draw the opposite conclusion.

Respondent's second argument for a remedy falling short of divestiture is the contention that Cavalier if divorced from respondent would not be a viable competitor. Seeburg contends Cavalier as a single line company selling solely to Coca-Cola bottlers had an uncertain future since it faces increased competition in selling to these customers because of the changes in Coca-Cola's approval policies. In addition, respondent asserts the combined firms' profits are falling at this time. However, whatever its present tribulations, Cavalier is by no means a failing company. Respondent further suggests that Cavalier would not be successful in selling to non-Coca-Cola bottlers since its ability to secure satisfactory sources of full-line vending equipment if divorced from Seeburg is "questionable."

This argument is rejected. Seeburg's Choice-Vend Division is now competing for both the non-Coca-Cola and Coca-Cola bottler trade. Choice-Vend's increasing sales to Coca-Cola bottlers are by no means insubstantial. Its success may well account for certain of the competitive inroads on the acquired firm's business which Seeburg asserts militate against the divestiture of Cavalier. After the change in Coca-Cola's policy, respondent evidently was careful to carve out a share of this customer group for Choice-Vend. Coca-Cola's policy change, which Seeburg asserts threatens Cavalier's continued viability, should also have indicated to prudent management the need for a diversified sales effort to expand the acquired firm's market beyond its existing customers, the Coca-Cola bottlers. Despite the claim that Cavalier needs Seeburg's continued financing and capital support,[2] it appears that such resources were not applied to make changes in order to facilitate a wider marketing effort on the part of the acquired firm. Seeburg does not explain its reasons for withholding the investment for a more diversified sales effort by Cavalier. In the light of the claim that the change in Coca-Cola's approval procedures threatened Cavalier's position, respondent's failure to support such a broadened sales effort for the acquired firm, in contrast to its Choice-Vend policy, is inexplicable. Whatever the consequences of such a management failure it cannot be set up as a defense against divestiture if the public interest requires that remedy.

[2] Oral Argument Tr. 11.

On the question of whether Cavalier, after divestiture would be able to secure alternative sources of full-line vending equipment complementary to its bottle and can vending machines, respondent merely contends that its ability to do so would be "questionable." Respondent does not directly challenge complaint counsel's assertions that such equipment is available on the open market. On this record, there is no reason for concluding that Cavalier would be unable to secure full-line vending equipment if this is needed to supplement its own machines, although it might be more difficult without the ties now binding it to respondent. In addition, it appears, as complaint counsel has stated, that a number of single line companies have managed to compete successfully and effectively in the relevant markets.

Respondent also argues that, in view of Cavalier's dependence on the Coca-Cola market and the increased competition for sales to these bottlers, divestiture of Cavalier would result in a substantial loss to Seeburg. Even on the basis of respondent's *in camera* affidavits the amount of the loss, if any, to Seeburg resulting from a divestiture of Cavalier is conjectural. Moreover, even if respondent were to incur such loss, the Commission may not withhold divestiture for that reason, since the circumstances of the case require the restoration of the acquired firm as an independent competitor. "Economic hardship can influence choice [of alternatives] only as among two or more effective remedies." [3]

Respondent stressing Cavalier's diminished market position and profit picture since 1966, contends divestiture should not be required since no suitable purchasers are available. Although Seeburg ostensibly appeals to the Commission's sense of equity rather than to the failing company doctrine,[4] judicial precedent on that defense is relevant. No efforts to date have been made by respondent to locate a suitable purchaser for the acquired firm. Cavalier's business is still substantial and it is still making a profit. The factual foundation for respondent's contention that divestiture would be unworkable is at best inconclusive. Only recently, the Supreme Court held in effect that where no positive effort has been made to find a noncompeting purchaser as an alternative to an illegal merger, then the failing company doctrine does not apply:

> The failing company doctrine plainly cannot be applied in a merger or in any other case unless it is established that the company that acquires it or brings it under dominion is the only available purchaser. For if another

[3] *United States* v. *Du Pont & Co.*, 366 U.S. 316, 327 (1961).

[4] Oral Argument Tr. 50.

person or group could be interested, a unit in the competitive system would be preserved and not lost to monopoly power * * *.[5]

A fortiori the requirement that affirmative measures be taken to seek a satisfactory purchaser necessarily applies in a case where the respondent seeks to escape divestiture not in reliance on that doctrine but rather on an appeal to the Commission's sense of equity.[6]

"The most appropriate remedy to redress a Section 7 violation is generally divestiture * * * [and it] commends itself as a rational course in restoring competition to the condition which obtained prior to the merger."[7] As the Supreme Court noted, "[i]t is simple, relatively easy to administer, and sure. It should always be in the forefront of a Court's mind when a violation of § 7 has been found."[8]

"The key to the whole question of antitrust remedy is of course the discovery of measures effective to restore competition."[9] Judged by that criteria, respondent's proposed order must be

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[5] *Citizen Publishing Company et al.* v. *United States*, 37 U.S.L. Week 4208, 4210 (1969).

[6] Compare also, *United States* v. *Pabst Brewing Co.*, 5 Trade Reg. Rep. ¶ 72,723 (E.D. Wis. 1969) holding:

"Pabst had the burden of proving that it had made every reasonable effort to explore alternative management and merger possibilities, either as a prospectively acquiring firm or as a firm to be acquired. Pabst has demonstrated that it undertook some limited contacts with a number of firms, but the proof in this respect falls short of a sufficiently clear showing that Pabst management undertook a well-conceived and thorough canvass of the industry such as to ferret out viable alternative partners for merger. Thus, Pabst did not show that the capital transfer resulting in its Blatz acquisition was the only available and reasonable one."

* * * * * * *

"In view of this test the defendants must establish two material elements to their defense: that at the time of the merger, the firm was indeed 'failing' in the sense that the firm was heading inevitably in the direction of bankruptcy, with the grave probability that failure would ensue—that is, that the trend was irreversible; and that in respect of the merger, there were available no reasonable, possible, or feasible alternatives which would have permitted the acquiring firm to remain an independent, competitive factor within the brewing industry."

"On the basis of the record in this case it appears that the defendants were in a very serious, even precarious, financial position at the time of the merger. Nonetheless, they have failed to satisfy their burden of proving the material elements of the failing firm defense. This defense, on the facts in this case, is hereby rejected."

[7] *Diamond Alkali Company*, F.T.C. Docket 8572, Final Order and Opinion, October 2, 1967, p. 4 [72 F.T.C. 700, 742].

[8] *United States* v. *Du Pont & Co.*, *supra* at 331. Respondent's reliance on *National Tea Co.*, F.T.C. Docket No. 7453 (Commission Order and Opinion, March 4, 1966) [69 F.T.C. 226, 265] to support the contention that a lesser remedy than divestiture will suffice is misplaced here. The decision in *National Tea* to confine the order to a ban on future acquisitions rested on a record involving largely market extension as opposed to horizontal mergers. Further the Commission in that case specifically found that relative ease of entry could in time dissipate the restraints on competition resulting from the challenged acquisitions, a finding we are unable to make on this record. Moreover, in any event, it is most unlikely that new entrants could dispel the anticompetitive effects flowing from a merger between direct major competitors in markets which are already highly concentrated.

[9] *United States* v. *Du Pont & Co.*, *supra* at 326.

rejected. The Commission found the Cavalier-Seeburg merger violative of the Merger Act because it eliminated a major competitor in highly concentrated markets which for some time had been characterized by a pronounced trend toward concentration. A ban on future acquisitions, which is necessary as a prophylactic measure to check further centralization in both relevant markets, will not restore the merged firm as an independent competitive entity. Furthermore, there is no indication in this record that Cavalier's patents represent breakthroughs of such a nature that opening them up to licensing would stimulate competition in any meaningful way. As respondent's counsel noted in oral argument before the Commission, "the big attraction of Cavalier * * * wasn't its technical innovation as a junior IBM of the vending machine industry." [10] In sum, Seeburg's proposal must be rejected because it will not effectively remedy the violation of the merger statute demonstrated by this record.[11]

The Commission accordingly will adopt the proposed order recommended by complaint counsel which provides for divestiture of the acquired firm and a ban for ten years on acquisitions without prior Commission approval of corporations engaged in the manufacture and/or sale of vending machines in the United States.

Commissioners Dixon and Elman believe that, in view of the changed conditions now existing in the vending machine industry, the public interest would be served by disposing of the case on the basis of the consent order settlement submitted by respondent. Commissioner Jones has filed a concurring statement.

CONCURRING STATEMENT

APRIL 10, 1969

BY JONES, *Commissioner:*

A majority of the Commission has determined that respondent Seeburg Corporation must divest itself of the Cavalier Corpora-

[10] Oral Argument Tr. 18.

[11] The disposition in *The Vendo Co.*, 54 F.T.C. 253, 256 (1957), is not controlling here. In that case, the Commission adopted the hearing examiner's finding that the acquired firm, Vendorlator, "probably had infringed upon a basic patent of respondent [Vendo] for a period of about two years, and at the time of the acquisition, more than eighty percent of the production of the Vendorlator Manufacturing Company was of such machines." That finding it appears was critical in the choice of remedy. The facts in *Vendo* are unique and indicate on their face why the Commission accepted a remedy lesser than divestiture. For obvious reasons the order in that case has no relevance here. As the Supreme Court noted

tion which the Commission previously found had been illegally acquired by Seeburg in violation of Section 7. I concur in this action but would like to state more fully my reasons for concluding that divestiture is essential in this case.

I am of the view that respondent's argument respecting Cavalier's present debilitated state is inaccurate and its pessimistic conclusions respecting Cavalier's potential competitive vitality are without any valid support in the record even assuming, which I do not, that such crystal ball gazing should be a relevant factor in the Commission's decision as to whether divestiture is a proper and essential remedy.[1]

Examination of Cavalier's annual and ten-month income statements obtained from *in camera* submissions by Seeburg and Cavalier, from 1963, the last year of its independent existence, through 1968 demonstrates that Cavalier has *not* declined since 1963. Rather, it shows that in 1968 Cavalier was just as healthy as it was in 1963, when it was acquired by Seeburg, and just as healthy as in its peak income year of 1965, before Coca-Cola opened its custom to a broader line of vending manufacturers.

Seeburg argues that Cavalier's profits since Coca-Cola broadened its purchasing policy (1966 through 1968) have been declining with the result that its 1968 net profits are substantially below those of peak Coca-Cola year 1965. However, a closer examination of Cavalier's income, expense, and profit data casts considerable doubt as to whether the alleged declines in Cavalier's profits since 1965 are as substantial as Seeburg contends, and doubt even as to whether there has been any significant decline at all. The apparent profit low point of 1968 and high level of 1965, the peak year from which profits allegedly tumbled, seem to result from an unexplained underestimation resulting from varying and seemingly arbitrary accounting treatment by Seeburg of Cavalier's expenses in 1965 relative to 1968.

For example, Seeburg made no allocation to Cavalier's net income in 1965 for corporate taxes in that year, although provision for taxes was allocated to Cavalier in each of the years following 1965. If Cavalier as a part of Seeburg in 1965 was

with respect to the precedential force of consent decrees granting relief short of divestiture, "the circumstances surrounding such negotiated agreements are so different that they cannot be persuasively cited in a litigation context." *United States* v. *Du Pont & Co., supra* at 330 n. 12.

[1] The theory of the antitrust laws is that the market should be determinative of competitive vitality and that individual members of that market are not the ones to make that judgment, especially when the judgment is expressed as support for an argument that the company which was illegally acquired should not be divested.

made to pay the same approximate average 50 percent tax which Cavalier paid when it was independent (1963) and which it has paid subsequent to 1965, its supposedly peak 1965 ten month profits would have been reduced by almost half the actual amount contended by Cavalier. Even at this profit level, however, Seeburg's figures would indicate that Cavalier has suffered a decline in profits from its peak year of almost 50 percent. However, a closer look at some of the expense items attributed to Cavalier by Seeburg in 1968 suggests that this 50 percent decline in its 1968 profit figure relative to 1965 may be substantially overstated. For example, even though Cavalier's volume of sales was higher in 1965 than 1968, substantial selling expenses are stated in 1968 while none were apparently incurred in supposedly peak 1965; administrative expenses in lower volume 1968 are substantially higher than for 1965; intercompany expenses of Seeburg allocable to Cavalier as one of Seeburg's subsidiaries are 100 percent higher in lower sales year 1968 than in "banner" year 1965.[2] In addition, if the allocation to its subsidiaries of expenses which Seeburg incurs in administering those subsidiaries is eliminated for supposedly anemic 1968, as it would be if Cavalier were independent, its net profits would be larger than they were in the last year of its independence, 1963, when Seeburg admitted Cavalier waş a viable competitor.

There is no doubt that after Coca-Cola broadened its list of bottle vending suppliers in 1966, Cavalier suffered a sales decline. However, this decline in sales roughly parallels an overall decline in sales in the entire vending machine industry, so that one certainly cannot say that Cavalier's sales performance has been any different from that of its competitors.

Thus not only is Cavalier's profit picture less precarious than it is pictured by Seeburg, but in addition the loss of its Coca-Cola business does not seem to be nearly as damaging as Seeburg contends. Moreover, Seeburg itself has been responsible for much of Cavalier's lost business, by taking away over one-third of the lost Coca-Cola business of Cavalier through the expanded sales to Coca-Cola of its own subsidiaries, *i.e.*, its own Choice Vend division. There is no reason to suppose that if competitively

[2] Likewise, some crucial expenses in 1966, another profitable year though not as profitable as 1965, appear understated relative to 1968, with resultant overestimation of 1966 profit and under-estimation in 1968. For instance, cost of sales is higher in 1968 though sales were down from 1966 levels. Further, even though sales declined from 1966 through 1968, supposedly anemic Cavalier was made to bear an allocated share which was several hundred thousands more of Seeburg's total administrative expense for intercompany operations in 1968 than it bore in 1966.

independent, Cavalier might not regain some portion of this business which Choice Vend gained after Seeburg's acquisition of Cavalier.

I also agree with the majority's rejection of Seeburg's argument that Cavalier could not survive in the industry because of its single line business as a bottle vending manufacturer in a period when the industry is trending towards multiple line businesses able to produce both can and bottle vending equipment. There seems to be validity to the point that multiple line sellers may have a competitive advantage in the vending machine industry. Nevertheless there are other single line companies like Cavalier in the business at present which remain competitive. The only instances cited of competitive disadvantages for single liners like Cavalier (*e.g.*, multiple liners can give replacement credits on old general vending equipment applicable only to purchase of new bottling equipment; multiple liners can afford an elaborate training school for their servicemen, singles just a simple training program) do not appear to be formidable. There does not seem to be any reason why Cavalier, should it receive an order which depends on its being able to supply other vending lines in addition to its own, should not be able to get those lines from other manufacturers in order to be able to fill the order. Moreover, given adequate access to the capital market there would seem to be nothing to prevent Cavalier from expanding into broader vending markets.

I find equally unpersuasive Seeburg's argument that its own credit standing will be jeopardized if it is forced to sell to Cavalier. If, as Seeburg argues, Cavalier constitutes an unprofitable operation, then divestiture of such an unprofitable concern should improve, not impair, its credit standing. Moreover, I do not believe that a company which has been found to have made an illegal acquisition can be heard to argue that it should be permitted to keep the fruits of this acquisition because it might suffer some financial reverses from having to divest.

Not only can I find no support in the record or in logic for the contention that divestiture here will hurt competition, I see positive competitive benefit from divestiture.

Divestiture will mean here that there will be an additional viable competitor in the sale of bottle and can vending machines. This is of great significance in view of the very concentrated nature of this market in which the number of firms is steadily diminishing through merger—from 15 in 1957 to 10 in 1964.

Cavalier will be independent, and so will Seeburg's Choice Vend. Cavalier's future will no longer be subservient to or linked with Seeburg's Choice Vend division, so that instead of having to assume a helpless posture as Choice Vend expands its own growing can-vending machine business to non-Coca-Cola customers (Pepsi-Cola, Seven-Up, etc.), it can remove itself from the Seeburg bridle and compete on its own for new forms of business, perhaps even gaining back the sales mentioned above which it lost to its sister subsidiary Choice Vend while both were a part of Seeburg.

Thus I cannot conclude that Cavalier's fortunes must be viewed as pessimistically as Seeburg would have us do. Nor do I believe that anyone can say now with any degree of certainty that a buyer would be unavailable or that the firm would fail. Rather, the income data show, if anything, just the opposite; and in this era of aggressively shopping conglomerates, it seems inconceivable that nobody would want to pick up what is basically a healthy bundle of assets at a reasonable price.

FINAL ORDER

Pursuant to the Commission's order of July 15, 1968 [p. 667 herein], complaint counsel and respondent have submitted proposed forms of order and supporting memoranda. The Commission has considered these proposals and has concluded, for the reasons stated in the accompanying opinion, that the following order is appropriate in light of the Commission's decision in this matter and the public interest, and that it should be adopted and issued forthwith as the Commission's final order. The Commission has also determined for the reasons stated that respondent's motion to withdraw this matter from adjudication should be denied. Accordingly,

A

It is ordered, That respondent, The Seeburg Corporation, a corporation, and its officers, directors, agents, representatives, employees, subsidiaries, affiliates, successors and assigns, within one (1) year from the date of service of this order, shall divest absolutely and in good faith, all stock, assets, properties, rights and privileges, tangible or intangible, including but not limited to all properties, plants, machinery, equipment, trade names, contract rights, patents, trademarks, and good will acquired by The Seeburg Corporation as a result of the acquisition by The

Seeburg Corporation of the assets of Cavalier Corporation, together with all plants, machinery, buildings, land, improvements, equipment and other property of whatever description that has been added to or placed on the premises of the former Cavalier Corporation, so as to restore Cavalier Corporation as a going concern and effective competitor in the manufacture and sale of bottle vending machines.

B

It is further ordered, That pending divestiture, respondent shall not make any changes in any of the plants, machinery, buildings, equipment or other property of whatever description of the former Cavalier Corporation which shall impair its present capacity for the production, sale and distribution of vending machines, or its market value.

C

It is further ordered, That by such divestiture, none of the assets, properties, rights or privileges, described in paragraph A of this order, shall be sold or transferred, directly or indirectly, to any person who is at the time of the divestiture an officer, director, employee, or agent of, or under the control or direction of, The Seeburg Corporation or any subsidiary or affiliated corporations of The Seeburg Corporation, or owns or controls, directly or indirectly, more than one (1) percent of the outstanding shares of common stock of The Seeburg Corporation, or to any purchaser who is not approved in advance by the Federal Trade Commission.

D

It is further ordered, That respondent shall for a period of ten (10) years from the date of service of this order, cease and desist from acquiring, directly or indirectly, through subsidiaries or otherwise, without the prior approval of the Federal Trade Commission, all or any part of the share capital or other assets of any corporation engaged in the manufacture and/or sale of vending machines in the United States.

E

It is further ordered, That respondent shall submit to the Commission periodically, within thirty (30) days from the date of service of this order and every ninety (90) days thereafter,

report in writing setting forth its efforts and progress in arrying out the divestiture requirements of this order until all uch assets have been divested with the approval of the Comıission; and respondent shall submit to the Commission on the rst day of each calendar year a report in writing setting forth ts compliance with the cease and desist provisions of this order.

F

It is further ordered, That respondent notify the Commission of the names and addresses of all persons, firms or corporations who shall express to respondent any interest in purchasing the assets to be divested under the terms of this order, within thirty (30) days after having been informed of such interest.

G

It is further ordered, That respondent's motion to withdraw this matter from adjudication be, and it hereby is, denied.

Commissioners Dixon and Elman believe that, in view of the changed conditions now existing in the vending machine industry, the public interest would be served by disposing of the case on the basis of the consent order settlement submitted by respondent.

IN THE MATTER OF

MICHAEL M. TURIN*

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE TEXTILE FIBER PRODUCTS IDENTIFICATION ACTS

Docket 8757. Complaint, Feb. 28, 1968—Decision Apr. 11, 1969

Consent order requiring a Costa Mesa, Calif., retailer of fabrics to cease misbranding its textile fiber products by failing to disclose on labels when the fabrics are "remnants of undetermined fiber content."

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Textile Fiber Products Identification Act, and by virtue of the authority vested in it by said Acts, the Federal

*Formerly trading as International Yardage Fair.