

IN THE MATTER OF
THE HOUSE OF SCHILLER, INC., ET AL.

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

Docket C-2723. Complaint, Aug. 27, 1975-Decision, Aug. 27, 1975

Consent order requiring a Long Island City, N.Y., manufacturer and distributor of plastic slipcovers, among other things to cease using bait and switch tactics in the sale of its merchandise.

Appearances

For the Commission: *Jerry R. McDonald.*

For the respondents: *Pro se.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that The House of Schiller, Inc., a corporation, and Lawrence Kane and Donald Sherman, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent The House of Schiller, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 41-40 27th St., Long Island City, N.Y.

Respondents Lawrence Kane and Donald Sherman are individuals and are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of plastic slipcovers to members of the purchasing public at retail.

PAR. 3. In the course and conduct of their business as aforesaid, respondents now cause, and for some time last past have caused, their said merchandise, when sold, to be shipped from their place of business located in the State of New York, to purchasers thereof located in various other States, and maintain, and at all times mentioned herein

have maintained, a substantial course of trade in said merchandise in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their merchandise, respondents have made, and are now making, numerous statements and representations in advertisements inserted in newspapers of general interstate circulation and by oral statements and representations of their sales representatives and agents to prospective purchasers with respect to said merchandise and services.

Typical and illustrative of said statements and representations, but not all inclusive thereof, is the following:

Sofa \$14.95 Chair \$8.50 3 piece sectional \$29.95

PAR. 5. By and through the use of said above quoted statements and representations, and others of similar import and meaning but not expressly set out herein, separately and in connection with the oral statements and representations of respondents' salesmen to customers and prospective customers, respondents have represented and are now representing directly or by implication that:

1. Respondents are making a bona fide offer to sell the advertised merchandise at the price and on the terms and conditions stated in the advertisements.

PAR. 6. In truth and in fact:

1. Respondents' offers are not bona fide offers to sell said merchandise at the price and on the terms and conditions stated in the advertisements. To the contrary, said offers are made for the purpose of obtaining leads to persons interested in the purchase of plastic slipcovers. Members of the purchasing public who respond to said advertisements are called upon in their homes by respondents or their salesmen who make little or no effort to sell to the prospective customer the advertised merchandise. Instead, they exhibit what they represent to be the advertised merchandise which, because of its poor appearance and condition, is frequently rejected on sight by the prospective customer. Higher priced merchandise of superior quality is thereupon exhibited, which by comparison disparages and demeans the merchandise. By these and other tactics, purchase of the advertised merchandise is discouraged, and respondents, through their salesmen, attempt to sell and frequently do sell the higher priced merchandise.

Therefore, the statements and representations as set forth in Paragraphs Four and Five, hereof, were and are false, misleading and deceptive.

PAR. 7. In the course and conduct of their business as aforesaid, and at all times mentioned herein, respondents have been, and now are, in

substantial competition in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, with corporations, firms and individuals engaged in the sale of merchandise of the same general kind and nature as the aforesaid merchandise sold by respondents.

PAR. 8. The use by respondents of the aforesaid false, misleading and deceptive statements, representations, acts and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that such advertisements and representations were and are true, and into the purchase of substantial quantities of respondents' said merchandise by reason of said erroneous and mistaken beliefs.

PAR. 9. The aforesaid acts and practices of respondents as herein alleged were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent The House of Schiller, Inc. is a corporation organized, existing and doing business under and by virtue of the laws

of the State of New York with its offices and principal place of business located at 41-40 27 St., Long Island City, N.Y.

Respondents Lawrence Kane and Donald Sherman are officers of said corporation. They formulate, direct and control the policies, acts and practices of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents The House of Schiller, Inc., a corporation, its successors and assigns, and its officers, and Lawrence Kane and Donald Sherman, individually and as officers of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale and distribution of plastic slipcovers or other merchandise to the public at retail, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using, in any manner, a sales plan, scheme, or device wherein false, misleading, or deceptive statements or representations are made in order to obtain leads or prospects for the sale of plastic slipcovers or other merchandise or services.

2. Making representations, directly or indirectly, orally, or in writing, purporting to offer merchandise or services for sale when the purpose of the representation is not to sell the offered merchandise or services but to obtain leads or prospects for the sale of other merchandise or services at a higher price.

3. Disparaging in any manner, or discouraging the purchase of any merchandise or services which are advertised or offered for sale.

4. Representing, directly or indirectly, orally or in writing, that any merchandise or services are offered for sale when such offer is not a bona fide offer to sell such merchandise or services.

5. Failing to maintain and produce for inspection and copying for a period of three years adequate records to document for the entire period during which each advertisement was run and for a period of six weeks after the termination of its publication in press or broadcast media:

a. the cost of publishing each advertisement including the preparation and dissemination thereof;

b. the volume of sales made of the advertised product or service at the advertised price; and

c. a computation of the net profit from the sales of each advertised product or service at the advertised price.

It is further ordered, That respondents shall maintain for at least a one (1) year period, following the effective date of this order, copies of all advertisements, including newspaper, radio and television advertisements, direct mail and in-store solicitation literature, and any other such promotional material utilized for the purpose of obtaining leads for the sale of plastic slipcovers and other merchandise, or utilized in the advertising, promotion or sale of plastic slipcovers and other merchandise.

It is further ordered, That respondents, for a period of one (1) year from the effective date of this order, shall provide each advertising agency utilized by respondents and each newspaper publishing company, television or radio station or other advertising media which is utilized by the respondents to obtain leads for the sale of plastic slipcovers and other merchandise, with a copy of the Commission's news release setting forth the terms of this order.

It is further ordered, That respondents deliver a copy of this order to cease and desist to all present and future personnel of respondents who are engaged in the offering for sale and sale of respondents' products, or in any aspect of preparation, creation, or placing of advertising and that respondents secure a signed statement acknowledging receipt of said order from each such person and that respondents distribute a copy of this order to each of their operating divisions.

It is further ordered, That respondents maintain full and complete records of all complaints and correspondence received from customers, or any memoranda in connection therewith, for a period of two years after receipt.

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

It is further ordered, That the individual respondents named herein promptly notify the Commission of the discontinuance of their present business or employment and of their affiliation with a new business or employment. Such notice shall include respondents' current business addresses and a statement as to the nature of the business or employment in which they are engaged as well as a description of their duties and responsibilities.

It is further ordered, That no provision of this order shall be construed in any way to annul, invalidate, repeal, terminate, modify or

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exempt respondents from complying with agreements, orders or directives of any kind obtained by any other agency or act as a defense to actions instituted by municipal or State regulatory agencies. No provision of this order shall be construed to imply that any past or future conduct of respondents complies with the rules and regulations of, or the statutes administered by, the Federal Trade Commission.

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

IN THE MATTER OF

THE BUDD COMPANY

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

Docket 8848. Complaint, June 18, 1971—Decision, Aug. 29, 1975

Order dismissing complaint issued against a Philadelphia, Pa., automotive parts supplier for alleged violation of Section 7 of the Clayton Act. The Commission vacated the initial decision of the administrative law judge, finding respondent's acquisition of Gindy Manufacturing Corporation to be procompetitive rather than anticompetitive as alleged in the complaint.

Appearances

For the Commission: *K. Keith Thurman, Ronald J. Dolan and James C. Egan, Jr.*

For the respondent: *Ralph W. Brenner, Edward R. Sandell and T. Michael Mather, Montgomery, McCracken, Walker & Rhoads, Philadelphia, Pa.*

COMPLAINT

The Federal Trade Commission having reason to believe that The Budd Company, a corporation subject to the jurisdiction of the Commission, has acquired the stock of Gindy Manufacturing Corporation, a corporation, in violation of Section 7 of the Clayton Act (15 U.S.C. §18), hereby issues this complaint, pursuant to Section 11 of that Act (15 U.S.C. §21), stating its charges in that respect as follows:

I. Definition

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

(a) "Containers and chassis," as used here, refer to large, closed box-type structures which can be used for the intermodal transportation of goods, by rail, ship or motor carrier and chassis used to transport containers. The container is detachable from the chassis of a trailer or semi-trailer when so used. Sizes are now generally standardized to 8 feet wide, 8 feet high and either 20 feet or 40 feet long, although a few odd sizes are also made.

(b) "Van trailer," as used here, refers to a large box-type structure attached permanently to a chassis for use as a truck trailer or semi-trailer. Among the principal types are:

- (1) Closed-top dry freight
- (2) Open-top.

II. The Budd Company

2. Respondent, The Budd Company (hereafter "Budd") is now, and was at the time of the acquisition, a Pennsylvania corporation with its principal office, and place of business located at 2450 Hunting Park Ave., Philadelphia, Pa.

3. In 1967, Budd had sales of \$330.9 million, and assets of \$264.5 million. In that year it was the 250th largest industrial corporation in the Nation in total sales. In 1968, its sales increased to \$469.5 million and assets increased to \$346.7 million making it the nation's 209th largest industrial corporation in total sales. By 1969, Budd had annual sales of \$561.7 million and assets of \$402 million and in terms of sales had progressed to rank 191st among the nation's largest industrial corporations.

4. Budd is one of the largest independent automotive suppliers in the nation and the largest independent supplier of body components to the automotive industry. Budd manufactures automotive bodies, wheels, rims, hubs, drums, brakes and other automotive products. It also produces jigs, dies and fixtures used in the manufacture of automotive bodies and components, railroad cars, metal stampings and industrial plastic products. Approximately 85 percent of its sales are in the automotive field.

5. Prior to its acquisition of Gindy Manufacturing Corporation, Budd surveyed the transportation equipment field, including manufacturers of van trailers and containers and chassis, with a view to acquisition of such companies. As a major manufacturer of metal stampings and parts such as wheels, rims, hubs, and drums, Budd made

many of the parts used in the manufacture of van trailers and container chassis. Furthermore, Budd has designed and produced components used in the manufacture of stainless steel dry freight van trailers and aluminum containers.

6. By virtue of its position as a substantial manufacturer and supplier of transportation equipment and component parts, its financial resources, its marketing knowledge and its demonstrated interest in entering the van trailer and container and chassis industry, Budd was, prior to Oct. 22, 1968, one of the most likely potential entrants into the manufacture and sale of van trailers and containers and chassis.

7. At all times relevant herein, Budd sold and shipped its products throughout the United States and was and is now engaged in commerce as "commerce" is defined in the Clayton Act.

III. Gindy Manufacturing Corporation

8. Prior to its acquisition by Budd on Oct. 22, 1968, Gindy Manufacturing Corporation (hereafter "Gindy") was a Pennsylvania corporation with its principal office and place of business located in Downingtown, Pa.

9. Gindy was engaged principally in the manufacture, sale and distribution of van trailers and containers and chassis. Its manufacturing and assembly facilities were located in Eagle, Lebanon and Honey Brook, Pa.; Pennsauken, N.J.; Collinsville, Va.; and St. Louis, Mo.

10. For the fiscal year ending May 31, 1968, Gindy's sales were approximately \$32.2 million, and its assets amounted to approximately \$44 million.

11. In calendar year 1968, Gindy was a substantial manufacturer and seller of van trailers and containers and chassis. With sales of \$32.2 million, it ranked fourth in the country in the sale of van trailers; with sales of \$26.7 million, it ranked fourth in the country in the sale of closed-top dry freight van trailers; with sales of \$3.1 million, second in the sale of open-top van trailers; and, with sales of \$3.1 million, sixth in the sale of containers and chassis. In that year, Gindy accounted for 8.4 percent of van trailer shipments, 10.8 percent of closed-top dry freight van trailer shipments, 15.9 percent of open-top van trailer shipments and 3.8 percent of container and chassis shipments. In calendar year 1969 Gindy's shipments of van trailers increased to \$42.6 million, and its market share increased to 8.8 percent. In that same year its shipments of closed-top dry freight van trailers increased to \$40.3 million, making Gindy the 3rd largest supplier with 12.9 percent of shipments. A significant increase in Gindy's position in the shipment of containers and chassis also occurred in 1969; its value of shipments increased to

\$9.0 million making it the 3rd largest supplier with 9.9 percent of that market.

12. At all times relevant herein Gindy sold and shipped its products throughout the United States and engaged in commerce as "commerce" is defined in the Clayton Act.

IV. The Acquisition

13. On or about Oct. 22, 1968, Budd acquired all of the then issued and outstanding capital stock of Gindy, aggregating 62,730 shares, for approximately 900,000 shares of Budd common stock. At the time of the acquisition the Budd stock exchanged for Gindy was valued at approximately \$24 million. Gindy has been operated as a Budd subsidiary since the acquisition.

V. Trade and Commerce

14. The relevant geographic market involved in this complaint is the United States as a whole. The relevant product markets are:

- (a) Van trailers
- (b) Containers and chassis.

The relevant product sub-markets are:

- (a) Closed-top dry freight van trailers
- (b) Open-top van trailers.

15. The manufacture of van trailers and containers and chassis is a significant industry in the United States. During 1968, the approximate total value of shipments in the relevant markets and submarkets by domestic producers was as follows:

- (a) Van trailers, \$381.7 million;
- (b) Closed-top dry freight van trailers, \$246.1 million;
- (c) Open-top van trailers, \$19.8 million; and
- (d) Containers and chassis, \$81.6 million.

During 1969, the approximate total value of shipments in the relevant markets and submarkets by domestic producers was as follows:

- (a) Van trailers, \$486.4 million;
- (b) Closed-top dry freight van trailers, \$312.3 million;
- (c) Open-top van trailers, \$16.3 million; and
- (d) Containers and chassis, \$91.6 million.

16. The van trailer manufacturing industry is marked by a high degree of concentration. In 1968, the four largest companies accounted for approximately 58.9 percent and the eight largest companies for approximately 81.1 percent of total industry sales. The closed-top dry freight van trailer market is even more highly concentrated with the

top four firms accounting for 65.9 percent of 1968 shipments and the top eight firms accounting for 84.8 percent. Concentration in the open-top van trailer market is also high, with the top four firms accounting for 56.9 percent of 1968 shipments and the top eight firms accounting for 72.1 percent. Concentration in the sale of containers and chassis is extremely high; in 1968 four firms accounted for 90.4 percent of shipments and the top eight for virtually all of the shipments in this market.

17. By 1969 concentration in the shipment of van trailers and closed-top dry freight van trailers had increased. In that year the top four firms accounted for 61.5 percent of van trailer shipments and the top eight firms for 81.7 percent. In 1969 the top four firms accounted for 72.0 percent of closed-top dry freight van trailer shipments and the top eight firms for 88.7 percent.

18. Of major importance to most purchasers of van trailers and containers and chassis, in many instances governing the purchaser's choice of supplier, are the terms relative to extent, duration, and rate of financing for proposed sales transactions. Access to significant financial resources which will permit a manufacturer to extend generous credit on easy repayment terms constitutes a decisive competitive advantage in the sale of van trailers and containers and chassis.

19. Entry into the manufacture and sale of van trailers and containers and chassis is difficult. A successful manufacturer and supplier of van trailers and containers and chassis must possess manufacturing and marketing knowledge of transportation equipment, must have ample financial resources, and must possess the ability to accept, service and dispose of substantial numbers of used trade-in van trailers.

VI. Effect of the Acquisition

20. The effects of the acquisition of Gindy by Budd may be substantially to lessen competition or to tend to create a monopoly in the manufacture and sale of: (1) van trailers, (2) closed-top dry freight van trailers, (3) open-top van trailers, and (4) containers and chassis throughout the United States in violation of Section 7 of the Clayton Act, as amended, in the following ways among others:

(a) Substantial potential competition between Budd and Gindy in each such line of commerce has been eliminated.

(b) Potential competition in each such line of commerce has been substantially lessened.

(c) Other manufacturers in each such line of commerce may be led to agree to acquisition by financially strong companies for defensive or retaliatory reasons.

(d) Barriers to entry of new manufacturers into each such line of commerce have been raised significantly.

VII. The Violation Charged

21. The acquisition of Gindy by Budd constitutes a violation of Section 7 of the Clayton Act, as amended (15 U.S.C. §18).

INITIAL DECISION BY RAYMOND J. LYNCH, ADMINISTRATIVE
LAW JUDGE

MARCH 8, 1974

PRELIMINARY STATEMENT

The Federal Trade Commission, on June 18, 1971, issued its complaint in this proceeding alleging that The Budd Company, a corporation, hereinafter referred to as Budd, by its acquisition of the stock of the Gindy Manufacturing Corporation, hereinafter referred to as Gindy, violated Section 7 of the Clayton Act (15 U.S.C. §18).

For the purposes of the complaint, the Commission has chosen the following definitions:

(a) "Containers and chassis," as used here, refer to large, closed box-type structures which can be used for the intermodal transportation of goods, by rail, ship or motor carrier and chassis used to transport containers. The container is detachable from the chassis of a trailer or semi-trailer when so used. Sizes are now generally standardized to 8 feet wide, 8 feet high and either 20 feet or 40 feet long, although a few odd sizes are also made.

(b) "Van trailer," as used here, refers to a large box-type structure attached permanently to a chassis for use as a truck trailer or semi-trailer. Among the principal types are:

- (1) Closed-top dry freight
- (2) Open-top

In addition, the relevant product markets are:

- (a) Van trailers
- (b) Containers and chassis

The relevant product submarkets are:

- (a) Closed-top dry freight van trailers
- (b) Open-top van trailers

and the relevant geographic market involved in the complaint is the United States as a whole.

Further, Budd's acquisition of Gindy violated Section 7 of the Clayton Act.

Summary of Proceedings

On Oct. 22, 1968, Budd acquired all the then outstanding capital stock of Gindy Manufacturing Corporation, a Pennsylvania corporation with its principal office and place of business located in Downingtown, Pa.

Although an initial investigation was conducted by the Federal Trade Commission at the time of the acquisition, no action was taken at that time. Several years later, on June 18, 1971, the Federal Trade Commission issued a complaint charging that Budd's aforesaid acquisition of Gindy violated Section 7 of the Clayton Act. An answer and an amended answer were duly filed by the respondent, admitting in part and denying in part the various allegations of the complaint.

Prehearing conferences were held on several occasions between Dec. 15, 1971 and May 15, 1973. In addition, depositions of three foreign nationals were taken in England, France and Belgium during the month of April 1973. The course and conduct of the prehearing procedures were regulated by the administrative law judge through the issuance of a series of prehearing orders.

Presentation of the case-in-chief began in Wash., D.C., on July 30, 1973, hearings being held continuously through Aug. 16, 1973, on which date they were adjourned until Sept. 17, 1973, on which latter date, in that city, complaint counsel rested their case.

Respondent filed a motion to dismiss with a supporting memorandum of law. Complaint counsel filed a memorandum of law in opposition. The administrative law judge denied the motion on Sept. 17, 1973, to hear respondent's defense.

Respondent's defense was presented at hearings held in Washington, D.C., during the periods Sept. 17 through Oct. 3, 1973, Oct. 29, 1973 through Oct. 31, 1973, and on Nov. 15, 1973, on which latter date respondent rested its defense and complaint counsel presented rebuttal.

The record, which included a transcript of testimony of 2,273 pages, was closed on Nov. 26, 1973. Upon order of the administrative law judge, both counsel for the respondent and complaint counsel filed proposed findings of fact and conclusions of law on Dec. 26, 1973, and filed reply briefs on Jan. 11, 1974.

Any motions not heretofore or herein specifically ruled upon, either directly or by the necessary effect of the conclusions in this initial decision, are hereby denied.

This proceeding is before the administrative law judge upon the complaint, answer and amended answer, testimony and other evidence, proposed findings of fact and conclusions of law filed by counsel supporting the complaint and by counsel for respondent. The proposed

findings of fact, conclusions and arguments of the parties have been carefully considered, and those findings not adopted either in the form proposed or in substance are rejected as not supported by the evidence or as involving immaterial issues not necessary for this decision.

References to the record are made in parentheses, and certain abbreviations, as hereinafter set forth, are used:

CX - Commission's Exhibits.

RX - Respondent's Exhibits.

The transcript of the testimony is referred to with either the last name of the witness and the page number or numbers upon which the testimony appears or with the abbreviation Tr. and the page.

Having heard and observed the witnesses and after having carefully reviewed the entire record in this proceeding, together with the proposed findings and conclusions submitted by the parties, the administrative law judge makes the following findings:

FINDINGS OF FACT

I. Identity and Business of Respondent and Acquired Company

A. *The Budd Company*

1. Respondent Budd is now, and was at the time of the acquisition, a Pennsylvania corporation with its principal office and place of business located at 2450 Hunting Park Ave., Philadelphia, Pa. (complaint and answer, par. 2).

2. Since the acquisition, the executive offices of Budd have been removed from the aforesaid principal office in Pennsylvania to 2155 W. Big Beaver Road, Troy, Mich. (admitted by respondent).

3. In 1967, Budd had sales of \$330.9 million, and assets of \$264.5 million. In that year, it was the 250th largest industrial corporation in the nation in total sales. In 1968, its sales increased to \$469.5 million and assets increased to \$346.7 million making it the nation's 209th largest industrial corporation in total sales. By 1969, Budd had annual sales of \$561.7 million and assets of \$402 million, and in terms of sales had progressed to rank 191st among the nation's largest industrial corporations (complaint and answer, par. 3).

4. Budd is one of the largest independent automotive suppliers in the nation and the largest independent supplier of body components to the automotive industry. Budd manufactures automotive bodies, wheels, rims, hubs, drums, brakes and other automotive products. It also produces jigs, dies and fixtures used in the manufacture of automotive bodies and components, railroad cars, metal stampings and

industrial plastic products. Approximately 85 percent of its sales are in the automotive field (complaint and answer, par. 4).

5. Prior to its acquisition of Gindy Manufacturing Corporation, Budd surveyed the transportation equipment field, including manufacturers of van trailers and containers and chassis, with a view to acquisition of such companies. As a major manufacturer of metal stampings and parts such as wheels, rims, hubs, and drums, Budd made many of the parts used in the manufacture of van trailers and container chassis. Furthermore, Budd has designed and produced components used in the manufacture of stainless steel dry freight van trailers and aluminum containers (complaint and answer, par. 5).

6. At all times relevant herein, Budd sold and shipped its products throughout the United States and was, and is now, engaged in commerce as "commerce" is defined in the Clayton Act (complaint and answer, par. 7).

B. *Gindy Manufacturing Corporation*

7. Prior to its acquisition by Budd on Oct. 22, 1968, Gindy was a Pennsylvania corporation with its principal office and place of business located in Downingtown, Pa. (complaint and answer, par. 8).

8. Gindy was engaged principally in the manufacture, sale and distribution of van trailers and containers and chassis. Its manufacturing and assembly facilities were located in Eagle, Lebanon and Honey Brook, Pa.; Pennsauken, N.J.; Collinsville, Va.; and St. Louis, Mo. (complaint and answer, par. 9).

9. For the fiscal year ending May 31, 1968, Gindy's sales were approximately \$32.2 million, and its assets amounted to approximately \$44 million (complaint and answer, par. 10).

10. In calendar year 1968, Gindy was a substantial manufacturer and seller of van trailers and containers and chassis. With sales of \$32.2 million, it ranked fourth in the country in the sale of van trailers; with sales of \$26.7 million, it ranked fourth in the country in the sale of closed-top dry freight van trailers; with sales of \$3.1 million, second in the sale of open-top van trailers; and, with sales of \$3.1 million, sixth in the sale of containers and chassis. In that year, Gindy accounted for 8.4 percent of van trailer shipments, 10.8 percent of closed-top dry freight van trailer shipments, 15.9 percent of open-top van trailer shipments, and 3.8 percent of container and chassis shipments. In calendar year 1969, Gindy's shipments of van trailers increased to \$42.6 million, and its market share increased to 8.8 percent. In that same year, its shipments of closed-top dry freight van trailers increased to \$40.3 million, making Gindy the third largest supplier with 12.9 percent of shipments. A significant increase in Gindy's position in the shipment of containers and chassis also occurred in 1969; its value of shipments

increased to \$9.0 million, making it the third largest supplier with 9.9 percent of that market (complaint and answer, par. 11).

11. At all times relevant herein, Gindy sold and shipped its products throughout the United States and engaged in commerce, as "commerce" is defined in the Clayton Act (complaint and answer, par. 12).

II. The Acquisition

12. On or about Oct. 22, 1968, Budd acquired all of the then issued and outstanding capital stock of Gindy, aggregating 62,730 shares, for approximately 900,000 shares of Budd common stock. At the time of the acquisition, the Budd stock exchanged for Gindy was valued at approximately \$29.7 million. Gindy has been operated as a Budd subsidiary since the acquisition (complaint and answer, par. 13; admission 19, 1/15/73).

III. Trade and Commerce

13. The relevant geographic market involved in this complaint is the United States as a whole. The relevant product markets are:

- (a) Van trailers;
- (b) containers and chassis.

The relevant product submarkets are:

- (a) Closed-top dry freight van trailers;
- (b) open-top van trailers (complaint and answer, par. 14).

14. The manufacture of van trailers and containers and chassis is a significant industry in the United States. During 1968, the approximate total value of shipments in the relevant markets and submarkets by domestic producers was as follows:

- (a) Van trailers, \$381.7 million;
- (b) closed-top dry freight van trailers, \$246.1 million;
- (c) open-top van trailers, \$19.8 million; and
- (d) containers and chassis, \$81.6 million (counsel supporting the complaint's confidential proposed finding 57).

During 1969, the approximate total value of shipments in the relevant markets and submarkets by domestic producers was as follows:

- (a) Van trailers, \$486.3 million;
- (b) closed-top dry freight van trailers, \$312.3 million;
- (c) open-top van trailers, \$16.3 million; and
- (d) containers and chassis, \$91.6 million (counsel supporting the complaint's confidential proposed finding 59).

15. The van trailer manufacturing industry is marked by a high

degree of concentration. In 1968, the four largest companies accounted for approximately 59.0 percent and the eight largest companies for approximately 80.7 percent of total industry sales. The closed-top dry freight van trailer market is even more highly concentrated, with the top four firms accounting for 65.9 percent of 1968 shipments and the top eight firms accounting for 84.9 percent. Concentration in the open-top van trailer market is also high, with the top four firms accounting for 57.2 percent of 1968 shipments and the top eight firms accounting for 72.1 percent. Concentration in the sale of containers and chassis is extremely high; in 1968, four firms accounted for 89.9 percent of shipments and the top eight for virtually all of the shipments in this market (counsel supporting the complaint's confidential proposed finding 57).

16. By 1969, concentration in the shipment of van trailers and closed-top dry freight van trailers had increased. In that year, the top four firms accounted for 61.6 percent of van trailer shipments and the top eight firms for 80.8 percent. In 1969, the top four firms accounted for 72.2 percent of closed-top dry freight van trailer shipments and the top eight firms for 87.9 percent (counsel supporting the complaint's confidential proposed finding 59).

17. Of major importance to most purchasers of van trailers and containers and chassis, in many instances governing the purchaser's choice of supplier, are the terms relative to extent, duration, and rate of financing for proposed sales transactions. Access to significant financial resources which will permit a manufacturer to extend generous credit on easy repayment terms constitutes a decisive competitive advantage in the sale of van trailers and containers and chassis (complaint and answer, par. 18).

18. Entry into the manufacture and sale of van trailers and containers and chassis on a large scale is difficult. A successful manufacturer and supplier of van trailers and containers and chassis must possess manufacturing and marketing knowledge of transportation equipment, must have ample financial resources, and must possess the ability to accept, service and dispose of substantial numbers of used trade-in van trailers (complaint and answer, par. 19).

19. By 1972, Gindy's total sales of van trailers, containers and chassis had increased to \$62 million (Hindin 1314).

20. Gindy enjoyed a good reputation, both among its competitors and its customers (CX 10; CX 11B, D; CX 63; CX 68B; CX 73A; CX 82; Ginsberg 260; Miller 376-77; Hammond 666).

21. Prior to its acquisition, Gindy was a very profitable company and never lost money in any single year (CX 42; CX 45; Ginsberg 274; Scott 1035, 1048-49, 1106). Indeed, Budd was interested in acquiring

Gindy because of the latter's profitability (Scott 1035, 1048-49, 1059). Gindy's average rate of return on sales before taxes in the five years preceding its acquisition was over 10 percent (CX 45F; Scott 1106). In the year preceding its acquisition, Gindy's average rate of return on stockholders' equity, before taxes, was 27.1 percent (RX 395, *in camera*).

22. Prior to Oct. 22, 1968, Gindy had credit arrangements with several banks and an insurance company (Ginsberg 275; Morris 1227; Todd 1540-41). In 1968, these creditors indicated that Gindy's borrowing power would be continued at a level which would have enabled Gindy to maintain its then present market share in its various product markets (Todd 1547). However, because of the tight money situation then extant for all van trailer manufacturers, Gindy could not secure the financing to expand its position in its various markets as rapidly as it had been expanding (Ginsberg 274-76; Morris 1228-29, 1239-40; Todd 1543, 1547). At the time of the acquisition, Gindy had a four- to five-month backlog of orders (CX 46).

23. At all times relevant herein, Gindy sold and shipped some of its products throughout the United States and engaged in commerce, as "commerce" is defined in the Clayton Act (complaint and answer, par. 12; Ginsberg 317, 346; Heinmiller 691).

IV. The Transaction

24. On Oct. 22, 1968, Budd acquired all of the then issued and outstanding capital stock of Gindy, aggregating 62,730 shares, in exchange for approximately 900,000 shares of Budd common stock and a contingent right to about 300,000 additional shares of common stock two years after said date (complaint and answer, par. 13). The Budd stock exchanged for the capital stock of Gindy on that date had a value of approximately \$29.7 million (admission 19, 1/15/73). Gindy has been operated as a Budd subsidiary since the acquisition (complaint and answer, par. 13).

V. The Geographic Market

25. The relevant geographic market is the United States as a whole for van trailers, closed-top dry freight van trailers and open-top van trailers (complaint and answer, par. 14).

26. The leading van trailer manufacturers sold throughout the United States (CX 68C; Bernstein 1426-27; Crumrine 1725; Linnen 1767; Bachman 1912).

27. The relevant geographic market is the United States as a whole for containers and chassis (findings 28-32).

28. Current federal regulations prohibit subsidized American shipping line operators from purchasing cargo containers of foreign manufacture with capital reserve funds or with general funds if reimbursement to the general fund for such purposes will be sought from the capital reserve fund.¹

29. The governments of Western Europe prohibit the use of American manufactured containers in point-to-point commerce within each country unless a duty has been paid (CX 149Z-41; CX 150Z-41). In fact, American manufactured containers do not meet the standards required by France (CX 149Z-12). The use within the United States of foreign built containers for which no duty has been paid is also severely restricted.²

30. When containers were first introduced, the United States was about the only place where they were available (Hindin 1336). Later, the foreign steamship lines bought them from manufacturers in their own countries (Hindin 1335-36).

31. Containers produced in the United States are delivered domestically, whereas containers produced outside the United States are delivered abroad (Heinmiller 720). American container producers manufacture and sell aluminum containers primarily (CX 150Z-14). European manufacturers of containers produce and sell steel containers primarily (Hindin 1335). This reflects the fact that shipping lines in the United States prefer and buy aluminum containers, while European shipping lines prefer and buy steel containers (CX 150Z-13; Hindin 1335).

32. Since the devaluation of the United States dollar, foreign container manufacturers have found it difficult to sell containers to domestic companies (Ginsberg 313).

VI. Lines of Commerce

A. *Van Trailers*

33. Van trailers are recognized as constituting a separate product market. The Bureau of the Census reports van trailer shipments separately (CX 39; CX 40; RX 48-50). The Truck Trailer Manufacturers Association (hereinafter "TTMA") assisted in establishing the classifications reported on by the Bureau of the Census (Calvin 914; Berard 1461, 1477). TTMA, manufacturers of trailers and the Bureau of the Census accept these categories, including van trailers, as appropriate categories (Calvin 915-16; Berard 1463).

34. There is a special section of TTMA to which manufacturers of

¹ 30 F.R. 12036 (Sept. 21, 1965).

² 19 CFR §10.41 a(f) (Jan. 1, 1972).

van trailers belong and a different section to which manufacturers of tank trailers belong (Calvin 914-15).

35. Van trailers have distinct physical characteristics which determine their end use. A van trailer is enclosed on at least five sides and is permanently attached to wheel assemblies. As a result of its construction, a van trailer is utilized in hauling a wide variety of commodities over the road (finding 36).

36. Van trailers have uses distinct from other types of trailers (Bernstein 1453). Van trailers are utilized to carry a wide variety of cargo, whereas other types of trailers are utilized to carry specific types of cargo (Ginsberg 235-37). Platform trailers are used to transport certain types of commodities, including steel girders and heavy equipment, which are bulky and not affected by weather conditions (Ginsberg 239; Miller 359; Walters 483; Weaver 904; Persinger 938). Low bed heavy haulers are used to haul anything extremely heavy, primarily construction equipment (Ginsberg 239-40; Walters 484-85; Heinmiller 690; Bernstein 1454). Pole and logging trailers are used to carry logs, poles, and long steel bars (Ginsberg 239; Walters 484; Bernstein 1454-55). Tank and bulk commodity trailers are used to transport liquids, chemicals or gaseous commodities (CX 143; CX 144; Ginsberg 238; Walters 483; Hammond 658). Dump trailers are used to transport bulk items such as dirt or coal (Ginsberg 240; Walters 485).

37. Van trailers are produced on unique production lines which cannot be economically utilized to produce other types of trailers (Miller 367-68, 386-87; Bachman 572; Bertsch 640; Hammond 661; Heinmiller 696-97; Brown 885; Persinger 940-41; Crumrine 1719-21, 1723; Linnen 1791). All types of van trailers can be produced on the same assembly line (Miller 386-87; Hegner 468; Bertsch 640; Heinmiller 703; Tway 877; Hindin 1341-43; Linnen 1791; Bertolini 1833-34). Tank trailers or bulk commodity trailers cannot be built on the same assembly lines used to produce van trailers (Ginsberg 249-51; Miller 367, 388; Bertsch 643-45; Hammond 659, 661, 679; Bernstein 1447-50; Crumrine 1719-21, 1723). A major revamping of Gindy's plants would have been necessary before it could have produced tank trailers (Ginsberg 252; Walters 495). It is not practical or economical to manufacture flat beds, low beds or dump trailers on the same assembly lines used to produce van trailers (Ginsberg 252; Miller 367-68; Walters 496; Bertsch 643-45; Hammond 679; Heinmiller 697; Brown 885; Hindin 1341-43; Crumrine 1750-51).

38. Van trailers, in general, are sold to different customers than those who purchase other types of truck trailers (Hammond 658; Weaver 904; Paterson 1631). Common carriers are generally restricted

by their Interstate Commerce Commission license to hauling general commodities; therefore, such carriers do not have specialized truck trailers such as tank trailers and low bed heavy haulers (Gross 1570; Burten 1577). Fruehauf's van trailer customers generally do not purchase tank trailers (Weaver 904). Strick's customers use only van trailers (Bachman 458-49, 574).

39. Some leasing companies purchase only van trailers while others purchase different types of truck trailers (Hindin 1381-82; Bernstein 1450-51; Paterson 1631). Such purchases are made after they have business from a customer (Weaver 904; Hindin 1382; Paterson 1631). Rental companies do not stock tank trailers (Weaver 909).

40. There are unique producers of van trailers (Ginsberg 231; Miller 356; Bachman 546). Few van trailer producers make tank trailers or low bed heavy haulers (Miller 356; Bachman 546; Hindin 1311-12, 1318). Conversely, Butler and Heil, leading producers of tank trailers, do not make van trailers (Paterson 1631-32).

41. Because of the uses for which they are intended, there is no substitution of van trailers for other types of trailers or containers, or vice versa, due to price changes of either (findings 36, 42; Bernstein 1453). Van trailers do not compete with tank trailers, dump trailers or platform trailers (Hammond 672; Hindin 1312; Bernstein 1453).

42. Van trailers are priced without regard for the pricing of other types of truck trailers (Bachman 552; Hammond 659; Brown 885; Bernstein 1455-56).

43. The van trailer market consists of several distinct submarkets, including closed-top dry freight van trailers and open-top van trailers (findings 44-52).

44. Each of these submarkets is recognized as being a distinct market by the industry. The industry trade association, TTMA, in cooperation with the Department of Commerce, established separate census reporting categories for closed-top dry freight van trailers and open-top van trailers (CX 39; CX 40; RX 48-51; Calvin 914; Berard 1461, 1477).

45. Each type of van trailer is designed to haul a specific type of cargo. Closed-top dry freight van trailers are designed to haul general, nonbulk commodities that do not require refrigeration or special loading (Ginsberg 232; Miller 358; Walters 481; Bachman 547; Hammond 658; Heinmiller 690; Burten 1595). Refrigerated or insulated van trailers are designed to haul commodities requiring constant or cool temperatures, although they may occasionally be used to haul general dry freight commodities on a backhaul basis when no freight requiring refrigeration or constant temperature is available (Ginsberg 233; Miller 358-59; Bachman 547; Hammond 658; Bernstein 1455; Gross 1566, 1568,

1573; Burten 1595). Drop frame van trailers are designed to haul furniture or high bulk, lightweight cargo (Ginsberg 236; Miller 359; Walters 482; Hammond 658; Heinmiller 690). Livestock van trailers are designed and used to haul livestock (Walters 483; Persinger 938). Open-top van trailers are designed to haul cargo that must be top loaded (Walters 481-82; Bachman 548; Hammond 658; Weaver 903; Gross 1567; Burten 1595). Open-top van trailers occasionally may be used on a backhaul basis to haul general freight if a canvas top is added; such use occurs when no top loaded freight is available (Weaver 903; Gross 1566-67). Open-top van trailers used with a canvas top experience some leakage problems that makes them inferior to a regular closed-top dry freight van trailer (Walters 481-82).

46. Only closed-top dry freight van trailers and refrigerated or insulated van trailers are designed for dock level loading by means of fork lift trucks (Miller 358-59; Hammond 665). Open-top van trailers generally are top loaded while drop frame van trailers are difficult to load from most docks and can, at most, be only partially loaded by means of a fork lift truck (Ginsberg 236-37; Miller 358-60; Hammond 665-66).

47. There are specialized customers for certain types of van trailers. Drop frame van trailers are commonly sold to different customers than those who purchase closed-top dry freight van trailers (Walters 380-81; Hammond 657; Weaver 902-03). Refrigerated van trailers are generally sold to different customers than those who purchase closed-top dry freight van trailers (Walters 534; Weaver 903). Livestock and grain trailers are sold to individuals, whereas other van trailers are sold to common carriers (Ginsberg 231-33; Persinger 938).

48. There are differences in the construction between closed-top dry freight van trailers and open-top van trailers (Brown 887). The top rail on the latter is much heavier than on the former (Hammond 665; Brown 895). Likewise, there are differences in the construction between closed-top dry freight van trailers and refrigerated van trailers. The body on the latter is sealed tighter than on the former and the latter has ventilators and insulation, whereas the former does not (Hammond 665).

49. Each type of van trailer is priced individually without regard to the prices for other types of van trailers (Ginsberg 244-46; Miller 361-62; Walters 487-88; Bachman 551-52; Brown 885; Bernstein 1455). Prices for other types of van trailers sold by competitors are not considered in submitting bids for closed-top dry freight van trailers (Walters 489; Hammond 659; Brown 885; Bernstein 1456).

50. Each type of van trailer has a distinct price (Ginsberg 240-42; Bachman 551; Hammond 659-60; Persinger 939; Gross 1569).

51. There are many producers of van trailers who specialize in a particular type of van trailer (Bachman 571; Persinger 937; Hindin 1318).

52. Budd recognized that closed-top dry freight van trailers constitute a separate product market, characterizing them as a "product line" in reports to its shareholders and listing their sales separately (CX 94K).

B. *Containers and Chassis*

53. Containers and chassis are reported to the Bureau of the Census under SIC 37150 53 "Detachable Trailer Bodies, Sold Separately" and SIC 37150 54 "Detachable Trailer Chassis, Sold Separately" (CX 39; CX 40; Berard 1461; Collier 1641, 1658). TTMA assisted in establishing these Census categories (Calvin 916-17; Berard 1461, 1477).

54. Containers have a use distinct from closed-top dry freight van trailers. As a result of their detachable characteristics, containers are most frequently used to transport commodities to and from seaports and over bodies of water (Ginsberg 234, 238; Brown 886) in contrast to closed-top dry freight van trailers, which are utilized almost exclusively for overland transportation (Brown 886).

55. Containers are constructed in a manner different from that utilized in van trailer production. Because containers are stacked on shipboard, the compressive loads required in the construction of shipping containers are completely different from those required in a van trailer (Brown 886-87; Bertolini 1832-33).

56. In contrast to van trailers, containers have to be tested with regard to their ability to sustain loads (Bertolini 1833). Such tests are performed by lifting the container from the four corners (Bertolini 1833). These tests must be certified by an independent agency whom the customer specifies (Bertolini 1833).

57. Containers are often constructed on different assembly lines than those used to build van trailers (Hindin 1318; Crumrine 1750-51; Bertolini 1833-34). It is difficult to construct a container on a van trailer assembly line, as additional fixtures are required (Hindin 1343-44).

58. Most containers and chassis are sold to different customers than purchase van trailers. The vast majority of containers and chassis are sold to ship lines (Ginsberg 234; Miller 357-58; Walters 481; Bachman 546-47; Brown 886). Van trailers generally are sold to common carriers or private truckers (Ginsberg 231-34; Miller 357; Walters 479-81; Bachman 546).

59. Containers are priced without regard to the price of van trailers (Walters 488; Bachman 550).

60. The average price of a container or a chassis is far lower than the average price of a van trailer. In 1968, the average price of a

container was \$2,500 and a chassis was about \$2,200 (CX 39A-H; Ginsberg 242, container \$2,500 to \$2,800, chassis \$2,500; Miller 360, container \$2,850, chassis \$2,700 to \$2,800; Walters 487, container \$3,200 to \$3,400, chassis \$1,400; Bachman 551, container \$2,750, chassis \$2,400 to \$2,600).

VII. The Market

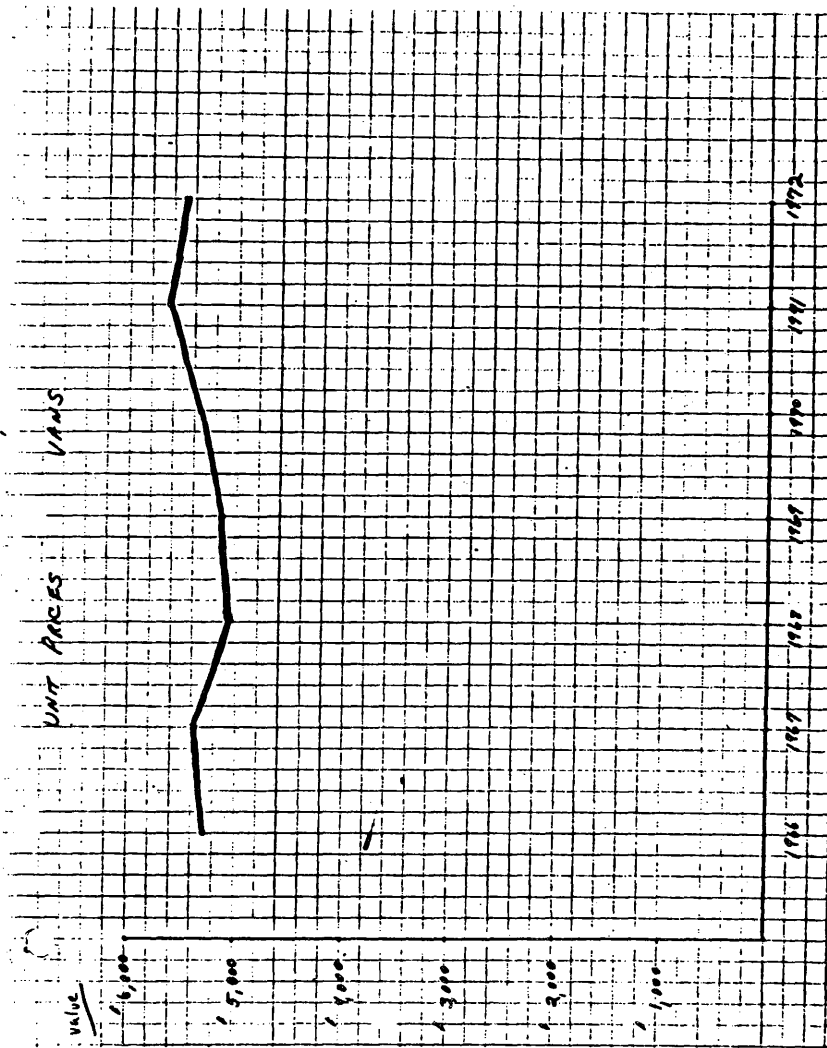
61. In 1968, there were 100 van trailer manufacturers, of whom 35-40 produced closed-top dry freight van trailers (Linnen 1799).

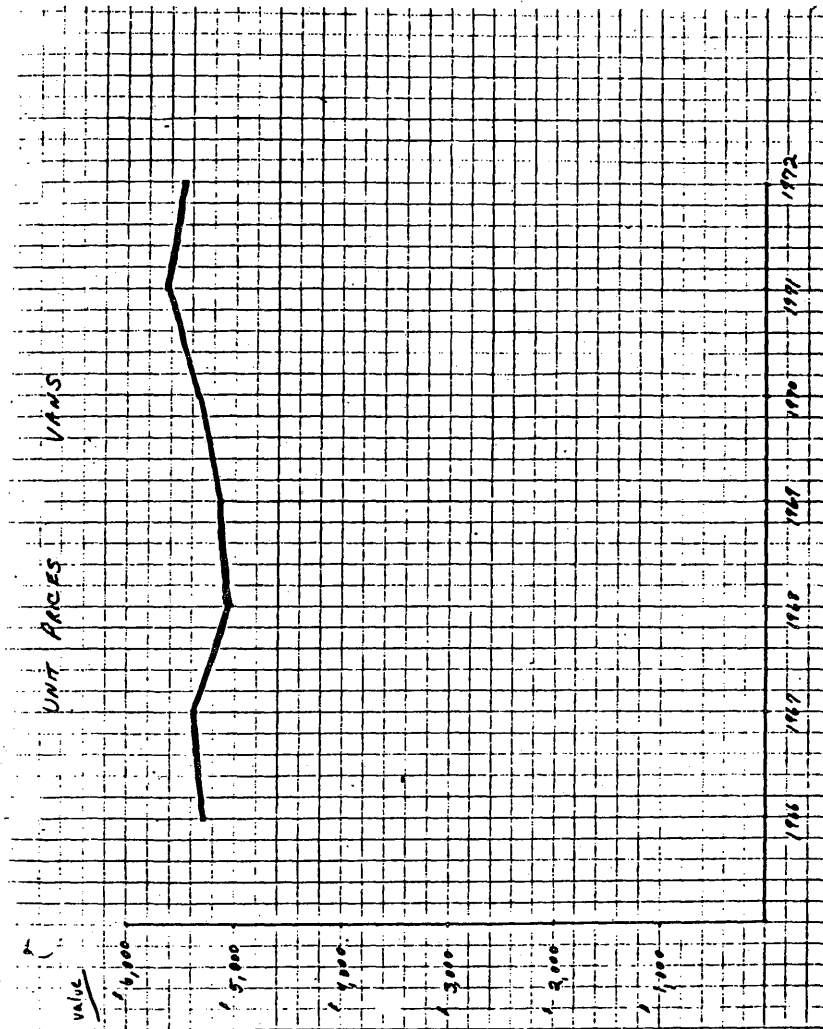
62. In 1968, the year of Gindy's acquisition by Budd, concentration in the relevant markets was high (see counsel supporting the complaint's confidential proposed finding 57).

63. Budd recognized that concentration was high, stating to its shareholders that 10 firms producing Gindy's type of products accounted for 90 percent of the sales of these products (CX 69E; CX 94M).

64. Concentration in these markets increased from 1968 to 1969 and then remained relatively constant through 1972 (see counsel supporting the complaint's confidential proposed finding 59).

65. Prices of van trailers fell from 1966 to 1968 and have generally increased since 1969 (Crumrine 1737). Prices of closed-top dry freight van trailers fell from 1966 to 1968, remained steady for one year and then steadily rose through 1972. The price trends of van trailers and closed-top dry freight van trailers are shown in the following charts:





66. The manufacture of van trailers, containers and chassis is very profitable. In the period 1962-1967, both Fruehauf Corporation and Gindy experienced an average rate of return on sales, before taxes, of approximately 10 percent (finding 21; CX 118E; CX 119E; CX 120E; CX 121E; CX 122E; CX 123E; Silverstein 1886-88). Profitability of van trailer, container and chassis manufacture, expressed as a rate of return on stockholders' equity, also is very high. In the year of acquisition, Gindy's rate of return on stockholders' equity, before taxes, of 27 percent was one of the highest in the industry (finding 21; RX 38F, Y, *in camera*; see also counsel supporting the complaint's confidential proposed findings 57, 59, 61).

VIII. Barriers to Entry

67. Entry into the manufacture and sale of van trailers and containers and chassis on a level such as that evidenced in this proceeding is difficult. One of the principal barriers to entry into the manufacture and sale of van trailers and containers and chassis is the need to finance sales (CX 10F; CX 46; CX 73B; CX 150Z-19; Ginsberg 257; Miller 371-73; Walters 502; Bachman 555, 558; Hammond 674; Blatt 757; RX 429J, T, Z-4, *in camera*). Financing may be more important than manufacturing (Feinberg 829). Smaller manufacturers of van trailers lose business because they do not have the ability to extend financing (Miller 372-73; Walters 502; Blatt 757; Feinberg 840; Tway 873-74).

68. The leading van trailer manufacturers in 1968 financed in excess of 40 percent of their total sales and extended 6-8 year terms with no down payment (Walters 502; Bachman 558). Small manufacturers generally did not have the ability to extend credit at all, or did so indirectly through banks (Miller 371; Hammond 662; Brown 886; Tway 873). In 1969, Theurer, Inc. was sold, among other reasons, in order to obtain a source of financing (Blatt 757). In 1968, those smaller van trailer manufacturers who could finance internally or through banks did not and could not offer credit terms as advantageous as those offered by the dominant firms (Ginsberg 257-58; Miller 371-73; Brown 886). Such smaller van trailer manufacturers lost business in 1968 due to their lack of ability to extend financing (finding 67).

69. Financing has played an increasingly important role in Gindy's sale of van trailers (Morris 1227). From 1965 through 1969, the number of van trailers Gindy sold with virtually no downpayment increased steadily from 46 percent to 64 percent, a fact which is dramatically reflected in the following table (CX 48B; CX 53B; Ward 1149):

GINDY MANUFACTURING COMPANY

Percentage of trailers sold with less than 10 percent down

1965	45.7%
1966	56.9%
1967	60.3%
1968	61.6%
1969	64.1%

Gindy also has extended its terms so that the percentage of trailers financed over 60 months has increased from 9 percent in 1965 to almost 44 percent in 1969 (CX 48B; CX 49B; CX 50B; CX 51B; CX 52B; CX 53B; Ward 1149).

70. The trend toward extended payment terms existed throughout the van trailer manufacturing industry during the period from 1965 to 1969 (Walters 501; Hammond 663; Todd 1543, 1548).

71. The substantial facilities and financial resources required to accept trade-ins and dispose of them is another principal barrier to entry into the manufacture and sale of van trailers (CX 11C). A small van trailer manufacturer does not have the funds or the outlets to accept used trailers (Tway 873). Unless the van trailer purchaser can turn in his used trailer, he does not purchase the new van trailer (Heinmiller 699-700).

72. It is difficult to enter into the sale of van trailers to large customers (answer, Par. 19). Since 1967, the size of customers buying van trailers has increased (Crumrine 1733, 1735; Linnen 1782). This increase in the size of customers for van trailers has increased the difficulty of entry into the manufacture and sale of van trailers.

73. There have been no entrants of any significance into the manufacture and sale of van trailers, containers and chassis for many years (Ginsberg 261, 334; Miller 377-78, 400; Bachman 563; Hammond 666-67; Heinmiller 700, 711-12). To the contrary, several manufacturers have left these markets (admission 24, 1/15/73; Miller 370, 378; Hegner 464; Walters 505; Bachman 563; Heinmiller 700-01; Paterson 1632; Linnen 1797; Bertolini 1828-29, 1855-56). Several manufacturers entered into the manufacture of containers or chassis in recent years and then have left within a short period of time. Several such new entrants went broke (Bertolini 1849-50, 1858-59). Grumman Aircraft entered into the manufacture of specialized van trailers, made no more than 200 and quit (CX 186; CX 187A-C; Ginsberg 323-24; Bertolini 1828-29, 1855-56).

IX. Budd Was The Most Likely Entrant

A. *Budd's Desire to Enter*

74. From 1934 to 1968, Budd was at the edge of the van trailer,

container and chassis market (CX 73A). During the period 1934 to 1956, Budd manufactured the primary portion of a van trailer, stainless steel shells (Bachman 552; Brown 887-88; Necker 1415; Bernstein 1435). These shells were sold to Fruehauf who incorporated them in complete van trailers (Bachman 552; Brown 888; Scott 1028; Bernstein 1438). Budd's role as a supplier of this component was widely known among van trailer manufacturers (Ginsberg 271; Miller 382; Walters 505-06; Bachman 552-53; Hammond 662-63; Heinmiller 699; Brown 888; Hammond 1306; Bernstein 1438).

75. As early as 1956 or 1957, Budd desired to enter the van trailer market. When Budd's relationship with Fruehauf concerning the stainless steel trailer shells was about to be terminated, Budd approached Brown Trailer Company, a manufacturer of van trailers, with a view to acquiring it or selling stainless steel trailers to or through Brown Trailer Company (Brown 887-88, 1532-36).

76. Between September 1960 and September 1961, Budd built aluminum containers for sale to Union Carbide at its Red Lion plant (complaint and answer, par. 5; Scott 1083).

77. In the early 1960's, Budd built a prototype sky-lounge, made primarily of aluminum, at its Red Lion plant (CX 19; CX 20).

78. In late 1961, Mr. Scott, then executive vice president of Budd, presented a white paper to Budd's top management (Scott 1017). This paper recommended closing down Budd's Railway Division as it was a losing operation and broadening the base of the company to make it less vulnerable to the whims of Budd's principal customers, the Big Three auto makers, and especially Ford (CX 69B; Scott 1017-18). For example, in 1966, 70 percent of Budd's sales were to the four domestic automobile manufacturers, including 35 percent of sales to Ford Motor Company (CX 94J). Budd felt that it had become "semicaptive" to the Big Three auto makers and desired to extricate itself from this "very dangerous situation" (CX 69B; CX 94J; Scott 1018-19; Ward 1116-17).

79. At that time, Budd decided to broaden its base by going into a proprietary, industrial type product which it would manufacture (Scott 1019). Budd considered van trailers to be a proprietary product (Scott 1093).

80. By 1965, Budd had decided to continue in the railway car business despite the fact that its "passenger rail business was getting into some difficulty" (CX 94H-J; Scott 1021-22). Therefore, it decided to attempt to add some products that had some relationship to this business (CX 2B; Scott 1021-22).

81. During the period from 1963 to 1968, Budd contacted Utility Trailer Manufacturing Company (hereinafter "Utility") at least twice concerning the possibility of acquiring Utility (Heinmiller 694-95; Ward

1133). During this period of time, Utility was a small manufacturer of van trailers, containers and chassis (RX 412A-B, *in camera*; finding 62; Scott 1090).

82. In the spring of 1967, Mr. Dudley Ward, a vice president of Budd and its chief financial officer, demonstrated Budd's intent to enter the van trailer market by interviewing an owner of a trucking company (the primary customers of van trailer manufacturers) (CX 73A-B; Ward 1135). This owner was told of Budd's prior involvement in highway trailers and its interest in getting into van trailer manufacturing (Ward 1136-37). Mr. Ward then asked for "an appraisal of the manufacturers of trailers, their products and how they compare—from the point of view of the trucker * * *." (CX 73A-B; Ward 1136). The memorandum of this interview was given to Mr. Scott, then president of Budd (Ward 1135).

83. On May 6, 1967, a Budd official submitted to Budd's management a report on the competitive conditions and future growth prospects in truck trailer sales (CX 24).

84. On Aug. 9, 1967, the president of Budd, Mr. Scott, wrote his recommendations concerning the future expansion plans of Budd (CX 14; Scott 1037, 1043). The ideas contained in this memo reflected a plan that "had been evolving and had been the subject of discussion by Mr. Scott and myself [Ward] almost from the day I joined the Budd Company in 1964." (CX 69B; Ward 1160). These views were communicated both to the Budd management and to its board of directors (Scott 1037, 1043; Ward 1161-62). The purpose of these recommendations was to focus the attention of Budd's staff on plans to enter areas which were related to Budd's current activities and which Budd could understand and have the ability to manage (CX 2B; Scott 1038). The list was titled "The Transportation Equipment Concept" and referred solely to various items used to transport goods or people (CX 9B; CX 14A-B; CX 67; CX 69B; Scott 1043, 1074-75). "In the list I [Scott] listed highway trailers as one possibility." (CX 14A-B; Scott 1038, 1042-43; Cf. Ward 1160-61). Another item included on the list was containers (CX 14A-B; Scott 1044-45; Ward 1160-61).

85. In 1967, Budd believed it possessed a managerial staff attuned to manufacture trailers:

JUDGE LYNCH: Was it your view that The Budd Company's managerial staff was attuned to manufacture trailers?

THE WITNESS: I think in terms of being able to learn and understand the trailer business, yes. This is something they could have some understanding about. That does not mean you can go out and run a plant immediately and make trailers as such. But if it involved the formation and welding of metal, this is something that Budd Company management and talents knew something about and could learn more about if they had to. (Scott 1039).

86. Budd had no interest in entering any area outside of hard goods manufacturing because it didn't believe its management understood these other areas (Scott 1038-39). It believed that van trailers had "a definite and planned 'fit' into the Budd picture." (CX 99C; CX 101C). Indeed, Budd's interests with regard to possible areas of expansion lay entirely within transportation equipment, exclusive of power equipment (locomotives or trucks), ships, aircraft and aircraft parts (CX 9B; CX 12, CX 13A; CX 14A-B; CX 67; CX 99A-B; CX 100B; CX 101B-D; Scott 1074-80).

87. Budd's interest in acquiring firms in the transportation equipment field and specifically van trailer manufacturers, was conveyed to several merger brokers utilized by Budd and to Budd's investment bankers (Blatt 749; Scott 1089; Ward 1162-63; Githens 1243, 1246, 1255).

88. The intentions of Mr. Scott regarding Budd's expansion plans as expressed in CX 14 became public knowledge as they were featured in an article appearing in the *New York Times* and in a President's Report to Shareholders sent to Budd's stockholders (CX 9B; CX 22).

89. Budd's intent to enter the van trailer business was clear in 1967-1968. Budd's president indicated, during Budd's acquisition negotiations with Gindy, that Budd would enter the van trailer manufacturing business whether Budd acquired Gindy or not (Ginsberg 267, 272-73; Scott 1057-58). "He [Scott] said he was going to go into the business regardless of whether I sold to him or not." (Ginsberg 267).

90. The acquisition of a trailer manufacturer made an "extremely attractive fit" for Budd (CX 99C; CX 101C; Ward 1121). Budd's chief financial officer described the nature of this fit as follows:

* * * One of the things that was different about Gindy, which appealed to me, was the fact it was not subject to the same automotive styling cycle that we had been confronted with before and yet the business of manufacturing and marketing of trailers did not seem to me to be so vastly different from the business that we were currently engaged in as to present a serious management problem. (Ward 1121.)

91. Budd considered a profit rate of the level experienced by Gindy to be "interesting" (Scott 1035). Gindy's profit level, expressed as a return on the sales dollar, was "a great deal better than Budd's was." (CX 45F; Scott 1082.)

92. Budd's intention of entering the van trailer market even without the acquisition of Gindy is made clear by its actions in early 1968, during a recess in the Gindy acquisition negotiations. At that time, Budd contacted several smaller van trailer manufacturers regarding their possible acquisition by Budd (CX 23; Ginsberg 272; Miller 379; Scott 1052; Ward 1128, 1130). In April 1968, Budd contacted The Dorsey Corporation concerning the possibility of acquiring one of its divisions, Dorsey Trailers, a manufacturer of van trailers (CX 147A-

B; Scott 1052-53, 1090-91; Ward 1133; Collier 1662). Late in 1967 or early in 1968, a third-party consultant, acting on behalf of Budd, contacted Theurer, Incorporated (hereinafter "Theurer"), a small manufacturer of van trailers, containers and chassis, concerning the possibility of Budd's acquiring Theurer (admission 15, 1/15/73; Blatt 748-49; Scott 1087). The president of Budd and its chief financial officer discussed the possibility of acquiring Miller Trailers, Inc. (hereinafter "Miller"), a manufacturer of van trailers, with the president of Miller in the spring of 1968 (Miller 379-80; Scott 1052; Ward 1130). A consultant working for Budd, discussed acquiring Great Dane Trailers, Inc. (hereinafter "Great Dane"), a manufacturer of van trailers (Scott 1087, 1091). During 1968 or 1969, Budd again contacted Utility regarding the possible acquisition of that company (Heinmiller 696).

93. In 1967-1968, Budd not only considered toehold acquisitions of van trailer manufacturers prior to acquiring Gindy, but also considered *de novo* entry into van trailer manufacturing. Budd recognized it could go into van trailer manufacture, but decided not to go into it because:

One is you had the problem of cash * * *. And the second problem is that timewise, to try and do that and have an influence on the company, you are looking at seven, eight years down the road, that sort of thing, and we wanted something that was much more imminent than that. (Scott 1060.)

In explaining to its shareholders what it received by acquiring Gindy, Budd related that it acquired "a leading manufacturer of truck trailers and cargo containers. We wanted to expand into this field, but the cost to build that kind of business from scratch would have been excessive." (CX 100C.)

94. In 1968, prior and subsequent to the acquisition of Gindy, Budd demonstrated its continued interest in the van trailer manufacturing industry by working with a major trucking firm to develop a double-deck system for closed-top dry freight vans and subsequently obtaining a license for the purpose of manufacturing and selling this system to van trailer manufacturers (CX 21A-B; Bruce 612-13, 616, 630).

95. Budd possessed an interest in significantly expanding its position in the van trailer market subsequent to any acquisition (Scott 1050, 1059; Ward 1130-31; Hindin 1313-14). This interest was shown not only by testimony of several top Budd officers, but also Budd's continued attempts to purchase van trailer manufacturers other than Gindy and its plan to expand the plants of Gindy (findings 96-99). In describing Budd's plans for Gindy, Mr. Scott stated:

* * * that this might well form the nucleus for the development of a major part of the industry. * * * We thought this would be the possibility of using them as the base for developing a truly nationwide competitor to the giants, Fruehauf and Trailmobile. * * * we could take that and build that into a national company of some substance. (Scott 1050)

96. Also, subsequent to the acquisition of Gindy, Mr. Cerra was sent

by Budd to examine the facilities of Highway Industries, Inc. (hereinafter "Highway"), a van trailer and container manufacturer, with a view to the possible acquisition of these facilities (Ginsberg 273; Cerra 422, 451; Scott 1056-57; Bertolini 1829).

97. In 1969, the president of Budd asked the general manager of the Automotive Division to contact Utility with regard to the possible acquisition of this van trailer manufacturer (finding 81; Heinmiller 696; Scott 1056, 1090).

98. Subsequent to the acquisition of Gindy, Mr. Scott made at least two trips to Timpte, Inc., a small producer of van trailers (Ginsberg 273-74; Scott 1055-56, 1091). On these occasions, he viewed Timpte, Inc.'s facilities and discussed the possible acquisition of Timpte, Inc. with Mr. Robert Ruland, the chief executive officer of Timpte, Inc. (Ginsberg 273).

99. Since its acquisition, Budd has undertaken many steps to increase Gindy's production and sales, including the rebuilding of one plant and the proposed building of another plant to make van trailers (findings 155-177).

100. Budd has been at the market's edge since 1957, ready and able to enter, until it finally entered through its 1968 acquisition of one of the leaders, Gindy (findings 74-94).

B. Availability of a Toehold Firm

101. On or about the time Budd acquired Gindy, there were a number of smaller manufacturers of van trailers, containers and chassis who were available for acquisition by Budd (findings 102-107).

102. Miller, a small manufacturer of van trailers, considered an offer from Budd immediately prior to the Gindy acquisition (Miller 379-80; Scott 1052). In November 1968, Miller agreed to merge with GAC Corporation. This agreement became final in February 1969 (Miller 370). The principal owners of Miller decided to sell the company in 1968 to solve their estate problems (Miller 393).

103. Great Dane, a small manufacturer of van trailers, was acquired by United States Freight Company in 1967 (Hammond 662; Scott 1087). A third party acting on behalf of Budd approached Great Dane regarding its possible acquisition (finding 92).

104. The president of Kentucky Manufacturing, Inc., a small producer of van trailers, testified that he would have considered a cash offer for his business (Tway 879-80).

105. Highway, a producer of van trailers, containers and chassis, in 1968 was owned by GAC which was willing to sell it or its assets (Scott 1091). In 1968, Budd knew that Highway was "getting into trouble" (Scott 1091). By July 1970, Highway was being prepared for liquidation, which occurred in 1971 (Hegner 463-64).

106. Trailco, a small van trailer manufacturer, was offered for sale to Budd by a broker (Scott 1087; Burten 1597). Subsequently, in 1971 Dorsey acquired Trailco (Collier 1656).

107. In 1969, V&W Trailer Co. (hereinafter "V&W") contacted Budd with regard to its possible acquisition by Budd (Scott 1090). Subsequently, V&W ceased van trailer manufacture and became a Gindy distributor (CX 58; CX 145; Miller 379; Hammond 667).

C. On Objective Criteria, Budd Was One of the Few Most Likely Entrants

108. Budd had an engineering and railroad car manufacturing business, which would have provided a solid basis from which Budd could have developed its own van trailer, container and chassis products (CX 37B; Ginsberg 322-23; Cerra 416-17).

109. The producers of railroad cars are among the most likely entrants into the manufacture of van trailers, containers and chassis. Several foreign producers of railroad cars have entered into the manufacture of van trailers or containers and chassis, including Cravens Homalloy (Sheffield) Limited (hereinafter "Cravens"),³ a corporation located in the United Kingdom; Societe Nouvelle Des Ateliers De Venissieux (hereinafter "SNAV"),⁴ a French corporation located in Venissieux, France; and LaBrugeoise et Nivelles (hereinafter "B/N"), a Belgium railroad car manufacturer with its headquarters in Brussels, Belgium, and a former Budd licensee for railroad cars (CX 149B; CX 150B-C, Z-43; CX 151B). Pullman considered using its railroad car facilities to build van trailers, but, after a cost study, decided not to do so at that time (Crumrine 1745-46).

110. Prior to producing van trailers or containers and chassis, Cravens was primarily a manufacturer of railroad passenger cars; it also produced multiple diesel carriages, electric carriages, freight wagons, small railroad freight containers and pressed steel bodies to be mounted on a 2-ton chassis (CX 151D-E). SNAV manufactured railroad freight cars, steam shovels, small mining cars, and as a sideline, was a welding subcontractor for other manufacturers (CX 149D). B/N was a manufacturer of railroad rolling stock, including railroad passenger cars (CX 150E, L).

111. Cravens and SNAV, prior to starting to produce van trailers or chassis, entered into the manufacture of containers (CX 149J; CX 151F). Within two years of its entry into container manufacture, Cravens began the manufacture of van trailers (CX 151C, D, G). SNAV

³ "Cravens" refers to Cravens Homalloy (Sheffield) Limited, incorporated in 1967, and its predecessor, Cravens, Limited (CX 151D).

⁴ Although SNAV did not make railroad passenger cars as Budd does, the manufacture of both involves similar techniques, the only differences being the design of the railroad passenger car which must have toilets, electrical and lighting fittings, air conditioning, heating devices and the like (CX 149Z-28).

began the manufacture of container chassis one year after it began the manufacture of containers (CX 149H-K). B/N first began the manufacture of van trailers in 1963-64, then added containers in 1966 and container chassis in 1967 (CX 150H-J).

112. There are similarities in the manufacture of railway cars and van trailers, containers and chassis which make railroad car manufacturers likely entrants into the production of containers, chassis and van trailers. The development of container manufacturing at SNAV:

* * * is the result of an internal expansion of activity previously existing in our Company.

In fact, our Firm has been manufacturing railway wagons since its origin. It is because of a similar technology together with the ability to mass produce metal products that we were directed to containers and later on, in 1968, to chassis for the transport of containers.

Knowledge and technical experience we gained in mass-producing wagons, have been very useful for us, especially for working out our container and chassis manufacture; mainly with regard to steel containers, which are now forming the whole of our production, the experience of techniques and processes for assembling, welding and handling, which we obtained through wagons has been determinative in the choice of launching container and chassis manufacture. (CX 149Z-44.)

113. Although their former products were composed primarily of steel and wood, the containers initially built by Cravens, SNAV, and B/N and all of their van trailers were of aluminum construction (CX 149G, M; CX 150H-J, L-M; CX 151E). The chassis produced by SNAV and B/N were of steel construction (CX 149M; CX 150M).

114. Budd possessed the ability to fabricate aluminum, the principal material used in van trailer production (CX 16; CX 19; CX 20).

115. A plant used to produce railroad cars can be used to make van trailers, containers and chassis (findings 116-117). Budd knew this because of its experience with its manufacturing arrangements with Fruehauf.

116. Cravens, SNAV and B/N each initially used the same factory which formerly produced railroad cars to make van trailers or containers and chassis (CX 149P; CX 150G, O-Q, Z-1; CX 151V).

117. Budd's Red Lion plant, at which it produced railroad cars in 1968, could have been used to produce van trailers, containers and chassis (Ginsberg 255-56, 323; Cerra 417, 458-59). Budd recognized this possibility when it stated in its first supplement to statement of respondent's position:

In 1968 respondent's rail car production facilities (the only ones which might be considered suitable [sic] for trailer, container or chassis production) were fully-utilized * * *. (p. 7)⁵

This plant was used to build aluminum containers in 1961 (Walters 506; Scott 1083).

⁵ It should be noted here that Budd did not have to acquire Gindy.

118. A corporation that makes railroad cars has the machinery to go into the manufacture of van trailers (Ginsberg 253, 255). The manufacturing operations—assembling, metal forming, welding, riveting, piercing—are basically similar (Cerra 413; Brown 895).

119. The capital equipment needed to produce railroad cars, automotive components, van trailers, containers and chassis—presses, cutting machines, shears, oxygen torches, welding equipment—are basically similar (CX 149V; Ginsberg 253-55; Cerra 413-14).

120. In 1968, the equipment in Budd's Gary plant could be used to manufacture van trailers, containers and chassis (Cerra 417, 446-47). At that time, the Gary plant produced automobile deck lids, deck assemblies, door assemblies, fender assemblies and similar products (Cerra 445). Budd's Red Lion plant also had equipment which could have been used, with rearrangement, to produce van trailers (Ginsberg 255-56; Cerra 417, 458-59). The Red Lion plant manufactured railroad cars and automotive frames in 1968 (Cerra 418).

121. Budd officials indicated, during the merger negotiations with Gindy that Budd was well qualified to make cross members or side rails (Walters 507; Scott 1062). Since the merger, Budd Gindy has been making parts which formerly Gindy had purchased (CX 146L). Among these parts are fifth wheels, landing gear parts and castings (Ginsberg 280-81; Hindin 1389).

122. Budd is a supplier of components such as wheels, hubs and drums used in the manufacture of trailers and chassis (admissions 10, 12 and 13, 1/15/73). It is one of the few suppliers of wheels and is the largest supplier of disc-type wheels, which are used almost exclusively west of the Mississippi River and are being used increasingly east of the Mississippi River (Ginsberg 248, 317, 321; Walters 489; Bachman 560-61; Hammond 682; Heinmiller 692, 706; Scott 1063-64; Paterson 1634; Collier 1659-60; Linnen 1776). As a manufacturer of these components, Budd has been and is a member of TTMA (RX 383; Ginsberg 262, 336; Miller 381-82; Calvin 913-14).

123. Budd contemplated, in a premerger analysis, that it "could capture some wheel sales that we do not have at the present time," by virtue of entering into the manufacture of van trailers and chassis (CX 10C-D).

124. The production of van trailers, containers and chassis requires knowledge and application of assembly line and mass production techniques (Cerra 414-15; Bertsch 641-42; Crumrine 1740-41). Budd was knowledgeable in the application of assembly line and mass production techniques because of its experience in the production of automotive stampings, railway passenger cars, disc brakes and disc wheels (CX 4B; CX 5B-G; CX 28; Cerra 416-18).

125. When Budd's corporate manager of facilities became a vice president of Gindy, he applied mass production techniques to Gindy and succeeded in improving the productive capability of Gindy's plants (CX 99B; finding 164; Cerra 419-20).

126. For many years prior to the acquisition of Gindy, Budd possessed technical and supervisory personnel familiar with the design and production of van trailers, containers and chassis (findings 126-128).

127. Between 1934 and 1958, Budd designed and produced stainless steel shells for closed-top dry freight van trailers (Necker 1415). Between September 1960 and September 1961, Budd personnel designed and manufactured aluminum box-type containers (complaint and answer, par. 5). During the Gindy acquisition negotiations, Budd mentioned its familiarity with containers, due to this previous experience in their production (Walters 506).

128. In 1968, Budd possessed the engineering personnel necessary to produce van trailers, containers and chassis (CX 37B; Cerra 415, 424). In a Budd memorandum dated Aug. 9, 1967, highway trailers and containers were included among transportation equipment products not then produced by Budd, but covered by Budd skills in engineering and manufacturing (CX 14).

129. At that time, Budd had not only the ability to design and construct the plant used for the manufacture of van trailers, containers and chassis, but also the ability to produce the necessary tools and lay out the machinery and assembly lines necessary to manufacture these products (CX 86; Cerra 416-17; Scott 1066). Subsequent to the acquisition of Gindy, Budd advertised that its new subsidiary, Gindy, could call on Budd's engineering skills (CX 37). Indeed, subsequent to the acquisition, Gindy did call on Budd's engineering skills. Several Budd engineers were brought over to Gindy from Budd (Walters 512). Budd's corporate manager of facilities was transferred to Gindy after the merger and became Gindy's vice president of operations (Walters 510). At Gindy, he set up new assembly lines and built a new facility for producing refrigerated van trailers (CX 86; Cerra 422-23; Scott 1066, 1097-98).

130. Subsequent to the acquisition of Gindy, Budd assumed full control of the operations of the company (Ginsberg 270). Budd promised the former owner and his son that they would run Gindy (Ginsberg 269). However, David Ginsberg, the former owner, became merely the honorary chairman of the Gindy board and his son Milton left shortly after the acquisition as "He [Milton] felt that they [Budd] were giving orders instead of taking advice." (Ginsberg 228, 270).

131. Budd possessed a name familiar to purchasers of van trailers and containers (findings 132-136).

132. Budd advertised in trade publications designed to reach motor carriers and other users of van trailers and containers (CX 35).

133. Prior to the acquisition, Budd and its distributors sold wheels directly to motor carriers and leasing companies, the major purchasers of van trailers (CX 10C; Ginsberg 232-33; Walters 489-90; Heinmiller 693; Scott 1064; Brown 1503-04; Paterson 1623).

134. Motor carriers and leasing companies often specified Budd wheels on the van trailers which they purchased (Ginsberg 248, 316; Miller 365; Bachman 553, 560, 586; Hammond 661; Heinmiller 706; Scott 1096-97; Brown 1504; Paterson 1623, 1634). Indeed, the name "Budd wheel" was almost a generic description of one of the two types of wheels used on van trailers (CX 33; Ginsberg 249; Bachman 553; Hammond 680; Heinmiller 693, 706).

135. Budd recognized that it possessed a favorable reputation among purchasers of van trailers (CX 101F). During acquisition negotiations with Gindy, Budd officials indicated that Budd's contacts with motor carriers and railroads that owned van trailers could help Gindy (CX 10G; Walters 508-09; Ward 1123).

136. Railroads purchase substantial numbers of van trailers (CX 44F; Miller 357; Bachman 546; Hammond 657, 680, Tway 873; Weaver 908). Budd has long been a leading supplier of passenger cars to railroads (CX 18B-C; CX 34; CX 76B; CX 94D).

137. Budd possessed the requisite financial ability to enter into the manufacture and sale of van trailers and containers and chassis, either *de novo* or through the acquisition and expansion of a toehold firm, and to become a substantial competitive factor in the sale of these products (complaint and answer, par. 6; CX 37B; Githens 1259; findings 138-143).

138. Budd is one of the largest companies in the Nation, ranking 191st in sales on the Fortune 500 list for 1969. Its securities are publicly traded on the New York Stock Exchange (CX 92; CX 94; CX 95; CX 96; Ward 1126).

139. One means by which Budd could obtain funds was the issuance of additional common stock. In 1968, 1969, and 1970, Budd issued additional common stock for the purpose of making acquisitions (CX 92; CX 95; CX 96) and common share purchase warrants issued in connection with loan transactions (CX 94A; CX 97). Budd's chief financial officer characterized Budd's ability to raise funds through the issuance of stock in 1968 as follows:

* * * our stock was a well accepted medium at that particular point in time. We were a New York Stock Exchange, a listed company, and our results were considered by the financial community, to be on the upswing, and the price of stock was attractive and that made acquisition possibilities for stock that much more attractive. (Ward 1126.)

140. Another means by which Budd could and did raise substantial sums of money was through borrowings and public debt offerings. In 1969, Budd raised \$30 million by a public funding (CX 94A; CX 98; Githens 1258). Of this sum, \$8 million was immediately channeled directly to Gindy "to finance its increased installment receivables arising from the expansion of its business" (CX 94D; CX 98B; Githens 1252, 1258). In 1970-1971, Budd borrowed \$30 million from several life insurance companies (CX 97A; Githens 1258).

141. Since the merger, Budd has provided substantial sums of money to Gindy directly and indirectly. Budd spent about \$1.5 million to renovate Gindy's Eagle plant in order to achieve a higher degree of automation (CX 86; CX 94K-L; Walters 512). Budd will also spend \$4 million to build a new plant for its Gindy Division in Martinsville, Va. (Ginsberg 279). The Budd Financial Corporation was established in 1970 as a wholly-owned subsidiary of The Budd Company primarily to service the installment financing originated by Gindy (CX 99B-C; admission 26, 1/15/73; Ginsberg 277). By the end of 1970, Budd had confirmed open lines of credit with banks of about \$113 million, of which about \$34 million was earmarked for Budd Financial Corporation (CX 101F).

142. Budd's financial ability has strengthened Gindy and could have strengthened a toehold firm (Miller 370-71). Budd had more leverage than Gindy in the money market (Ginsberg 277). Budd's financial ability has enabled Gindy to finance van trailer sales which it otherwise would have lost. Likewise, Budd's financing has increased Gindy's ability to accept, service and dispose of used trailers traded in on the purchase of new trailers (CX 65; CX 146L; Feinberg 834; 837). Finally, Budd's financial backing of Gindy has enabled Gindy to finance the sale of containers, something Gindy could not do previously, as a creditor cannot really secure his interest in the collateral and only Budd could risk the potential disastrous losses of a default (Walters 514-15). Since the acquisition, Gindy's expenditures on advertising have been considerably higher than previously (CX 57).

143. Budd's financial ability has helped Gindy and could have helped a toehold firm establish wholly-owned distribution branches (finding 173). Gindy had three wholly-owned distribution branches prior to the merger (finding 172). By 1973, Gindy had opened six additional branches which repair and sell new and used van trailers (finding 173).

144. In 1968, Budd had research and development capabilities in all kinds of metals, including aluminum (CX 19; CX 20; CX 26B-F; CX 37B; Scott 1039-40). It had developed the Plane-Mate, an aluminum vehicle used as a traveling lounge at airports (CX 80; CX 132; Scott 1048).

145. Budd operated a van trailer testing facility in 1968 (CX 94M; Miller 364; Cerra 420; Walters 490; Bachman 554; Bruce 612; Hammond 1306). This facility could perform almost any kind of test upon a van trailer (Cerra 420-21; Walters 490-91). Budd tested trailer kingpins, frames and beef plates and the heat transfer properties of refrigerated van trailers (CX 94M; Walters 490-91; Bachman 554; Bruce 611-12, 617-19; Hammond 1306).

146. The manager of Budd's testing facility was personally involved in designing and setting up all of the tests, evaluating the results, and writing the reports (Bruce 620). As a result, Budd could have learned about the insulating or heating qualities of van trailers, the strength of materials in the van trailer frame, and the mechanical properties of a van trailer (CX 21A-B; Cerra 421). This knowledge could be very helpful to a van trailer manufacturer (CX 21A-B; Bachman 554-55; Bruce 619-20).

147. At the time of the Gindy acquisition, Budd was the most likely entrant into the manufacture and sale of van trailers, including closed-top dry freight and open-top van trailers, containers and chassis. At that time, no other firm indicated both a strong desire to enter and possessed the several advantages described above which would have aided Budd either as a *de novo* entrant or in the expansion of a toehold firm in these markets (Scott 1092).

148. Only a few firms expressed an interest in entering (Ginsberg 302, 306, 308; Scott 1091). Of these, only Walter Kidde expressed an interest in acquiring a firm smaller than Gindy (Blatt 750, 755-56). Likewise, only Walter Kidde expressed an interest in more than one van trailer manufacturer (Ginsberg 308). Neither of these firms, nor any other firm, was shown to have possessed any of the factors which made Budd a likely *de novo* entrant or gave it the ability to expand a toehold producer. Budd's president knew of no firm other than Budd who was seeking a van trailer manufacturer in 1967 or 1968 (Scott 1092). Furthermore, the several firms suggested by respondent's counsel as purported possible entrants had no interest whatsoever in entry (CX 176; CX 179-191; Morris 1237-38).

149. No firm other than Budd possessed the number of advantages possessed by Budd which made Budd a likely *de novo* entrant or gave it the ability to expand a toehold producer.

150. Truck tractor manufacturers are not as likely entrants into van trailer manufacturing as was Budd. No manufacturer of truck tractors currently makes van trailers (Brown 1512-13; Crumrine 1742; Linnen 1795, 1801). No truck tractor manufacturer, except Mack Truck which has not pursued its expression of interest, has indicated any interest in

entering the manufacture of van trailers (CX 181; CX 182A-D; CX 189; Scott 1092; Morris 1237-38; Crumrine 1742).

D. *Gindy Is Not a Toehold*

151. Budd did not view Gindy as a toehold at the time of its acquisition (CX 11A). In its notice to its shareholders concerning this acquisition, Budd characterized Gindy as "a leading manufacturer of truck trailers and cargo containers * * *." (CX 100C). Similar language was used subsequent to the acquisition to describe the role of Gindy in the van trailer market (CX 59; CX 101B; CX 175).

152. The president of Budd testified that Gindy was a substantial factor in the van trailer market at the time of its acquisition (Scott 1035).

153. Prior to the merger, Gindy was acknowledged to be a major and leading competitor in the industry (CX 41A; CX 59; CX 69E; CX 100C; Bachman 549; Hammond 659; Feinberg 826). Two competitors characterized Gindy as one of "The Big Ones" (Tway 878; Collier 1658). Gindy was viewed as a tough competitor by other van trailer producers (CX 11A; Miller 376-77; Hammond 666; Heinmiller 700; Weaver 904-05; Bernstein 1427; Collier 1658; Crumrine 1731; Linnen 1775). Gindy's customers viewed it as a major competitive factor (CX 73A-B; Feinberg 840; Crumrine 1730).

154. In 1968, Gindy was the fourth largest supplier of closed-top dry freight vans, accounting for 11 percent of shipments (finding 10). In 1969, Gindy was the third largest supplier of closed-top dry freight vans, accounting for 13 percent of such shipments (finding 10).

E. *Budd Entrenched Gindy*

155. A finance company helps a van trailer manufacturer obtain additional funds which can be used to finance van trailer sales (Miller 370-71; Bachman 558; Hammond 662; Scott 1095; Ward 1143; Bernstein 1425; Todd 1546). The lack of such a finance company was "extremely limiting" on the ability of a van trailer manufacturer to handle a large volume of installment notes (Ward 1134). The ability of a van trailer manufacturer to extend financing to its customers in 1968 was "vitally important" to that manufacturer (finding 67; Miller 372, 396).

156. By use of a finance company, a van trailer manufacturer can obtain funds for financing of his sales at a lower interest rate (Ginsberg 277; Todd 1546).

157. The three largest manufacturers of van trailers in 1968 had finance companies, whereas the smaller van trailer manufacturers did not (CX 124K; Miller 371; Bachman 558, 594; Hammond 662; Feinberg 840; Tway 872; Brown 886, 1497, 1524; Scott 1095, 1101; Ward 1144; Bernstein 1432-33; Crumrine 1730; Linnen 1769). Indeed, the smallest

manufacturers did not even finance any of their sales (Feinberg 840; Tway 872).

158. Prior to its acquisition by Budd, Gindy, unlike the smaller van trailer manufacturers, provided extensive financing of its sales (CX 48A-B; CX 49A-B; CX 50A-B; CX 51A-B; CX 52A-B; CX 53A-B). Gindy financed its installment paper on van trailer sales by means of bank loans and long-term borrowing from insurance companies (Ginsberg 375-76, 338-39; Ward 1139-40; Morris 1228; Hindin 1322; Todd 1540-41).

159. Subsequent to acquisition, Budd's investment bankers recommended that a finance company be established for Gindy (Morris 1233; Todd 1545-46).

160. Budd Financial Corporation (hereinafter "Budd Finance") was established in 1970 to help finance the van trailers sold by Gindy (CX 99B-C; CX 146Z-6; Ginsberg 277; Scott 1066; Ward 1143-44; Hindin 1323; Todd 1545).

161. Budd contributed \$8 million in funds to establish Budd Finance (CX 94D; Ward 1144; Morris 1234; Githens 1252-53, 1258; Todd 1548).

162. In 1970, Budd loaned Budd Finance an additional \$4 million (CX 97B; Ward 1144; Githens 1252-53, 1258).

163. By virtue of the additional equity contributed to Budd Finance, Gindy's capacity to finance van trailer sales increased (Ward 1141-43, 1153; Morris 1235; Hindin 1322-23, 1380-81). At the time of acquisition, the total amount of funds Gindy could borrow to finance its van trailer sales was \$16 million (Ward 1141). In May 1969, Budd was able to increase the amount of funds available to Gindy for financing van trailer sales from \$16 million to \$35 million (Ward 1141-42). Subsequent to the establishment of Budd Finance, the amount of funds available to Gindy for financing van trailer sales was further increased to \$48 million (Ward 1144).

164. Budd enlarged and redesigned Gindy's Eagle plant at a cost to Budd of \$1 3/4 million (CX 86; CX 94K-L; CX 99B; Walters 512; Scott 1066; Hindin 1327, 1388). This expansion resulted in a 40 percent capacity increase at the Eagle plant (CX 99B). It also erected an addition to the Lebanon plant at a cost to Budd of \$500,000 (CX 146L; Hindin 1327, 1388). Such alterations made Gindy by 1971 a more efficient van trailer producer than it was at the time of its acquisition of Budd (Scott 1108).

165. It is an advantage for a van trailer manufacturer to have plants located in major market areas throughout the country (Miller 370-71; Bernstein 1425, 1431; Crumrine 1722-23; Linnen 1774). However, only Fruehauf comes close to having a van trailer manufacturing plant located in each major market area (Bernstein 1427; 1447-50).

Trailmobile and Brown operate three van trailer plants, but neither has a southern or southwestern plant (Linnen 1765; Crumrine 1719-21). In 1968, Strick had no van trailer plants located in the South, Southwest or West (Bachman 559).

166. Budd has plans to erect two new van trailer plants for Gindy (CX 99B). One of these plants, now under construction, will be an enlarged facility to be located in Martinsville, Va. (Ginsberg 278; Walters 512; Hindin 1327). Its expected cost is \$4.5 million (Ginsberg 278-79; Hindin 1389). This plant will replace Gindy's present inadequate plant in Martinsville (Ginsberg 318; Hindin 1318, 1327). Budd also purchased land near Chicago for a new midwestern plant for Gindy (Ginsberg 279; Walters 512; Scott 1066; Hindin 1327).

167. It is advantageous for a van trailer manufacturer to be integrated into the manufacture of the components used in assembling a van trailer (Ginsberg 343; Miller 383; Bachman 557; Hindin 1388). The major manufacturers of van trailers are vertically integrated into many of the components used in assembling a van trailer (Bachman 561-62; Crumrine 1731-32; Linnen 1779). Smaller van trailer manufacturers are less highly integrated than are the major manufacturers (Collier 1645).

168. Since the acquisition, Budd has helped Gindy achieve further integration by starting the production of certain components such as kingpin subframes, running gear subframes, landing gear subframes and front and rear ends (CX 146L; Ginsberg 280-81; Hindin 1389).

169. Factory-owned branches (hereinafter "branches") are considered by many manufacturers to be preferable to independent dealers (hereinafter "dealers") in distributing new van trailers (CX 146L; Miller 397; Hammond 674-75; Hindin 1322; Bernstein 1425, 1429; Brown 1495-96; Crumrine 1727). Branches can handle used equipment service and sales more effectively than can dealers (Miller 397; Hammond 674-75; Hindin 1322; Bernstein 1429-31; Brown 1495-96). Branches are used to stock new trailers and thereby gain additional sales from customers who want fast delivery (Miller 374; Crumrine 1727; Linnen 1768-69).

170. Several of the largest manufacturers of van trailers utilize both branches and dealers to distribute their van trailers, relying primarily on the former (Bernstein 1445-46; Brown 1494; Crumrine 1725; Linnen 1767). However, the second largest van trailer manufacturer in 1968 had only a very few branches (Walters 502; Bachman 559).

171. Smaller manufacturers of van trailers rely almost entirely on direct sales efforts from the factory or dealers to distribute their van trailers (Heinmiller 699; Brown 1494; Collier 1640; Daniel 2215).

172. Prior to acquisition, Gindy utilized primarily dealers to sell its van trailers (CX 94K; Hindin 1320). However, it did operate branches in New Jersey, Chicago and Cleveland (Ginsberg 280; Walters 502).

173. Since Budd acquired Gindy, Gindy has opened six additional branches and plans to open four more within the next few years (CX 65; CX 146L; Ginsberg 280; Walters 512-14; Hindin 1322, 1327; Bernstein 1442). Budd has provided between \$3 and \$4 million to enable Gindy to open these branches (Hindin 1389).

174. Subsequent to the acquisition, Budd has improved the quality of the Gindy van trailer (Weaver 905; Bernstein 1442; Burten 1584; Paterson 1620). In part, this was achieved through a redesign of the Gindy van trailer (CX 86; CX 87; CX 89; CX 146L; Cerra 423-24; Hindin 1331-32; Bernstein 1442; Gross 1562; Paterson 1620). Gindy has introduced a unique inclined roller tandem to replace the sliding tandem previously used (CX 88).

175. Since the acquisition, Gindy has broadened the types of van trailers which it offers by adding furniture and deep drop frame van trailers to its product lines (CX 58; CX 146L; Walters 530-31; Hindin 1332; Bernstein 1442-43).

176. Gindy currently is at maximum capacity. It has a five-month backlog and is turning down orders because it cannot meet delivery times (Hindin 1385-86).

177. Subsequent to the acquisition, Budd has increased substantially the amount of advertising done for Gindy's van trailers, compared to the amount of advertising done by Gindy prior to its acquisition (CX 57; CX 59-62; CX 76; CX 83-84; CX 86-89; Walters 504).

X. The Facts and the Law

A. *The Lines of Commerce*

One of the principal issues in this case is the product markets. The legal standards to be used in determining the proper line of commerce in Section 7 cases were laid down by the Supreme Court:

The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes * * *. 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. Because § 7 of the Clayton Act prohibits any merger which may substantially lessen competition "in any line of commerce" (emphasis supplied), 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*, 370 U.S. 294, 325 (1962).

When the *Brown Shoe* criteria are applied to the facts in this matter, it becomes apparent that the four relevant product markets are van

trailers, closed-top dry freight van trailers, open-top van trailers and containers and chassis.

Van trailers as a separate and distinct line of commerce meets the following *Brown Shoe* criteria: *industry recognition* (findings 33, 34); *peculiar characteristics and uses* (findings 35-36); *unique production facilities* (finding 37); *distinct customers* (findings 38-39); *sensitivity to price changes* (findings 41-42); and *specialized vendors* (finding 40).

Closed-top dry freight van trailers and open-top van trailers as separate and distinct lines of commerce meet the following *Brown Shoe* criteria: *industry recognition* (findings 44, 52); *peculiar characteristics and uses* (findings 45-46, 48); *distinct customers* (finding 47); *sensitivity to price changes* (findings 49-50); and *specialized vendors* (finding 51).

Containers and chassis as a separate and distinct line of commerce meets the following *Brown Shoe* criteria: *industry recognition* (finding 53); *peculiar characteristics and uses* (findings 54, 57); *distinct customers* (finding 58); *distinct prices* (finding 60); and *sensitivity to price changes* (finding 59).

It is now well established that it is not necessary for each of the seven criteria set forth in *Brown Shoe* to be present in every merger case in order to establish a market. A relevant market has been found to exist where three or less of the *Brown Shoe* criteria were present. *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 593-95 (1957); *General Foods Corporation v. FTC*, 386 F.2d 936, 941 (3rd Cir. 1967); *Reynolds Metals Company v. FTC*, 309 F.2d 223 (D.C. Cir. 1962).

Further analysis is unnecessary since the Commission has already outlined the relevant product markets in *Fruehauf Trailer Co.*, 67 F.T.C. 878 (1965). In that case, involving horizontal acquisitions by Fruehauf, the Commission said:

The hearing examiner, applying the test declared by the Supreme Court in [*Brown Shoe*], correctly found that aluminum vans, platform trailers, and dump trailers, among others, were appropriate product markets in which to appraise the competitive effects of the acquisitions, as well as truck trailers generally. 67 F.T.C. at 930, n.2.

B. *Budd as an Actual Potential Entrant*

The importance of the potential competition doctrine in antitrust analysis is now well established. The latest Commission decision dealing with potential competition is *General Mills, Inc.*, Docket No. 8836 (Oct. 5, 1973), in which the Commission analyzed the effect of eliminating an actual potential entrant:

Secondly, aside from whether it is viewed as a potential competitor by firms in the market, elimination of a potential entrant by acquisition of a leading firm in that market will eliminate the competition that would have been added had the acquiring firm entered the market *de novo* or by toehold acquisition. *General Mills, Inc.*, *supra*, at 5.

When analyzing the "impact" of the loss of a potential entrant, it is important to look not only at what the impact would have been had the

potential entrant actually entered through internal expansion or by acquisition of a "toehold," but also at the impact which it had as a deterrent to current competitors by its mere presence on the fringe of the market. *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158 (1964). As the Supreme Court held in *Ford-Autolite*, a lost potential entrant:

* * * may well have been more useful as a potential than it would have been as a real producer, regardless how it began fabrication. Had * * * [the potential entrant] taken the internal-expansion route, there would have been no illegality; not, however, because the result necessarily would have been commendable, but simply because that course has not been proscribed. 405 U.S. at 567-68.

More recently, in *United States v. Falstaff Brewing Corp.*, 410 U.S. 526 (1973), the Court stated:

Suspect also is the acquisition by a company not competing in the market but so situated as to be a potential competitor and likely to exercise substantial influence on market behavior. Entry through merger by such a company, although its competitive conduct in the market may be the mirror image of that of the acquired company, may nevertheless violate § 7 because the entry eliminates a potential competitor exercising present influence on the market. *FTC v. Procter & Gamble Co.*, 386 U.S. at 580-581; *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158, 173-174 (1964). As the Court stated in *United States v. Penn-Olin Chemical Co.*, 378 U.S., at 174, "The existence of an aggressive, well equipped and well financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market would be a substantial incentive to competition which cannot be underestimated." (410 U.S. at 531-32). See also *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967); *Beatrice Foods Company*, 67 F.T.C. 473, 716-722 (Apr. 26, 1965).

In *Falstaff*, the Court went on to hold that even if it is found that the alleged potential entrant *would not have entered otherwise*, this

* * * does not *ipso facto* dispose of the potential-competition issue.

The specific question with respect to this phase of the case is not what Falstaff's internal company decisions were but whether, given its financial capabilities and conditions in the New England market, it would be reasonable to consider it a potential entrant into that market. (410 U.S. at 533.)

The record is clear that it is reasonable to consider Budd a potential entrant into the sale of van trailers, closed-top dry freight van trailers, open-top van trailers, and containers and chassis to motor carriers and other users of these products prior to its acquisition of Gindy. Budd had great financial capabilities; enjoyed a reputation as a quality manufacturer of railroad cars and wheels for van trailers; had the know-how and capacity to enter the markets; had evidenced a long-sustained and strong interest in entering the markets; and had compelling reasons for entering. Moreover, the markets were highly concentrated, the barriers to entry very high and no corporation other than Budd had the inclination, resources and know-how to enter the markets.

Budd made no secret of its interest in the markets under consideration. Budd approached various van trailer manufacturers when merger negotiations with Gindy were suspended (findings 81, 92).

Furthermore, Budd made an inquiry of a possible customer concerning its possible entry. Considering the above, it cannot be said that those already competing in sales to motor carriers, railroads and other users of the products under consideration were unaware of Budd's interest in entering the sale of van trailers, containers and chassis.

It is also now well established that when assessing the loss of a potential entrant "[t]he form of entry is clearly not a determinative factor." *Kennecott Copper Corporation*, 78 F.T.C. 744, 927 (1971), *aff'd*, 467 F.2d 67 (10th Cir. 1972). As the Commission stated in *The Bendix Corporation*, 77 F.T.C. 731 (1970), remanded for further proceedings, 450 F.2d 534 (6th Cir. 1971):

Various forms of merger entry other than through acquisition of a leading company—for example, a "toehold" acquisition of a small company capable of expansion into a substantial competitive force—may be as economically desirable and beneficial to competition as internal expansion into a relevant market, and must be considered in assessing the potential competition of the acquiring firm which has been eliminated as a result of the challenged merger.

Although previous cases * * * have only involved potential entry in one form, *i.e.*, by internal expansion, it is clear that the *form* of entry was not controlling in these decisions. What was determinative in each of these cases was (1) the actual elimination of the additional decision-making, the added capacity, and the other market stimuli which would have resulted had entry taken a pro-competitive form, such as internal expansion; and (2) anticompetitive consequences of the removal of the disciplining effect of a potential competitor from the market's edge. We believe that these adverse effects on competition may result from the elimination of a potential entrant who might have entered by internal expansion or who might have entered by a toehold acquisition. 77 F.T.C. at 817.

A long line of cases sets forth the factors to be considered in determining whether a respondent is an actual potential entrant. The relevant market must be substantially concentrated or exhibit a trend toward concentration *The Stanley Works v. FTC*, 469 F.2d 498 (2d Cir. 1972); *Beatrice Foods Co.*, 81 F.T.C. 481 (1972). The firm within the market must be a leading or major factor, so that the merger cannot be justified as a "toehold" acquisition:

From the standpoint of Section 7, and the statutory policy of favoring mergers which may increase competition and prohibiting mergers which may lessen competition, it made a crucial difference whether Bendix merged with Fram or *another* leading firm, or with any one of the various smaller and less established firms with which it unsuccessfully negotiated (emphasis added). *The Bendix Corp., supra*, at 824.

A company outside the market will be viewed as a likely or potential entrant if it is shown to have distinctive capabilities, resources, incentives, and interests to enter the particular market. Thus, in *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 660 (1964), the Supreme Court looked to the nearness of the absorbed company to the relevant market, the acquiring firm's "eagerness to enter that market, its resourcefulness and so on." The Supreme Court expanded this analysis in *United States v. Penn-Olin Chemical Co., supra*, at 175

(1964), in which it discussed the factors it considered key in deciding whether a company was a potential entrant: The company's inclinations, resources, know-how, its long-standing and strong interest in entry, its reputation and business connections with firms in the relevant market, its capacity to enter, and its competitive and economic reasons to do so. Finally, it is essential to show that the acquiring firm is the most likely entrant or one of a few such likely entrants *The Bendix Corp.*, *supra*, at 830; *FTC v. Procter & Gamble Co.*, *supra*; *United States v. El Paso Natural Gas Co.*, *supra*.

Thus, considering the principles derived from these decisions, a merger eliminates potential competition and is illegal if the following four factors are established: (1) The particular market is shown to be substantially concentrated; (2) the merging firm within the market is shown to be a leading or major factor in that market; (3) the merging firm outside the market is shown to be a likely entrant by internal growth or by a relatively small acquisition as an alternative to the proposed merger; and (4) the acquiring firm is shown to be the most likely entrant or one of few such likely entrants *Beatrice Foods Company*, Docket 8864 (Oct. 25, 1973); *Beatrice Foods Company*, *supra*, at 326 (1972).

Applying these factors to the facts in this matter, Budd was a potential entrant by internal expansion or by "toehold" acquisition or by both methods of entry into the manufacture and sale of van trailers, closed-top dry freight van trailers, open-top van trailers, containers and chassis.

1. Trend Toward Concentration

The Commission has recognized that the elimination by merger of a potential entrant into an industry exhibiting such a high degree of concentration as found in the markets under consideration, can violate Section 7 of the Clayton Act:

Once having recognized the importance of potential competition, the question then arises under what conditions does the elimination of a potential competitor have the effect proscribed by Section 7 of the Clayton Act? As a general rule, a violation of Section 7 has been found in those circumstances in which the acquired firm is a leading factor in a tight oligopoly. A tight oligopoly has been defined as an industry having a "very small number (eight or fewer) firms supplying 50 percent of the market, with the largest firm having a 20 percent or higher share * * *." *Kennecott Copper Corp.*, *supra*, at 921-22.

The markets under consideration were already tight oligopolies in 1968, the year of the merger, yet became more concentrated in 1969. The top four van trailer manufacturers accounted for 59 percent and 62 percent of shipments in 1968 and 1969, respectively, and the top four manufacturers accounted for 90 percent and 89 percent of container and chassis shipments, respectively, in these years (findings 62, 64).

Concentration in the major submarket, closed-top dry freight vans, was even higher. The top four manufacturers accounted for 65 percent and 72 percent of shipments in 1968 and 1969, respectively (findings 62, 64).

Moreover, Fruehauf, admittedly the largest factor in the industry, met or exceeded the 20 percent market share benchmark accepted in *Kennecott* in each of the product markets in question except for open-top van trailers (findings 62, 64).

There had been no substantial entry into the product markets under consideration for 15 years (finding 73). Instead, firms have been leaving these markets (finding 73).

2. Gindy Was a Leading and Major Factor in the Relevant Product Market

Budd itself characterized Gindy as "a leading manufacturer of truck trailers and cargo containers" (findings 151-152). Gindy sold its trailers throughout the United States, and competitors acknowledged that Gindy was a major and leading competitor in the industry, some characterizing Gindy as "one of The Big Ones" (finding 153).

Gindy was the fourth largest supplier of van trailers in 1968 and 1969 (findings 62, 64). As for closed-top dry freight vans, Gindy was also the fourth largest producer in 1968, and third largest in 1969, accounting for 10.8 percent and 12.9 percent of shipments, respectively, in each year (finding 10).

3. Budd Was a Likely Entrant by Internal Growth or by a "Toehold" Acquisition

The record shows conclusively that in 1968 Budd had the distinctive capabilities, resources, incentives, and interests to enter the van trailer, container and chassis markets.

Budd, as a railroad car manufacturer, had the engineering background from which it could have developed its own van trailers, containers and chassis (findings 108-120, 124-130). The metal working skills and machines necessary to manufacture the products sold by Budd and Gindy are similar (findings 108-121). Indeed, Budd had built aluminum containers at its Red Lion plant (finding 117). Budd personnel had the background and experience to manufacture van trailers, containers and chassis (findings 126-130). Budd's executives recognized that van trailer manufacturing was complementary to its production and managerial skills (findings 85-86). In addition, Budd had experience with assembly line techniques necessary to manufacture van trailers (finding 124); had a name familiar to truckers (finding 131); produced items used by truckers, namely, wheels (finding 122); sold to

the same types of customer as Gindy (findings 133-136); and had van trailer testing facilities from which Budd could learn a great deal about van trailer design (findings 145-146).

Barriers to entry into the manufacture and sale of van trailers, containers and chassis are high. One of the principal barriers is the need to finance sales, especially to large customers (findings 67-70). The substantial facilities and financial resources required to accept trade-ins and dispose of them is another major entry barrier (finding 71). Budd had the financial resources necessary to surmount these barriers (findings 137-143).

Budd's longstanding interest in the relevant product markets is clearly reflected in the record. Budd made trailer components for Fruehauf during the fifties (finding 74); had approached Brown Trailer to take Fruehauf's place when the relationship with Fruehauf was terminated (finding 75); contacted Utility twice concerning possible acquisition during the period from 1963 to 1968 (finding 81); and, in 1967, Budd's president recommended that Budd seek to enter areas in the transportation equipment industry, among which were highway trailers and containers (finding 84). Budd never seriously considered an acquisition outside the transportation equipment industry (finding 86). When Gindy suspended merger negotiations, Budd made acquisition overtures to several smaller van trailer manufacturers (finding 92). During these negotiations, Budd's president declared that Budd would enter Gindy's business whether or not it acquired Gindy (finding 89).

Budd also had sufficient incentives to enter the relevant product markets. As early as 1961, a Budd executive recommended that Budd cease its railroad car activities and broaden its base to deemphasize Budd's traditional role as a semicaptive supplier to the automotive industry (finding 78). Budd decided to broaden its base by selling proprietary products such as van trailers (finding 79). By 1967, Budd's executives adopted the recommendations of Budd's president that the company enter into areas such as van trailers and containers. These were areas, according to Budd's president, which related to Budd's then current activities and which Budd could understand and manage (findings 84-86). Finally, acquisitions in van trailers, containers and chassis were attractive, as these markets were considerably more profitable than Budd (findings 21, 91).

Given Budd's interest, abilities and incentives, it could have expanded into Gindy's business through internal expansion or by acquiring a smaller, toehold manufacturer. The declaration of Budd's president, that Budd would enter Gindy's business whether or not it purchased Gindy, clearly reveals an intent to enter had its acquisition attempt failed. Other railroad car manufacturers have expanded

internally into the manufacture of van trailers, containers and chassis, using railroad car manufacturing facilities, personnel and machinery (findings 109-113, 116). Budd recognized that it too could do so (finding 93), but decided to pursue an easier course, acquisition of Gindy. Several toehold van trailer manufacturers were available to Budd at or about the time of the merger (findings 101-107). Budd could have acquired and expanded one of these toeholds as it planned to, and did, expand Gindy (findings 155-177).

4. Budd Was the Only Likely Potential Entry into the Relevant Product Markets

The record fails to show any other firm interested in entering the relevant product markets (findings 148-150). On the contrary, it was shown that many of the purported potential entrants suggested by Budd's counsel had no interest whatsoever in entry (findings 148-150). The inescapable conclusion is, therefore, that Budd was the only likely potential entrant, either by acquisition or internal expansion.

C. *Budd as a Perceived Potential Entrant*

Before Budd's acquisition of Gindy, Budd was a perceived potential entrant. In the spring of 1968, Gindy suspended negotiations with Budd (finding 92). At that time, Budd's executives contacted Miller and Dorsey, both van trailer manufacturers, concerning possible acquisition (finding 92). A third-party consultant approached Theurer, another van trailer manufacturer (finding 92). Budd had also contacted Utility twice during the period from 1963 to 1968 (finding 81). Thus, at least four van trailer manufacturers were aware of Budd's interest shortly before the acquisition of Gindy. Because the acquisition occurred so soon after these contacts, Budd did not influence existing competition in the relevant product markets only because the contacted companies did not have enough time to react to Budd's known interest in entry.

D. *The Recent Commission Decision in General Mills Does Not Apply to the Instant Case*

The evidence which establishes Budd as a potential competitor in van trailers, containers and chassis differs in several respects from the evidence presented in *General Mills, supra*.

(1) Unlike General Mills, Budd had expressed definite, specific interest in entering the van trailer, container and chassis markets (findings 75-76, 81-93).

(2) Budd not only sought to enter these markets, but to expand *within* them (findings 95-96, 99), unlike General Mills which sought postacquisition expansion outside of frozen seafood.

(3) The markets in which Budd was alleged to be a potential entrant fit Budd's internal criteria outlined in preacquisition memos and conversations (findings 78-80, 84-91); whereas Gorton did not fit the recommended criteria contained in General Mills' study. Specifically, Budd acquired a highly profitable firm, one whose profit rate was three times that of Budd, whereas Gorton was a low profit firm, especially compared to General Mills (finding 91).

(4) Unlike the lack of complementary relationship between General Mills and Gorton, the products of Gindy were complementary to those of Budd. Both sold products to the same customers (finding 136) and even belong to the same trade association (finding 122). Furthermore, there are similarities in production which were recognized by Budd's management (findings 84-85) and shown by numerous technological relationships (findings 108, 125). Indeed, Budd possessed personnel and production facilities which could have been used to produce Gindy's products (findings 115-121).

(5) If General Mills had not acquired Gorton, it would not have entered the frozen fish market. However, Budd management not only stated that they would enter Gindy's markets with or without Gindy (finding 89), but took steps to implement those alternative entry plans (finding 92).

CONCLUSIONS OF LAW

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

2. On Oct. 22, 1968, Budd acquired the business and assets of Gindy.

3. Budd and Gindy were, at all times relevant herein, corporations engaged in commerce, as "commerce" is defined in the Clayton Act, as amended.

4. The proper product markets within which to determine the probable effects of said acquisition, for purposes of this proceeding are: (a) van trailers; (b) closed-top dry freight van trailers; (c) open-top trailers; and (d) containers and chassis.

5. The proper geographic market within which to determine the probable effects of said acquisition, for purposes of this proceeding, is the United States, as a whole.

6. The effect of the acquisition of Gindy by Budd has been, or may be, to lessen competition substantially or tend to create a monopoly in violation of Section 7 of the Clayton Act, as amended, in the following ways:

(a) Substantial potential competition between Budd and Gindy in the sale of van trailers, closed-top dry freight and open-top van trailers, and containers and chassis, has been eliminated.

(b) Budd has been eliminated as a substantial potential competitor in the sale of van trailers, closed-top dry freight and open-top van trailers, and containers and chassis.

(c) Entry of new manufacturers into the sale of van trailers, closed-top dry freight and open-top van trailers, and containers and chassis, may be inhibited or prevented.

(d) Other manufacturers in each such line of commerce may be led to agree to acquisition by financially strong companies for defensive or retaliatory reasons.

(e) Barriers to entry of new manufacturers into each such line of commerce have been raised significantly.

7. The acquisition of Gindy by Budd may be substantially to lessen competition, or tend to create a monopoly, as described in Paragraph 6 above, in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. §18).

8. Total divestiture of the acquired assets and all additions and improvements thereto is both necessary and appropriate to remedy the probable anticompetitive effects of the unlawful acquisition.

9. As Justice Marshall discussed in *Falstaff*, the objective evidence in this proceeding makes it abundantly clear that the product market (van trailers, closed-top dry freight and open-top van trailers, and containers and chassis) constituted a highly concentrated market held by a few large firms. Further, the objective evidence in the record, although denied by the respondent, strongly suggests that Budd had both the capability and the incentive to enter the van trailer, closed-top dry freight and open-top van trailer, container and chassis market *de novo*. There is no question from the testimony of Budd's own witnesses that it intended to go into the market, and furthermore, that it intended to become a national competitor on a par with Fruehauf, Strick and Trailmobile. Budd had the money, all the facilities, plant and equipment to accomplish what it set out to do, *de novo*, without attaining entry into the market by acquisition of a large firm such as Gindy.

While the testimony of the witnesses and the evidence adduced by Budd would lead one to believe that it had no intention of entering the market *de novo*, it is the opinion of the trier of the facts in this case that while the subjective statements of the witnesses may appear to be credible, they are insufficient to outweigh the strong objective evidence to the contrary.

The Remedy

It is well settled that the choice of the remedial order is committed to the discretion of the Commission *FTC v. Mandel Bros.*, 359 U.S. 385, 392-93 (1959); *Niresk Industries, Inc. v. FTC*, 278 F.2d 337, 343 (7th Cir.

1960), cert. denied, 364 U.S. 883 (1960); *L. G. Balfour Company v. FTC*, 442 F.2d 1 (7th Cir. 1971). The Commission has the power to order divestiture to restore competition to the state of health it might be expected to enjoy but for the acquisition *FTC v. Dean Foods Co.*, 384 U.S. 597, 606 n. 4 (1966); see *Pan American World Airways Inc. v. United States*, 371 U.S. 296, 312-13 nn. 17 and 18 (1963); *Ekco Products Company*, 65 F.T.C. 1204, 1214-17 (1964). The remedial phase of antitrust cases is crucial and the primary focus of inquiry as to remedy is whether the relief adequately redresses the economic injury arising out of the violation *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 326, 327. Moreover, "once the government has successfully borne the considerable burden of establishing a violation of law all doubts as to the remedy are to be resolved in its favor." *United States v. du Pont*, *supra*, at 334. Generally, the most appropriate remedy to redress a Section 7 violation is divestiture *FTC v. Procter & Gamble Co.*, *supra*.

Divestiture is the only appropriate remedy in this matter. Such divestiture will restore Budd as a force on the edge of the market and a *de novo*⁶ potential entrant. See *FTC v. Procter & Gamble Co.*, *supra*, for a complete discussion of considerations which govern the framing of relief in a Section 7 violation.

ORDER

I

It is ordered, That the respondent, The Budd Company (hereafter Budd), a corporation, and its successors and assigns, shall divest all stock, assets, properties, rights and privileges, tangible and intangible, acquired by Budd as the result of its acquisition of the stock of Gindy Manufacturing Corporation (hereafter Gindy), together with all additions and improvements thereto. Budd shall cause to be transferred as part of such divestiture such portion of the assets of Budd Financial Corporation as relate to or derive from, in whole or in part, Budd's operation of Gindy, including, but not exclusively, personnel, finance contracts, and a share of the uncommitted funds and credit lines, along with such guarantees by Budd as shall be necessary to effect such transfer. Such divestiture shall be absolute, shall be accomplished no later than one (1) year from the service of this order, and shall be subject to the prior approval of the Federal Trade Commission.

⁶ The term "*de novo*," as used in this instance, includes entrance by both internal expansion and by toehold.

II

It is further ordered, That such divestiture shall be accomplished absolutely to an acquirer approved by the Federal Trade Commission so as to transfer Gindy as a going business and a viable, competitive, independent concern engaged in the manufacture, production, distribution, sale and financing of van trailers, containers and chassis.

III

It is further ordered, That none of the assets, properties, rights or privileges, described in Paragraph I 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, Budd, or any of Budd's subsidiary or affiliate corporations, or anyone who owns or controls, directly or indirectly, more than one (1) percent of the outstanding shares of common stock of Budd or to anyone who is not approved in advance by the Federal Trade Commission.

IV

It is further ordered, That pending divestiture Budd shall maintain and operate Gindy (as more fully described in Paragraph I), in the same manner and form as Gindy was being operated at the date the complaint herein issued; shall not commingle Gindy's assets, properties, and financing with other of Budd's businesses and operations, and, shall take no steps to impair or otherwise adversely affect the economic, competitive and financial position of Gindy.

V.

It is further ordered, That, for a period commencing on the effective date of this order and continuing for ten (10) years from and after the date of completing the divestiture required by this order, Budd shall cease and desist from acquiring, directly or indirectly, without the prior approval of the Federal Trade Commission, the whole or any part of the stock, share capital, assets, any interest in or any interest of, any domestic concern, corporate or noncorporate, engaged in the manufacture, production, distribution, sale or financing of van trailers, containers and/or chassis, nor shall Budd enter into any arrangement with any such concern by which Budd obtains the market share, in whole or in part, of such concern in the above-described product lines.

VI

It is further ordered, That within thirty (30) days from the date of service of this order and every thirty (30) days thereafter until divestiture is accomplished, Budd shall submit, in writing, to the Federal Trade Commission a report setting forth in detail the manner and form in which Budd intends to comply, is complying, or has complied with the order. All compliance reports shall include, among other things that are from time to time required, (a) the steps taken to accomplish the required divestiture, and (b) copies of all documents, reports, memoranda, communications and correspondence concerning or relating to the divestiture.

With respect to Paragraph V of this order, Budd shall on the first anniversary date of the effective date of Paragraph V and each anniversary date thereafter until the expiration of the prohibition set forth in Paragraph V, submit a report, in writing, listing all acquisitions made by it, the date of each such acquisition or merger, the products involved and such additional information as may from time to time be required.

VII

It is further ordered, That The Budd Company shall notify the Commission at least thirty (30) days prior to any proposed changes which may affect compliance obligations arising out of the order, such as dissolution, assignment or sale resulting in the emergence of successor corporations, and that this order shall be binding on any such successor.

DISSENTING STATEMENT OF COMMISSIONER DIXON

SEPTEMBER 3, 1975

My reading of the record in this matter convinces me that Budd was an actual potential entrant into the markets found relevant by the administrative law judge,¹ and that Budd's entry through Gindy was anticompetitive as it did not come about through internal expansion or

¹ Based on the finding that closed-top dry freight trailers and open-top van trailers could be manufactured by the same machinery and distributed through the same channels, the majority concluded that these two products should not be viewed as comprising distinct submarkets. Although cross-elasticity of production and distribution is determinative when considering the outer boundaries of a market, such cross-elasticity is only one of the factors to be considered when drawing submarkets. My reading of the record comports with that of the administrative law judge insofar as he finds that these closed and open-top van trailers are sufficiently distinct to warrant the finding that each should be considered a relevant submarket. Particularly persuasive in this connection is the administrative law judge's finding that these two products are sold to different customers because their end uses are distinct and the finding that there is no cross-elasticity as to price between them. It may be, as an example, that peanut butter and peanut oil are produced by the same machines and distributed by the same wholesalers. Yet we would not conclude from their cross-elasticity of production and distribution that each does not comprise a separate product market. That one cannot be substituted

(Continued)

by acquisition of a toehold firm. I cannot accept the majority's holding that Gindy was a toehold firm. It is my understanding that a firm cannot qualify as a toehold if it is already a significant competitive factor in the relevant markets, or is likely to achieve that status without the infusion of capital from the acquiring firm. Assuming, *arguendo*, that Gindy became significant only after the challenged acquisition,² the manner in which it achieved this position demonstrates that Gindy was capable of ascending to such a position in the relevant markets on its own, and that it was likely to do so. There is no dispute that Budd's investment of a few million dollars increased Gindy's production capacity and geographical distribution and was all that was required to bring Gindy into more direct competition with the "industry giants." In brief, it was well within the capacity of Gindy to become, through internal expansion, a significant competitor of Fruehauf, Strick, and Trailmobile, if it was not already at the time of the acquisition. Since this prospect was obviated by the Budd acquisition, as was the potential for Budd to become a significant competitor through internal expansion or acquisition of one of the smaller firms in the relevant markets, the acquisition should not be permitted to stand.

DISSENTING STATEMENT OF COMMISSIONER HANFORD

SEPTEMBER 15, 1975

I agree with Commissioner Dixon that open-top van trailers and closed-top dry freight vans are distinct product submarkets, and that the submarket which the majority has defined as encompassing both types of trailers fails to reflect economic reality. Accordingly, I find I am unable to agree with the majority's conclusion that Budd's purchase of Gindy constitutes entry by toehold acquisition.

What we have here is a situation in which Budd was, prior to the acquisition, an actual potential entrant into markets which are characterized by high concentration and substantial barriers to effective competition. Moreover, it was one of the few most likely potential entrants into these markets. Budd could have entered these markets by toehold acquisition or *de novo* through internal expansion. It had the capacity to do so. Had it entered in either of these two ways, it would have been a direct competitor of Gindy, which at the time of the acquisition was ranked number two in the production of open-top van trailers. In addition, the other leading firms in this market would have had to contend with aggressive new competition from Budd as

for the other by the end user, and that there is no price cross-elasticity between them would be determinative. So it should be with open and closed-top van trailers.

² This assumption is unquestionably without merit with respect to the open-top van trailer submarket, as Gindy's 16 percent share of that submarket placed it as the second largest producer of these vans.

well as the existing competition from Gindy. Thus, the acquisition results in the loss of one of the few firms which could have and was likely to be, had it entered *de novo* or by a toehold acquisition, an important additional competitor in this highly concentrated market.

OPINION OF THE COMMISSION

AUGUST 29, 1975

BY ENGMAN, *Commissioner*:

The Budd Company appeals from the initial decision in this matter in which the administrative law judge found that its acquisition of the Gindy Manufacturing Corporation ("Gindy") in 1968 violated Section 7 of the Clayton Act.

According to the Fortune Directory of the 500 Largest United States Industrial Corporations, in 1967 Budd was the 250th largest industrial corporation in the nation in terms of sales (\$469.5 million) and was one of the largest independent automotive suppliers in the nation and the largest independent supplier of body parts to the automotive industry. Budd principally manufactured automotive bodies, wheels, rims, hubs, drums, brakes, jigs and dies used in the manufacture of automotive body parts. In addition it was a leading manufacturer of railroad and mass transit cars.

Prior to its acquisition by Budd on Oct. 22, 1968, Gindy was a Pennsylvania corporation engaged in the manufacture and sale of van trailers, containers and container chassis. For fiscal year 1968, Gindy sales were approximately \$32 million and its assets amounted to about \$44 million.

On Oct. 22, 1968, through an exchange of Budd stock valued at \$29.7 million, Budd acquired the outstanding capital stock of Gindy.

The complaint alleges that prior to the acquisition Budd was one of the most likely potential entrants into the manufacture and sale of van trailers, closed-top dry freight van trailers, open-top van trailers, and containers and container chassis, and that by acquiring Gindy, Budd eliminated itself as a substantial potential competitor in these markets. The complaint further alleges that these markets and segments thereof are highly concentrated and characterized by high entry barriers.

After extensive hearings, the administrative law judge sustained these allegations and entered an order requiring divestiture of the acquired firm.

I. RELEVANT PRODUCT MARKETS

The broadest product markets found by the ALJ to be appropriate for this case are (1) "van trailers" and (2) "containers and chassis." "Van

trailers" refers to the large box-type trailers attached permanently to a chassis with wheels that are pulled by a truck tractor. Truck trailers that are *not* "van trailers" would include tank and bulk commodity trailers (for hauling liquids, gas, cement, and the like); platform trailers and low bed heavy haulers (used, for instance, to transport heavy machinery and girders); pole and logging trailers; and dump trailers. Trucks and truck bodies are not included with the term "van trailers" which is used exclusively to refer to trailers of 5-ton capacity or more that are pulled by a truck tractor. A van trailer can be open or closed at the top and is usually made with aluminum or steel or both. Vans represent by far the largest percentage of all types of truck trailers.

"Containers and chassis" refer to large, closed box-type structures which can be used for intermodal transportation of goods, by rail, motor carrier, or ship. The container is designed to be detachable from the chassis on which it sits when pulled by a truck. Sizes are standardized and containers must be strong enough to be hoisted and stacked on top of one another during shipboard transit.

Respondent does not dispute the existence of these product markets, although it suggests that a broader "all truck trailer" market would be a more appropriate market in which to view the acquisition.

We are satisfied that the "van trailers" and "containers and chassis" each constitute appropriate markets for purposes of the case. It is not disputed that van trailers are produced on fairly unique production lines which cannot be quickly utilized to produce other types of non-van trailers such as tank, platform, logging, or dump trailers. Also, because of their special design, there is little or no substitution in end use between van trailers and these other types of truck trailers. Likewise, containers and chassis serve a distinct function that separates them from van trailers and they are usually constructed on different assembly lines than those used to build van trailers.

In addition to the foregoing product markets, the ALJ found that subcategories of van trailers listed by the Department of Census as "closed-top dry freight van trailers" and "open-top van trailers," constitute relevant submarkets for purposes of this case. Respondent takes sharp issue that these finer divisions constitute markets, as did its economist-witness Dr. Oliver Williamson (Tr. 2088-2090).

We agree with respondent and its expert witness that "closed-top dry freight van trailers" and "open-top van trailers" do not constitute meaningful economic markets. The market for open top trailers is limited as they are used mainly to carry freight, such as steel lengths, which must be loaded from the top by cranes. Census reported a total

of \$19.8 million in open-top van trailer production for 1968 as compared to \$246.1 million for closed-top dry freight van trailers.¹ Although it is true that a buyer may not find these types substitutable for particular end uses, the record nevertheless establishes that production and distribution facilities for each are identical and are essentially identical among other types of vans. Both "closed" and "open" top vans are commonly made by all van trailer manufacturers, including Gindy, and do not require separate assembly lines (CX 90, 91, Tr. 386-87, 572, 640-41, 703, 877, 890, 1343).

No doubt the reason that complaint counsel urge the existence of separate "closed-top" and "open-top" van markets is that Gindy's "market share" is much higher if these product lines are used. Although Gindy's share of all van trailer shipments in 1968 was 8.4 percent (giving it an industry rank of number 4), its production of open-top trailers happened to represent nearly 16 percent of all open-top van trailer shipments in that year (giving it a rank of number 2 in the production of open-top vans). Its share of U.S. production of "closed-top dry freight vans" in 1968 and 1969 also exceeded 10 percent. The inappropriateness of making a distinction in market definitions based on the presence or absence of a top on the trailer² is evidenced by the fact that in the following year, although Gindy's market share and ranking stayed nearly the same in overall van sales, its shipment of open-top trailers declined precipitously from \$3,150 million to \$1,268 million resulting in a drop from 15 percent to 7.8 percent of the industry total in just one year. The difference was made up by the production of other types of van trailers, thus evidencing ease of production flexibility. By 1972, Gindy's share of open-top vans dropped even further, down to 4.17 percent.

The ALJ, in accepting complaint counsel's argument that "closed-top" and "open-top" van trailers each constitute a relevant submarket, mechanically relied on the fact that several of the submarket criteria referred to in *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962) were applicable, such as peculiar characteristics and uses, distinct prices, and industry recognition of open-top van trailers as a category of truck trailers. But as the Court observed in a later case, "[T]hese [Brown Shoe] guidelines offer no precise formula for judgment and

¹ Total production of all vans in 1968 amounted to \$381.7 million. It should be noted that "open-top vans" and "closed-top dry freight vans" do not account for all vans. In addition to these subcategories, Census lists under "vans" the following: insulated vans (\$84 million), drop frame (furniture-type) vans (\$22 million), and livestock vans (\$9 million).

² There are differences in construction between open-top and closed-top freight trailers in addition to the presence or absence of a roof. Open-top trailers must have stronger top rails among other things and in fact sell for a slightly higher price than equivalent size closed-top vans. Nevertheless, as noted, production procedures and equipment are the same. Both types of trailers are produced on the same assembly line, and no additional expenditures are required to switch production capability from one to the other (Tr. 386-87, 1343).

they necessitate, rather than avoid, careful consideration based upon the entire record" *United States v. Continental Can Co.*, 378 U.S. 441, 449 (1964). Cross-elasticity of supply can also be an important consideration in defining markets. See *Brown Shoe, supra* at 325 n. 42. The interchangeability of production and distribution facilities between two products is a strong indication that in measuring the relevant market and the degree of market power held by firms, the output of both products should be included since the manufacturer of one can shift readily to the production and sale of the other in response to profit opportunities. Cf. *Sterling Drug, Inc.*, 80 F.T.C. 477 (1972). See also *United States v. Columbia Steel Co.*, 334 U.S. 495, 510-11 (1948). Because the record establishes such a high degree of cross-elasticity of production, and identical marketing ease, among van trailers, we conclude that "open-top" and "closed-top" van trailers do not constitute separate submarkets.

In adopting "van trailers" and "containers and chassis" as lines of commerce, we do not deny that there is probably an even broader economic market encompassing these and other trailers. It appears that there is considerable interchangeability in production equipment and skills over the long-run between all types of truck trailers except for tank and bulk commodity trailers which seem to fall in a specialized production class all of their own. Indeed, the Commission in *Fruehauf Trailer Co.*, 67 F.T.C. 878 (1965) found "truck trailers generally" to be a relevant product market for analyzing the acquisitions involved there. Consequently, in addition to the two product markets adopted in the initial decision, we will also examine the instant acquisition in terms of market share statistics for a broader market consisting of all truck trailers (except tank and bulk commodity trailers).

II. GEOGRAPHIC MARKET

The record supports the ALJ's findings that the relevant geographic market is the United States as a whole for sales of van trailers and containers and chassis. This is not to say that all trailer manufacturers are able to compete uniformly throughout the Nation. High transportation costs, even for such mobile products as trailers, make it difficult to supply trailers to distant locations. Nevertheless neither party suggests that anything less than the Nation should be considered the proper geographic market.

Respondent does argue that foreign producers of containers have competed with domestic producers of containers and that purchasers of containers look beyond the boundaries of the United States for supplies of this product. Respondent asserts that since the market statistics for containers do not include container production of foreign firms, the

initial decision's market analysis is defective insofar as containers are concerned. The record indicates that there has been little competition from foreign-made containers insofar as domestic consumption in this country is concerned. Shipping lines are the primary buyers of containers and Federal regulations prohibit American shipping line operators from purchasing cargo containers of foreign manufacture with capital reserve funds. 30 F.R. 12036 (Sept. 21, 1965). Furthermore, since the devaluation of the U.S. dollar, foreign container manufacturers have found it particularly difficult to sell containers in this country.

III. MARKET CONCENTRATION

Universe figures for the various lines of commerce described above were taken from Census Bureau publications. Shipments of individual firms were obtained directly from the manufacturers. The following tables show relevant data for the years 1966 through 1968 for Gindy and the leading three firms in each of the markets:³

³ The record source for much of the tabulated data was placed *in camera* by the ALJ. In view of the fact that the figures are over six years old, no third party interests are likely to be harmed by their disclosure. See Section 3.45(a) the Commission's Rules of Practice and Procedure.

TABLE I

All Trailer Production Less Tanks
and Bulk Commodity Trailers

	1966		1967		1968	
	<i>Industry:</i>		<i>Industry:</i>		<i>Industry:</i>	
	\$579,350		\$506,462		\$593,387	
	\$(000)	%	\$(000)	%	\$(000)	%
Fruehauf	146,226	25.24	125,156	24.71	171,377	28.88
Trailmobile	89,268	15.41	64,859	12.81	73,238	12.34
Strick	72,900	12.58	65,321	12.90	66,781	11.25
Gindy	37,769	6.52	24,776	4.89	35,661	6.01
Top 4	59.75		55.59		58.49	
Top 8	75.46		73.79		75.83	
Gindy's Rank	4		5		4	

Source: Table V of "Respondent's Confidential Proposed Findings,"
Industry totals: RX 48, CX 39; Fruehauf, RX 406 A-F-18, CX 165A-165I, RX 436A-F-9, CX 166A-166D; Trailmobile, RX 407 A-E-63, CX 168A-172L; Strick RX 408 A-L, CX 157 A-B; Gindy RX 409 A-H, CX 178 A-D.

TABLE II
Van Trailers

	1966		1967		1968	
	<i>Industry:</i> \$400,001 \$(000)	%	<i>Industry:</i> \$318,567 \$(000)	%	<i>Industry:</i> \$381,665 \$(000)	%
Fruehauf	92,500	23.13	68,073	21.37	105,148	27.61
Trailmobile	67,913	16.98	48,341	15.17	47,465	12.35
Strick	55,512	13.88	41,122	12.91	40,441	10.60
Gindy	28,992	7.25	22,725	7.13	32,176	8.43
Top 4	61.24		56.68		58.99	
Top 8	79.89		80.83		80.69	
Gindy's Rank	4		4		4	

Source: Table III of "Respondent's Confidential Proposed Findings,"
Industry totals: RX 48, 49, CX 39; Fruehauf, RX 406 A-F-18, CX 165A-165I, RX 436A-F-9, CX 166A-166D; Trailmobile, RX 407 A-E-63, CX 168A-172L; Strick RX 408 A-L, CX 157 A-B; Gindy RX 409 A-H, CX 178 A-D.

TABLE III
Containers and Chassis

	<i>1968</i>	
	<i>Industry: \$81,956</i>	
	<i>\$(000)</i>	<i>%</i>
Fruehauf	28,868	35.35
Strick	21,029	25.75
Trailmobile	19,094	23.38
Dorsey	4,703	5.75
Great Dane	3,709	4.18
Gindy	3,128	3.83
Top 4	90.23	
Top 8	99.48	
Gindy's Rank	6	

Source: Commission exhibit 90.

Before the loss of a potential entrant can be viewed as violating Section 7, it must be established that the market is concentrated or threatens to become so, that entry barriers are high, and that the acquired firm is a leading factor in the market. *Kennecott Copper Corp.*, 78 F.T.C. 744, 921-22 (1971), *aff'd*, 467 F.2d 67 (10th Cir. 1972); *The Bendix Corp.*, 77 F.T.C. 731 (1970), *remanded for further proceedings*, 450 F.2d 534 (6th Cir. 1971). If the market is not concentrated, there is usually little opportunity for the sellers to collectively maintain prices above competitive levels and any diminution of potential competition will not be material. On the other hand, if the market is concentrated but entry barriers are low, potential competition will be important but since there will be a large number of firms able to come into the market under approximately the same conditions, the merger of one of those firms with an existing seller will make no difference because the threat of new entry will remain approximately the same. *Beatrice Foods Company*, 81 F.T.C. 481, 530 (1972); *General Mills, Inc.*, Dkt. 8836, Slip Opinion Oct. 5, 1973, p.5 n.2 [83 F.T.C. 696].

As the foregoing tables show, 4-firm concentration ratios are approximately 60 percent or more, with the largest firm, Fruehauf, usually representing about 25 percent of output. The top three firms (Fruehauf, Trailmobile, and Strick) collectively shared more than 50 percent of the output in each of the markets during the three years leading up to the year of acquisition. Although the record indicates that the balance of the markets are shared by nearly a hundred firms, clearly these markets are substantially concentrated. *The Stanley Works*, 78 F.T.C. 1023, 1065 n. 12 (1971), *aff'd*, 469 F.2d 498 (2d Cir. 1972); *Beatrice Foods Company*, Dkt. 8864 (July 1, 1975) [86 F.T.C. 1].

In addition, the ALJ found that there were substantial barriers to entry insofar as entering on a substantial level of production is concerned. Respondent argues that no barriers exist, as the manufacture of trailers and containers requires no extensive know-how or expensive equipment, patent licenses are not required, only a small amount of capital is needed to start manufacturing, and there appear to be no significant economies of scale in manufacturing. However we think the record bears out the ALJ's finding, although the term "barriers to effective competition" might convey a more accurate picture than "barriers to entry," see *Fruehauf Trailer Co.*, 67 F.T.C. 878, 930-931 (1965). Small van trailer manufacturers generally do not have the ability to extend or obtain credit to finance a sale of a large number of trailers to large customers or to offer finance terms competitive with terms offered by the large trailer manufacturers. It is not uncommon for the largest companies in the industry to sell trailers to fleet operators with virtually no downpayment on 6 to 8 year credit

terms (I.D. findings 68-69). Manufacturers who do not have the capital resources to finance sales on these terms generally cannot arrange such favorable terms through banks (Tr. 257-58, 371-73, 502, 757, 829, 840, 873-74, 886).

In addition, the larger van manufacturers have an advantage as they have geographically-dispersed branch outlets that enable them to service and resell large lots of used trailers that have been accepted as trade-ins in sales to fleet operators.

Respondent argues that these requirements are merely incremental in nature since any given sales transaction requires a small additional amount of money and it is possible to enter "on a shoestring" if one is willing to do so. This may be so, but the most important customers are the large motor common carriers and truck-leasing companies who buy in large lots—often a hundred or several hundred units at a time. Only a few trailer manufacturers, led by Fruehauf and Trailmobile, have had the facilities to deal with these fleet operators who prefer to place their orders with manufacturers who can accept trade-ins on a large scale and extend favorable financing terms.

Lest there be any misunderstanding, we do not suggest as does the initial decision, that the superior ability of the larger trailer manufacturers to offer services and financing is an "unfair" advantage that is somehow anticompetitive. The advantages are ones that basically arise out of firm size and, although in part may be caused by imperfections in the capital market, are nevertheless beneficial to the customers who are served thereby. They should therefore, be viewed as providing real, and not simply "pecuniary," economies.

The ALJ found that the trailer manufacturing industry is "highly profitable." However there is little concrete evidence in the record in the form of actual profit data. Although Gindy in the year preceding the acquisition had been highly profitable (this fact quickened Budd's interest in acquiring it), little information is revealed by the profit and loss statements of the top firms since for the most part they are parts of conglomerate corporations which do not report profits and losses on a product-line basis.⁴ There was much testimony to the effect that the industry is at least *regarded* by both insiders and outsiders as a low-profit industry. A number of firms have exited from the industry in recent years because of losses, including Highway Trailer Company, which in 1968 ranked number six in the van trailer market.

The record indicates that from 1966 onward van trailer prices have

⁴ By 1968, Fruehauf was a large diversified corporation. In terms of assets it exceeded Budd in size and ranked as the 234th largest industrial corporation in the country. Trailmobile was owned by the Pullman Company which was the 149th largest corporation. Until December 1968 Strick was a subsidiary of Penn Central. Brown Trailers was a division of the Clark Equipment Company, the 193rd largest corporation in terms of sales. Great Dane Trailers was a subsidiary of United States Freight Company.

not risen at a pace commensurate with increases in cost of labor and material. Prices even declined to below 1966 levels from 1967 through 1969 (I.D. finding 65 and accompanying charts).

The foregoing suggests that despite the degree of concentration evidenced by the market share figures, the market may have been performing in a manner that has yielded prices and profits at a competitive or near-competitive level. The Commission has taken this into account in evaluating complaint counsel's argument that the loss of Budd as a grassroots entrant was an important loss to the market.

IV. BUDD AS A POTENTIAL ENTRANT

The administrative law judge found that since at least 1956 Budd has been a potential entrant into the manufacture and sale of van trailers and containers and chassis and that by acquiring Gindy, Budd removed itself as an actual future entrant in these markets either by entry *de novo* or by acquisition of a small company. In addition he found that Budd was perceived by firms in the market as a potential entrant and loss of its presence at the edge of the market removed any disciplining effects that would have ensued from its continued presence as a perceived potential entrant.

Respondent takes strong issue with all of these findings, arguing that Budd was not interested in entering the trailer industry except by acquisition of a firm having an operation of the scale and profitability that Gindy possessed. Respondent argues that the Gindy acquisition was in fact procompetitive because Gindy's advancement in the market had reached a plateau and without access to capital for expansion and financing of sales on a mere competitive basis it could not hope to make inroads on the market position of Fruehauf and Trailmobile.

On the question of whether Budd was a perceived potential entrant, we disagree with the ALJ. A large number of industry witnesses testified in this proceeding and when asked whether they had viewed Budd as a potential entrant before the Gindy acquisition, the response was uniformly "no." Notwithstanding such testimony the ALJ reasoned:

In the spring of 1968, Gindy suspended [merger] negotiations with Budd. At that time Budd's executives contacted Miller and Dorsey, both van trailer manufacturers, concerning possible acquisition. A third-party consultant approached Theurer, another van trailer manufacturer. Budd also contacted Utility twice during the period 1963 to 1968. Thus, at least four van trailer manufacturers were aware of Budd's interest shortly before the acquisition of Gindy. (initial decision pp. 50-51. [pp. 562, herein])

However executives from Miller, Dorsey, Theurer and Utility testified they did not perceive Budd as a potential entrant (Tr. 714, 1660, 1831, 1852, 1917). Prior to the time Budd acquired Gindy, these and the other trailer companies who appeared at the hearing did not

take Budd into account in formulating competitive practices and prices (Tr. 524, 714, 753-54, 1304, 1439, 1510-11, 1646, 1738-39, 1776, 1904, 1917, 2216-17). Nor is there any reason to believe that had the Gindy acquisition not taken place Budd's continued presence outside the market would have influenced industry prices. Numerous industry witnesses, including representatives from the market leaders, identified other firms and types of firms they considered more likely to enter the truck trailer industry than Budd. These included automobile manufacturers (Tr. 1362-63), truck tractor manufacturers (Tr. 1362-63, 1511-14, 1591, 1628-29, 1633, 1740-42, 1777-78, 1868) and truck body manufacturers (Tr. 1588-91, 1753-54). No witness testified that their prices or practices were affected by these firms. The only conclusion that can be reasonably drawn from the evidence is that there is no basis upon which to believe that *Budd's* continued presence at the edge of the market would have any greater effect on market performance.

We are left then with the argument that Budd was a likely actual entrant which would have entered the market at some time in the future by means other than the Gindy acquisition.⁵ This finding is also strongly disputed by the respondent. We find it unnecessary, however, to review the lengthy arguments that have been presented on this issue.

Although the ALJ found that Budd was an actual potential entrant into the van and container markets, we think he jumped too quickly to the conclusion that entry by way of acquiring Gindy was anticompetitive. Insufficient attention was paid to whether Gindy should be viewed as a "toehold or foothold firm," acquisition of which would lead to improved competition against dominant market leaders. As the Commission observed in *Bendix Corporation*, *supra* 77 F.T.C. at 818-19 (1970); "[I]n a highly concentrated, sluggish market, the acquisition of a small industry member by a powerful, innovative firm which, by building upon the base of the smaller firm can pose a more effective competitive challenge to the industry giants [may promote competition]. Such procompetitive mergers are not only not forbidden by Section 7, they are positively encouraged." "[T]he threat of a toehold merger by a powerful firm may often serve as a much greater incentive

⁵ The Supreme Court has explicitly reserved decision on whether elimination of a non-perceived but likely entrant can violate Section 7 of the Clayton Act. As it noted in *United States v. Marine Bancorporation*, *supra*, 418 U.S. at 625:

"The Court has not previously resolved whether the potential competition doctrine proscribes a market extension merger solely on the ground that such a merger eliminates the prospect for long-term deconcentration of an oligopolistic market that in theory might result if the acquiring firm were forbidden to enter except through a de novo undertaking or through the acquisition of a small existing entrant (a so-called foothold or toehold acquisition). Falstaff expressly reserved this issue." *Accord U.S. v. Falstaff Brewing Corp.*, 410 U.S. 526, 537.

The Commission has recently reaffirmed its view that elimination through merger of a likely procompetitive entry falls within the scope of Section 7. *Beatrice Foods Company*, Dkt. 8864, July 1, 1975, slip opinion, p. 12 n.6 [86 F.T.C. 1 at 63].

to competitive performance in the affected market than the prospect of more costly and slower internal, *de novo* expansion." *id.* at 819.⁶

In the *Bendix* case the Commission struck down the acquisition by Bendix of the third-ranking firm (Fram) which had 17.2 percent of the market. However it characterized as a toehold firm that could lawfully have been acquired by Bendix, fourth-ranking Wix Manufacturing Company which had 9.5 percent of the market and was not shown to be technologically inferior. Similarly, the Ajax Company, recognized as a permissible toehold or foothold candidate in *Stanley Works*, 78 F.T.C. 1023, 1072 (1971) *aff'd on other grounds*, 469 F.2d 498, 508-09 n.24 (2d Cir. 1972), ranked third in the market with a share of about 8 percent. As we recently noted, the Commission has generally considered "firms having market shares below 10 percent as toehold companies, acquisition of which would have been procompetitive" *Beatrice Foods Company*, Dkt. 8864 (July 1, 1975, slip opinion p. 17 n.8 [86 F.T.C. 1 at 67]).

V. GINDY'S POSITION IN THE INDUSTRY

Market share data set forth *supra*, show that Gindy ranked considerably below Fruehauf, Trailmobile, and Strick. In the overall trailer market Gindy's share fluctuated between 4.9 percent and 6.5 percent during the three years prior to the merger. In the van trailer market, where Gindy's share was highest, it never rose appreciably above 7-8 percent as compared to Fruehauf's 27 percent and Trailmobile's 17 percent. Gindy's market position in 1968 was much closer to firms ranking below it, such as Brown Trailer (6.6 percent of the van trailer market in 1968), Highway (5.5 percent), and Great Dane (5.1 percent). Complaint counsel in fact characterize Highway and Great Dane as available "toehold" firms. In the container-and-chassis market, Gindy ranked number 6 with only 3.8 percent of the market.

At the time of acquisition, Gindy's principal manufacturing plant was located in Eagle, Pa., in addition to which it had a manufacturing plant located in Lebanon, Pa. and in Martinsville, Va.; and a relatively small production facility in St. Louis, Mo., which was later closed down as obsolete. Gindy was described by numerous industry witnesses as being a regional producer. Ninety-five percent of its sales were made in the Eastern part of the United States. In contrast, Fruehauf and

⁶ See also *Brown Shoe Co. v. United States*, 370 U.S. 294, 319: "When concern as to the Act's breadth [amended Section 7] was expressed, supporters of the amendments indicated that it would not impede, for example, a merger between two small companies to enable the combination to compete more effectively with larger corporations dominating the relevant market * * *"

Trailmobile were viewed by industry witnesses as the "national companies," and for many years have dominated the industry.⁷ Fruehauf, for instance, had trailer production plants located in California (two plants), Texas (two plants), Nebraska, Tennessee, Pennsylvania, and Ohio. In addition it owned 80 sales and/or service outlets located throughout the country. Trailmobile had production facilities in Pennsylvania, Missouri, Texas, and California, and 30 factory-owned branch service and sales outlets. At the time Gindy was acquired by Budd the only facilities owned by Gindy outside of the Philadelphia area, except for the aforesaid manufacturing plants, was an outlet for selling used trailers which was located in Chicago, Ill. and a facility in Camden, N.J. for repairing used trailers.

Fruehauf, Trailmobile, and Strick had their own finance divisions, which because of their leverage in the money market, were able to offer financing on better terms than were generally available from banks. Prior to the merger, Gindy depended upon credit arrangements with several banks and an insurance company. The record shows, and the ALJ found, that "because of the tight money situation [in 1968] for all van trailer manufacturers, Gindy could not secure the financing to expand its position in its various markets rapidly as it had been expanding" I.D. finding 22; Tr. 275-76.

The administrative law judge, in holding that Gindy could not be viewed as a toehold or foothold acquisition candidate, relied on the fact that Gindy's shares in the alleged submarket "closed-top freight vans" exceeded 10 percent in 1968 and 1969 (findings 151-154). However, as we have held, this is not a meaningful economic market or submarket and Gindy's shares varied from 3 to 8 percent in the relevant markets during the years immediately prior to the merger.

We believe it to be desirable to observe a general rule in potential competition cases that firms possessing no more than 10 percent in a target market (where, as here, the 4-firm concentration is approximately 60 percent or more) should ordinarily be presumed to be toehold or foothold firms. This presumption by no means is conclusive and the inference of lack of anticompetitive effects flowing from acquisition of such a firm can be rebutted in particular cases.⁸ The 10 percent

⁷ "From the earliest days of the truck-trailer industry, fifty years ago * * * respondent [Fruehauf] has at all times been the nation's leading manufacturer of trucks, and by a substantial margin. . . . With one other large firm, Trailmobile, it has consistently accounted for more than one-half of the industry's sales * * *." *Fruehauf Trailer Co.*, 67 F.T.C. 878, 929-30 (1965).

⁸ In *United States v. Phillips Petroleum Co.*, 367 F. Supp 1226 (C.D. Cal. 1973), *aff'd per curiam without opinion*, 94 S. Ct. 3199 (1974), the district court held that acquisition of Tidewater Oil Company by the Phillips Petroleum was not a toehold or foothold acquisition. Tidewater ranked seventh in the sale of motor gasoline in California (the relevant market) and had a 6-7 percent share of the market. The Court specifically found that "Phillips did not use Tidewater as a small base from which to expand its operations and did not have a substantial need to build upon the acquisition

(Continued)

demarcation is supported by the prior Commission cases, as noted, and is not inconsistent with the Department of Justice Merger Guidelines.⁹

In this case, the presumption is supported by the record which shows that the acquisition of Gindy by Budd engendered increased capacity and other procompetitive forces, the very effects the toehold doctrine was designed to elicit.

The record shows that to compete optimally in this industry, a producer of trailers must have a network of plants and sales and service facilities geographically dispersed throughout the country, a broad line of truck trailer products, and capability to provide financing of customers' purchases of trailers on competitive terms (Tr. 257-58, 372-73, 397, 752, 674-75, 1134, 1316, 1319, 1321-23, 1425, 1428-31, 1491-92, 1644, 1794). Geographic dispersion of plants and outlets is required for several reasons. Customers of trailer manufacturers have been getting larger and so have the size of their orders. Freight costs of delivering are substantial and it is difficult to compete in States which are far distant from a manufacturing plant (Tr. 1328-29, 1618-19, 1662, 1773-74). Branch factories and outlets provide greater capacity to fill large orders, take trades, and provide service and repair facilities (Tr. 1728, 1768-69, 1793).

We have already noted that at the time of acquisition Fruehauf and Trailmobile were the only producers of trailers and containers that operated on a nationwide basis. Their product lines were far broader than other producers of van trailers and chassis (Tr. 902, 1318, 1427-28, 1583, 1720, 1873). Fruehauf has been recognized as the dominant market factor in setting financing terms to customers (Tr. 502, 518-19, 675, and see *Fruehauf Trailer Co.*, [67] F.T.C. 878, 920-924 (1965)). Fruehauf, Trailmobile and Strick were offering more attractive finance terms than Gindy was able to obtain or offer.

In the opinion of Gindy officials, without the financial assistance Budd made available to Gindy subsequent to the acquisition it is doubtful that Gindy would have substantially augmented its preacquisition level of operations (Tr. 515, 274-75; 1228-29, 1242). Budd officials viewed Gindy as undercapitalized in comparison to Fruehauf and other major trailer companies, and that with Budd's help it could grow to

* * * *id.* at 1258. As indicated in the discussion in the text the facts are quite different with respect to Budd's acquisition of Gindy.

⁹ The Guidelines states in pertinent part (§18): "[T]he Department will ordinarily challenge any merger between one of the most likely entrants into the market and; * * * (iii) one of the four largest firms in a market in which the shares of the eight largest firms amount to approximately 75% or more, provided the merging firm's share of the market amounts to approximately 10% or more." 1 CCH Trade Reg. Rep. ¶4510. Two refinements noted in subparagraph (iv)—that challenges will also be made (A) where the merging firm's share of the market is not insubstantial and there are no more than one or two likely entrants into the market or (B) the merging firm is a rapidly growing firm—are not applicable here. The record does not support a finding that there are no more than one or two likely entrants in the trailer business. And, as indicated in this opinion, there is substantial reason to believe that Gindy had reached a plateau in its growth absent a means of raising capital at a cost lower than was available to it in 1968.

become a more effective competitor, particularly in the area of financing trailer sales, and could be expanded from a regional to a national competitor (see, *e.g.* CX 10F, CX 69E, Tr. 1050-51).

Subsequent to the acquisition, Budd established a financial corporation to help finance the van trailers sold by Gindy as well as sales by other Budd divisions. By virtue of this finance subsidiary Gindy was able to finance trailer sales on more competitive terms. Furthermore, for the first time it was able to provide customer finance on container sales, which theretofore had been considered too risky by commercial banks. This enabled Gindy to compete in container sales and financing with Fruehauf and Trailmobile (Tr. 515, 1141-43, 1153, 1235, 1322-23, 1380-81). The amount of funds available to finance Gindy customers was increased by \$32 million (I.D. finding 163).

In addition, Budd enlarged Gindy's Eagle plant and increased its capacity by 40 percent at a cost to Budd of \$1.75 million. An addition to the Lebanon plant was made by Budd and a cost to it of \$500,000. The record supports the ALJ's finding that these alterations made Gindy by 1971 "a more efficient van trailer producer than it was at the time of acquisition" (I.D. finding 164).

At the time of the hearing, Budd had also purchased land in Chicago for a new midwestern Gindy plant and had plans to erect two new van trailer plants (CX 99B). Since the acquisition, Gindy has also opened six additional branch outlets and had plans to open four more. Budd provided between \$3 and \$4 million to enable Gindy to open these factory branches (Tr. 1389). Under the direction of Budd, Gindy has broadened the types of trailers which it offers and has improved the design of the Gindy van trailer.

Gindy has been viewed by its competitors as being a stronger and more effective competitor subsequent to the acquisition. A former executive vice president of Fruehauf, who viewed Gindy prior to the acquisition as "just one of the smaller competitors on the east coast," testified:

Q. Now, did this situation change after the acquisition of Budd-of Gindy by Budd?

A. Yes. Gindy opened up some new plants—branches, built another plant, got into the container business, got into the freight business to a greater extent, got into the container chassis business; were just more of a factor. They introduced a broader line of—I think they started introducing open tops; a better line of and more competitive line of refrigerator trailers. About that time, as I recall, Gene Hindin came with them and he did a fine job of redesigning, taking some cost out of the trailer and changing their whole approach toward manufacturing—quality control and everything else when he came in.

And as a result, they firmed up and broadened their scope. They moved into Chicago a little more strongly, out into the west coast. The first time we started feeling their sales ability was down in the Dallas area and St. Louis (1441-1442).

The law judge, relying on the foregoing and other post acquisition changes made by Budd in the Gindy Company, concluded that the

acquisition also violated Section 7 because it entrenched Gindy and raised entry barriers. Contrary to the conclusions reached by the ALJ, there is nothing in the record to support the view that the acquisition has raised existing entry barriers or has otherwise "entrenched" Gindy. Between 1968 and 1972 Gindy's dollar sales of trailers increased from \$35.7 million to \$56.5 million, its share of that market increasing from 6.01 percent to 7.07 percent. But it appears that Gindy's gain was Fruehauf's loss. Fruehauf's market share dropped during the same period of time from 28.88 percent to 23.28 percent. (The aggregate share of the three leading firms also declined, from 52.47 percent to 47.61 percent.) Representatives of smaller firms testified that they did not believe the acquisition had made it more difficult for them to grow. For the most part the smaller trailer manufacturers increased their respective shares of the market after 1968.¹⁰ Although these post-acquisition data do not conclusively settle the question, clearly these are not the trends of a less competitive market.

In view of our finding that the acquisition did not lessen competition, the initial decision will be vacated and the complaint dismissed.

FINAL ORDER

This matter having been heard by the Commission upon briefs and oral argument in support of and in opposition to the appeal of respondent from the administrative law judge's initial decision herein, and the Commission, for the reasons stated in the accompanying opinion, having concluded that the appeal should be granted.

It is ordered, That the administrative law judge's initial decision be, and it hereby is, vacated and the attached opinion be, and it hereby is, adopted as the decision of the Commission, and

It is further ordered, That the complaint in this matter be, and it hereby is, dismissed.

Commissioners Dixon and Hanford dissenting.

IN THE MATTER OF EXXON CORPORATION, ET AL.

Docket 8934. Order Aug. 29, 1975

Administrative law judge's order denying respondents' motions and related requests relying upon assertions of *res judicata* and collateral estoppel placed on Commission's docket for review, and upon review affirmed.

¹⁰ Market data discussed in this paragraph are in the record and are tabulated in respondent's *in camera* proposed findings, Table V.

Appearances

For the Commission: *Roger J. McClure, Rhett R. Krulla, Anne R. Schenof, Ira S. Nordlicht, James H. Thessin, Patrick J. Quinlan, David I. Haberman and Roger B. Pool.*

For the respondents: *John H. Chiles, Houston, Tex. and Benjamin T. Richards, New York City, for Exxon Corporation. William Weitzel, Ass't General Counsel and Milton Handler, Kaye, Scholer, Fierman, Hays & Handler, New York City, for Texaco, Inc. Jesse P. Luton, Assoc. General Counsel, Houston, Tex. and Frank R. O'Hara, Pittsburgh, Pa., for Gulf Oil Corporation. Thomas R. Trowbridge III, Vincent A. Moccio, and Charles F. Rice, New York City, for Mobil Oil Corporation. David McKean, McKean, Whitehead & Wilson, Wash., D.C. and Turner H. McBaine, Pillsbury, Madison & Sutro, San Francisco, Calif., for Standard Oil of California. M. J. Keating, William R. Jentes, Kirkland & Ellis, Robert C. Smith, Chicago, Ill., for Standard Oil of Indiana. Harold F. McGuire, Wickes, Riddell, Boomer, Jacobi, & McGuire, New York City, for Shell Oil Co. Francis X. McCormack, Edward E. Clark and Donald A. Bright, Los Angeles, Calif., Robert E. Jordan III, Steven H. Brose and F. Michael Kail, Steptoe & Johnson, Wash., D.C., for Atlantic-Richfield Company.*

ORDER AFFIRMING DENIAL OF RESPONDENTS' MOTIONS
BASED ON ASSERTIONS OF RES JUDICATA AND COLLATERAL
ESTOPPEL

By leave of the administrative law judge, respondents have filed four applications for review of his "Order Denying Respondents' Motions and Related Requests Relying Upon Assertions of Res Judicata and Collateral Estoppel" dated Mar. 5, 1975. Essentially, respondents argue that certain issues raised in this proceeding have already been conclusively determined against the Government in previous actions brought against them by the Antitrust Division of the Department of Justice. Although he denied the motions, the law judge determined that they raised issues which met the criteria for interlocutory review set forth in Section 3.23(b) of the Commission's Rules of Practice. The Commission agrees and has determined to place the order of Mar. 5, 1975 on its docket for review.

The law judge's order was based primarily on his conclusion that judicial determinations in actions brought by the Department of Justice under the antitrust laws are not binding in subsequent actions brought by the Federal Trade Commission. His analysis of the relevant statutes convinced him that Congress did not intend that the public interest in vigorous enforcement of the antitrust laws be thwarted by strict

application of the doctrines of *res judicata* and collateral estoppel. Furthermore, he found respondents' contention that privity always exists between officers of the United States Government too simplistic, in that it ignores the plain fact that the Justice Department is not authorized to enforce the Federal Trade Commission Act, which is the basis for the instant proceeding.

For the reasons stated in the law judge's thorough analysis, we are inclined to agree with the above conclusions. However, there is no need to rest our decision in this matter solely on a novel question of statutory interpretation. Even assuming the conclusive effect of the Justice Department's antitrust actions on the Commission, the doctrines of *res judicata* and collateral estoppel are inapplicable since the specific cases upon which respondents rely do not involve the same issues and charges which are raised by the instant matter.

The consent settlements cited by respondents Standard Oil Company of California and Atlantic Richfield Company were, at most, determinations that the acquisitions in question, under the conditions set forth in the agreements with the Justice Department, did not significantly lessen competition within the meaning of Section 7 of the Clayton Act. This is entirely different from the questions raised in the instant matter as to whether these companies and six other respondents have pursued "a common course of action" which inhibited competition.

Similarly inapplicable to the instant matter is the provision contained in the agreement between the Justice Department and respondents Texaco, Inc., Exxon Corporation, and Gulf Oil Corporation,¹ settling the so-called *Cartel Cases*.² The provision purports to bar plaintiff, which respondents vigorously argue includes the entire United States Government, from reasserting "any claim or charge * * * made by plaintiff in the complaint or otherwise in this action." Assuming, *arguendo*, that the Justice Department has the authority to bargain away the statutory duty of the Commission to make a determination as to the public interest in challenging alleged illegal acts and practices, the two matters involve clearly different "claims and charges." The *Cartel Cases* charged the above companies and others with conspiracies to violate Sections 1 and 2 of the Sherman Act and Section 73 of the Wilson Tariff Act, whereas the instant matter, as noted above, charges a different group of companies with "pursuing a common course of action" in violation of Section 5 of the Federal Trade Commission Act.

¹ These respondents are joined in appealing the law judge's decision regarding the *Cartel Cases* by respondent Standard Oil Company (Indiana).

² *United States v. Standard Oil Co. (New Jersey)*, 60 Trade Cases ¶69,849 (S.D.N.Y. 1960), and *United States v. Gulf Oil Corp.*, 1960 Trade Cases ¶69,851 (S.D.N.Y. 1960), as superseded by *United States v. Standard Oil Co. (New Jersey)*, 1969 Trade Cases ¶¶72,742, 72,743 (S.D.N.Y. 1968); *United States v. The Texas Co.*, 1963 Trade Cases ¶70,819 (S.D.N.Y. 1963).

Finally, respondents plead the conclusive effect of two litigated matters. However, *United States v. Arkansas Fuel Company*, 1960 Trade Cases ¶69,619 (N.D. Okla. 1960), charging all respondents except Atlantic Richfield with criminal conspiracy, is clearly inapplicable to the instant civil action. Aside from the different nature of the charges themselves, the standard of proof must be at least as great in the subsequent action as in the former in order for *res judicata* or collateral estoppel to be applicable. *Helvering v. Mitchell*, 303 U.S. 391, 397 (1938). This requirement is not satisfied by the judge's remarks to the effect that the Government had failed to meet its burden by a wide margin, since such remarks are merely *dicta* and do not affect the standard of proof involved.

In the other litigated matter cited by respondents, *United States v. Standard Oil Company (Indiana)*, 1964 Trade Cases ¶71,215 (N.D. Cal. 1964), the court dismissed a challenge to defendant's acquisition of Honolulu Oil Corporation. Respondent/defendant now argues that all of the court's findings of fact are binding upon the Commission, including those to the effect that the petroleum industry is highly competitive at all levels (Findings No. 109-150). However, it is well established that only the "ultimate facts" which are essential to the judgment are conclusive in subsequent actions. *Yates v. United States*, 354 U.S. 298, 337-38 (1957). It is difficult to determine to what extent, if any, the court based its decision on the broad conclusions asserted by respondent, but one fact which is clearly essential, and which could alone be the basis for the decision, is the conclusion in the memorandum accompanying the findings that the acquisition was "*de minimis* by any standard."

For the foregoing reasons,

It is ordered, That the administrative law judge's order of Mar. 5, 1975 be placed on the Commission's docket for review.

It is further ordered, That the aforesaid order be, and it hereby is, affirmed.

Commissioner Nye concurs in the result. He believes all respondents' motions are premature and should therefore be denied.

IN THE MATTER OF

LITTON INDUSTRIES, INC.

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

Docket 8778. Substitute Order, Mar. 4, 1975-Modified Order, Sept. 3, 1975

Order modifying a substitute order dated March 4, 1975, 85 F.T.C. 332, 40 F.R. 18989, by striking the compliance paragraph requiring the filing of reports every sixty (60) days and substituting a new compliance paragraph requiring the filing of compliance reports on an annual basis after finality of the order.

Appearances

For the Commission: *Harold G. Munter, Lois E. Berge, Laurence O. Masson and Joseph J. O'Malley.*

For the respondents: *Theodore F. Craver, Beverly Hills, Calif., Howrey, Simon, Baker & Murchison, Wash., D.C. and Hammond, Schrieber, New York City.*

ORDER MODIFYING ORDER TO CEASE AND DESIST

Respondent, by letter dated July 25, 1975, which will be treated as a petition to reopen this proceeding, has requested that the requirement that it file compliance reports at 60-day intervals, contained in the order to cease and desist issued Mar. 4, 1975, be modified so as to require only annual reports. The Bureau of Competition has filed an answer wherein it advises that it does not oppose respondent's request.

The Commission has duly considered respondent's request and has determined that it should be granted.

It is ordered, That the proceeding be, and it hereby is, reopened.

It is further ordered, That the order to cease and desist be, and it hereby is, modified by striking the compliance paragraph and substituting therefor the following:

It is further ordered, That respondent shall, within 60 days after the date of service of this order, and on the anniversary of the date of finality of the order thereafter, until respondent shall have fully complied with the provisions of this order, submit, in writing, to the Federal Trade Commission a report setting forth in detail the manner and form in which respondent intends to comply, is complying, or has complied with this order.

Complaint

86 F.T.C.

IN THE MATTER OF

TV STEREO CITY FREIGHT LIQUIDATORS, INC., ET
AL.FINAL ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING
ACTS*Docket 9002. Complaint, Jan. 7, 1975—Decision, Sept. 3, 1975*

Order requiring a former renter and seller of stereos, television sets, and other electronic equipment formerly located in Pennsauken, N.J., among other things to cease using price misrepresentations and other unfair and deceptive means to sell its merchandise; and violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

Appearances

For the Commission: *Everette E. Thomas, Richard C. Donohue and Mitchell Paul.*

For the respondents: *Pro se.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Truth in Lending Act and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that TV Stereo City Freight Liquidators, Inc., a corporation, and Dennis R. LaVine, individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have engaged in acts and practices contrary to the Commission's Trade Regulation Rule Relating to Deceptive Advertising as to Sizes of Viewable Pictures Shown by Television Receiving Sets (16 CFR 410), as amended, in violation of the Federal Trade Commission Act, and have also engaged in acts and practices in violation of the provisions of the above-mentioned Acts, and the implementing regulation, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent TV Stereo City Freight Liquidators, Inc., is a corporation organized, existing and formerly doing business under and by virtue of the laws of the State of New Jersey with its principal office and place of business formerly located at 5245 Marlton Pike, Pennsauken, N.J.

Respondent Dennis R. LaVine is an individual and is the principal officer of the corporate respondent. He formulated, directed and controlled the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His business address is 31 Kendall Blvd., Oaklyn, N.J.

PAR. 2. Respondents were engaged in the advertising, offering for rental or sale, rental or sale and distribution of television sets, radios, stereos, radio/television/stereo combinations, electric appliances or other articles of merchandise to the public at retail.

COUNT I

Alleging violation of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One and Two, hereof, are incorporated by reference in Count I as if fully set forth verbatim.

PAR. 3. In the course and conduct of their business as aforesaid, respondents have caused their said merchandise, when rented or sold, to be shipped from their place of business in the State of New Jersey to purchasers thereof located in various other States of the United States, and maintained a substantial course of trade in said merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their aforesaid business, and for the purpose of inducing the rental or purchase of certain television sets, radios, stereos, radio/television/stereo combinations, electric appliances or other articles of merchandise, the respondents made numerous statements and representations by repeated advertisements inserted in newspapers of interstate circulation, and by oral statements and representations of their salesmen to prospective purchasers or renters with respect to their merchandise and services.

Typical and illustrative, but not all inclusive thereof, are the following:

Rent or Buy
 Scott 300 Watts
 Pay only \$5.68 weekly
 Rent/Buy
 Comparative retail value \$899.
 Our price Only \$699.
 AM/FM Stereo
 Olympic 150 Watts
 Modular System
 \$3.66 weekly
 Rent/Buy
 Comparative retail value \$899.

Complaint

86 F.T.C.

Our price \$799.

Emerson Briarwood 25" Color
Model 25cc90w

Pay only \$6.48 weekly
Rent/Buy

Comparative retail value \$899.

Our price \$799.

Sanyo Automatic 19" Color TV
Pay only \$3.88 weekly Rent/Buy
Comparative retail value \$529.

Our price \$469.

Emerson Dorchester 25" Color,
Pay Only \$5.68 weekly Rent/Buy.
Comparative retail value \$899.

Our price only \$699.

Emerson Automatic 19" Color TV,
Pay only \$3.88 weekly Rent/Buy,
Comparative retail value \$529.

Our price \$469 with Free Stand.

Dumont Sheridan 25" Color,
Pay only \$5.68 Weekly Rent/Buy,
Comparative retail value \$899.

Our price only \$699.

PAR. 5. By and through the use of the above-quoted statements and representations, and others of similar import and meaning but not expressly set out herein, separately and in connection with the oral statements and representations of respondents' salesmen to customers and prospective customers, the respondents have represented, directly or by implication, that:

1. By and through the use of the words "Comparative Retail Value \$899.00. Our price only \$699.00," and other words of similar import and meaning not set out specifically herein, that said comparative retail value was the price at which the same merchandise was being offered for sale by a substantial number of the principal outlets in respondents' trade area.

2. By and through the use of the terms "Rent or Buy," "Pay Only \$5.68," and other terms of similar import or meaning, that purchasers or renters of respondents' merchandise were being given a bona fide option of renting said merchandise on a week-to-week basis at the advertised rate.

PAR. 6. In truth and in fact:

1. The same merchandise was not offered for sale at the compara-

tive price by a substantial number of the principal outlets in respondents' trade area.

2. Respondents did not offer to purchasers or renters of respondents' merchandise a bona fide option of renting the merchandise on a week-to-week basis at the advertised rate. To the contrary, the rental of any of respondents' merchandise required a \$100 deposit and a minimum rental period of six months.

Therefore, the statements and representations as set forth in Paragraphs Four and Five hereof were false, misleading and deceptive.

PAR. 7. In the further course and conduct of their business, respondents made representations, separately and in connection with the oral statements and representations of respondents' salesmen to customers and prospective customers, concerning the size of viewable pictures shown by television receiving sets bought and distributed by them and thereby represented, directly or by implication, that the indicated size so described was the actual size of the viewable picture area measured on a single plane basis.

PAR. 8. In representing, directly or indirectly, the actual size of the viewable pictures shown by television receiving sets, respondents have represented television picture sizes that did not represent the horizontal dimension of the actual viewable picture area of the television receiving set.

PAR. 9. On Apr. 21, 1971, after due notice and hearing, the Commission promulgated its amendment of the trade regulation rule relating to the deceptive advertising of television picture sizes (31 F.R. 3342), which rule became effective on Jan. 1, 1967. This amendment of the Trade Regulation Rule relating to the Deceptive Advertising as to Sizes of Viewable Pictures Shown by Television Receiving Sets (16 CFR 410), as amended, became effective on Dec. 10, 1971. On the basis of its findings, as set out in the "Accompanying Statement of Basis and Purpose" of the said Trade Regulation Rule, the Commission determined that it constitutes an unfair method of competition and an unfair and deceptive act or practice to:

Use any figure or size designation to refer to the size of the picture shown by a television receiving set or the picture tube contained therein unless such indicated size is the actual size of the viewable picture area measured on a single plane basis. If the indicated size is other than the horizontal dimension of the actual viewable picture area such size designation shall be accompanied by a statement, in close connection and conjunction therewith, clearly and conspicuously showing the manner of measurement.

PAR. 10. Notice is hereby given that the presentation of evidence in the course of a hearing in this proceeding may be required to dispose of the issues that may arise as a result of the allegations contained in Paragraphs One through Four and Paragraphs Seven through Nine herein, and that if the issues presented as a result of the allegations

contained in those paragraphs should be resolved in substantiation of such allegations, then the above trade regulation rule is relevant to the alleged practices of the respondents. Therefore, the respondents are given further notice that they may present evidence, according to Section 1.12(e) of the Commission's Procedures and Rules of Practice, to show that the above trade regulation rule is not applicable to the alleged acts or practices of respondents. If the Commission should find that the above rule is applicable to the alleged acts or practices of the respondents, then it will proceed to make its findings, conclusions, and final order in this proceeding on the basis of that rule. A copy of the rule and Accompanying Statement of Basis and Purpose, marked Appendix A, is attached hereto and made a part of this pleading.

PAR. 11. The aforesaid methods of competition and acts and practices of respondents, as alleged in Paragraph Seven hereof, were contrary to the provisions and requirements of the Commission's Trade Regulation Rule relating to Deceptive Advertising As To Sizes of Viewable Pictures Shown By Television Receiving Sets (16 CFR 410), as amended, and thereby constituted unfair methods of competition in commerce and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

PAR. 12. In the course and conduct of their business respondents were in substantial competition, in commerce, with corporations, firms and individuals in the sale or rental of television sets, radios, stereos, radio/television/stereo combinations, electric appliances and other articles of merchandise of the same general kind and nature as those sold by respondents.

PAR. 13. The use by respondents of the aforesaid false, misleading, and deceptive statements, representations and practices has had the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were true and into the purchase or rental of substantial quantities of respondents' merchandise by reason of said erroneous and mistaken belief.

PAR. 14. The aforesaid acts and practices of respondents, as herein alleged, were all to the prejudice and injury of the public and of respondents' competitors and constituted unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

COUNT II

Alleging violation of the Truth in Lending Act and the implementing regulation promulgated thereunder, and of the Federal Trade Commis-

sion Act, the allegations of Paragraphs One and Two, hereof, are incorporated by reference in Count II as if fully set forth verbatim.

PAR. 15. Subsequent to July 1, 1969, respondents in the ordinary course of business as aforesaid, and in connection with their credit sales, as "credit sale" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System, have caused customers to execute binding retail installment contracts, hereinafter referred to as the contracts. Respondents have not provided these customers with any other consumer credit cost disclosures.

By and through the use of these retail installment contracts, respondents in some instances:

1. Failed to disclose the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, and to describe that sum as the "deferred payment price," as required by Section 226.8(c)(8)(ii) of Regulation Z.

PAR. 16. In the ordinary course and conduct of their business as aforesaid, respondents caused to be published advertisements to aid, promote and assist credit sales as "advertisement" and "credit sale" are defined in Regulation Z.

By and through the use of certain of said advertisements respondents:

1. Failed to make disclosures clearly, conspicuously, and in a meaningful sequence, and in the form and manner prescribed under Section 226.6(a) of Regulation Z, as required by Section 226.10(d) of Regulation Z.

2. Disclosed in a number of instances the amount of weekly payments computed to the amount of monthly payments without disclosing whether such payments will have to be made weekly or monthly if credit is extended. Failure to disclose such information has the ability and tendency to mislead or confuse customers in violation of Section 226.6(c) of Regulation Z.

3. Stated the amount of installment payment or period of payment scheduled to repay the indebtedness without also stating all the following items, in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10(d)(2) thereof:

- (i) the cash price;

- (ii) the amount of the downpayment or that no downpayment is required, as applicable;

- (iii) the number, amount and due dates or period of payments scheduled to repay the indebtedness if credit is extended;

(iv) the amount of the finance charge expressed as an annual percentage rate; and

(v) the deferred payment price.

PAR. 17. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failures to comply with the provisions of Regulation Z, constitute violations of that Act, and, pursuant to Section 108 thereof, respondents thereby violated the Federal Trade Commission Act.

INITIAL DECISION BY THOMAS F. HOWDER, ADMINISTRATIVE
LAW JUDGE

JULY 17, 1975

PRELIMINARY STATEMENT

The Commission issued a complaint on Jan. 7, 1975, charging respondents TV Stereo City Freight Liquidators, Inc., a corporation, and Dennis R. LaVine, individually and as an officer of said corporation, with unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act. The complaint also charged respondents with violating the Truth in Lending Act and the implementing regulation promulgated thereunder, in violation of the Federal Trade Commission Act.

Said complaint and accompanying notice order were personally served on respondent LaVine on Feb. 21, 1975. Under Section 4.4(a)(1)(ii) of the Commission's Rules of Practice, service upon respondent LaVine constitutes valid service upon the respondent corporation. No answer or other response has been received, although answer was required within 30 days following service.

Section 3.12(c) of the Commission's Rules of Practice provides that failure to file answer within the time provided shall be deemed to constitute waiver of the right of appearance and to contest the allegations of the complaint. Further, this section authorizes the administrative law judge, without further notice to respondents, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions, and order.

Pursuant to the above rule, complaint counsel on Apr. 8, 1975, moved that respondents be held in default for failure to answer the complaint. Complaint counsel's motion is hereby granted, and the following findings, conclusions and order are issued:

FINDINGS OF FACT

PARAGRAPH 1. Respondent TV Stereo City Freight Liquidators, Inc., is a corporation organized, existing and formerly doing business under and by virtue of the laws of the State of New Jersey with its principal office and place of business formerly located at 5245 Marlton Pike, Pennsauken, N.J.

Respondent Dennis R. LaVine is an individual and is the principal officer of the corporate respondent. He formulated, directed and controlled the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His business address is 31 Kendall Blvd., Oaklyn, N.J.

PAR. 2. Respondents were engaged in the advertising, offering for rental or sale, rental or sale and distribution of television sets, radios, stereos, radio/television/stereo combinations, electric appliances or other articles of merchandise to the public at retail.

I

The findings set forth in Paragraphs One and Two are incorporated by reference into the following findings set forth in Paragraphs Three through Fourteen, inclusive.

PAR. 3. In the course and conduct of their business as aforesaid, respondents have caused their said merchandise, when rented or sold, to be shipped from their place of business in the State of New Jersey to purchasers thereof located in various other States of the United States, and maintained a substantial course of trade in said merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their aforesaid business, and for the purpose of inducing the rental or purchase of certain television sets, radios, stereos, radio/television/stereo combinations, electric appliances or other articles of merchandise, the respondents made numerous statements and representations by repeated advertisements inserted in newspapers of interstate circulation, and by oral statements and representations of their salesmen to prospective purchasers or renters with respect to their merchandise and services.

Typical and illustrative, but not all inclusive thereof, are the following:

Rent or Buy
Scott 300 Watts
Pay only \$5.68 weekly
Rent/Buy
Comparative retail value \$899.

Our price Only \$699.

AM/FM Stereo

Olympic 150 Watts

Modular System

\$3.66 weekly

Rent/Buy

Comparative retail value \$899.

Our price \$799.

Emerson Briarwood 25" Color

Model 25cc90w

Pay only \$6.48 weekly

Rent/Buy

Comparative retail value \$899.

Our price \$799.

Sanyo Automatic 19" Color TV

Pay only \$3.88 weekly Rent/Buy

Comparative retail value \$529.

Our price \$469.

Emerson Dorchester 25" Color,

Pay Only \$5.68 weekly Rent/Buy.

Comparative retail value \$899.

Our price only \$699.

Emerson Automatic 19" Color TV,

Pay only \$3.88 weekly Rent/Buy,

Comparative retail value \$529.

Our price \$469 with Free Stand.

Dumont Sheridan 25" Color,

Pay only \$5.68 Weekly Rent/Buy,

Comparative retail value \$899.

Our price only \$699.

PAR. 5. By and through the use of the above-quoted statements and representations, and others of similar import and meaning but not expressly set out herein, separately and in connection with the oral statements and representations of respondents' salesmen to customers and prospective customers, the respondents have represented, directly or by implication, that:

1. By and through the use of the words "Comparative Retail Value \$899. Our price only \$699," and other words of similar import and meaning not set out specifically herein, that said comparative retail value was the price at which the same merchandise was being offered for sale by a substantial number of the principal outlets in respondents' trade area.

2. By and through the use of the terms "Rent or Buy," "Pay Only

\$5.68," and other terms of similar import or meaning, that purchasers or renters of respondents' merchandise were being given a bona fide option of renting said merchandise on a week-to-week basis at the advertised rate.

PAR. 6. In truth and in fact:

1. The same merchandise was not offered for sale at the comparative price by a substantial number of the principal outlets in respondents' trade area.

2. Respondents did not offer to purchasers or renters of respondents' merchandise a bona fide option of renting the merchandise on a week-to-week basis at the advertised rate. To the contrary, the rental of any of respondents' merchandise required a \$100 deposit and a minimum rental period of six months.

Therefore, the statements and representations as set forth in Paragraphs Four and Five hereof were false, misleading and deceptive.

PAR. 7. In the further course and conduct of their business, respondents made representations, separately and in connection with the oral statements and representations of respondents' salesmen to customers and prospective customers, concerning the size of viewable pictures shown by television receiving sets bought and distributed by them and thereby represented, directly or by implication, that the indicated size so described was the actual size of the viewable picture area measured on a single plane basis.

PAR. 8. In representing, directly or indirectly, the actual size of the viewable pictures shown by television receiving sets, respondents have represented television picture sizes that did not represent the horizontal dimension of the actual viewable picture area of the television receiving set.

PAR. 9. On Apr. 21, 1971, after due notice and hearing, the Commission promulgated its amendment of the trade regulation rule relating to the deceptive advertising of television picture sizes (31 F.R. 3342), which rule became effective on Jan. 1, 1967. This amendment of the trade regulation rule relating to the Deceptive Advertising as to Sizes of Viewable Pictures Shown by Television Receiving Sets (16 CFR 410), as amended, became effective on Dec. 10, 1971. On the basis of its findings, as set out in the "Accompanying Statement of Basis and Purpose" of the said trade regulation rule, the Commission determined that it constitutes an unfair method of competition and an unfair and deceptive act or practice to:

Use any figure or size designation to refer to the size of the picture shown by a television receiving set or the picture tube contained therein unless such indicated size is the actual size of the viewable picture area measured on a single plane basis. If the indicated size is other than the horizontal dimension of the actual viewable picture area

such size designation shall be accompanied by a statement, in close connection and conjunction therewith, clearly and conspicuously showing the manner of measurement.

PAR. 10. Respondents were placed on notice by the complaint that they could present evidence in the course of a hearing in this proceeding as might be required to dispose of the issues that could arise as a result of the allegations contained in Paragraphs One through Four and Paragraphs Seven through Nine herein, and that if the issues presented as a result of the allegations contained in those Paragraphs should be resolved in substantiation of such allegations, then the above trade regulation rule would be relevant to the alleged practices of the respondents. The respondents were given further notice that they could present evidence, according to Section 1.12(c) of the Commission's Procedures and Rules of Practice, to show that the above trade regulation rule was not applicable to the alleged acts or practices of respondents, and that if the Commission should find that the above rule was applicable to the alleged acts or practices of the respondents, then it would proceed to make its findings, conclusions, and final order in this proceeding on the basis of that rule. A copy of the rule and Accompanying Statement of Basis and Purpose, marked Appendix A, was attached to the complaint and made a part of that pleading.

PAR. 11. The aforesaid methods of competition and acts and practices of respondents, as alleged in Paragraph Seven hereof, were contrary to the provisions and requirements of the Commission's trade regulation rule relating to Deceptive Advertising As To Sizes of Viewable Pictures Shown By Television Receiving Sets (16 CFR 410), as amended, and thereby constituted unfair methods of competition in commerce and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

PAR. 12. In the course and conduct of their business respondents were in substantial competition, in commerce, with corporations, firms and individuals in the sale or rental of television sets, radios, stereos, radio/television/stereo combinations, electric appliances and other articles of merchandise of the same general kind and nature as those sold by respondents.

PAR. 13. The use by respondents of the aforesaid false, misleading, and deceptive statements, representations and practices has had the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were true and into the purchase or rental of substantial quantities of respondents' merchandise by reason of said erroneous and mistaken belief.

PAR. 14. The aforesaid acts and practices of respondents, as herein alleged, were all to the prejudice and injury of the public and of

respondents' competitors and constituted unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

II

The findings set forth in Paragraphs One and Two are incorporated by reference into the following findings set forth in Paragraphs Fifteen through Seventeen, inclusive.

PAR. 15. Subsequent to July 1, 1969, respondents in the ordinary course of business as aforesaid, and in connection with their credit sales, as "credit sale" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System, have caused customers to execute binding retail installment contracts, hereinafter referred to as the contracts. Respondents have not provided these customers with any other consumer credit cost disclosures.

By and through the use of these retail installment contracts, respondents in some instances:

1. Failed to disclose the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, and to describe that sum as the "deferred payment price," as required by Section 226.8(c)(8)(ii) of Regulation Z.

PAR. 16. In the ordinary course and conduct of their business as aforesaid, respondents caused to be published advertisements to aid, promote and assist credit sales as "advertisement" and "credit sale" are defined in Regulation Z.

By and through the use of certain of said advertisements respondents:

1. Failed to make disclosures clearly, conspicuously, and in a meaningful sequence, and in the form and manner prescribed under Section 226.6(a) of Regulation Z, as required by Section 226.10(d) of Regulation Z.

2. Disclosed in a number of instances the amount of weekly payments computed to the amount of monthly payments without disclosing whether such payments will have to be made weekly or monthly if credit is extended. Failure to disclose such information has the ability and tendency to mislead or confuse customers in violation of Section 226.6(c) of Regulation Z.

3. Stated the amount of installment payment or period of payment scheduled to repay the indebtedness without also stating all the

following items, in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10(d)(2) thereof:

- (i) the cash price;
- (ii) the amount of the downpayment or that no downpayment is required, as applicable;
- (iii) the number, amount and due dates or period of payments scheduled to repay the indebtedness if credit is extended;
- (iv) the amount of the finance charge expressed as an annual percentage rate; and
- (v) the deferred payment price.

PAR. 17. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failures to comply with the provisions of Regulation Z, constitute violations of that Act, and, pursuant to Section 108 thereof, respondents thereby violated the Federal Trade Commission Act.

ORDER

It is ordered, That respondents TV Stereo City Freight Liquidators, Inc., a corporation, its successors and assigns, and its officers, and Dennis R. LaVine, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale or rental, sale or rental or distribution of television sets, radios, stereos, radio/television/stereo combinations, electric appliances or any other articles of merchandise or services, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. (a) Representing, directly or indirectly, orally or in writing, that by purchasing any of respondents' merchandise or services, customers are afforded savings amounting to the difference between respondents' stated price and a compared price for said merchandise or services in respondents' trade area unless a substantial number of the principal retail outlets in the trade area regularly sell said merchandise or services at the compared price or some higher price.

(b) Representing, directly or indirectly, orally or in writing, that by purchasing any of respondents' merchandise or services, customers are afforded savings amounting to the difference between respondents' stated price and a compared value price for comparable merchandise, unless substantial sales of merchandise of like grade and quality are being made in the trade area at the compared price or a higher price and unless respondents have in good faith conducted a market survey or obtained a similar representative sample of prices in their trade area

which established the validity of said compared price and it is clearly and conspicuously disclosed that the comparison is with merchandise or services of like grade and quality.

(c) Representing, directly or indirectly, orally or in writing:

(1) that any amount is respondents' usual and customary retail price for merchandise unless such amount is the price at which the merchandise has been usually and customarily sold at retail by respondents in the recent regular course of business.

(2) that any saving is afforded in the purchase of merchandise from the respondents' retail price unless the price at which the merchandise is offered constitutes a reduction from the price at which said merchandise is usually and customarily sold at retail by the respondents in the recent regular course of business.

2. Failing to maintain and produce for inspection or copying for a period of three (3) years, adequate records (a) which disclose the facts upon which any savings claims, sale claims and other similar representations as set forth in Paragraph 1., of this order are based, and (b) from which the validity of any savings claims, sale claims and similar representations can be determined.

3. Representing, directly or indirectly, orally or in writing, that an individual can rent any of respondents' merchandise for any specified amount and any period of time without clearly and conspicuously disclosing in immediate conjunction with such offer, the terms, conditions or limitations of respondents' rental plans; or misrepresenting, in any manner, the advantages, amounts, sales, time period, terms, conditions or limitations of respondents' rental plans.

4. Using any figure or measurement to designate or describe, directly or by implication, the size of the picture tube with which their television receiving sets are equipped which is greater than the horizontal measurement of the viewable area of the tube on a single plane basis, unless it is conspicuously disclosed in immediate connection therewith that said figure or measurement is the diagonal measurement, when such is the fact; or an accurate specification of the viewable area of the tube, in square inches, is conspicuously disclosed in immediate connection with such figure or measurement.

It is further ordered, That respondents TV Stereo City Freight Liquidators, Inc., a corporation, its successors and assigns, and its officers, and Dennis R. LaVine, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with any extension of consumer credit or advertisement to aid, promote, or assist directly or indirectly any extension of consumer credit, as "consumer credit" and

“advertisement” are defined in Regulation Z (12 CFR §226) of the Truth in Lending Act (Pub.L. 90-321, 15 U.S.C. §1601, *et seq.*), do forthwith cease and desist from:

1. Failing to disclose the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, and to describe that sum as “deferred payment price” as required by Section 226.8(c)(8)(ii) of Regulation Z.

2. Failing in such advertising to make disclosures clearly, conspicuously, and in a meaningful sequence, and in the form and manner prescribed under Section 226.6(a) of Regulation Z, as required by Section 226.10(d) of Regulation Z.

3. Representing the amount of weekly payments computed to monthly payments, unless the customer is told whether he will have to make payments weekly or monthly; or stating, utilizing, or placing any additional information or explanations with any disclosure required by Regulation Z so as to mislead or confuse the customer or contradict, obscure, or detract attention from the required information, as required by Section 226.6(c) of Regulation Z.

4. Representing in any such advertisement, directly or by implication, that no downpayment is required, the amount of the downpayment or the amount of any installment payment, either in dollars or as a percentage, the dollar amount of any finance charge, the number of installments or the period of repayment, or that there is no charge for credit, unless all of the following items are clearly and conspicuously stated, in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10(d)(2) of Regulation Z:

- (i) the cash price;
- (ii) the amount of the downpayment required or that no downpayment is required, as applicable;
- (iii) the number, amount, and due dates or period of payments scheduled to repay the indebtedness if the credit is extended;
- (iv) the amount of the finance charge expressed as an annual percentage rate; and
- (v) the deferred payment price.

5. Failing in any consumer credit transaction or advertisement, to make all disclosures, determined in accordance with Section 226.4 and 226.5 of Regulation Z, in the manner, form and amount required by Sections 226.6, 226.7, 226.8, 226.9 and 226.10 of Regulation Z.

It is further ordered, That respondents shall maintain for at least a one (1) year period, following the effective date of this order, copies of all advertisements, including newspaper, radio and television advertisements, direct mail and in-store solicitation literature, and any other such promotional material utilized for the purpose of obtaining leads

for the sale or rental of television sets, radios, stereos, radio/television/stereo combinations, electric appliances or any other articles of merchandise or services, utilized in the advertising, promotion or sale or rental of television sets, radios, stereos, radio/television/stereo combinations, electric appliances or any other merchandise or services.

It is further ordered, That respondents, for a period of one (1) year from the effective date of this order, shall provide each advertising agency utilized by respondents and each newspaper publishing company, television or radio station or other advertising media which is utilized by the respondents to obtain leads for the sale or rental of television sets, radios, stereos, radio/television/stereo combinations, electric appliances or any other merchandise or services, with a copy of the Commission's news release setting forth the terms of this order.

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 respondents deliver a copy of this order to cease and desist to all present and future personnel of respondents engaged in the offering for sale, sale of any product, consummation of any extension of consumer credit or in any aspect of preparation, creation, or placing of advertising, and that respondents secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

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

FINAL ORDER

The administrative law judge filed his initial decision in this matter on July 17, 1975, finding respondents to have engaged in the acts and practices as alleged in the complaint and entering a cease-and-desist order against respondents. A copy of the initial decision and order was served on the respondents on Aug. 7, 1975. No appeal was taken from the initial decision.

The Commission having now determined that the matter should not be placed on its own docket for review, and that the initial decision should become effective as provided in Section 3.51(a) of the Commission's Rules of Practice,

It is ordered, That the initial decision and order contained therein shall become effective on Sept. 8, 1975; and

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

IN THE MATTER OF

ASH GROVE CEMENT CO.

Docket 8785. Order, Sept. 9, 1975

Denial of respondents' petition for reconsideration of Commission's final order and opinion dated June 24, 1975.

Appearances

For the Commission: *Thomas F. McNerney, Paul N. Kane and Nancy P. Rosenfeld.*

For the respondent: *David J. McKean and Robert L. Williams, McKean, Whitehead & Wilson, Wash., D.C.*

ORDER DENYING PETITION FOR RECONSIDERATION

Respondent Ash Grove Cement Company ("Ash Grove") has moved, pursuant to Section 3.55 of the rules of practice, for reconsideration of the Commission's final order and opinion, dated June 24, 1975. [85 F.T.C. 1121]

Section 3.55 provides that a petition for reconsideration "* * * must be confined to new questions raised by the decision or final order and upon which the petitioner had no opportunity to argue before the Commission."

Respondent claims that the Commission's order raises such a question:

namely, conceding *arguendo* that Ash Grove's acquisition of Lee's Summit [Ready-Mixed Concrete & Materials Company] and Fordyce [Concrete, Inc.] violated the Clayton Act, whether an order of divestiture is appropriate and in the public interest in view of substantial evidence in the record which shows that the challenged acquisitions resulted in consumer benefits in the form of lower prices and a vigorous enhancement of price competition in the sale of portland cement and ready-mixed concrete in the "Kansas City" area.

Respondent, however, had an opportunity, which it exercised, to argue before the Commission its claim that the acquisitions benefited consumers and enhanced price competition. See respondent's brief on appeal at 30-38. The Commission ordered divestiture of Fordyce and Lee's Summit only after a full review of the record, including the extensive briefing and oral argument on appeal, and a consideration of all of respondent's contentions raised therein.

It is ordered, That respondent's petition for reconsideration be, and it hereby is, denied.

IN THE MATTER OF
HERTZ CORPORATION, ET AL.

Docket 9033. Order, Sept. 9, 1975

Denial of application of Investor Protective League, Inc., for review of administrative law judge's order denying its motion to intervene.

Appearances

For the Commission: *Thomas F. McNerney, William J. Murphy III* and *Charles G. Brown II*.

For the respondents: *Jerome Schestack, Schnader, Harrison, Segal & Lewis* and *Irving Kagan*, Philadelphia, Pa., for Hertz Corporation. *Alan S. Ward, Baker, Hostetler, Frost & Towers*, Wash., D.C. for Avis Rent-A-Car System, Inc. *Michael P. Sullivan, Gray, Plant, Mooty & Anderson*, Minneapolis, Minn., *J. Wallace Adair, Howery, Simon, Baker & Murchison*, Wash., D.C. and *Robert W. Bird*, Minneapolis, Minn., all for National Car Rental System, Inc.

ORDER DENYING APPLICATION FOR REVIEW

The administrative law judge, on July 23, 1975, denied a motion to intervene filed by Investor Protective League, Inc., ("Investor") pursuant to Section 3.14 of the rules of practice. On Aug. 6, 1975, Investor filed an application for review of the law judge's order under Section 3.23(a).

Before the Commission will permit intervention "it must be demonstrated that (1) the persons seeking such intervention desire to raise *substantial* issues of law or fact which would not otherwise be properly raised or argued, and (2) the issues thus raised are of sufficient importance and immediacy to warrant an additional expenditure of the Commission's limited resources on a necessarily longer and more complicated proceeding in that case, when considered in light of

other important matters pending before the Commission" *Firestone Tire [Rubber Co., 77 F.T.C. 1666, 1669 (1970).*

Investor is apparently a membership corporation consisting of consumer renters of automobiles from respondents. In support of its motion before the administrative law judge, Investor claimed that it had filed a class action against respondents in the United States District Court for the Eastern District of New York (Docket No. 75 Civil 940) and that the Commission's determination will have a significant impact on Investor's lawsuit. Investor also noted that if it were made a party to the proceedings before the Commission it would have available evidence before the Commission for use in its private lawsuit. Finally, Investor suggested that it has an interest in "the type of relief granted."

Investor, however, has failed to show that it will raise before the Commission any issues, substantial or otherwise, that would not otherwise be properly raised or argued. The Commission, therefore, cannot see any reason why it should exercise its discretion to review the law judge's order. Accordingly,

It is ordered, That the application of Investor Protective League, Inc., for review of the order of the administrative law judge denying its motion to intervene be, and it hereby is, denied.

IN THE MATTER OF

LIFETIME FILTER EQUIPMENT CORP., ET AL.

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

Docket 8942. Complaint, Nov. 16, 1973-Decision, Sept. 10, 1975

Consent order requiring a Freeport, N.Y., seller and distributor of filters and other swimming pool products, among other things to cease using a misleading corporate name; misrepresenting the durability or permanence of its products; furnishing means and instrumentalities of misrepresentation or deception; and misrepresenting guarantees.

Appearances

For the Commission: *John A. Crowley* and *Alan F. Rubinstein.*

For the respondents: *George Maislen, Freeport, N.Y.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act,

and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that Lifetime Filter Equipment Corp., a corporation, and Peter A. Cattano, Sr., individually, and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Lifetime Filter Equipment Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 6 Brooklyn Ave., Freeport, N.Y.

Respondent Peter A. Cattano, Sr. is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been engaged in the advertising, offering for sale, sale and distribution to dealers and the public of products used in connection with swimming pools, including, but not limited to filters, diving boards, handrails, steps, pumps, chemicals, piping, heaters and instruments.

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

PAR. 4. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their products by dealers and consumers, respondents have made, and are now making, numerous statements and representations in advertising and promotional material with respect to the nature and limitations of their warranty, the durability of their products, and their business affiliations.

Typical and illustrative of said statements and representations, but not all inclusive thereof, are the following:

LIFETIME is revolutionizing
the swimming pool market
THE DYNAMIC NEW
LIFETIME FILTER
HPF 1000

Unconditional
GUARANTEE
Lifetime Filter

PAR. 5. By and through the use of the aforesaid statements and representations and others of similar import and meaning, but not specifically set out herein, respondents have represented, and are now representing, directly or by implication, that:

1. Since the swimming pool filters manufactured and sold by respondents are the products of a corporation denominated Lifetime Filter Equipment Corp., said filters are designed to be operative for the lifetime of the original owner.

2. The swimming pool filters sold by respondents are unconditionally guaranteed.

PAR. 6. In truth and in fact:

1. The swimming pool filters sold by respondents are not lifetime filters since they are not designed to last for the lifetime of the purchaser and the guarantee offered by respondents is limited to a maximum duration of five years.

2. The swimming pool filters sold by respondents are not unconditionally guaranteed. The filters are guaranteed for a period of five years. The first year of the guarantee provides for replacement of parts at no charge to the user. The remaining four years of the guarantee provide for parts replacement on a sliding scale of charges. Therefore, the guarantee provided by respondents is subject to conditions and limitations.

Therefore, the statements and representations, as set forth in Paragraphs Four and Five hereof, were, and are, false, misleading and deceptive.

PAR. 7. In the course and conduct of their business, and at all times mentioned herein, respondents have been, and are now, in substantial competition, in commerce, with corporations, firms and individuals in the sale of products used in connection with swimming pools, including, but not limited to, filters and other swimming pool accessories.

PAR. 8. The use by the respondents of the aforesaid false, misleading and deceptive statements and representations, has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair

methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act and the respondents having been served with a copy of that complaint; and

The Commission having withdrawn the matter from adjudication for the purpose of considering settlement by the entry of a consent order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby makes the following jurisdictional findings, and enters the following order:

1. Respondent Lifetime Filter Equipment Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 140 E. Merrick Rd., in the Village of Freeport, State of New York.

Respondent Peter A. Cattano, Sr. is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Lifetime Filter Equipment Corp., a corporation, its successors and assigns, and its officers, and Peter A. Cattano, Sr., individually and as an officer of said corporation, and respondents' agents, representatives and employees directly or

through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale and distribution of swimming pool products such as filters, diving boards, handrails, steps, pumps, chemicals, piping, heaters and instruments, or any other products, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the word "Lifetime" or any word or term denoting a definite period of time, in the corporate or trade name, to designate or describe any of the corporate respondent's products which is in excess of that for which said product is usually and customarily effective.

2. Representing, directly or by an implication, that any product sold by respondents will last or endure for a "lifetime" or for any other period beyond what can reasonably be expected for said product.

3. Using, in any manner, in conjunction with the model designations or specifications of any product sold by the respondents the word lifetime or any such word or phrase which exaggerates the life expectancy of the product.

4. Furnishing to dealers or any other persons, any written, printed, or photographic material in which the word lifetime is used in any manner in describing any product sold by the respondents.

5. Representing, directly or by implication, that any of respondents' products are warranted or guaranteed, unless:

- (1) the nature and extent of the warranty or guarantee, the identity of the warrantor or guarantor and the manner in which the warrantor or guarantor will perform thereunder are clearly and conspicuously disclosed in immediate conjunction therewith, and,

- (2) the guarantor does in fact perform all of the actual and represented obligations and requirements, directly or impliedly represented, under the terms of each such warranty or guarantee.

It is further ordered, That the prohibitions contained in provision 1. of this order shall become effective as of Oct. 1, 1975.

It is further ordered, That respondents shall forthwith deliver a copy of this order to cease and desist to all present and future personnel and distributors of respondents engaged in the advertising, offering for sale or sale of respondents' products, installations or services, and that respondents secure a signed statement acknowledging the receipt of said order from each such person.

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

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

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
WINN-DIXIE STORES, INC.

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

Docket C-1110. Modified Order, June 24, 1968-Modified Order, Sept. 10, 1975

Order modifying an earlier order dated Sept. 14, 1966, 70 F.T.C. 611, 31 F.R. 13080, modified June 24, 1968, 73 F.T.C. 1056, 33 F.R. 10205, pursuant to order of the United States District Court for the Middle District of Florida, 377 F.Supp. 733, 9 S.&D. 1016, by requiring prior Commission approval of food store acquisitions by respondent only in those States or subdivisions where respondent presently operates such stores or departments.

Appearances

For the Commission: *Mary L. Azcuenaga* and *William M. Sexton*.
For the respondent: *J. Shepard Bryan, Jr.*, Jacksonville, Fla., *Collier, Shannon, Rill & Edwards*, Wash., D.C.

ORDER REOPENING PROCEEDING AND MODIFYING ORDER TO
CEASE AND DESIST

The Federal Trade Commission, having issued a consent order herein on Sept. 14, 1966, and having modified said consent order on June 24, 1968, and the United States District Court for the Middle District of Florida having enjoined the Commission from failing to reopen the consent order proceeding for the purpose of modifying the order in accordance with the order entered by the Commission against the Kroger Company in F.T.C. Docket No. C-2067; now therefore,

It is ordered, That this matter be, and it hereby is, reopened.

It is further ordered That the order issued in this matter on Sept. 14,