any sale of respondents' products to any such buyer for his own account.

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

It is further ordered, That, with the exception of findings numbered 105 through 110 which have not been reviewed, the initial decision, as modified, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That respondents Tillie Lewis Foods, Inc. (formerly Flotill Products, Inc.), Mrs. Meyer L. Lewis, Albert S. Heiser and Arthur H. Heiser shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist set forth herein.

Commissioner Elman's views are set forth in a separate opinion. Commissioner MacIntyre dissented in part. Commissioner Reilly did not participate for the reason he did not hear oral argument.

IN THE MATTER OF

ALFONSO GIOIA & SONS, INC.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SECS. 2(a), 2(d), AND 2(e) OF THE CLAYTON ACT

Docket 7790, Complaint Feb. 25, 1960—Decision, June 30, 1964

Consent order requiring a macaroni manufacturer in Rochester, N.Y., to cease discriminating in price by such practices as giving to some customers substantial discounts on certain of its products and free goods, but not to other customers competing with them, in violation of Sec. 2(a) of the Clayton Act; making payments for advertising or other services furnished in connection with the sale of its products to some customers but not to their competitors, thus violating Sec. 2(d); and furnishing demonstrators to certain customers while not furnishing proportionally equal services to all other competing purchasers, in violation of Sec. 2(e).

813-121—70——74

ORDER REOPENING PROCEEDING

FEBRUARY 8, 1962

The Commission having issued on October 21, 1960 [57 F.T.C. 964], its decision adopting as its own the initial decision of the hearing examiner in this matter accepting an agreement containing a consent order to cease and desist theretofore executed by respondent and counsel in support of the complaint; and

The Commission, upon petition of respondent, having determined that the public interest requires that its aforesaid decision of October 21, 1960, be vacated and set aside, thereby reinstating the initial decision of the hearing examiner; and

The Commission being of the opinion that by reason of the filing of its aforesaid petition, respondent has waived notice and opportunity for hearing thereon:

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

It is further ordered, That the Commission's decision of October 21, 1960, adopting as its own the initial decision of the hearing examiner be, and it hereby is, vacated and set aside.

It is further ordered, That the date on which the initial decision of the hearing examiner, as reinstated by the order herein, would otherwise become the decision of the Commission be, and it hereby is, extended until further order of the Commission.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

The Commission, for reason of the public interest cited in its order of February 8, 1962, having by said order reopened this proceeding; having thereby vacated and set aside its decision of October 21, 1960 [57 F.T.C. 964], which had adopted as its own the initial decision of the hearing examiner in this matter, and having thereby reinstated said initial decision; and also having thereby further ordered that the date on which the initial decision of the hearing examiner, as so reinstated, would otherwise become the decision of the Commission be extended until further order of the Commission; and

That matter now coming on to be heard by the Commission, *sua sponte*, and it appearing to the Commission that it would be in the public interest now to adopt as the Commission's own decision the initial decision of the hearing examiner, which initial decision accepted an agreement containing a consent order to cease and desist theretofore executed by respondent and counsel in support of the complaint; now, therefore,

It is ordered, That the initial decision of the hearing examiner be, and it hereby is, adopted as the decision of the Commission.

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

IN THE MATTER OF

EKCO PRODUCTS COMPANY

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

Docket 8122. Complaint, Sept. 26, 1960—Decision, June 30, 1964

Order requiring the nation's largest producer of baking pans for commercial and industrial use, also a large producer of commercial meat-handling equipment, tinware and cutlery, with plants in many states and Canada and which, in the ten years 1950 to 1959, inclusive, had more than doubled the size of its operations largely as a result of acquiring the assets and stock of some two dozen operating concerns, to divest itself of assets acquired as a result of its acquisition in 1954 of the McClintock Manufacturing Co.—a relatively small concern which had a monopoly in the production of commercial meat-handling equipment—including (1) trade names and secrets, patents, customer lists, inventories, supply and requirements contracts, tools, patterns, etc., used in the manufacture or sale of commercial meat-handling equipment; (2) all other assets peculiar to such manufacture and sale but excepting assets not peculiar thereto; and (3) all other assets necessary to reconstitute McClintock as a going concern and effective competitor; and for one year to furnish such technical and marketing assistance as might be requested by McClintock; and for 20 years to refrain from acquiring stock or assets of any corporation manufacturing or selling commercial meat-handling equipment without prior approval of the Commission.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter more particularly designated and described, has violated and is now violating the provisions of Section 7 of the Clayton Act (U.S.C., Title 15, Sec. 18) as amended and approved December 29, 1950, hereby issues its complaint, pursuant to Section 11 of the aforesaid Act (U.S.C. Title 15, Sec. 21) charging as follows:

PARAGRAPH 1. Respondent, Ekco Products Company (hereinafter referred to as "respondent") is a corporation organized and existing under the laws of the State of Delaware, with its office and principal

place of business located at 1949 North Cicero Avenue, Chicago, Illinois.

Respondent was originally established in 1888 and was subsequently incorporated in Illinois on October 6, 1903, as Edward Katzinger Company. The name Ekco Products Company was adopted in June 1944. The state of incorporation of respondent was changed from Illinois to Delaware and the assets and business of Ekco Products Company, an Illinois corporation, were merged into a new Delaware corporation of the same name effective as of April 29, 1960.

PAR. 2. The McClintock Manufacturing Company (hereinafter referred to as "McClintock") was, prior to June 30, 1954, a corporation organized and existing under the laws of the State of California, with its office and principal place of business located at 2700 Eastern Avenue, Los Angeles, California.

PAR. 3. The Blackman Stamping & Manufacturing Company (hereinafter referred to as "Blackman") is a corporation organized and existing under the laws of the State of California, with its office and principal place of business located at 2730 East 37th Street, Los Angeles, California.

PAR 4. Respondent, directly and through various wholly owned subsidiary corporations, is engaged in the manufacture and sale of commercial food and meat-handling equipment and containers, kitchen tools and tinware, cutlery, commercial baking pans, ice cream scoops and paddles, woodenware, pressure cookers, stainless steel cooking utensils and flatware, aluminum-ware, enamelware, clothes dryers, bathroom hardware and accessories, sliding door hardware, and steel lockers and cabinets.

Respondent is the largest producer in the United States of baking pans for commercial and industrial use. Respondent is also one of the largest, if not the largest, producers in the United States of kitchen tools, tinware and cutlery, and is a leading and substantial producer in many of its other product fields.

Since its acquisition of McClintock in June 1954, respondent has been the largest and most dominant manufacturer and seller in the United States of commercial meat-handling equipment. (The term "commercial meat-handling equipment," as hereinafter used in this complaint, refers to aluminum platters, pans, and lugs (deep pans) and metal racks and carts for said platters, pans and lugs, which equipment is used by food supermarkets, chain grocery stores, butchers, meat markets, smaller grocery stores and others in handling, storing and transporting meat.) Also, since the McClintock acquisition, respondent has been a major producer, seller and lessor of rubber greens used

for decorative purposes in meat markets and meat departments of other food establishments.

Respondent markets its products under the following trade names: Ekco, A. & J., Miracle, Flint, Ovenex, Sta-Brite, Tru-Spot, Katzinger, Ekcoware, Ekco Line, Minute Mop, Diamond, Shore Craft, Geneva Forge, Pakkawood, Mary Ann, Bocaroy, Autoyre, McClintock, Best, Kennatrack, Scottie and Worley.

The manufacturing operations of respondent are conducted through its main plant in Chicago, Illinois, and through three operating divisions: Ekco Massillon Division, with a plant at Massillon, Ohio; Sta-Brite Division, with a plant at Byesville, Ohio; and McClintock Manufacturing Co. Division, with a plant at Whittier, California. In addition, many of the products sold by respondent are manufactured by respondent or its subsidiaries at plants at the following locations:

Geneva, New York	Elkhart, Indiana
Lock Mills, Maine	Pico, California
Canton, Ohio	Holyoke, Massachusetts

Respondent engages in considerable manufacturing and marketing abroad of many household and commercial products similar to those produced and sold in the United States. Said foreign business is conducted through wholly owned or controlled subsidiaries located in Canada, England, Germany, Netherlands and Mexico.

In addition to the foregoing operations, respondent through wholly owned subsidiaries engages in glazing, coating, washing and conditioning of bakery pans for commercial bakeries through plants located at Chicago, Illinois; San Francisco and Los Angeles, California; Kansas City, Missouri; Seattle, Washington; Minneapolis, Minnesota; Dallas, Texas; New Orleans, Louisiana; Columbus, Ohio; Pittsburgh, Pennsylvania; Fairlawn, New Jersey; Baltimore, Maryland; Charlotte, North Carolina; Miami, Florida; Chattanooga, Tennessee; and in Canada at Toronto, Ontario and Vancouver, British Columbia.

PAR. 5. Respondent, directly and through various wholly owned or controlled subsidiaries, sells its products and services to some 10,000 customers throughout the United States. Its principal sales divisions are: The Housewares Division, which handles its household lines of kitchen tools and utensils, cutlery and related items; the Bakery Division, which sells its commercial and institutional bakery pans, equipment and accessories; and another division, which markets building hardware and commercial meat handling equipment and accessories.

Respondent's houseware products are distributed nationally through jobbers, chain grocery stores, food supermarkets, department stores, mail order and premium specialty houses, hardware stores and

other retail establishments. Sales of commercial bakery pans, equipment and accessories are made directly to commercial and institutional bakeries as well as through bakery supply jobbers throughout the country. Commercial meat handling equipment, rubber greens and other meat market accessories, are sold by respondent throughout the United States directly to food supermarkets and chain grocery stores, and are also distributed through butcher and meat market supply jobbers.

Respondent sells the products and services described in Paragraphs Four and Five herein to purchasers thereof located in various States of the United States and in the District of Columbia. In the course and conduct of its business of producing and selling said products and services, respondent is engaged in commerce, as "commerce" is defined in the Clayton Act, as amended.

PAR. 6. During the ten year period between 1950 and 1959 inclusive, respondent has more than doubled the size of its operations. A comparison of selected financial data of respondent and its domestic and foreign subsidiaries for the period 1950 and 1959 shows the following:

	1950	*1959*	*Percent of increase*
Net sales	$36, 759, 142	$73, 593, 729	100. 2
Net income before taxes	5, 889, 581	11, 371, 296	93. 1
Total assets	27, 605, 190	63, 395, 251	129. 6
Net worth	19, 193, 105	43, 714, 050	127. 8

During the period between 1950 and 1959 respondent's substantial increase in size and growth and the diversification of its operations and product lines have been accelerated and achieved in large measure as a result of acquiring the assets and stock of numerous operating concerns. The acquisitions made during this period include the following:

Month and year	Company	Product
January 1951	Lusto Company, Inc.	Copper cleaners.
November 1951	Minute Mop Company	Cellulose sponge mops.
May 1952	Republic Stamping & Enameling Co.	Enameled kitchen utensils.
October 1953	Bocaroy Manufacturing Corp.	Disappearing clothes lines.
Do	Continental Gem Company	Tea strainers.
February 1954	Autoyre Manufacturing Co.	Bathroom accessories.
June 1954	McClintock Manufacturing Company	Commercial meat-handling equipment and rubber greens.
July 1954	Adams Plastics Co., Inc.	Compressed wood and plastic cutlery and kitchen tool handles.
September 1954	Olson Panglaz Co.	Silicone coating of commercial baking pans.
April 1955	Houseware-Plastics Division of Kilgore, Inc.	Plastic housewares.
August 1955	Shore Machine Corp.	Ice cream scoops and paddles.
August 1956 (sold February, 1959).	Ruby Lighting Company	Fluorescent lighting fixtures.
September 1956	Kennatrack Corporation	Sliding door hardware and frames.
Do	Plasteel Division of P. R. Mallory Plastics, Inc.	Plastic bathroom accessories.
Do	Ekco-Alcoa Containers (50% interest)	Aluminum foil and foil containers.
September 1956 (sold in 1958).	Consolidated Can Company (80% interest).	Cans, containers and packaging.
January 1957	Metaloid Company	Kitchen stove and table mats, step stools and serving carts.

Month and year	Company	Product
February 1957	Worley & Co.	Steel lockers and shelving.
July 1957	Emro Manufacturing Company	Beverage can piercers and wire bottle cap openers.
May 1958	Commercial Meat Handling Equipment Line of Blackman Stamping & Manufacturing Company.	Commercial meat-handling equipment.
September 1959	Berkeley Industries, Inc.	Shoe, hat and tie racks, garment hangers and store display items.
December 1959	J. C. Davis Rolling Pin Company	Rolling pins and kitchen boards.
January 1960	Engineered Nylon Products Company	Nylon parts used in housewares and builders' hardware.
February 1960	Washington Steel Products, Inc.	Cabinet and door hardware and kitchen cabinet attachments.

In addition to the foregoing acquisitions, respondent between 1927 and 1950 expanded and diversified its operations by the acquisition of at least eight other companies that were engaged in the manufacture and sale of household kitchen utensils and tools, cutlery, table flatware, wooden handles for cutlery and kitchen tools, aluminumware, houseware specialty items, and grade rolled and stamped flatware.

PAR. 7. Prior to June 30, 1954, McClintock was engaged in the business of manufacturing commercial meat-handling equipment which was sold to food supermarkets, chain grocery stores, and to distributors and jobbers who resold said equipment to butchers, grocery stores, meat markets and other meat handlers. It also produced and sold or leased rubber greens, which are used for decorative purposes in meat markets and meat departments of other food establishments.

McClintock owned and operated a large manufacturing plant at Los Angeles, California, which was fully equipped with machinery, tools, dies and other facilities for producing a complete line of commercial meat-handling equipment. (As used in this complaint, "a complete line" of commercial meat-handling equipment means that the manufacturer or seller produces or sells all of the various sizes of aluminum platters, pans, lugs (deep pans) and metal racks and carts that are generally used by food supermarkets, chain grocery stores and others in handling meat.)

Prior to its acquisition by respondent, McClintock was the largest producer and seller of aluminum meat-handling platters, pans and lugs in the United States. It was also the only manufacturer and marketer of a complete line of said products on a national basis. It was a growing and profitable concern and was recognized as the leading and dominant factor in the production and sale of commercial meat-handling equipment in the United States. In 1953, the last complete year of operations prior to its acquisition, McClintock's total sales and rentals were $1,496,999 of which $696,879 represented sales of commercial meat-handling equipment. On May 31, 1954, one month before the acquisition, the total assets of McClintock were $716,859.

McClintock sold and distributed commercial meat-handling equipment and meat-market accessories to purchasers thereof located in various States of the United States and in the District of Columbia. In the course and conduct of its business, McClintock was engaged in commerce, as "commerce" is defined in the Clayton Act, as amended.

PAR. 8. On or about June 30, 1954, respondent acquired McClintock as a going concern, including all of its assets, patent rights, trademarks, trade name, business and goodwill. The acquisition was accomplished by respondent purchasing from various stockholders all of the outstanding capital stock (48,080 shares) of McClintock for $782,982.90.

Subsequently on November 30, 1954, McClintock was dissolved and all of its assets were distributed and merged into respondent. Since this date the business of McClintock, except its rubber greens rental business, has been operated as a division of respondent. In December 1954, respondent formed a new subsidiary, McClintock Products Company, which operates the rubber greens business formerly conducted by McClintock.

PAR. 9. While respondent neither made nor sold any products directly competitive with commercial meat-handling equipment before the acquisition of McClintock, respondent, by virtue of said acquisition, has expanded, diversified and implemented the line of products it manufactures and sells to, and through, food supermarkets and chain grocery stores. These establishments constitute one of the largest, if not the largest, class of customers for commercial meat-handling equipment in the country. Before the acquisition of McClintock, respondent was one of the leading suppliers of professional-quality knives and other butcher's cutlery to supermarkets and grocery chains. Respondent also, before said acquisition, sold substantial quantities of cutlery, kitchen tools and utensils and similar products through supermarkets and grocery chains. Therefore, as a result of the acquisition of McClintock, respondent, with its previously established supplier relationship with supermarkets and chain grocery stores, is in a dominant and commanding position to increase further the monopolistic position which McClintock held in the commercial meat-handling equipment field, before it was acquired by respondent.

PAR. 10. Prior to May 9, 1958, a part of the manufacturing operations of Blackman were devoted to the production of a complete line of commercial meat-handling equipment, which was sold for use by food supermarkets, chain grocery stores, butchers, smaller grocery stores, meat markets and other meat handlers. Blackman's production of commercial meat-handling equipment was sold and distributed throughout the United States through a national sales agent, Gleason Sales, Inc., Los Angeles, California, which sold said equipment di-

rectly to users such as food supermarkets and grocery chains, as well as to distributors, market equipment dealers and butcher supply houses.

Blackman purchased the necessary tools, dies and machinery and began producing and selling commercial meat-handling equipment sometime in 1955. In due course Blackman began manufacturing said equipment in all of the various sizes generally used by food supermarkets, chain grocery stores, butchers, and other meat handlers, and, at the time of the acquisition of this phase of its business by respondent, Blackman was the only manufacturer, other than respondent, who was producing a complete line of said equipment and offering it for sale throughout the United States.

During the period from 1955 when it entered the field, until May 9, 1958, Blackman's production and sale of commercial meat-handling equipment grew considerably, and Blackman had become a substantial competitor of the McClintock Division of respondent. Blackman's commercial meat-handling equipment was sold and distributed under the name "Dura-Loy", which had become well know and accepted in the trade at the time of the acquisition.

In 1956, the first year in which Blackman produced commercial meat-handling equipment, its annual sales of said equipment were approximately $113,000, with said sales amounting to about $100,000 in 1957 and approximately $96,000 for the five month period January 1, through May 31, 1958. Blackman's operations in the commercial meat-handling equipment business were profitable in each of the years 1956 and 1957, as well as during the last five months of its operations in 1958.

The commercial meat-handling equipment produced by Blackman was sold and distributed to purchasers thereof located in various States of the United States and in the District of Columbia. In the course and conduct of its business of producing and selling said equipment, Blackman was engaged in commerce, as "commerce" is defined in the Clayton Act, as amended.

PAR. 11. On or about May 9, 1958, respondent acquired the business and manufacturing operations of Blackman devoted to the production of commercial meat handling equipment, including tools and dies, inventories of raw materials and finished goods, patents and customer lists, plus an agreement by Blackman not to engage in any way in the manufacture and sale of commercial meat-handling equipment for five years. The acquisition was accomplished through execution of a purchase and sales agreement under which the aforementioned assets and properties of Blackman were purchased by respondent for a cash consideration of $142,335.52.

Following the acquisition from Blackman, respondent completely removed from the United States domestic market the commercial meat-handling equipment operations that were acquired from Blackman.

PAR. 12. Since its acquisition of McClintock, respondent has engaged in certain acts and practices and conduct designed to insulate itself from competition and to perpetuate its monopolistic position as the largest, most dominant producer and seller of commercial meat-handling equipment in the United States. One of the most significant of such acts was the acquisition from Blackman of its expanding commercial meat-handling equipment business. Another such act was respondent's unsuccessful attempt to acquire the commercial meat-handling equipment business of another producer, which came into the market about the time respondents acquired McClintock, and which is now the sole competitor that competes with respondent on a national basis in selling commercial meat-handling equipment.

The only national competitor of respondent in the commercial meat-handling equipment business at the present time is a small producer which entered the market on a limited basis shortly after respondent acquired McClintock. It began by producing, and has continued to produce, only the two sizes of aluminum meat platters, in addition to metal carts and racks, that are most frequently used by food supermarkets, chain grocery stores, butchers and other meat handlers.

Following its acquisition of McClintock, respondent increased prices on all of the various sizes of aluminum meat platters, pans, lugs, racks and carts in its line, except that respondent did not increase prices on its two sizes of aluminum meat platters that were competitive with the two sizes of said platters produced and sold by its sole national competitor. Respondent's prices on these two items until recently have remained the same as its competitor's prices.

Through the utilization of a system of freight equalization, respondent, with its plant in Whittier, California, has eliminated any geographical competitive advantage which its only national competitor had, by virtue of having a plant located nearer to the Eastern, Southern and Midwestern markets for commercial meat-handling equipment in the United States. This has been achieved by respondent absorbing freight, to the extent necessary, to equalize its delivered prices, in all parts of the United States with the delivered prices on the two sizes of aluminum platters produced and sold by its only national competitor.

Since on or about April 1, 1960, respondent has further intensified its activities and has engaged in certain price cutting which may substantially reduce the competitive effectiveness of, or ultimately elimi-

nate, its only national competitor in the commercial meat handling equipment business. Commencing on or about April 1, 1960, respondent discontinued selling at the same prices as its only national competitor, and began selling at substantially reduced prices, its two sizes of aluminum meat-handling platters that are competitive with the two sizes of said platters produced and sold by its only national competitor. Said price cutting action by respondent constitutes a serious threat to the continued existence of respondent's only national competitor, who found it necessary, on account of increased costs, to announce a price increase on its two sizes of aluminum meat-handling platters about the time when respondent effectuated the aforementioned price reduction.

PAR. 13. At the time of its acquisition, the only competitors of McClintock in the production and sale of commercial meat-handling equipment were small local manufacturing concerns, none of which were producing a complete line of said equipment, and many of which were producing said products only as a side line, or on a special order basis. The sales made by these small producers were primarily on a local basis and the share of the market represented by such sales was inconsequential.

On the other hand, when it was acquired by respondent, McClintock occupied a dominating and monopolistic position in the production and sale of commercial meat-handling equipment in the United States. Inasmuch as there were no other producers competing with McClintock in manufacturing and selling a complete line of said equipment on a national or regional basis, McClintock's sales, at the time it was acquired, constituted the national market for commercial meat-handling equipment.

In 1957, the total sales of commercial meat-handling equipment by the three producers which marketed said equipment on a national basis amounted to about $1,278,159. The total sales of said equipment that year by the McClintock Division of respondent represented $1,064,169, or an 83.3 per cent share of the national market. Blackman's sales of commercial meat-handling equipment in 1957 were $99,990, representing 7.8 per cent of the national market. On this basis, therefore, respondent's share of the national market was increased to 91.1 per cent, following its acquisition of the commercial meat-handling equipment business of Blackman in May 1958.

PAR. 14. Respondent has violated Section 7 of the Clayton Act, as amended, in that the acquisition of the stock, assets, and business of McClintock, as well as the acquisition of the commercial meat-handling equipment, assets and business of Blackman, as described in Paragraphs Eight and Eleven hereof, may have the effect of sub-

stantially lessening competition or tending to create a monopoly in the production and sale of commercial meat-handling equipment in the United States, or in various parts thereof.

More specifically, the aforesaid effects include the actual or potential lessening of competition or a tendency to create a monoply in the following ways, among others:

(a) Actual and potential competition generally in the production and sale of commercial meat-handling equipment has been or may be substantially lessened.

(b) McClintock and Blackman have been permanently eliminated as independent competitive factors in the production and sale of commercial meat-handling equipment.

(c) The only national competitor of respondent, as well as any potential future competitors, in the commercial meat-handling equipment field have been or may be foreclosed from competing with respondent because of any one, or more, or all of the following factors:

1. Respondent's financial and economic strength;

2. Respondent's power and ability to control prices, terms and conditions of sale on commercial meat-handling equipment, particularly through the use of pricing practices that have the effect of lessening, restricting, restraining or eliminating competition;

3. Respondent's dominant and monopolistic position as the only manufacturer and seller of a "complete line" of commercial meat-handling equipment; and

4. Respondent's demonstrated ability to eliminate competition by acquiring or buying out competing producers and sellers of commercial meat-handling equipment.

(d) Actual and potential competition between distributors and jobbers of commercial meat-handling equipment has been, or may be, substantially lessened or eliminated;

(e) By reason of the aforesaid acquisitions, respondent has acquired and been placed in a dominant and monopolistic position in the production and sale of commercial meat-handling equipment in the United States;

(f) By reason of the aforesaid acquisitions, respondent is the only producer and seller in the United States of certain types and sizes of commercial meat-handling equipment;

(g) By reason of the aforesaid acquisitions, competition has been eliminated between McClintock and Blackman in the production and sale of commercial meat-handling equipment;

(h) New entrants into the business of producing and selling commercial meat-handling equipment have been, or may be, discouraged or inhibited because of the dominant and monopolistic position, financial

resources and economic power of respondent and because of the substantial costs involved in establishing manufacturing facilities and in breaking into and gaining a share of the commercial meat-handling equipment market;

(i) By reason of the aforesaid acquisitions, concentration generally in the commercial meat-handling equipment business has been greatly increased; one of respondent's two national competitors in the field has been eliminated; and respondent's capital resources, operating facilities and economic power generally have been substantially increased; and

(j) By reason of the aforesaid acquisitions, respondent has acquired the manufacturing facilities, the market position and the dominant ability to monopolize or tend to monopolize the market for commercial meat-handling equipment in the United States and various parts thereof.

PAR. 15. The aforesaid acquisitions, acts and practices of respondent, as hereinbefore alleged and set forth, constitute violations of Section 7 of the Clayton Act (U.S.C. Title 15, Sec. 18) as amended and approved December 29, 1950.

Mr. William J. Boyd, Jr., and *Mr. Peter Jeffrey* supporting the complaint.

Mayer, Friedlich, Spiess, Tierney, Brown & Platt, Chicago, Ill. by *Mr. Leo F. Tierney*, *Mr. Bryson P. Burnham* and *Mr. Robert W. Patterson* of Chicago, Ill. for respondent.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

Nature of the Proceeding—The Issues

In this case it is alleged in the complaint, and denied in the answer, that respondent corporation, Ekco Products Company (hereinafter for brevity referred to either as Ekco or as respondent), has violated § 7 of the Clayton Act, as amended, and approved December 29, 1950, 15 U.S.C.A. § 18.[1] The two acquisitions made by respondent, which are alleged to constitute such violation, are (1) its conglomerate acquisition in 1954 of the McClintock Manufacturing Company (hereinafter for brevity referred to as McClintock), which had been theretofore engaged, among other things, in the manufacture, sale and distribution

[1] The innuendo of the complaint also properly refers to its issuance pursuant to § 11 of the Clayton Act, as amended (15 U.S.C.A. § 21) which is the procedural section of said act. Since no procedural questions under said section have been raised herein, it will not be further referred to in this initial decision. Many questions relating to evidence and procedure under the Administrative Procedure Act, however, have been raised by counsel and determined by numerous rulings and orders in the course of this litigation.

of commercial meat-handling equipment, which is the line of commerce involved; and (2) its subsequent horizontal acquisition of those particular assets of Blackman Stamping & Manufacturing Company (hereinafter for brevity referred to as Blackman), which it had used in its competition with respondent in the same type of business for more than two years prior to the time respondent purchased such assets on May 9, 1958.

Under the pleadings, and as the case was actually tried, the only basic issue in substantial dispute is whether the facts establish with reasonable probability that the said acquisitions by respondent in such line of commerce, and its activities in such business, constitute a violation or violations of said § 7, as amended.[2] There is no essential dispute (1) as to the status, character and extent of the business of the three respective corporate organizations involved in the two mergers; (2) that such corporations are, or at material times have been, engaged in interstate commerce; (3) as to what constitutes the relevant geographic market or (4) the line of commerce involved; and (5) that respondent did effect the said two acquisitions.

Counsel supporting the complaint insist, in substance, that the evidence establishes that respondent corporation in its totality is far larger and more financially powerful than any of its competitors in the line of commerce involved herein; that the aforesaid acquisitions, as well as the various acts of respondent allegedly related thereto, which are hereinafter referred to briefly, were and are unlawfully predatory in character and have the effect of substantially lessening competition or tending to create a monopoly as prohibited by said § 7, as amended; and, therefore, such evidence justifies and requires the issuance of an extremely broad and harsh order of divestiture of McClintock by Ekco, although such order is not demanded of the Blackman assets since the same are now nonexistent for purposes of such an order.

[2] The material language of said section which is contained in its first paragraph is as follows: "That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock * * * and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

The following language in the third paragraph of said section is not material to the issues of the proceeding, but is relevant to any possible implication or inference that the numerous other acquisitions and over-all corporate structure of respondent not charged in the complaint as violations of § 7 are unlawful: "* * * [Nothing] contained in this section [shall] prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition."

Respondent, however, in denying the charges contends, in substance, that each of its two questioned acquisitions has been lawfully made and that the evidence fails to show either that it has established a monopoly or that there is any reasonable probability there will be any such alleged unlawful monopolistic effect in the future. Among other matters presented in support of its position, respondent argues that the evidence establishes that there is and can be no tendency toward monopoly in this type of business because the line of commerce is of such a nature that entry into it is comparatively easy; that none of the products in this line of commerce require any large investment for the necessary presses, dies and tools for their manufacture; and that there were already, and still are, substantial competitors actually engaged to some extent in the business, and that there are many others who presently have the potentiality of engaging competitively at any time in this line of commerce. It further asserts that relative to its acquisition of the Blackman assets, any order of divestiture would be moot (as to which contention counsel supporting the complaint have tacitly conceded); that its prior acquisition of McClintock made no change in the competitive market then existing, and there is no evidence of any unlawful acts on its part subsequent thereto upon which divestiture of McClintock can be lawfully premised. It further contends that in any event certain portions of the order of divestiture as to McClintock proposed by counsel supporting the complaint are without authority of law.

In this initial decision, on the whole record, it is found and determined that counsel supporting the complaint, having the burden of proof,[3] have failed to establish by substantial evidence any legal basis for divestiture under § 7 of the Clayton Act, and the complaint herein is therefore dismissed. But, as hereinafter set forth, the alleged acts of respondent after its acquisition of McClintock in 1954 may be such as to warrant a proceeding under Section 5 of the Federal Trade Commission Act, as well as under the Clayton Act, as amended by the Robinson-Patman Act. Without expressing any opinion, however, either as to the administrative advisability of such a proceeding or as to the merits of any facts which might therein be adjudicatively presented, this dismissal of the present complaint, by its very nature, is without prejudice to any such further proceeding as the Commission in its wisdom may deem is required.

[3] Section 7(c) of the Administrative Procedure Act (15 U.S.C.A. 1006(c)), and the Commission's Rules of Practice for Adjudicative Proceedings, formerly § 3.12, and now § 4.12(a).

History of the Litigation

The Commission issued its complaint herein on September 26, 1960, and it was thereafter duly served upon respondent. When the complaint issued, the undersigned hearing examiner was appointed to take the testimony, receive evidence and perform all other duties authorized by law. On November 2, 1960, respondent moved for an extension of time to plead, and also requested that if a motion were filed by it, a date should be set for oral argument thereon. On November 3, 1960, respondent was granted to December 5, 1960, to plead.

Respondent, within the time granted therefor, filed its motion to strike those considerable portions of the complaint which related to the acquisition of McClintock, together with a motion for extended time to answer the remaining portions of the complaint. These motions were opposed by an answer filed December 14, 1960, by counsel supporting the complaint and thereafter, on January 19, 1961, the examiner heard oral arguments on the motion to strike. On March 9, 1961, after due consideration, the examiner denied respondent's said motion to strike and thereupon set April 1, 1961, as the time for filing answer to the complaint in its entirety as administratively approved and issued by the Commission.

Respondent, on March 20, 1961, filed a request for leave to file an interlocutory appeal from this order and also requested the Commission for a corresponding extension of time to answer. Counsel supporting the complaint then filed their answer brief before the Commission, and respondent filed a reply brief thereto. On April 10, 1961, the Commission denied the respondent's request for an interlocutory appeal on the ground that respondent had made no showing that the Commission in issuing its complaint had erred in its administrative decision that it had reason to believe respondent's acquisition of McClintock Manufacturing Company violated § 7 of the Clayton Act, and on the further grounds that the appeal was premature and not one to be granted under the Commission's Rules of Practice.

On April 11, 1961, respondent promptly filed its answer to the complaint.

The presentation of the Commission's case in chief required some 23 days of trial on and between August 7, 1961, and September 18, 1962. Hearings were held in the cities of Washington, D.C., Chicago, Illinois, Detroit, Michigan, and Los Angeles and San Francisco, California. A number of objections, motions and other matters were presented and determined by the examiner during the course of those hearings. Specific and detailed references to most such matters are unnecessary to be recited herein, but reference is made herein to certain matters that bear materially upon this decision.

After 15 hearings had been held in four of the said cities, on November 28, 1961, counsel supporting the complaint requested the Commission for permission to file their interlocutory appeal, raising questions as to various rulings made by the examiner during the hearings rejecting certain proffered evidence and, in the alternative, praying that the Commission either amend the complaint, or direct its amendment, in numerous substantial and specific particulars which would have injected additional issues into the complaint by expanding the lines of commerce, thereby broadening the other issues on which the case had theretofore been partially and extensively tried. In practical effect, it would have necessitated a retrial from the beginning or due process of law would have been denied to respondent. Respondent filed a reply to the said request for permission to appeal and, on January 24, 1962, the Commission denied such request for interlocutory appeal as unjustified under its Rules of Practice and also denied counsels' alternative request for numerous amendments to the complaint, apparently confirming its earlier administrative determination as to the nature and breadth of the charges it desired to have tried in this proceeding.

These rejected amendments, if allowed, would have extensively broadened the alleged lines of commerce by including commercial baking pans and rubber greens. The latter are artificial vegetables used to decorate meat displays to the retail trade. Neither of these types of products had been alleged in the complaint to constitute any part of the line of commerce set forth therein and, in fact, are entirely irrelevant thereto as is hereinafter found.

At the last hearing of evidence on September 18, 1962, the case in chief was rested. Respondent then rested its defense without presenting any evidence, conditioned only upon the examiner's deferred rulings on certain offers of evidence made late in the trial by counsel supporting the complaint. Such offers in due course were rejected by an order issued December 10, 1962, whereby respondent's rest became absolute (R. 2866–2873), and by the said order the examiner therefore also formally closed the case for the reception of evidence.

During said last hearing on September 18, 1962, counsel supporting the complaint, prior to resting the case-in-chief, moved that the hearing examiner take official notice of the Commission's "Report on Corporate Mergers and Acquisitions, May 1955," which respondent opposed only insofar as it would tend to establish specific facts in issue. The examiner, by a comprehensive written order dated December 6, 1962, granted said motion in part and denied it in part, in substance agreeing to take official notice of said report as background evidence, but refusing to officially notice such certain requested particular por-

tions thereof as proof of any specific facts in actual contest in this proceeding.

Pursuant to leave granted, counsel for the parties on January 25 and 28, 1963, filed their respective proposed findings and conclusions, together with supporting briefs. Counsel supporting the complaint also filed their proposed order of divestiture. Also, by further leave granted on January 21, 1963, each of the parties thereafter filed their respective objections to the matters theretofore proposed by the other, the "Answer" of counsel supporting the complaint being filed on February 25, 1963, and the "Objections" of respondent being filed on February 26, 1963. Counsel supporting the complaint meanwhile on January 25 had filed their "In Camera Schedules Supplementing Proposed Findings of Fact" etc., and upon February 26 respondent filed an "In Camera Memorandum in Opposition to Certain Findings Proposed by Counsel Supporting the Complaint", together with a Reply brief.

Case Submitted Generally and Considered Upon the Whole Record

This case has been submitted generally for initial decision and not upon an interlocutory motion to dismiss under § 4.6(e) of the Commission's Rules of Practice for Adjudicative Proceedings, and the evidence has therefore been evaluated, weighed and considered and is decided herein upon the merits with applicable legal principles.

The record herein consists of a transcript of evidence of 2873 pages and some 400 documentary exhibits. Some 34 witnesses testified. Counsel supporting the complaint has submitted 253 proposed findings, while respondent has submitted 73. Many of these proposed findings, based upon considerable evidence, now become immaterial to decision in view of the very recent opinion of the Supreme Court in *United States* v. *The Philadelphia National Bank, et al*, decided June 17, 1963, not yet officially reported, but found set forth in full in BNA's Antitrust and Trade Regulation Report No. 101, June 18, 1963, pp. X–7 to X–29, inclusive. While this decision involved bank mergers, and other provisions of law than § 7 were involved, in the course of the opinion the court, after reviewing the legislative history of the 1950 amendments to § 7, and with reference to many pertinent court decisions, including *United States* v. *Brown Shoe Co.*, U.S. 370 U.S. 294, held (p. X–19):

> This intense Congressional concern with the trend toward concentration warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anti-competitive effects. Specifically, we think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must

be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anti-competitive effects. * * *

Such a test lightens the burden of proving illegality only with respect to mergers whose size makes them inherently suspect in light of Congress' design in § 7 to prevent undue concentration. * * *

The merger of appellees will result in a single bank's controlling at least 30% of the commercial banking business in the four-county Philadelphia metropolitan area. Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat. * * *

While this recent decision involves only a horizontal merger, the opinion makes clear, as have earlier decisions, that all mergers are within the contemplation of the 1950 amendments to § 7 and the above-quoted principles undoubtedly apply to the case at bar which has been mostly concerned with evidence purporting to show "market behavior" and "probable anti-competitive effects."

In the case at bar the proof establishes that, prior to its acquisition by Ekco in 1954, McClintock had approximately 98% of business done on the national scale in the line of commerce involved herein (excluding a few companies doing business on a local or limited basis). Ekco's share, while shrinking somewhat during Blackman's short boom and Chesley's near monopoly in the Detroit distribution area, has again reached a percentage of such national business substantially approximating what McClintock had when Ekco acquired it. While there are some minor disputes, there is no doubt that McClintock, in its day, held, and Ekco now holds the lion's share of the total production and sale of the products in question. Therefore, such substantially uncontradicted facts now appear to have established a prima facie case in support of the complaint, except as the facts in evidence establish that by the very nature of the business there is no reasonable probability that a monopoly exists within the contemplation of § 7, as amended. Of course, counsel for both parties, as well as the examiner, during the trail were unaware that such a broad rule would be laid down in this recent bank decision and the case was tried and heard without its benefit.

A decision covering all issues presented in detail is impossible to prepare within the very limited time therefor which the Commission has prescribed. But since very substantial parts of the record relate to numerous events occurring subsequent to respondent's acquisition of McClintock, with which a large part of the proposed findings of the parties is concerned, such record and findings may be disregarded herein without passing upon their merits. This is true not only because they relate to post-acquisitioned activities of respondent unnecessary to ultimate decision, but also because this is a conglomerate merger

with special guide lines which are determinative of the case upon consideration of certain basic facts relating to the fundamental nature of the business which can more briefly be stated. The gist of this case lies within the ambit of a few basic facts, that respondent has by far the largest share of the market of the products involved but (1) it does not make or control the source of the basic materials used in such products' manufacture, (2) the amount involved for necessary machinery and tools to manufacture these products is small; and (3) sales organizations are readily at hand in numerous distributors of various items to the meat market trade, all of which means easy access to the markets and buyers.

Many of the proposals submitted by counsel supporting the complaint are premised upon evidence which was rejected according to basic principles of evidence. This decision must be made upon the whole record and not upon rejected evidence. Therefore, to grant such proposals by reconsidering and receiving rejected evidence would necessarily require reopening and retrying substantially the entire case in order to afford respondent due process of law, and unduly delay the final determination of this proceeding. Such proposals, therefore, have been rejected. All other proposed findings of fact, together with conclusions of law and orders, respectively submitted by the parties, which are not incorporated herein, either verbatim or in substance and effect, are also hereby rejected; and any pending offers of evidence, motions, or objections made during the course of the proceedings, which have not heretofore been expressly granted, denied or overruled, are hereby denied or overruled.

The hearing examiner has given full, careful and impartial consideration to all testimony, taking into consideration his observation of the appearance, conduct and demeanor of each of the witnesses who appeared before him. All documents in evidence and stipulations of fact, as well as those facts alleged in the complaint which are admitted in the answer, have been duly considered, and all statements, arguments, proposals and briefs of counsel have been closely studied in the light of all the evidence. The examiner has also carefully considered as a matter of judicial notice the Commission's said Report of May 1955, but only for background purposes in accordance with his said ruling of December 10, 1962. He has, however, limited the findings herein made to those which are deemed material and rejected those which seem relevant to another type of proceeding or are unnecessary to this decision.

Upon the whole record so considered, the hearing examiner finds generally that counsel supporting the complaint have failed to maintain the burden of proof incumbent upon them, and have failed to

establish by reliable, probative and substantial evidence, and the fair and reasonable inferences drawn therefrom, the material disputed issue herein, and therefore finds that the charges of the complaint have not been sustained. More specifically, upon consideration of the whole record, the hearing examiner makes the following

FINDINGS OF FACT

The Corporations Involved

Ekco Products Company, which for brevity is hereinafter referred to either as "respondent" or "Ekco," was originally established as a business in 1888. On October 6, 1903, it became an Illinois corporation as "Edward Katzinger Company." In June 1944, the corporate name was shortened by substituting "Ekco" for the personal name "Edward Katzinger." It is inferred that "Ekco" was coined from the initials of the first and surnames of the founder as set forth in the previous corporate title, and with the syllable "co" added in short for "Company." It is further inferred that this short, distinctive and catching trade name of "Ekco" was also adopted not only to retain the flavor of the original name but to hold substantial and long established good will. In any event the word "Ekco" had become so well known it was retained when the corporation was reorganized as a Delaware corporation on April 29, 1960, as "Ekco Products Company" and all of respondent's assets and business were merged into the new Delaware corporation. Since becoming a Delaware corporation, respondent has continued to maintain its office and principal place of business at 1949 North Cicero Street, Chicago, Illinois.

Counsel supporting the complaint seek to read into this reorganization of respondent as a Delaware corporation something sinister relative to the alleged illegality of the two mergers involved in this proceeding. None such appears, and such suggestion is rejected as fantastic, unrealistic, and wholly contrary to the clearly proper and legitimate corporate purposes of respondent in effecting such reorganization under the laws of the State of Delaware.

McClintock Manufacturing Company, hereinafter which for brevity is referred to as "McClintock," was incorporated April 5, 1934, and before its sale to "Ekco" on June 30, 1954, had been a corporation organized and existing under the laws of the State of California, with its office and principal place of business at 2700 South Eastern Avenue, Los Angeles, California.

The Blackman Stamping & Manufacturing Company, which for brevity is hereinafter referred to as "Blackman," is now and was at the times material hereto, a corporation organized and existing under

the laws of the State of California, with its office and principal place of business at 2730 East 37th Street, Los Angeles, California.

Interstate Commerce—The Relevant Market

There is no dispute as to the fact that respondent is now and at all times material hereto has been engaged in commerce, as "commerce" is defined in the Clayton Act, as amended. In the course and conduct of its business respondent has produced and sold, and continues to produce and sell, its products and services to purchasers located in the various states of the United States and in the District of Columbia.

It is also undisputed that at the time Ekco acquired all the stock and assets of McClintock on June 30, 1954, McClintock was engaged, and for many years prior thereto had been engaged, in the sale and distribution of commercial meat-handling equipment and meat market accessories in commerce, as "commerce" is defined in the Clayton Act, as amended, its purchasers being located in the various states of the United States and in the District of Columbia.

Further, it is undisputed that at the time Ekco by purchase acquired certain assets of Blackman on May 9, 1958, Blackman in the course and conduct of its business of selling and distributing commercial meat-handling equipment was engaged, and for a period of over two years prior thereto had been engaged in commerce, as "commerce" is defined in the Clayton Act, as amended, in the sale and distribution of such products to purchasers thereof located in various states of the United States and in the District of Columbia. There is no evidence, however, that Blackman in its other activities hereinafter more fully referred to, was so engaged in commerce.

It is substantially agreed by the parties and it is also found upon the evidence that the relevant lines of products involved in this proceeding are sold on a national basis and the entire United States is therefore the relevant market.

The Line of Commerce

The relevant line of commerce in this proceeding as substantially alleged and referred to in Paragraphs Four, Seven, and Nine to Eleven, inclusive, of the Complaint, and clearly established by the evidence consists of two sub-lines:

(a) The manufacture and sale of anodized aluminum platters, pans and lugs suitable for storing and transporting a variety of commercial products within a factory, store or warehouse, the use of which insofar as is relevant here consists of the storing and transporting of meats; and

(b) The manufacture and sale of metal racks, which are stationary, and metal carts, which with wheels attached are movable racks, and which are appropriately used in such premises in the storing and transportation of meats.

These two sub-lines of products require different materials and methods of manufacture. The basic material used in the manufacture of the platters, pans and lugs is aluminum, which when anodized by an electrolytic process makes a product the surface of which is hard and impervious to organic acids deriving from raw meats and which surface easily lends itself to cleaning, does not chip or shatter and break and by reason of its durability has longtime life in spite of the ordinarily hard usage it receives in meat handling. On the other hand, racks and carts, which are used respectively to store or to transport the platters, pans and lugs in which the meat is placed, are made of sheet metal shelving held in place by metal tubing, plus wheels, of course, in the case of carts. Aluminum is not the basic metal used in the making of racks and carts.

These two lines are complimentary and used in conjunction with each other in the business of handling meats. Each on account of its strength and durability only infrequently needs replacement and the replacement market for such products is very small and the primary and important sales are now made to those who are equipping newly opened supermarkets as hereafter more fully set forth under the caption "Market for the Line of Commerce."

In order that the distinction between the differently named containers above referred to may be clearly defined, platters are shallow, being about three-fourths of an inch deep and pans are from one to three inches deep, depending on size of the other dimensions, while lugs are much deeper pans, such depths being dependent on the size of the other dimensions and the specific use for which such lugs are intended. In the trade, models of such products are described and referred to by their length and breadth, Model 1024, for example, being 10 inches wide by 24 inches long.

The Commission by its order of January 24, 1962, had denied the attempt of counsel supporting the complaint to inject into this case any new line of commerce or to enlarge by amendment the above-described line of commerce to include (1) rubber greens, which are artificial vegetables used for decorative purposes in the display of meat to retail trade, and (2) baking pans which are used for the baking of breads and pastries. It is obvious that baking pans are entirely a different line of commerce and that rubber greens have no direct connection with platters, pans and lugs and their storage and transport, which matters primarily have to do with the behind the scenes of "back room" opera-

tions. It is inferred that even the carts, after wrapped meats have been transported to and placed in self-service refrigerators, or other refrigerated display cases in the sales area of the store or market, are usually promptly returned to the cutting room for further use there and not left to impede the passage of clerks and retail customers through the aisles of the retail selling areas.

Market for the Line of Commerce

For some time prior to the recent tremendous growth in popularity of self-service retail meat operations, and as late as 1954 when Ekco acquired McClintock, the principal market for aluminum platters, pans and lugs had been the service type of butcher shop usually found in food stores and markets. In this earlier type of butcher shops the meat was displayed in closed refrigerated cases attended by butchers who dealt directly with and served the customers by cutting or grinding the meat as selected and ordered by the customers. This type of store utilized aluminum platters and pans primarily for the showing of uncut or unground meat products in the refrigerated display cases. This required the manufacturer to provide a large variety of different sizes of platters and pans to fit the various cuts of meat which were on display as well as to fit them into the various sizes of display cases then generally in use. Those stores, however, had comparatively little "back room" meat cutting and consequently had at best but limited need for lugs, carts and racks.

Similar to many other businesses there have been significant changes in the retail meat trade in recent years. Commencing in the middle 1950's and continuing thereafter, there has been a steady and rapid increase in the number of self-service type of supermarkets. Although not all individual units of all grocery chains are supermarkets, the evidence shows that the grocery chains and independents are rapidly closing many of their non-supermarket stores and replacing them by constructing new and larger stores in the same general trading areas to conform with supermarket business needs and practices.

The increase in self-service supermarkets has resulted in a great decline in demand for varied smaller sizes of platters and pans but in an increased demand for carts, racks and lugs and for larger sizes of platters and pans. Now generally, only a few of the larger dimension platters and pans are used in the self-service type of meat operation. Chain food stores usually standardized on one or two of the larger sizes of platters and pans for use in their self-service retail meat operations of all of the stores in the chain, but different chains have standardized on different sizes.

At the present time, the principal market for the meat-handling products just described are new food supermarkets, both chain and independent, where such products are used principally for the handling and storing of meat in their "back room" meat cutting and packaging operations and generally food supermarkets utilize self-service techniques in their meat merchandising. In such self-service retail meat operations, their meat handling products are generally utilized only for the storage of the meat products and the movement thereof from the "back room" to the refrigerated display cases, but ordinarily they are not used in the display cases themselves.

A "complete line" of platters and pans to service food supermarkets which now are the principal market for these products consists of not more than seven sizes, and may be as few as four. Even Gleason and Jayne, Blackman's former salesmen, definitely hostile to respondent, conceded in substance that a large line was not necessary and a few large sizes of such products would be sufficient to meet the demands of the trade.

Illustrative of the popularity of larger sizes, the seven largest dimension platters which Ekco's McClintock Division has recently manufactured, for example, constituted 81% of its total production of platters for the year 1960, and five of those largest sizes, from 10 to 12 inches wide by 24 to 30 inches long, constituted 74% of said total production.

The cost of equipping the meat department in an average modern self-service supermarket is approximately $20,000; of this amount only about $400 is devoted to the purchase of platters, pans and lugs and only approximately $500 to the purchase of carts and racks, a total of or less than five per cent of the total cost of such department's entire meat-handling equipment. The total annual dollar value of this line is but a very small part of the Gross National Product.

Since this comparatively small cost of equipping self-service retail meat departments with platters, pans, lugs, carts and racks has not been shown to have any effect upon the retail prices of meat and there is no charge or proof in this proceeding that the public at large has been injured, the principal theoretical injuries which upon this proceeding must be founded *sub silentium* appears to be those which might probably occur to the supermarkets of the country. The evidence concerning them in this case, without more, is fully indicative that such corporate entities are well able to look out for their own interests as to the selection and prices of the commodities involved herein.

Nature and Extent of Respondent's Business

In Paragraphs Four, Five and Six of the complaint, there are rather extensive allegations relating to the nature and extent of respondent's business. Most of the material facts so alleged are respectively admitted by paragraphs 4, 5, and 6 of the answer and, insofar as such allegations are admitted or further confirmed or developed by the evidence, the examiner finds the following facts to be true:

Respondent, directly and through several operating divisions and various wholly owned subsidiary corporations, is engaged in the manufacture and sale of a wide variety of articles among which are the commercial food and meat-handling equipment, which is the line of commerce involved herein as well as containers, kitchen tools and tinware, cutlery, commercial baking pans, ice cream scoops and paddles, woodenware, stainless steel cooking utensils and flatware, aluminum ware, bathroom hardware and accessories, sliding door hardware, and steel lockers. Respondent, in addition to its main plant in Chicago, Illinois, has several manufacturing plants about the country, including one at Canton, Ohio, one at Whittier, California (the McClintock Manufacturing Company Division Plant), and one at Pico Rivera, California, which latter three plants were discussed and described at some length in the testimony.

Since its acquisition of McClintock in June 1954, respondent through its McClintock Division has been the largest manufacturer and seller in the United States of commercial meat-handling equipment which line it had never manufactured or sold before.

Since the McClintock acquisition, respondent has been a substantially large producer, seller and lessor of rubber greens, although in 1960 it sold its lessor business and is no longer engaged in that activity. Respondent, through wholly owned subsidiaries, also long prior to the McClintock acquisition, has engaged and still engages in the manufacture of bakery pans for commercial bakeries through its plants located in Chicago, Illinois, and a number of other cities throughout the United States, as well as in the Dominion of Canada in the cities of Toronto, Ontario, and Vancouver, British Columbia.

While respondent markets its various products under a number of trade names, the only one which concerns the meat-handling equipment material to this proceeding is "McClintock," although some incidental reference has been made to other of its trade names for different and unrelated products.

Respondent, directly and through its various subsidiaries, sells its multifarious products and services to some 10,000 customers through-

out the United States. Its principal sales divisions are: the housewares division, which handles its household lines of kitchen tools and utensils, cutlery and related items; the bakery division, which sells its commercial and institutional bakery pans, equipment and accessories; and a third division, with which this proceeding is concerned, which markets building hardware and commercial meat-handling equipment and accessories. Respondent also has a fourth or International Division which is of no materiality in this proceeding.

Respondent's commercial meat-handling equipment is sold by it throughout the United States, to the far greater extent through independent butcher and meat market supply distributors who in turn either sell such equipment to jobbers or directly to the trade, although in some cases respondent itself does sell directly to food supermarkets.

Respondent's executives have frankly admitted that it is a progressive and rapidly developing company with a large diversity of manufactured products which it sells throughout the country and abroad. By reason of its mergers of various other companies in the period 1950 and 1960, respondent substantially doubled the size of its operations, its net sales of all its divers lines of products going up from some $36,000,000 to over $73,000,000 between 1950 and 1959, with a proportionate increase of its annual net income before taxes. And in its value of total assets its net worth of some $19,000,000 in 1950 became nearly $44,000,000 in 1959.

During the period of 1950 through 1960, Ekco acquired some 28 companies, each of which had been engaged in completely different types and lines of equipment, most of which can be generally classified under household articles, particularly kitchenware. During this period, however, it sold or otherwise entirely disposed of some four of these companies and ceased to manufacture and sell the principal products formerly made by three more of its said merged companies. It also disposed of all, or a substantial part of the stock or assets acquired from four others. The McClintock acquisition of June 1954, and the Blackman assets acquisition of May 1958, are the only ones among the said total of 28 acquired companies that included any of the products which constitute the relevant line of commerce in this proceeding.

Throughout their proposed findings and arguments, counsel supporting the complaint have repeatedly referred to the size and financial power of respondent corporation, comparing it to other considerably smaller corporations engaged competitively with respondent in the same line of commerce with which we are here concerned. Of course, respondent's size has been duly considered but, as hereinafter more fully found, respondent has not used its corporate resources generally to manufacture or promote the sales of its commercial meat-handling

equipment, but has separately retained substantially the same basic organization as McClintock had at the time of its acquisition by respondent, although it has increased the number of its distributors for such products.

It is basic that size is not *per se* a violation of the antitrust laws. This has long been the uniform line of holdings under the Sherman Act. See *U.S.* v. *U.S. Steel Corp.*, (1920) 251 U.S. 417, 445–448, 451; *U.S.* v. *International Harvester Co.*, (1927) 274 U.S. 693, 708–709, and *U.S.* v. *Swift & Co.*, (1932) 286 U.S. 106, 116. In *International Harvester*, supra, p. 708, the court said, "The law, however, does not make the mere size of a corporation, however impressive, or the existence of unexerted power on its part, an offense when unaccompanied by unlawful conduct in the exercise of that power," and in the *Swift* case, *supra*, p. 116, the court says that a corporation's size, if used to abuse power, "is not to be ignored".

In cases under § 7, the same viewpoint still obtains. See *Reynolds Metals Company* v. *F.T.C.*, (C.A.D.C. 1962) 309 F. 2d, 223, at p. 230, which decision has ended that litigation insofar as it concerns the determination of the illegality of Reynolds' acquisition of Arrow Brands, Incorporated. In that case the court held: "[W]e do not, nor could we intimate, that the mere intrusion of 'bigness' into a competitive economic community otherwise populated by commercial 'pygmies' will *per se* invoke the Clayton Act." The court cites *Brown Shoe Co.*, *supra*, 370 U.S. pp. 328–329, in support of this holding.

The McClintock Acquisition in 1954

On June 30, 1954, respondent purchased all outstanding stock and thereby all assets of McClintock for a total consideration of $782,-982.80. After operating McClintock as a separate going corporation for five months, respondent caused McClintock to be dissolved on November 30, 1954, and all of its assets were then merged into respondent. McClintock had been engaged in manufacturing various products. Among other assets Ekco acquired from McClintock those which it had used in the manufacture and sale of commercial meat-handling products were set aside and thereafter handled by respondent through a separate division or subsidiary of respondent which was established in December 1954, known as the McClintock Products Company, for brevity hereinafter referred to as the McClintock Division.

McClintock had paid no dividends since 1950, and its available cash position had declined until shortly prior to its acquisition by Ekco in 1954. In order to provide necessary working capital, McClintock borrowed $200,000 upon conditions imposed by its lender that it should

maintain at all times net current assets of that amount and would pay no dividends or other unusual expenses beyond current operating expense without the consent of such lender. McClintock's chief stockholders found that, since it was a Los Angeles concern and the bulk of their business was in the Middle West and its freight costs to that area were very substantial, its capital was probably inadequate to meet any substantial competition in the Middle West. The large manufacturers of refrigerators were specially feared by McClintock as competitors since they had freight advantages over McClintock, and while they were not yet actively competitive, such manufacturers were equipped with the necessary manufacturing machinery and sales organization to become active competitors. Also, McClintock's officers also knew that any one with presses and some money could easily duplicate the dies which McClintock used in its anodized pans, platters and lugs and be competitive within six months. While McClintock was at that time the country's largest producer of meat-handling equipment in issue here, it is quite understandable why its stockholders were desirous of selling the entire business. After a number of friendly conferences with Ekco's representatives, Ekco did buy the business, and some of McClintock's executives accepted positions with Ekco, but at the time of the hearings seven years or more later, some of them had either retired or had become associated with other and entirely different businesses.

Prior to its acquisition of McClintock, respondent had never engaged in the manufacture and sale of the meat-handling products involved herein or of any products comparable therewith or complementary thereto. Strenuous effort has been made by counsel supporting the complaint to show the relevancy of baking pans, in which business respondent was a leading competitor. Such products are not of material consequence here, although prior to the merger respondent and McClintock had both been competing in that particular field. The case does not involve any alleged illegal merger in the baking pan business and as already stated the Commission rejected the attempt to amend the complaint to include such products within the line of commerce relevant hereto.

McClintock among its varied activities had also engaged in the manufacture, sale and lease of rubber greens which as already stated in substance are only for the purpose of attracting and beguiling the retail buyer of meat and are in no way essential to or even related to the use of any of the articles in the relevant line of commerce. The Commission also had rejected proposed amendments to the complaint to include them in this proceeding. McClintock also did a considerable amount of industrial job shop stamping on a customer basis, and, like-

Ekco, had been engaged in defense contract work for the United States Government.

For Ekco, its entry into this business of manufacturing and selling anodized aluminum platters, pans and lugs, as well as racks and carts, for the handling of meats, was an entirely new venture. It had never before manufactured or sold any such articles or any articles comparable thereto. As already stated, its acquisition of such business of McClintock in 1954, therefore, was a conglomerate acquisition and, insofar as its activity in this line of business is concerned (other than its subsequent acquisition of Blackman in 1958, which was a horizontal acquisition, and hereinafter fully discussed), this case must be considered in the light of the decisions which govern conglomerate mergers. Thus far, there has not been very much definitive law made upon this subject. It was stated in the opinion of United States District Judge Bryan, of the Southern District of New York, issued April 15, 1963, *United States* v. *Continental Can Co., Inc.*, BNA Anti-Trust Regulations Reporter, Number 94, April 30, 1963, pages X-1 to X-26, inclusive, at page X-11:

> What we have here, basically is a conglomerate combination in which one company in two separate industries combined with another in a third industry for the purpose of establishing a diversified line of products suitable for a variety of end uses to be sold to a wide range of customers with differing packing requirements.

After apt quotations from the Commission's *Procter & Gamble* decision, Docket No. 6901, hereinafter more fully referred to, the Court continued:

> Here the Government moved into virtually uncharted Section 7 territory. In the twelve years since Section 7 was amended there are apparently only two other cases raising this exceptional problem. They are *United States* v. *General Motors* (Euclid Road Machines) which is currently pending in the District Court for the Northern District of Ohio, and the *Procter & Gamble* case before the Federal Trade Commission which has just been cited. A third case, *United States* v. *General Dynamics*, filed in this district on November 8, 1962 and as yet undetermined may also involve the same problem to some extent. (The learned court may have intentionally excepted from this list *Consolidated Foods Corporation*, Docket No. 7000, decided November 15, 1962, because of the "reciprocity" problem inherent in that case which distinguishes it in substantial respects from a clear-cut conglomerate merger such as was before the Court and such as is involved here.)

The evidence shows that since Ekco acquired McClintock it has carried on the McClintock activities in a part of a plant owned by Ekco at Whittier, California, actually occupying only 32,000 square feet of factory and warehouse space as against 40,000 square feet previously used by McClintock in its Los Angeles factory. There is no substantial evidence that Ekco put its financial and other resources into the pro-

duction and sale of the products manufactured and sold by the McClintock Division. Its growth has been gradual and it has merely progressed at about the same progressive rate that McClintock had with respect to the relevant line of commerce herein. Ekco has not augmented the McClintock Division staff with research, executive or sales people from any other part of its large and diversified organization. The line of products has not been expanded although it may well be that certain improvements in relevant products that Blackman innovated have been adopted and used since that acquisition although the record is not at all clear in that respect. In substance, the evidence shows that Ekco has carried on essentially the same manufacturing and selling operations that McClintock did prior to the merger and has not injected or infused capital or assets from any other part of its business in the manufacture, advertising or sale of the relevant products herein.

The Blackman Acquisition in 1958

For some years prior to 1956, Blackman had been engaged solely in the business of contract metal stamping in the Los Angeles area. It had made some meat-handling equipment prior to 1952 for McClintock but in no manner had otherwise engaged in such business.

Patrick J. Gleason was one of the owners of Gleason Manufacturing Company, which made and sold rubber greens, and in such business had been in competition with McClintock and subsequently so competed with respondent's McClintock Division after Ekco had acquired McClintock. Roger Jayne had sold rubber greens for Gleason and they were both well acquainted with Richard Blackman, the president and chief stockholder of Blackman. In the business of selling rubber greens, Gleason had decided that he needed a line of pans, platters, and lugs designed for use in the meat-handling trade in order to further develop his own business. There is no evidence that either of them had sold anything but rubber greens, but in the course of that selling they had become acquainted with the supermarket and other butcher trade around the country. Gleason and Jayne both frankly admitted during their testimony that they did not have sufficient capital to engage in the manufacturing of meat-handling equipment, so they sought someone who could finance and carry out such manufacturing. Before they went to Blackman, they had searched around the Greater Los Angeles area for such a backer and interviewed a number of concerns or persons engaged in the stamping business. They were not successful, since those they interviewed either had insufficient capital or just were not interested in going into such an extensive business as that enthusiastically projected by Gleason and Jayne.

Gleason then solicited Blackman to manufacture such articles for his company. Blackman was not a large metal stamping business, but was substantial, and Richard Blackman, its president and chief owner, evidently believed it had sufficient capital and credit to finance the purchase of the anodized aluminum necessary for the manufacture of such products and to advertise the same sufficiently over the country. Blackman also had some interest in developing a proprietary line for his company in addition to his general metal stamping business, although he and his company had had no experience in manufacturing and selling on a nation-wide basis. After some negotiations, upon Gleason's persuasion, Blackman finally did agree to manufacture and finance the public presentation of a line of pans, platters, and lugs which were to be sold under the trade name "Dura-Loy."

Gleason and Jayne then organized Gleason Sales, Inc., a corporation which was to be the sole national sales agent for the Dura-Loy line of products and which would also market the rubber greens which were manufactured by Gleason's other business, the Gleason Manufacturing Company. It is inferred that the manufacture of rubber greens requires less capital than that required in the making of metal products. Gleason was the president and Jayne the vice president of Gleason Sales, Inc., Jayne being in direct charge of its sales operations. The sole purpose of this corporation was to act as a national selling agent in the supermarket equipment field.

Blackman agreed to and did supply the needed financing for the purchase of anodized aluminum and with his presses did manufacture the platters, pans and lugs. Gleason and Jayne, and their company, were not to be compensated except on a strictly commission basis. The business required the printing of price lists and sales propaganda, which the record indicates was paid for by Blackman. No written contract was ever executed between Blackman, on the one hand as the financier and manufacturer of the Dura-Loy line, and Gleason and Jayne, on the other hand, as the sales organization. As Jayne explained it, they all had confidence in each other.

About two years later, for reasons not explained, Gleason Sales, Inc., was dissolved or reorganized as National Market Equipment Associates. During this period, Gleason and Jayne had induced Blackman to add a line of carts and racks, which apparently he did reluctantly, in view of the results theretofore achieved in the meat-handling products field. Gleason and Jayne had attended a great many national meetings, established a line of distributors, and pushed their product to a point where a substantial number of the Dura-Loy pans, platters, and lugs were being sold over the country. The record discloses, however, that Blackman, although a considerable investment had been

made in this meat-handling equipment business, had not prospered in that line; in fact, it is to be found from the *in camera exhibits* summarizing financial records of the company that substantial net losses to Blackman had been sustained after he had entered into this new line.

It was then that Blackman was advised by his personal physician that he was incurably ill with cancer from which he subsequently died in March, 1959. It is urged strenuously by counsel supporting the complaint that Ekco's acquisition of Blackman was unlawful and predatory in character, but the evidence relating to this tragic physical condition of Mr. Blackman, and the sale of those assets of his company that related to the manufacture of meat-handling products is revealing to the contrary.

Jayne testified that he knew Mr. Blackman was ill. At the time he testified herein, Jayne was quite upset due to the fact that his home was in an outlying area of Los Angeles which was near a raging forest fire, and counsel and the examiner did not press the matter with him when he said, "It was out of respect to Dick Blackman that I don't amplify any further. [It was] quite a shock, believe me." He was very emotional about Blackman. The witness, Cecil L. Brewer, Jr., who was associated with Blackman, and who succeeded him as president of the company, testified as to the circumstances and reasons for Blackman selling the Dura-Loy business to Ekco as follows:

[There were] several considerations. We had considerably more money invested in the business than we had foreseen. The volume of sales wasn't as great as we had anticipated, and early in 1958, Mr. Blackman had been informed that he had cancer, and he was concerned about the future of the business. I think that placed considerable weight on his decision.

Brewer had nothing to do with the negotiations leading up to the sale of the Blackman assets pertaining to the Dura-Loy line to the McClintock Division of Ekco, but John L. Williams, then general sales manager and now the president of the McClintock Division, testified credibly as follows:

Well, I suppose the best way is to start from the beginning. As I testified yesterday, I knew Mr. Richard Blackman for many years, and I always admired him as a gentleman, although we were competitors in various types of business. Mr. Blackman and I had no real close relationship, but we were friendly competitors. One day I received a telephone call from him, asking me if I would have lunch with him. * * * It was, maybe, within a 30-day period before the acquisition. So I went and met him for lunch, and we discussed the weather and the fishing; and he told me that his doctor had informed him that he had cancer and that he wanted to start getting his estate in order; that he intended to sell this part of his business and he wanted to know if we should be interested in buying it. I told him, as far I was personally concerned, this was not a decision that I could make alone; but I would discuss it with Mr. Burns, who was then my superior officer. I went back and discussed it with Don [Burns]; and a few

days later, we decided that we were interested in this. I contacted Blackman again, and told him we were interested and asked him to submit whatever his proposal might be, quoting a price, and what he specifically had to sell. So he did this; and the company decided to acquire these assets, and they did.

It is unquestioned in the record that Ekco bought that part of Blackman's business on May 9, 1958, for a cash consideration of $142,335.52 under a purchase and sale agreement which, among other things, contained a covenant by the Blackman Company not to re-engage in the manufacture and sale of any meat-handling equipment for five years, a proper precaution, but probably unnecessary since Richard Blackman himself was soon to die and his successor in management, Brewer made no indication during his testimony that the surviving heirs or anyone connected with the company had any interest whatsoever in returning to the business after Richard Blackman's death. The five-year period, of course, has now expired. Such a covenant is not uncommon, and what probable illegal monopolistic effect it may have been supposed to have created is, in any event, now completely dissipated.

Aside from the intangibles pertaining to the Blackman Dura-Loy line of meat-handling equipment the respondent by its purchase acquired certain raw materials and finished goods on hand, but the only manufacturing machinery useful in making the line which it acquired were certain tools and dies which have since been disposed of. They were sent to a Canadian subsidiary of respondent and then sold for scrap.

Donald Burns, presently vice president and general manager of Ekco's Builders Hardware & Industrial Division, and former vice president in charge of sales of the McClintock Division during the period when the Blackman acquisition occurred, testified in corroboration of Williams with respect to the acquisition except as to the personal conversation between Williams and Blackman, whereat Burns was not present. As he recalled Ekco's position with respect to this acquisition, no consideration was ever given to buying the entire Blackman business and the sale in question only involves those assets relating to the Dura-Loy line of products. And the record affords no evidence from which it can be inferred that Blackman, in getting his affairs in shape in readiness for his imminent certain death, ever wanted to, or tried to dispose of any other part of the business in selling than this losing element of his business which Gleason and Jayne had gotten him into.

Ease of Entry Into This Line of Commerce

The evidence herein shows that buyers frequently are not discriminate as between the manufacturers of products, and sometimes buy

steel racks and carts from one competitor and platters, pans and lugs from another. There is no evidence as to how much of any of the products involved herein are made by local pressing and tinsmith concerns, hence all findings are based upon the evidence presented relative to those doing a substantial interstate business in the relevant line of commerce.

While the evidence shows that porcelainized steel products were once popularly used in the platters, pans and lugs used in the handling of meats in retail establishments, the present basic material preferred and used therefor is anodized aluminum. There is evidence the plastic lug is gaining ground. Chesley sells only plastic lugs, and successfully. Safeway Stores, Inc., the second largest food chain in the country, seems to prefer plastic lugs, but currently this element of the relevant line of commerce is anodized aluminum platters, pans and lugs.

The evidence is clear that respondent is not a manufacturer of either aluminum or steel, which are the basic items needed for the manufacture of the platters, pans and lugs, and the racks and carts, respectively. There is no evidence that, due to its size, respondent receives any preferential treatment from the aluminum companies or the steel companies over anyone else engaged in this relevant line of commerce.

The evidence does show, however, that there are many operators of presses throughout the country who do commercial work for others. For example, Gleason and Jayne conferred with a number of concerns doing that type of work before they dealt with Blackman. The cost of dies for Blackman's 22 sizes of aluminum platters, 22 sizes of pans, and 4 sizes of lugs, was estimated by Brewer to have been not less than $23,000, nor more than $50,000. These 48 different sizes are no longer necessary to compete in the present-day demand for such products, and a few sizes are sufficient. Gleason and Jayne testified, for example, if they were to re-enter such business they would concentrate on a few of the larger and popular sizes of such products. Chesley had attained a substantial business growth with only three large sizes of aluminum platters, a plastic lug, and also carts and racks. The cost of a die for a 10 inch by 30 inch platter would cost from $2,500 to $3,000 and that these would cost less per die if several were made was testified to by Kaplan, of Eastern Steel Rack Company. It necessarily follows that a few thousand dollars cash on hand would pay for the necessary dies, and if one had other capital or credit to buy the aluminum and steel, pay the cost of pressing the aluminum to size and paying the labor cost of assembly of steel pipe, sheets and wheels together in racks or carts, one would be in business in this line except for the promotion of such products. Carts and racks at most require very simple equip-

ment such as cutting tools and other tools capable of bending steel rods or pipes. No expensive specialized machinery is necessary to go into the cart and rack business. Of course, it would take some knowledge of the business to fix adequate competitive prices and to contact distributors, but the record shows there were many distributors who sold various lines to the grocery and meat trade who would willingly take on this additional line of products. The evidence shows that Blackman's failure in the business was not in getting it started and under way with abundant distributors glad to take on the Dura-Loy line, but Blackman's inability to estimate the price at which such products should sell nationally through numerous distributors and still leave a reasonable profit to Blackman. Blackman spread out too rapidly in a new business.

There are a number of competitors in this line of business on a national scale. Ekco and its predecessor, McClintock, appeared to be the only ones doing business in most, if not all, regions of the country, except for Blackman. The Eastern Steel Rack Company, of Boston, Massachusetts, confines itself to the northeastern section of the United States, while Chesley Products Company, of Detroit, has not been interested in meeting competition in the West Coast areas but has confined its effort in this line chiefly to the area between the Appalachian Mountains and the Mississippi River, where this Detroit manufacturer has a freight cost advantage over other substantial competitors. Chesley avoided the mistake Blackman made, although both of them entered this field many years after McClintock did, and even several years after Ekco acquired McClintock.

Other competitors in the anodized aluminum platter and pan business are the Warren Company, Incorporated, of Atlanta, Georgia; Friedrich Refrigerators, Inc., of San Antonio, Texas; and C. V. Hill & Company, Incorporated, of Trenton, New Jersey. These are all concerns whose primary business is the manufacture and sale of all types of commercial refrigerators and allied equipment. They all make certain sizes of anodized aluminum platters and other types of platters as well for their refrigerators but have not pushed the platter, pan and lug business as a separate line, although each possesses the machinery, capital, national sales organization and "know-how" to easily do so. These are the concerns which McClintock specially feared when it sold out to Ekco. They are always incipient competition in this line. The Hill Company has annual sales of 19 to 20 million dollars. Friedrich Refrigerators is a subsidiary of Ling-Temco-Vought which had total assets at the time of the hearings in excess of $190,000,000. The Warren Company has annual sales of about $9,500,000.

A Divestiture of McClintock Would Only Aid Competitors

Since each case must be decided upon its own peculiar facts, comparison of the evidence in the case at bar with the facts in others serves very little purpose except to indicate that others, in each instance, insofar as the examiner has had time to carefully examine some of the numerous cases brought under § 7, involve a much greater and more important public interest than that presented herein. While § 7 does not contain the precise expression "to the public interest" that is the keystone of all Commission cases under Section 5 of the Federal Trade Commission Act, § 7 does contain language and has a legislative history which the Supreme Court has interpreted in *Brown Shoe Co.*, *supra*, that requires at least an inchoate determination that the proceeding is brought and maintained for the benefit of the public and not to further the private interests and demands of some competitor or competitors. As the Court said in *Brown Shoe*: "Taken as a whole, the legislative history illuminates congressional concern with the protection of *competition*, not *competitors* * * *" (370 U.S., p. 320). And again the Court said: "It is competition, not competitors, which the Act protects." (id. p. 334).

In the case at bar the evidence shows that respondent by its nation-wide selling invaded the area in which Chesley chose to operate and in which it had little, if any, competition. Chesley resented this intrusion and the loss of substantial business to a newcomer in the area. Likewise, Gleason and Jayne resented respondent's competition in their rubber greens line as well as in the Blackman Dura-Loy line of meat-handling equipment. Some of the distributors for Blackman were likewise unhappy over the merger of that company by Ekco, but apparently would have been satisfied had respondent made them its distributors rather than selecting or retaining other distributors. Since there is no evidence that the general public has been forced to pay more for meat with Blackman out of business, even if Chesley and Gleason are losing some business, it would appear that to put Ekco out of this line would only aid Chesley and Gleason. Certainly, the supermarkets, both chain and independent, have not been hurt and can take excellent care of themselves in any product market. Local facilities exist for making all the products involved in the line in question, and both the supermarkets and smaller retail meat dealers could readily obtain what they need in this line in many places.

The Supreme Court in *Brown Shoe Co.*, *supra*, further held that Congress intended that the validity of mergers "was to be gauged on a broader scale: their effect on competition generally is an economically significant market" (id. p. 335).

In none of the § 7 cases heretofore decided by the courts or the Commission has any such small and limited line of commerce been involved as in the case at bar. One is mindful that § 7, as amended, specifically applies to "any line of commerce," hence the *de minimus* rule is not applicable here even if the total annual national product in the commercial meat-handling equipment line herein pales into insignificance beside the vast volume of any other respondent in any other reported case. In *Warner Company*, Docket No. 7770 [62 F.T.C. 1295], the Commission, while noting its jurisdiction in a horizontal merger case, nevertheless dismissed the complaint on May 15, 1963, although the record disclosed Warner had acquired by its mergers in 1956 and 1957, some 12 to 13 million dollars worth of the 20 to 23 million dollars annual volume of the entire mixed concrete business *in the Philadelphia area alone*, while in the case at bar the *total annual volume of national competition* in the relevant line of commerce for the same years, as disclosed by *In Camera* Schedule 12, is trifling in comparison, being approximately only 5% thereof. And in *Warner* there was nothing to compare to the massive "economically significant" markets in other cases decided by the Commission and the Courts.

Certainly from the standpoint of whether the relevant line of commerce in the case at bar is "an economically significant market," a determination is most difficult. It certainly falls far short of being classified as one of oligopoly. But mere comparative size of this market alone, to other markets considered in the many cases already decided, has no more significance than the comparison of respondent's size against that of its competitors. The important thing to bear in mind, however, is that in the vast corporate empires involved in all other § 7 cases, entry into the competitive field is no easy matter, and in some industries virtually impossible. The effect of the mergers involved here, where almost any competent person or concern with small capital and possessing the know-how, of whom the record shows there are many, can enter the business locally, or expand such business, cannot be compared to the gigantic operations considered, for a few examples, in such Commission cases as *Pillsbury Mills*, D. 6000 [57 F.T.C. 1274]; *Procter & Gamble Company*, *supra*, D. 6901; *Consolidated Foods*, D. 7000 [62 F.T.C. 929]; and *Union Carbide Corporation*, D. 6826 [59 F.T.C. 614]. *Brown Shoe Co.*, *supra*, and other Federal Court cases cited have involved huge industries with vital impact upon the economy.

Basic Errors in the Theory of the Prosecution

The general insistence throughout much of this litigation by counsel supporting the complaint to inject additional issues into the case has important bearing herein. While the examiner could observe during

the trial there was some special reason for counsel's persistence in this respect, careful analysis of the whole record more clearly reveals why the difficulties confronting counsel impelled them to repeated efforts to create a substantial change in the issues.

The fundamental and inherent weakness in the case appeared at the beginning of the trial before any evidence had been adduced when respondent's counsel first raised material questions arising out of the Commission's then very recent decision in *Procter & Gamble Company*, Docket No. 6901, issued June 15, 1961 [58 F.T.C. 1203], (R. 48–54). This case, like that now at bar as respects the McClintock acquisition, admittedly was a case of first impression involving a conglomerate acquisition. The Commission, in remanding the case to the hearing examiner for the presentation of further evidence, in its *per curiam* opinion decided:

> Such a [conglomerate] merger * * * does not have the effect of automatically foreclosing to competitors any market outlet or source of supply as in a vertical merger, nor does it have the effect of automatically eliminating a competitor as in a horizontal merger * * *.
>
> The question in this proceeding thus is whether the proscribed effect may in fact result from this particular acquisition where the only immediate effect is the replacement of one competitor by another. In making this determination, the same tests apply as in any other matter coming within the purview of § 7, but since a conglomerate acquisition does not have the above-mentioned "automatic" effects of a vertical or horizontal merger, such a determination is necessarily difficult to make from a consideration of evidence relating solely to the competitive situation existing in the relevant market prior to the acquisition and to the pre-merger status of the acquired and acquiring corporation. Consequently, a consideration of post-acquisition factors is appropriate.

Some post-acquisition activities of the acquired company, Clorox, has been given emphasis by the hearing examiner in that case in holding that the dominant position of Clorox in the sale of liquid bleach, the line of commerce involved, had been enhanced, and that, in substance, competitive conditions tended to create a monopoly. While holding the examiner "was correct in considering this evidence" the Commission did "not agree that it supported his conclusion with respect to the probable effects of the acquisition." The Commission, therefore, remanded the case for the presentation by counsel supporting the complaint therein of additional evidence pertaining to pre-acquisition growth of Clorox as well as post-acquisition activities of Clorox under respondent's management, particularly its production and merchandising facilities and techniques. Since that time the hearing examiner had further proceedings and issued his second initial decision in which he ordered divestiture. Since that time there have been extended proceedings before the Commission and no final submission or decision has yet been reached.

Recognizing the increased difficulty of establishing a § 7 conglomerate case under the principles enumerated in the Commission's said *Proctor & Gamble* opinion, counsel supporting the complaint then made every effort possible to introduce evidence with reference to the pre-existing competitive status of Ekco with McClintock and its present general competitive status in the commercial bakery pan line of commerce, and also the competitive former status of McClintock and the subsequent competitive status of Ekco's McClintock Division with Gleason Manufacturing Co. and Gleason Sales Co. in the rubber greens line of commerce. The examiner sustained objections to repeated offers of such evidence.

Then, after many hearings had been held under the complaint's theory, counsel supporting the complaint, without moving the examiner for amendments to the complaint, upon their attempt to obtain an interlocutory appeal on various rulings on evidence, also applied to the Commission for amendments to the complaint to include bakery pans and rubber greens into the case. This was certainly for the purpose of trying the case upon two horizontal acquisitions, rather than upon one major conglomerate acquisition (McClintock), plus an academic and moot horizontal one (Blackman). Counsel supporting the complaint were unsuccessful in convincing the Commission that it had erred in its original administrative judgment in issuing the complaint. It is also inferred by the examiner that further delay in the progress of the case was not proper and that it was not reasonable and fair to permit counsel to mend their hold when the case had progressed so far on a different and more limited theory. The proposed amendments having been denied by the Commission, the examiner has been and still is foreclosed from allowing any such change of issues, even were he disposed to do so.

But counsel supporting the complaint, nothing daunting them, have now presented numerous proposed findings of fact in at least an indirect effort to inject competition in the two rejected lines of commerce into the facts of this case and thereby consequently into this initial decision. They have conceded that the Blackman acquisition order is moot and at best they can only obtain divestiture of the McClintock acquisition. In confirmation of the examiner's view, among other things, no other discernible reason exists for counsel's requesting an order of divestiture of McCormick by Ekco which includes all of McCormick's former varied lines of commerce, and specially including by name both rubber greens and commercial bakery pans, as well as the commercial meat-handling equipment which is the only relevant line of commerce involved in this proceeding.

Counsel supporting the complaint, as already stated, have recognized and conceded that there is no remedy available to them by way of divestiture of the dissipated assets which Ekco acquired from Blackman. They therefore seek to divest Ekco of the stock and assets of McClintock it acquired nine years ago.

The officers and other controlling stockholders of the dissolved McClintock corporation have not evinced any interest in reorganizing that concern in any form. They have either retired entirely from any business or are now engaged in entirely different businesses. McClintock's effort to do business on a national scale was largely the cause of its sale to Ekco. Chesley has never been interested in selling far from its seat of operations in Detroit nor has Eastern Steel Rack Company desired any business distant from its strongly held New England and Eastern territory. Whether the large refrigerator companies desire to expand their operations soon and have any interest in acquiring the McClintock Division's assets used in the line of meat-handling equipment is not manifest and, in any event, sale to any of them would be to other corporate interests at least as large, or tremendously larger, financially than Ekco, a thought which must be abhorrent to counsel supporting the complaint in view of their passionately eloquent protestations herein against the unchallenged acquisitions by the corporate respondent herein.

To divest Ekco of its interests in the commercial meat-handling equipment business, assuming a ready and willing purchaser, at best would be mere *quid pro quo*, as Ekco could use the proceeds of such sale in re-engaging in this business. Apparently so fearing that Ekco could easily acquire other equipment and be in the same business again, counsel supporting the complaint, in addition to the customary type of divestiture order which the Commission has followed in all § 7 cases, urge a most drastic remedy far beyond any provided by Congress. Their proposed order provides that for 10 years Ekco cannot acquire any capital or other assets of any corporation engaged in commerce without the prior approval of the Federal Trade Commission. Their only cited authority, *Union Carbide Corporation*, Docket 6826 [59 F.T.C. 614], contains no such provision in its order, it being limited to the only authority granted the Commission by Congress, namely, the divestiture of the acquired corporation and its assets as provided in §7, as amended. "There is * * * no legal requirement that the Commission be notified of corporate mergers or acquisitions either before or after consummation." Annual Report of the Federal Trade Commission for the fiscal year ended January 30, 1957, p. 22. Notwithstanding any consent order cases or dissenting opinions, the Commission has not yet attempted, as an administrative adjudicative body,

to go beyond its powers and become a court of equity. Its unquestioned authority to formulate appropriate remedies under the broad language of Section 5 of the Federal Trade Commission Act has no application here other than in event divestiture is ordered, the Commission has power also to prohibit any such future violations.

Since there was no illegality in Ekco's acquisition of McCormick when it occurred nine years ago, what counsel supporting the complaint have been compelled to do, in view of their inability to amend the complaint, is to attempt to prove a series of acts which are in essence "unfair methods of competition," and thereby retroactively to condemn the original legal acquisition. The logic of this, if any, entirely escapes the examiner since this was a conglomerate merger and there was a mere substitution, not an absorption of an existing competitor as in horizontal mergers. There was no prior control by Ekco of any basic commodity such as aluminum or steel essential to the production of the products in relevant line of commerce thus driving McClintock into a forced sale to Ekco. The examiner has found no case in which such a *nunc pro tunc* finding of illegality has yet been finally determined on a legitimate long-antecedent conglomerate merger.

What does appear to the examiner in this connection is that counsel supporting the complaint have attempted to try a Section 5 "unfair competition" case or a Robinson-Patman case or both under the cloak of a strictly § 7 complaint, and then obtain remedies afforded in all such types of proceedings. No opinion is expressed herein as to what the merits of such a Section 5 case, or a case combining both Section 5 and Robinson-Patman issues, might be since no such case is before the examiner. It is to be noted, however, that counsel supporting the complaint have not in their proposed order here gone quite so far as to request prohibition of respondent from using its own assets for any purpose, limiting their proposed order to divestiture of McClintock and restraining respondent's acquisition of "any part * * * of the share capital or any other assets of any corporation engaged in 'commerce'," without the approval of the Commission for ten years. At any rate, if the Commission is to be made into a purely management body and not a public regulatory body, certainly it appears that such a vital and radical change of public policy, if the same were constitutional, should first be presented to Congress and its legislative approval obtained.

Summary

In summation of the facts, this case involves two acquisitions involving a very limited line of commerce. Concededly divestiture is moot and not warranted as to the later and smaller assets acquisition by respondent in 1958 since the assets thereby acquired are gone. A

divestiture of the earlier conglomerate merger in 1958 is unwarranted primarily upon the ease of competitive entry by others into this line of commerce and the presence of substantial actual and incipient competition. While counsel supporting the complaint have presented considerable evidence purporting to show that respondent has engaged in a number of allegedly unfair competitive practices after the 1954 merger, such evidence, although fully considered by the examiner, requires no findings and determination in view of the very recent holding of the Supreme Court in *U.S.* v. *Philadelphia National Bank et al*, *supra* that a *prima facie* case is made by a showing that by the merger, a substantial portion of the business will be held by one corporation. Here it has been found that when respondent acquired McClintock in 1954, the latter had 98% of the entire line of commerce on a national or interstate basis and that respondent has retained nearly all of such percentage. Hence to discuss and determine the facts purporting to establish the numerous instances of alleged unfair competition subsequent to the respondent's merger of McClintock in 1954 would serve no useful purpose herein. Since all counsel, and the examiner, as well, were necessarily unaware of this most recent and surprising Supreme Court decision tending to shorten the Government's presentation in any § 7 case, no criticism should attach to the length of the record herein.

There being jurisdiction of the person of the respondent corporation, upon the findings of fact hereinbefore made and the legal principles applicable thereto the hearing examiner makes the following

CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding.

2. There is no substantial evidence warranting an order of divestiture under § 7 of the Clayton Act, as amended, divesting respondent of the capital stock and assets of the McClintock Manufacturing Company, dissolved and merged into respondent in 1954; there is no substantial evidence warranting any divestiture of these assets of The Blackman Stamping & Manufacturing Company, which were acquired by respondent in 1958, and which are no longer in existence; and consequently no further supplemental order of any kind is authorized by law.

Upon the foregoing findings of fact and conclusions of law, the following order is hereby entered:

ORDER

It is ordered, That the complaint be, and hereby is, dismissed, without prejudice, however, to further proceedings by the Commission

under any other statutory authority than § 7 of the Clayton Act, as amended.

Opinion of the Commission

APRIL 21, 1964

By Elman, *Commissioner:*

The complaint in this matter was issued on September 26, 1960, and challenges the lawfulness, under Section 7 of the Clayton Act, as amended (15 U.S.C. § 18), of two corporate acquisitions by respondent: the acquisition in 1954 of the stock and assets of McClintock Manufacturing Company; and the acquisition in 1958 of part of the assets of Blackman Stamping & Manufacturing Company. After extensive hearings, the hearing examiner rendered his initial decision, in which he ordered the complaint dismissed. Complaint counsel have appealed.

I

The following facts are essentially undisputed. Respondent is one of the nation's leading manufacturers of housewares—kitchen tools, tinware, kitchen cutlery, stainless steel cooking utensils and flatware, etc.—and commercial baking pans, hardware, and other fabricated metal articles. In 1959, respondent's net sales were more than $70 million and its total assets more than $60 million.

At the time of its acquisition by respondent, McClintock Manufacturing Company was engaged primarily in the manufacture of commercial meat-handling equipment, consisting of (1) anodized aluminum platters, pans and lugs (deep pans), used for storing and carrying meats on the premises, chiefly in supermarkets and grocery stores, and (2) the metal racks and carts that hold such platters, pans and lugs. McClintock sold these products throughout the nation through a system of independent jobbers and distributors, and was, at the time of the acquisition, the nation's leading manufacturer of such equipment. Indeed, it enjoyed a virtual monopoly in the field.[1] McClintock's sales of commercial meat-handling equipment were approxi-

[1] Respondent concedes that at the time of the acquisition McClintock had, for all practical purposes, a monopoly in the production of anodized aluminum platters, pans, and lugs. The picture is somewhat less clear as to carts and racks. There was at least one important producer besides McClintock, Eastern Steel Rack Company, but its production was confined to a specialized, higher-cost type of rack more in the nature of permanent shelving and not an adequate substitute for McClintock's carts and racks in most instances. McClintock's other competition in this line appears to have been purely regional or local and, in the aggregate, of relatively little importance. McClintock was the only national producer in this line and enjoyed the lion's share of the total business. Overall, it is apparent that McClintock in 1954 occupied a monopoly position in the commercial meat-handling equipment industry.

mately $700,000 in 1954, out of total sales of $1.5 million. Respondent acquired McClintock for a consideration of $783,000.

Despite its monopoly position in commercial meat-handling equipment, McClintock, at the time of the acquisition, was not very strong financially. Although it was nowhere near being a failing company, it had not paid any dividends for years, it was short (and growing shorter) of cash, and its operations were cramped by the terms of a loan agreement under which McClintock was compelled to maintain net current assets of $200,000 and forbidden to pay dividends or make other expenditures without the prior written consent of the creditor. Such disabilities were removed as a result of the acquisition.

McClintock's monopoly position is somewhat difficult to account for. There do not appear to be unduly high barriers to new competition in the industry, although the small size of the industry may itself constitute a barrier. See *Brillo Mfg. Co.*, F.T.C. Docket 6557 (decided January 17, 1964), p. 14 [64 F.T.C. 259]. Dies and other assets required in the manufacture of commercial meat-handling equipment are relatively inexpensive; there is no raw-material shortage, patent protection, or impeded access to distribution; neither product differentiation nor economies of scale are important factors; and cost of production is low, in part because there is little demand for more than a very few sizes of platters, pans and lugs. In addition, demand for commercial meat-handling equipment is not decreasing, and there are no close substitutes for either the anodized aluminum platters, pans and lugs or for the carts and racks. In light of such facts, one might have expected that McClintock's monopoly would not long remain unchallenged; and, in fact, it did not.

At about the time of respondent's acquisition of McClintock, a small firm, Chesley Industries, Inc. (its total assets in 1958 were $363,000), began to manufacture and sell commercial meat-handling equipment. In 1955, another small firm, Blackman Stamping & Manufacturing Company (1958 total assets: $213,000) entered the field. Although neither of these firms dislodged McClintock from its dominant position in the industry, they made considerable inroads into its monopoly. Thus, in 1958 Blackman accounted for 10% of total sales of platters, pans and lugs, and McClintock's market share was down to 76%.

In 1957, respondent had made unsuccessful efforts to acquire Chesley Industries. In 1958, respondent acquired, for a cash consideration of $142,000, Blackman's tools and dies used in the producton of commercial meat-handling equipment and some inventory. The inventory was soon sold off; the tools and dies were transferred to a Canadian subsidiary of respondent and, after being used for a short

time, scrapped. The elimination of Blackman as a competitor,[2] and the apparent decline in Chesley's market share between 1957 and 1960, restored McClintock to about the same monopoly position in the field that it had enjoyed in 1954 at the time of its acquisition by respondent.

The plant in which McClintock's manufacturing facilities were located at the time of the acquisition has since been sublet to third parties. Its operations are now carried out in a portion of one of respondent's plants.

In addition to the foregoing, largely undisputed facts, complaint counsel introduced evidence purporting to show that after the acquisition Ekco-McClintock engaged in various exclusionary and predatory tactics with the aim of driving Blackman Stamping & Manufacturing Company (prior to respondent's acquisition of Blackman) and Chesley Industries out of business.[3] The hearing examiner made no findings with respect to such evidence, and, as will appear, we consider it for the most part unnecessary to our decision.

II

In ordering the complaint dismissed on the ground that a violation of Section 7 had not been proved, the examiner reasoned as follows: (1) respondent's acquisition of McClintock was *prima facie* unlawful under the rule of *United States* v. *Philadelphia National Bank*, 374 U.S. 321, since McClintock's share of the relevant market (commercial meat-handling equipment) [4] was more than 30%; but (2) this *prima facie* case was successfully rebutted by proof of ease of entry; (3) the amount of commerce affected by the acquisitions in question may, in any event, have been *de minimis*; (4) evidence of post-acquisition predatory or exclusionary conduct is immaterial in a Section 7 proceeding; and (5) the acquisition of Blackman is moot, due to the disap-

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[2] As part of the transaction in which respondent acquired the Blackman assets, Blackman gave respondent a covenant not to re-enter the commercial meat-handling equipment field for five years. Blackman's owner died shortly after the acquisition, and, although the covenant not to compete has by now expired, the prospects of the company's re-entering the field within the near future are remote.

[3] The following tactics are listed by complaint counsel: (1) coercive price fixing; (2) blocking Blackman's distribution; (3) freight absorption; (4) cash discount terms: (5) attempt to acquire Chesley; (6) complete elimination of Blackman competition: (7) scrapping Blackman tools and dies acquired by respondent; (8) substantially lessening competition among distributors; (9) predatory price cutting; (10) discriminatory and below-cost price cutting. Appeal Brief, pp. 10–23. Points (5) through (7) are discussed, in somewhat different terms, later in this opinion.

[4] Respondent concedes that both anodized aluminum platters, pans, and lugs and metal carts and racks, used for commercial meat handling, are proper lines of commerce in which to test the effects of the challenged acquisitions under Section 7. Since these product lines, though separate, are complementary, we may also speak of them as composing one line of commerce, commercial meat-handling equipment. Compare the Supreme Court's treatment of all commercial bank services as a single line of commerce, "Commercial banking." *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 356–57.

pearance of the acquired assets, and the Commission is helpless to afford any relief in these circumstances because it is not a "court of equity".

We shall consider each of these points before taking up the ultimate question of whether the acquisitions challenged in the complaint are unlawful under Section 7, not only because these points are relevant to the decision of the present case but also because they help illuminate some recurring problems of Section 7 enforcement.

First. The examiner's reliance on the rule of presumptive unlawfulness announced in the *Philadelphia Bank* decision was misplaced. The rule is "that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of the firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects." 374 U.S., at 363. Specifically, the Court, although it did not attempt "to specify the smallest market share which would still be considered to threaten undue concentration", held that where the merger caused a 33% increase in concentration and resulted in a single firm's controlling 30% of the relevant market, the rule was applicable. *Id.*, at 364–65.

Since the substitution of respondent for McClintock in the commercial meat-handling equipment line as a result of the acquisition had no immediate effect on the concentration of firms in the relevant market, the rule of *Philadelphia Bank*—a rule designed for the testing of conventional horizontal mergers—appears to be inapplicable. The need for reasonably simple rules of liability under Section 7 is no less exigent in the case of a product-extension acquisition (see *Procter & Gamble Co.*, F.T.C. Docket 6901 (decided Nov. 26, 1963), p. 15 [63 F.T.C. 1543]), such as respondent's acquisition of McClintock, than in the case of a conventional horizontal acquisition. It would seem clear, however, that application of the particular rule announced in *Philadelphia Bank* should be limited to the latter.

Second. Difficulty of entry by new competitors into the relevant market is highly material in a Section 7 case. Indeed, the existence of substantial barriers to entry into an already highly concentrated market may be the decisive factor in the determination that a particular merger is unlawful. For in such a market, where actual competition has already been eliminated to a large extent, potential competition may be the only force keeping the market from behaving in a completely non-competitive manner. See *Foremost Dairies, Inc.*, F.T.C. Docket 6495 (decided April 30, 1962), p. 50 [60 F.T.C. 1089]; *Proctor & Gamble Co.*, F.T.C. Docket 6901 (decided Nov. 26, 1963), pp. 28, 61–62

[63 F.T.C. 1552, 1577–1578]. Just recently, the Supreme Court has held that, in such circumstances, the elimination, by acquisition, of a potential competitor may violate Section 7. *United States* v. *El Paso Natural Gas Co.*, No. 94, October Term 1963 (decided April 6, 1964).

However, difficulty of entry into the market is not indispensable to a finding of illegality under Section 7. A merger may violate Section 7 even though there do not appear to be formidable barriers to entry into the market affected by the acquisition; the existence of potential competition does not justify or excuse elimination of actual competition. In such a case, where the merger's effects on competition are those proscribed by Section 7, its illegality cannot be overcome by a showing of ease of entry. Section 7 would surely be violated in a case where all of the firms in an industry merged into one, even if the barriers to entry remained low. Ease of entry may, to be sure, cause the market power of established firms to be eroded by the advent of significant new competitors; but this is likely to be at best a long-term affair. See Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 Harv. L. Rev. 226, 260 (1960). Ease of entry may also induce the firms active in the relevant market to keep their prices down to an entry-discouraging level; but that does not mean that such an entry-discouraging price level is likely to be as low as the level that would prevail if there were actual competition in the market. See *id.*, at 261. In short, the absence of high entry barriers cannot be depended upon to ensure effectively competitive conditions. Cf. Bain, Barriers to New Competition 189 (1956); Bain Industrial Organization 425 (1959).

Thus, where complaint counsel undertakes to prove difficulty of entry as part of his case, the respondent may properly present evidence in rebuttal; but a merger that has been proved to be so anticompetitive as to violate Section 7, even apart from difficulty of entry into the market, cannot be defended on a mere showing of absence of high entry barriers.

This conclusion is supported by the Supreme Court's treatment of the question of relevant product market under Section 7. The Court has indicated that such a market consists of the product and probably its close substitutes, but does not embrace all products as to which there is a significant cross-elasticity of demand, or which are, in a broad sense, substitutes,[5] even though the existence of substitutes is among

[5] *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 356–57; *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325; *United States* v. *E. I. duPont de Nemours & Co.*, 353 U.S. 586, 593–94. See also *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576, 593–94, n. 36 (S.D.N.Y. 1958).

the factors which determine the extent of a firm's market power. While the existence of substitutes is likely to exercise a restraining influence even on a monopolist, it is the restraint only of potential, not actual, competition. It leaves the monopolist free to set prices within at least a range, and, even if it has a definite moderating effect on price, it is less likely to be effective in encouraging technological innovation in the particular product line involved. See Turner, *Antitrust Policy and the Cellophane Case*, 70 Harv. L. Rev. 281, 292 (1956).

The Court's approach toward defining the relevant product market parallels our approach toward the question of proof of easy entry. Ease of entry as such should not be recognized as a defense in a Section 7 proceeding because even if there are no very substantial barriers to entry, powerful firms active in the relevant market are bound to have some, and probably considerable, leeway in which to exercise their market power. On the other hand, to the extent that such barriers exist, competitive conditions in the market may be directly impaired; consequently, difficulty of entry will sometimes be a basis for inferring a violation of Section 7. By the same token, while the existence of "substitute competition" is not a proper defense under Section 7—for it does not limit market power sufficiently—substitute competition, like other forms of potential competition, may be a force for restraint in a market which is already well on the way toward the elimination of competition. Therefore, an acquisition which impaired or eliminated substitute competition could, possibly on that basis alone, violate Section 7. Cf. *United States* v. *Continental Can Co.*, 217 F. Supp. 761 (S.D.N.Y. 1963), prob. juris. noted, 375 U.S. 893.

Third. We do not think that the line of commerce in which to test the competitive effects of a merger challenged under Section 7 must necessarily be economically substantial or important—although the commercial meat-handling equipment line is. See *Reynolds Metals Co.*, 56 F.T.C. 743, 773, aff'd, 309 F. 2d 223 (D.C. Cir. 1962). The line of commerce need not be either a line of interstate commerce (*Foremost Dairies, Inc., supra*, pp. 36–37 [60 F.T.C. 1077–1078]) or a line in which a substantial dollar volume is involved, so long as it is a properly defined product market; the jurisdictional requirements of the statute are satisfied if the acquiring and acquired corporations are engaged in commerce. We believe that the phrase "substantially to lessen competition" refers to substantiality within the line of commerce involved, not substantiality in any absolute monetary terms. If competition in a product which has no close substitutes is impaired to the degree specified in the statute, the statute has been violated, whatever the commercial significance of the product.

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It is true that in *United States* v. *E. I. duPont de Nemours & Co.*, 353 U.S. 586, 595, the Court stated that the line of commerce in a Section 7 case must be economically substantial. But the Court was speaking of a product submarket—auto finishes and fabrics, in contrast to the broader market for all finishes and fabrics—in the context of foreclosure of competing suppliers. The Court's point was that the automobile industry represented a substantial outlet for duPont and its competitors, not that Section 7 is applicable only where total sales of the product involved are economically substantial or commercially important.

It is also true that Section 7 has been construed to require that the relevant *geographic* market have commercial importance. See *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320, n. 35, 336–37; *Philadelphia Bank*, *supra*, 374 U.S., at 359, n. 36. The legislative history of the 1950 amendments to Section 7 indicates that Congress did not intend Section 7 to reach corporate acquisitions affecting strictly local geographic areas—e.g., small towns. See Note, 52 Col. L. Rev. 766, 779 (1952). There might, for example, be problems if the Government were free to challenge mergers involving substantial corporations on the basis of entirely localized competitive effects. Congress properly showed no such concern in the case of products having relatively little economic importance; it granted no dispensation to monopolists of products which play only a small role in the total economy. It would be inconsistent with Congress' evident intention, in amending Section 7 in 1950, to preserve small business from a rising tide of economic concentration to hold that a very large corporation, such as the present respondent, is free from any scrutiny under Section 7 where it enters, by merger, a product market previously occupied only by very small firms.

Fourth. Once again, complaint counsel in a Section 7 proceeding before the Commission have placed a great deal of, and perhaps undue, weight on post-acquisition evidence. See *Procter & Gamble Co.*, *supra*, pp. 38–39, 67–69 [63 F.T.C. 1559–1560, 1582–1584]. Much of the lengthy record in this case is taken up with evidence by which complaint counsel attempted to prove that respondent, after acquiring McClintock, engaged in predatory and exclusionary tactics to preserve McClintock's monopoly of commercial meat-handling equipment.

Without finding it necessary to pass on the merits of such evidence, we conclude that, with some exceptions to be discussed later, in the circumstances of this case it is beside the point. The Commission might perhaps have brought a proceeding against respondent alleging that, by its total course of conduct from 1954 to 1960, including the two acquisitions challenged in this case as well as a variety of traditionally

monopolistic practices, respondent monopolized the manufacture and sale of commercial meat-handling equipment in violation of Section 5 of the Federal Trade Commission Act. Had such a case against respondent been proved, structural and other relief might have been appropriate going far beyond the divestiture of the two acquired firms. Since the case was not brought on such a theory, post-acquisition evidence, whether of predatory conduct or anything else, is relevant only insofar as it casts light on the narrower question of whether either or both of the challenged acquisitions had the unlawful effects on competition specified in Section 7.

It is illogical and impractical to use Section 7 as a vehicle for attacking anticompetitive practices rooted in causes other than the particular merger being challenged. If post-acquisition conduct is not causally related to the acquisition, how can it be relevant to the acquisition's lawfulness? Furthermore, an order of divestiture or other relief directed toward an acquisition is not likely to be effective in restoring competition if the non-competitive condition of the market reflects factors other than the acquisition. Thus, it is not only improper, but largely self-defeating, to challenge under Section 7 acts or practices that in fact are independent of the challenged acquisitions.

It is because Section 7 is a statute designed for dealing with corporate acquisitions, and not with the entire range of unfair or monopolistic practices and conditions, that the use of post-acquisition evidence in a Section 7 proceeding frequently raises acute questions of multiple causation. It is not enough that a predatory practice follows an acquisition in time. It must be *propter* as well as *post hoc*. It is only where a restrictive practice was enabled by, or is otherwise attributable to, the acquisition that it is genuinely probative with respect to the *acquisition's* competitive effects. To isolate, in a complex business and economic environment, the various causal strands that may contribute to particular effects is, however, a difficult and indeed often impossible task. For that reason, there is little point in utilizing Section 7 where an actual restraint of trade has occurred subsequent to the acquisition. It is more appropriate in such a case to attack under Sherman or Federal Trade Commission Act principles a respondent's total course of conduct, including its acquisitions, rather than challenge simply the acquisitions themselves and attempt to use the other elements of the respondent's conduct as evidence of the competitive effects of the acquisitions.

As will be seen, however, the present case, like *General Motors-duPont* (*United States* v. *E. I. duPont de Nemours & Co.*, 353 U.S. 586) and *Reynolds* (*Reynolds Metals Co.*, 56 F.T.C. 743, aff'd, 309 F. 2d 223 (D.C. Cir. 1962)), is one where there is post-acquisition evidence

directly and substantially probative on the issue of the lawfulness of the acquisition under Section 7, because it demonstrates how anticompetitive results were accomplished which probably would not have been accomplished but for the acquisition.

It does not follow from the fact that post-acquisition evidence has only a rather limited role to play in Section 7 enforcement that complaint counsel, in attempting to rely on such evidence, should bear an impossible burden of proof. He should certainly not be required to demonstrate conclusively that particular post-acquisition conduct or effects would not and could not have occurred but for the acquisition. Such a standard for proving a negative proposition would be unrealistic. Complaint counsel should not, of course, be permitted to rest on the mere fact that the conduct or effects occurred subsequent to the merger. But we think that his burden of coming forward with evidence is discharged if he shows that the conduct would probably not have occurred but for the acquisition. At that point, the burden shifts to respondent to adduce evidence that the conduct would probably have occurred even if the acquisition had not been made.

Fifth. The present case raises in acute form the question of the scope of the Commission's remedial powers in enforcing Section 7 of the Clayton Act. Section 11(b) of the Act, as amended, provides that the Commission, if it finds a violation of any of the provisions of Sections 2, 3, 7 and 8 of the Clayton Act, shall "issue * * * an order requiring * * * [respondent] to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held or rid itself of the directors chosen contrary to the provisions of sections 7 and 8 of this Act, if any there be, in the manner and within the time fixed by said order." Does this grant of remedial power authorize the Commission to impose, as complaint counsel have contended in the present case, a ban on future acquisitions? Does it permit any order at all in respect of the assets acquired from Blackman Stamping & Manufacturing Co., or has that acquisition been rendered moot by the disappearance of the assets? To state this problem slightly differently, is the Commission's remedial power under Section 11 to be given a narrow, literal interpretation, or has the Commission in the enforcement of Section 7 been given many or most of the powers of a court of equity?

Section 5(b) of the Federal Trade Commission Act authorizes the Commission to issue orders requiring respondents "to cease and desist from using" methods of competition found unlawful under the Act. Until recently, this grant of power was interpreted in a rather schizoid fashion. On the one hand, the Supreme Court repeatedly emphasized that the scope of the Commission's remedial power was very

broad, and indeed coterminous with its substantive power. "Congress placed the primary responsibility for fashioning such orders upon the Commission, and Congress expected the Commission to exercise a special competence in formulating remedies to deal with problems in the general sphere of competitive practices." *F.T.C.* v. *Ruberoid Co.*, 343 U.S. 470, 473; see *Herzfeld* v. *F.T.C.*, 140 F. 2d 207 (2d Cir. 1944). "The Commission is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed. It has wide latitude for judgement and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." [6]

At the same time, however, the Court held that the Commission did not have the power under Section 5(b) to order divestiture of stock or assets even where such relief was necessary to terminate a violation of law effectively and ensure against its recurrence. *F.T.C.* v. *Eastman Kodak Co.*, 274 U.S. 619. Thus, the Court on the one hand indicated that the Commission had broad, flexible and essentially equitable powers of relief,[7] but on the other hand flatly refused to permit the Commission to apply an equitable remedy of great importance in the antitrust field—divestiture.

The *Eastman Kodak* decision has never been expressly overruled by the Court, but its authority has been eroded by later decisions. It is now clear that the Commission has been given, in Section 5(b), a complete array of essentially equitable remedies, including divestiture and other remedies designed to effect structural reorganization. In *Pan American World Airways* v. *United States*, 371 U.S. 296, 312 and nn. 17, 18, the Supreme Court held that the Civil Aeronautics Board has the power to order divestiture under a provision modeled on Section 5. Cf. *Gilbertville Trucking Co.* v. *United States*, 371 U.S. 115, 129–31. While the Court's holding in *Pan American* may in part reflect circumstances—involving the Board's comprehensive regulatory responsibilities in the field of civil aviation—which have no precise parallel in the activities of the Federal Trade Commission, the language of the Court indicates that Section 5(b) itself will now be construed to include the power to order divestiture in appropriate

[6] *Jacob Siegel Co.* v. *F.T.C.*, 327 U.S. 608, 612–13. See *F.T.C.* v. *Cement Institute*, 333 U.S. 683, 726. Cf Section 7 of the Federal Trade Commission Act (Commission as master in chancery to assist in drafting district court antitrust decrees).

[7] See *F.T.C.* v. *National Lead Co.*, 352 U.S. 419, 430, n. 7, where the Court expressly left open the question whether the Commission's remedial powers under Section 5(b) were as broad as those of the Federal District Courts in equity suits (see also *United States* v. *E. I. duPont de Nemours & Co.*, 366 U.S. 316, 328, n. 9), but at the same time, in construing the scope of the Commission's powers, relied indiscriminately on district court antitrust cases. See 352 U.S., at 430.

cases.[8] The Commission, just recently, has so held. *American Cyanamid Co.*, F.T.C. Docket 7211 (Opinion Accompanying Final Order, Dec. 17, 1963). [63 F.T.C. 1747, 1898.]

Decisions construing the Commission's power to order divestiture under Section 5(b) have a definite relevance to the Commission's power under Section 11(b) of the Clayton Act to order relief in lieu of, or in addition to, divestiture. In a series of decisions antedating the 1950 amendments to Sections 7 and 11 of the Clayton Act, the Supreme Court held that the Commission's remedial power under Section 11(b) was to be narrowly construed and that the Commission had not been granted by that section the powers of a court of equity. *Thatcher Mfg. Co.* v. *F.T.C.* and *Swift & Co.* v. *F.T.C.*, decided with *F.T.C.* v. *Western Meat Co.*, 272 U.S. 554; *Arrow-Hart & Hegeman Elec. Co.* v. *F.T.C.* 291 U.S. 587. The Court held that the Commission could not order divestiture of assets even where they had been acquired as the result of an unlawful stock acquisition and for the purpose of disabling the Commission from issuing an effective order divesting such stock.

The holdings of these cases do not directly govern the question of whether broad, equitable relief, beyond simple divestiture, is permissible under Section 11(b) as a remedy for an unlawful asset acquisition. But the decisions obviously depend on the view that the Commission's powers under 11(b) are narrowly circumscribed by the literal terms of the section, which, prior to the 1950 amendments, specified stock divestiture but was silent on asset divestiture. If this view is sound, the Commission in the enforcement of Section 7 may be strictly limited to narrow divestiture orders.

Clearly, however, these decisions are no longer authoritative. In the recent *Philadelphia Bank* case, the Supreme Court stated that the 1950 amendments to Sections 7 and 11 were intended to overrule *Thatcher*, *Swift*, and *Arrow-Hart* (374 U.S., at 343), and that "Congress in 1950 clearly intended to remove all question concerning the FTC's remedial power over corporate acquisitions" (*id.*, at 348). And if, as suggested above, *Eastman Kodak* has for all practical purposes been overruled, then the decisions that construed Section 11 so narrowly have been substantially undermined. The Court's decision in

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[8] "We have heretofore analogized the power of administrative agencies to fashion appropriate relief to the power of courts to fashion Sherman Act decrees. * * * Dissolution of unlawful combinations * * * is an historic remedy in the antitrust field, even though not included in the powers of an administrative agency to be part of its arsenal of authority." 371 U.S., at 312, n. 17. "There is no express authority for divestiture in either the Sherman or Clayton Act. See 15 U.S.C. §§ 4, 25. The reasoning that supports such a remedy under those Acts is as applicable to the Board as it is to the courts." *Id.*, at 312, n. 18.

Eastman Kodak rested entirely on the two earlier Section 11 decisions (*Thatcher* and *Swift*); the Court held that "The question here presented is in effect ruled by [*Thatcher* and *Swift*]" (274 U.S., at 624). If the Court now believes that *Eastman Kodak* was erroneously decided and that the remedial powers conferred on the Commission in Section 5(b) should not be narrowly and literally construed, there seems no reasonable basis for reading Section 11(b) narrowly and literally.[9]

We conclude that the Commission's powers to grant relief in respect of unlawful corporate acquisitions are broadly equitable,[10] no less so than under Section 5. See Duke, *Scope of Relief Under Section 7 of the Clayton Act*, 63 Col. L. Rev. 1192, 1206–07 (1963). Hence, in a Section 7 case, as in any other case within the jurisdiction of the Commission, the question to be asked in fashioning a remedy should be: What kind of order, within the broad range of an equity court's remedial powers, would, in the particular circumstances, be most effective to "cure the ill effects of the illegal conduct, and assure the public freedom from its continuance" (*United States* v. *United States Gypsum Co.*, 340 U.S. 76, 88)?

In view of the nature of the Commission's remedial powers under Section 11, it seems clear that a ban on future acquisitions is not *ultra vires* the Commission; such a ban has been imposed by a Federal District Court under Section 15. *United States* v. *Jerrold Electronics Corp.*, 187 F. Supp. 545, 575 (E.D. Pa. 1960), aff'd *per curiam*, 365 U.S. 567. It also seems clear that the Commission is not, as a matter

[9] Mr. Justice Stone, dissenting in *Eastman Kodak*, argued that the language of Section 11(b) was narrower than that of Section 5(b). 274 U.S., at 625–627. Actually, the language is in essence the same. Both specifically grant the Commission the power to issue cease and desist orders; Section 11(b) also specifies orders of divestiture and orders that the respondent rid of itself of directors chosen contrary to Section 8; neither 11(b) nor 5(b) grant, in terms, broad remedial powers.

The Court in *Philadelphia Bank* stated that the correctness of *Thatcher, Swift,* and *Arrow-Hart* was not now open to challenge because those decisions had formed the explicit premise of the 1950 amendments to Sections 7 and 11. 374 U.S. at 339–40, n. 17. All the Court appears to have meant, however, was that the meaning given Sections 7 and 11 by Congress in the 1950 amendments depended on what Congress understood the law under the original Sections 7 and 11 to be, so that the Court could not, for purposes of interpreting the 1950 amendments, treat decisions which had been critical in Congressional thinking at that time as overruled. No such problem is present here.

[10] This is not to say that the Commission is, in all respects, a "court of equity". One difference between the Commission's powers under Section 11 and the powers of the Federal District Courts under Section 15 may be that the courts, by virtue of their express authority "to prevent and restrain violations" of the Clayton Act, but not the Commission, can enjoin a merger in advance of its consummation. If the Commission is under special limitations in this regard, that would not affect the question—which has not been authoritatively answered—of whether the Commission may in certain circumstances obtain a preliminary injunction under the All Writs Statute, 28 U.S.C. § 1651(a), forbidding the scrambling of assets (or other conduct which might render effective Commission relief impracticable) following a merger challenged by the Commission under Section 7. Compare *Board of Govs. of Fed. Res. Sys.* v. *Transamerica Corp.*, 184 F. 2d 311 (9th Cir. 1950), with *F.T.C.* v. *International Paper Co.*, 241 F. 2d 372 (2d Cir. 1956).

of power, limited to an order divesting the precise assets acquired in an unlawful merger.[11] There may, to be sure, be cases in which the disappearance of the particular acquired assets removes the threat to competition posed by the merger, and, in such a case, further relief would probably be unnecessary; the case would as a practical matter be moot. If, however, the significance of the acquisition lay in eliminating an important competitor from the relevant market, the mere disappearance of the particular acquired assets would not cure the ill effects of the acquisition. In such a case, the appropriate remedy might take the form of an order directing the respondent to restore the acquired company as an effective competitor. Such an order, if warranted by the particular circumstances of the case, would, we think, be within the Commission's powers under Section 11(b). And this should be a possible remedy even if the assets disappeared in the course of *bona fide* business conduct, rather than having been destroyed specifically to frustrate effective relief.[12]

We emphasize, in this connection, that the purpose of a Commission order in a restraint of trade case, whether under Section 11(b) of the Clayton Act or Section 5(b) of the Federal Trade Commission Act, is not punitive, or narrowly or negatively prohibitory. The purpose of such an order is to restore, so far as is practicable, competitive conditions to at least the state of health which they might have been expected to enjoy but for the unlawful conduct. "A public interest served by such civil [antitrust] suits is that they effectively pry open to competition a market that has been closed by defendants' illegal restraints. If this decree accomplishes less than that, the Government has won a lawsuit and lost a cause." *International Salt Co.* v. *United States*, 332 U.S. 392, 401.

To achieve this positive goal of restoration and rehabilitation, it may not be sufficient to prohibit merely the particular acts or practices found to be unlawful, or to undo merely the particular unlawful transactions that have been consummated. It may be necessary and proper to forbid acts lawful in themselves (see, e.g., *F.T.C.* v. *National Lead Co.*, 352 U.S. 419, 430) or to compel affirmative acts of compliance; and, if so, the Commission has the power and the duty to provide such relief. Not only is it conceivable that, in order to cure the ill effects

[11] Of course, where the acquisition is of a going concern, not, as here, of merely a part of a corporation's assets, divestiture should ordinarily include replacement assets (and other assets currently employed in the business) as well as assets originally acquired—though after-acquired assets may raise special problems. See pp. 36–37, below [pp. 1200–1201 herein]. The particular problem of the Blackman assets is ordinarily encountered only in partial-acquisition situations.

[12] Complaint counsel attempted to prove that respondent destroyed the Blackman assets for the specific purpose of preventing the Commission from entering an effective order. We find a failure of proof on this point.

of a merger in a case where the particular assets involved have disappeared, the Commission might order such divestiture of other assets as is required to recreate a viable concern having approximately the competitive strength of the acquired firm at the time of the acquisition; in addition, since "[a]n industry does not remain frozen during the period of retention" of an acquired company, the Commission could require that the acquired firm be recreated in such form as would reflect the firm's probable growth (*Union Carbide Corp.*, 59 F.T.C. 614, 646 (final order); Zimmerman, *The Federal Trade Commission and Mergers*, 64 Col. L. Rev. 500, 521 (1964))—so as to ensure that the ill effects of the acquisition will be completely expunged.

In speaking of the broad scope of the Commission's remedial powers under Section 11, we do not mean to minimize the practical difficulties that may militate against divestiture or other structural relief in particular cases. Despite the breadth of its powers, the Commission would not attempt to apply remedies so drastic, or inequitable, that the cure would be worse than the disease. Thus, while divestiture is normally the appropriate remedy in a Section 7 proceeding, on occasion it may possibly be impracticable or inadequate, or impose unjustifiable hardship—which underscores the importance of the Commission's having a range of alternatives in its arsenal of remedies.

Finally, we note that in the fashioning of antitrust remedies, whether by the courts or by the Commission, the public interest in effective competition is paramount. As the Supreme Court stated in the second *General Motors-duPont* decision, "the Government cannot be denied the latter remedy [complete divestiture] because economic hardship, however severe, may result. Economic hardship can influence choice only as among two or more effective remedies." *United States* v. *E. I. duPont de Nemours & Co.*, 366 U.S. 316, 327; see *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 189. Hence, while the practical consequences of divestiture or other remedies are immediately relevant to the question of the proper remedy, purely private economic interests must be subordinated to the public interest.

III

We now turn to the ultimate question in this case, which is whether the effect of respondent's acquisitions of McClintock and of the Blackman assets "may be substantially to lessen competition, or to tend to create a monopoly" in the manufacture and sale of commercial meat-handling equipment throughout the nation.

The record in this case is silent on how McClintock managed to obtain a virtual monopoly in the commercial meat-handling equipment field, and we therefore assume that its monopoly was acquired

lawfully. But even a lawful monopolist may not always act with the same freedom as an ordinary businessman.[13] Conduct that would be considered fair and legitimate competitive tactics by firms not possessing extreme market control may be unlawful under the antitrust laws in the hands of a single-firm monopolist. Thus, while the mere possession of a monopoly may not be unlawful, the monopolist who takes active steps to maintain his market control, for example by embracing all competitive opportunities promptly as they arise, or by constantly anticipating and responding to increases in demand, runs the danger of being found to have unlawfully monopolized. See *United States* v. *Aluminum Co. of America*, 148 F. 2d 416 (2d Cir. 1945); *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, 342–45 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521. Cf. *United States* v. *Griffith*, 334 U.S. 100. Perhaps only "the passive beneficiary of a monopoly, following upon an involuntary elimination of competitors by automatically operative economic forces" (*United States* v. *Aluminum Co. of America*, *supra*, at 430), can escape condemnation under Section 2 of the Sherman Act.[14]

Merger activity is one means—less dramatic perhaps than, say, predatory price cutting, but no less effective—by which a firm can monopolize. Cf. *United States* v. *United Shoe Machinery Corp.*, *supra*, at 307–12; *United States* v. *Aluminum Co. of America*, *supra*, at 434–36. The tendency-to-monopoly provision of Section 7 reflects an awareness of the role of acquisitions in monopolization. It seems clear, therefore, that under Section 7 principles, as well as under Sherman Act principles, the permissible scope of merger activity involving a single-firm monopolist is very restricted.

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[13] Compare the decisions imposing, on firms or combinations of firms having monopoly control, restrictions on their freedom of action akin to those imposed under systems of public utility regulation. E.g., *Associated Press* v. *United States*, 326 U.S. 1; *United States* v. *Terminal R.R. Assn.*, 224 U.S. 383; *Gamco, Inc.* v. *Providence Fruit & Produce Bldg.*, 194 F. 2d 484 (1st Cir. 1952); *American Federation of Tobacco Growers* v. *Neal*, 183 F. 2d 869 (4th Cir. 1950).

[14] "In one sense, the leasing system and the miscellaneous activities just referred to * * * were natural and normal, for they were, in Judge Hand's words, 'honestly industrial'. 148 F. 2d at page 431. They are the sort of activities which would be engaged in by other honorable firms. And, to a large extent, the leasing practices conform to long-standing traditions in the shoe machinery business. Yet, they are not practices which can be properly described as the inevitable consequences of ability, natural forces, or law. They represent something more than the use of accessible resources, the process of invention and innovation, and the employment of those techniques of employment, financing, production, and distribution, which a competitive society must foster. They are contracts, arrangements, and policies which, instead of encouraging competition based on pure merit, further the dominance of a particular firm. In this sense, they are unnatural barriers; they unnecessarily exclude actual and potential competition; they restrict a free market. While the law allows many enterprises to use such practices, the Sherman Act is now construed by superior courts to forbid the continuance of effective market control based in part upon such practices. Those courts hold that market control is inherently evil and constitutes a violation of § 2 unless economically inevitable, or specifically authorized and regulated by law." *United States* v. *United Shoe Machinery Corp.*, *supra*, at 344–45.

It has, in fact, been recognized in decisions interpreting Section 7 that merger activity becomes increasingly suspect in proportion as the markets in which the effects of the mergers are felt become increasingly concentrated. As the Supreme Court recently stated, "if concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great." *Philadelphia Bank*, *supra*, 374 U.S., at 365, n. 42. As a market approaches the condition of single-firm monopoly, further mergers affecting the market are unlikely to escape condemnation under Section 7. "[A] merger involving a leading firm in a market that is already well on the way to a non-competitive structure may be unlawful under Section 7 even where the aggravation of non-competitive market conditions by the merger may seem relatively slight because of the already advanced oligopoly condition of the market." *Procter & Gamble Co.*, *supra*, p. 60 [63 F.T.C. 1577]. And, finally, when the condition of the relevant market is not that of oligopoly, but of monopoly, the requirements of demonstrating the aggravating effects of a particular acquisition should be relaxed even further—especially in view of the traditional distinction, in antitrust thinking, between single-firm monopolists and multi-firm monopolists (oligopolists), the former being dealt with, on the whole, under far stricter standards of liability. A very strict rule limiting the merger possibilities of single-firm monopolists is plainly warranted.

The interplay of monopolization and Section 7 principles has been explicitly recognized by the Commission. See *Scott Paper Co.*, 57 F.T.C. 1415, remanded, 301 F. 2d 579 (3d Cir. 1962), opinion of Commission on remand (F.T.C. Docket 6559, Dec. 26, 1963) [63 F.T.C. 2240]. A firm having substantial market power is not free, under Section 7, to embrace through corporate acquisitions every opportunity to meet a rising demand for its product in order to maintain its dominant position. *Id.*, opinion on remand, pp. 11–12 [63 F.T.C. 2247–2248]. In the case of a firm that is not only dominant, but a monopolist, its freedom of action, where exercised in order to preserve its monopoly position, is even more strictly limited by Section 7.

Where a single-firm monopolist—McClintock in 1954—is acquired by a corporation having many times the resources of the acquired firm—and respondent was at the time of the acquisition, and is today, such a corporation—that fact in itself makes the merger highly suspect under Section 7. We need not dwell on the many ways in which the substitution of a large firm such as respondent for a very small firm such as McClintock would have a tendency to entrench the monopoly position of the acquired firm and, in particular, to strengthen the latter's ability to repulse new competition. See *Procter*

& Gamble Co., *supra*, pp. 47–49, 53–60 [63 F.T.C. 1566–1567, 1571–1577]. Moreover, in the case of a monopolist, potential competition is the only restraining influence on the full exploitation of market control, and entry by new competitors the only possible source of challenge to that power. Respondent, as a large, diversified, and growing firm active in a related product line (commercial baking pans, of which respondent is the nation's largest producer), was a prime prospect to enter the commercial meat-handling equipment field on its own and offer McClintock effective competition. This is suggested by the fact that at the time of the acquisition McClintock was just beginning to expand into the commercial baking pans field; and respondent was manufacturing large aluminum meat boxes. We believe that in the particular, and perhaps unique, circumstances of the case—the acquisition of a single-firm monopolist by a very much larger corporation in a related product line—a violation of Section 7 can be shown without extended analysis of the competitive effects of the acquisition.

But we need not rest on a presumption that adverse competitive effects flowed from respondent's acquisition of McClintock. The record indicates concretely how the acquisition enhanced McClintock's power in the relevant market and enabled it to retain its monopoly control in the face of new competition. After the entry of Blackman into the commercial meat-handling equipment field in 1955, respondent's market share began to decline. Although in 1958 its market share was still approximately 75%, there is no telling how much further its monopoly might have been eroded as a result of the competition offered by Blackman. Cf. *Standard Oil Co.* v. *United States*, 337 U.S. 293, 309. The elimination of Blackman as a competitor was thus a logical and perhaps even necessary step for respondent to take in order to be secure in its monopoly. It is improbable that this step would or could have been taken but for respondent's acquisition of McClintock.

As mentioned earlier, McClintock at the time of the acquisition was strapped for cash and subject to a highly restrictive loan agreement, and we think it unlikely that an independent McClintock could have paid a substantial cash consideration for the Blackman assets. In all likelihood, but for the acquisition of McClintock by respondent, which enabled the purchase of the Blackman assets and the elimination of Blackman as a competitor in the manufacture and sale of commercial meat-handling equipment, those assets would have remained in being as a source of competition to McClintock. We conclude that respondent's acquisition of McClintock has enabled the preservation of a monopoly in the face of new competition and is, therefore, unlawful under Section 7.

As for respondent's acquisition of the assets of Blackman, its unlawfulness under Section 7 is clear and is virtually conceded by respondent. A dominant firm may not lawfully eliminate its leading competitor by acquiring that competitor's assets. Such an acquisition is forbidden by Section 1 of the Sherman Act (*United States* v. *First National Bank & Trust Co.*, Sup. Ct. No. 36, October Term 1963 (decided April 6, 1964)), and *a fortiori* by Section 7 of the Clayton Act. See *Brillo Mfg. Co.*, F.T.C. Docket 6557 (decided January 17, 1964), p. 16 [64 F.T.C. 261]. It is, of course, immaterial that the assets acquired were a part, rather than the whole, of the corporation's assets, in view of the language of Section 7.[15] Nor does the fact that the owner of Blackman Stamping & Manufacturing Company sold the assets in question because he was suffering from an incurable disease bring the acquisition within the "failing company" exception. The exception refers to business failures. See *International Shoe Co.* v. *F.T.C.*, 280 U.S. 291, 299–303; H.R. Rep. No. 1191, 81st Cong., 1st Sess. 6 (1949); S. Rep. No. 1775, 81st Cong., 2d Sess. 7 (1950). There is no suggestion that the company was anywhere near failing condition at the time of the acquisition.

IV

We suggested earlier that the powers of the Commission in the area of remedy essentially parallel those of a court of equity. This implies not only that the Commission's powers are broad and flexible, but also that they are to be exercised in accordance with principles of fairness and equitable treatment. The historic role of equity has been to mitigate the harshness of legal remedies as well as to supplement and strengthen those remedies. If the Commission enjoys, as we think it does, essentially equitable powers under Section 11 of the Clayton Act, it must, as a corollary, assume equitable responsibilities. Cf. Neal, *The Clayton Act and the Transamerica Case*, 5 Stan. L. Rev. 179, 228 (1953).

For example, there is the question of whether to divest properties acquired after the challenged acquisition but made a part of the assets of the acquired firm. To the extent that restoration of competition demands such divestiture, it will be ordered. Cf. *Reynolds Metals Co.* v. *F.T.C.*, 309 F. 2d 223, 231 (D.C. Cir. 1962). But consideration of a multitude of equitable factors is inescapable—the respondent's good faith, the proportion of after-acquired to acquired assets, the extent

[15] Section 7 provides in pertinent part: "no corporation * * * shall acquire the whole or any part of the assets of another corporation * * *." See *United States* v. *Lever Bros. Co.*, 216 F. Supp. 887 (S.D.N.Y. 1963); Note, 52 Col. L. Rev. 766, 779–80 (1952).

to which they can be segregated, whether the after-acquired properties represent reinvestment of proceeds from the acquired properties or the normal growth that would have taken place if the merger had not occurred,[16] and so on.

The problem of fashioning a remedy that is both effective and fair seems to be a rather difficult one in the present case, although neither complaint counsel nor respondent have given it much attention. McClintock's operations are now carried on in a part of one of respondent's plants, and if divestiture of McClintock is to be accomplished, it may be necessary for respondent to establish McClintock in a new plant. This may or may not be a feasible undertaking. Given the rather small scale of McClintock's operations, its restoration as an independent corporation may be disproportionately expensive—especially since it is now almost ten years since McClintock ceased to be operated as an independent entity. Before a final order in respect of the acquisition can be entered by the Commission, it is essential that the parties make a full submission of such views, argument and data as would assist a court of equity in fashioning equitable relief. As mentioned earlier, the criterion for the appropriate remedy is the public interest, not the private interests which might be affected. But at present we are without a basis for making an informed judgment as to whether the divestiture of McClintock would advance or impede the public interest.

Since divestiture may not, in the particular circumstances of this case, be an appropriate remedy, it is particularly important that the parties give consideration to other remedies, and in particular to whether respondent should be barred from making future acquisitions in the commercial meat-handling equipment field.[17] Respondent's propensity to engross by merger new competition in the commercial meat-handling equipment line is demonstrated not only by its acquisition of the Blackman assets, but also by its attempt in 1957 to purchase Chesley Industries—its only other competitor.

It seems clear that future acquisitions by respondent in this field would be inconsistent with effective and lasting relief from the adverse effects of the acquisitions challenged in this case. Were respondent—assuming it was allowed to retain control of McClintock—free to make further acquisitions of competitors of McClintock in the

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[16] It has been suggested that the Commission should "presume that all postacquisition additions represent the best evidence of what would have been the growth of the company during the years of acquisition, and * * * require the divesting company to rebut that presumption." Zimmerman, *supra* p. 17, at 521.

[17] Complaint counsel argue that respondent should be forbidden from making acquisitions in any line of commerce for a period of years. However, respondent is a far-flung, diversified corporation active in many different lines of commerce, and we find no evidence in the record from which to infer that acquisitions by respondent in other lines of commerce besides commercial meat-handling equipment would contravene the policy of Section 7.

future, it would be in a position to retain its monopoly position against new competition, just as it did by acquiring Blackman. In view of the comparative ease of entry that seems to exist in the commercial meat-handling equipment field, it is conceivable that if respondent is strictly precluded from making further acquisitions in the line, McClintock's monopoly position may eventually be substantially eroded due to new competition. Cf. *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 446–47 (2d Cir. 1945).

The problem of proper remedy with respect to respondent's aquisition of the Blackman assets is also acute. As noted earlier, we believe the Commission has the power to compel the restoration of Blackman as an effective competitor notwithstanding the disappearance of the particular acquired assets. But it is not clear how realistic such a remedy would be in the particular circumstances of the present case. The cost of establishing a completely new company as a viable competitor in such a small industry as commercial meat-handling equipment might be undue, and the prospects for the survival of such a company might be remote. These questions, like those pertaining to the McClintock acquisition, cannot be answered on the basis of the Commission's present knowledge.

Accordingly, we are directing the parties to submit, pursuant to Section 3.24(c) of the Commission's Procedures and Rules of Practice (effective August 1, 1963), proposed forms of order with supporting briefs presenting relevant views, argument and data. On the basis of these submissions, the Commission will adopt a final order affording the maximum possible relief against the adverse competitive effects of respondent's unlawful acquisitions. At present, the Commission is in a position only to recognize, not solve, the difficult problems of relief which appear to be present.[18]

Commissioner Reilly did not participate for the reason that he did not hear oral argument.

ORDER MODIFYING INITIAL DECISION, ADOPTING FINDINGS AND CONCLUSIONS, AND DIRECTING FILING OF PROPOSED FORMS OF ORDER

APRIL 21, 1964

Upon consideration of complaint counsel's appeal from the initial decision of the hearing examiner, the Commission has determined that

[18] The suggestions made in this opinion regarding remedial possibilities are not intended to be exhaustive. For example, the parties should explore the possibility of some form of partial divestiture of either or both of the challenged acquisitions. See, e.g., *Brillo Mfg. Co.*, F.T.C. Docket 6557 (Final Order, January 17, 1964) [64 F.T.C. 245]. Also, the parties should consider the feasibility of a provision in the order requiring respondent to provide knowhow or other assistance to prospective new competitors. On problems of remedy, see generally Duke, *Scope of Relief Under Section 7 of the Clayton Act*, 63 Col. L. Rev. 1192 (1963).

(1) the final order entered by the examiner should be vacated; (2) the findings and conclusions of the examiner should be adopted by the Commission to the extent consistent with the accompanying opinion, and rejected to the extent inconsistent therewith; (3) additional findings and conclusions, contained in the accompanying opinion, should be adopted by the Commission; (4) although the Commission has found a violation of law, no final order should be entered at this time pending receipt of additional views on the form and content of an appropriate order. Accordingly,

It is ordered, That the initial decision be, and it hereby is, adopted by the Commission to the extent consistent with the accompanying opinion, and rejected to the extent inconsistent therewith.

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

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

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

Opinion Accompanying Final Order

JUNE 30, 1964

By Elman, *Commissioner:*

On April 21, 1964, the Commission determined that respondent's acquisitions (1) of the stock and assets of McClintock Manufacturing Company, and (2) of certain assets of Blackman Stamping & Manufacturing Company, were unlawful under Section 7 of the Clayton Act, as amended (15 U.S.C. § 18). However, the Commission deferred entry of a final order pending receipt of additional views on the form and content of an appropriate order, which the parties were directed to submit. Those views have been received, and the Commission is now ready to formulate a final order that will provide effective and equitable relief against the ill effects of respondent's unlawful conduct.

In its opinion of April 21 (see pp. 23–25 [pp. 1222–1223 herein]), the Commission suggested the following as possible forms of remedy in this case: (1) complete divestiture of McClintock, and its restoration as an independent competitive entity in the commercial meat-handling equipment field; (2) restoration of Blackman as such an entity; (3) a ban on future acquisitions by respondent in this field; (4) partial divesti-

ture of either or both of the challenged acquisitions; (5) a provision for know-how or other assistance by respondent to prospective new competitors. The Commission reserved decision on what remedy, or combination of remedies, would be most appropriate in the particular circumstances of this case. Complaint counsel have submitted a proposed form of order that would require respondent to divest a part of the assets involved in its acquisition of McClintock, principally those assets actually used for the manufacture of commercial meat-handling equipment, and that would also require respondent to cease and desist from acquiring in the future, without prior approval by the Commission, any part of the stock or assets of any corporation engaged in the manufacture or sale of commercial meat-handling equipment, rubber greens, or related products distributed to supermarkets, chain stores, and butcher-supply distributors and jobbers. Respondent's proposed order would, in essence, bar respondent, for a period of five years after the issuance of this order, from acquiring without prior approval by the Commission the stock or assets of any corporation engaged to a substantial extent in the manufacture of commercial meat-handling equipment.

In directing the parties to consider various remedial possibilities in this matter, the Commission expressed concern with the practical difficulties that divestiture might, in the particular circumstances, involve. In recognition of such difficulties, complaint counsel have not proposed complete divestiture of McClintock or restoration of Blackman, the assets of which have disappeared since the acquisition. Complaint counsel do, however, propose the divestiture of such acquired assets as are required for the manufacture and sale of commercial meat-handling equipment. The proposed order would permit respondent to retain those acquired assets, such as fork-lift trucks, motors, presses, shears, automobiles, leaseholds, and office supplies, that may be used in but are not peculiar to the manufacture or distribution of the McClintock lines of commercial meat-handling equipment. Such an order, while it would not restore McClintock in the exact form in which it existed prior to its acquisition by respondent, should suffice to enable the restoration of McClintock as a viable competitor in the manufacture and distribution of commercial meat-handling equipment.

Respondent does not contend that partial divestiture would be impractical or inequitable, but it does contend that, "[b]ecause the Commission's finding of illegality with respect to the McClintock acquisition is based upon respondent's subsequent acquisition of certain Blackman assets, an order which will prevent respondent from making any further acquisitions of that nature for a stated period of time in the future will be effective to accomplish the Commission's purpose", so

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that "nothing would be accomplished by an order divesting respondent of McClintock." (Respondent's Memorandum With Respect to Relief, p. 5.) Respondent has, however, misconceived the ground of the Commission's decision. The Commission did not hold that the acquisition of McClintock was unlawful merely because it enabled respondent's subsequent acquisition of the Blackman assets, but based its determination on the following additional factors:

Because McClintock enjoyed at the time of the acquisition a monopoly in the manufacture and sale of commercial meat-handling equipment, any acquisition whereby its power to dominate and control the industry was enhanced even slightly would necessarily violate Section 7. Specifically, the substitution of a large firm such as respondent for a very small firm such as McClintock had "a tendency to entrench the monopoly position of the acquired firm and, in particular, to strengthen the latter's ability to repulse new competition." (Commission opinion, p. 1219.) The acquisition was further inimical to competition in eliminating Ekco as a potential competitor in the commercial meat-handling equipment field. For these reasons the Commission concluded that the acquisition was unlawful under Section 7. The Commission went on, however, to give a concrete illustration of how the acquisition had contributed to the entrenchment of McClintock's monopoly in the commercial meat-handling equipment field: it had enabled the elimination of Blackman as a competitor of respondent in that field.[1] Since the Commission's basis for concluding that the McClintock acquisition was unlawful was, not that it enabled respondent to acquire the Blackman assets, but that it enhanced the monopoly power of McClintock—the Blackman acquisition illustrating how that enhanced power was exer-

[1] Respondent argues at some length (Respondent's Memorandum With Respect to Relief, pp. 4–5, n. 5) that the Commission was in error in concluding that "[i]t is improbable that this step [the elimination of Blackman as a competitor by the purchase of certain Blackman assets] would or could have been taken but for respondent's acquisition of McClintock." (Commission opinion, p. 1220.) Respondent argues that the restrictive loan agreement to which McClintock was subject would not have precluded its purchasing Blackman and that McClintock was, moreover, sufficiently profitable an enterprise before its acquisition by respondent to make the purchase. Respondent again misunderstands the Commission's reasoning. It is not that McClintock absolutely could not have made the acquisition had it not been acquired by Ekco, but that the probabilities are that the independent McClintock's financial limitations would have prevented the Blackman purchase if McClintock had not been acquired by Ekco. In so concluding, moreover, the Commission relied not only on the restrictive provision in the loan agreement relating to net current assets, as respondent seems to believe, but also on the other significant disabilities under which the independent McClintock labored. (See Commission opinion, pp. 1205, 1220–1221.) These factors, considered as a whole, justified the Commission in concluding that respondent's acquisition of McClintock probably enabled the subsequent acquisition of the Blackman assets. In any event, while the purchase of the Blackman assets strengthening the inference that the acquisition of McClintock violated Section 7, the Commission would reach the same result even if it was not established that McClintock's acquisition by respondent enabled the subsequent acquisition of the Blackman assets. For, as noted above, it is not the Commission's position "that respondent's acquisition of McClintock was retroactively unlawful." (Respondent's Memorandum With Respect to Relief, p. 4.)

cised—respondent's contention that divestiture is an unnecessary remedy, and that it would be enough to ban future acquisitions by respondent in the commercial meat-handling equipment field, fails.

In any event, a prohibition on future acquisitions is clearly not an adequate substitute for divestiture in this case. The effectiveness of such a prohibition alone to restore competition in this industry would depend on the ability of new competitors to gain a foothold in the face of respondent's entrenched position of monopoly power, since, at present, respondent is substantially free from competition. The prospects for such new competition would appear to be rather remote, given respondent's size and competitive strength and the fact that respondent, so long as it retains McClintock, is of course excluded as a potential entrant into the industry. The prospects of new competition would be significantly improved if McClintock were made independent from Ekco, since in that case McClintock would be denied the advantages of Ekco's size and strength and Ekco would be restored as a potential new competitor. Since divestiture in the form discussed earlier seems clearly to be the only really effective remedy, and also appears to be fair, equitable and practicable, we have determined that it should be ordered in the public interest.[2]

We have also modified complaint counsel's proposed order to eliminate the requirement that respondent may not, within one year following divestiture, re-enter the commercial meat-handling equipment market. While such a covenant not to compete may be appropriate, that should be left to mtual determination by respondent and the purchaser of the assets required to be divested, subject to the Commission's approval.

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[2] We have modified the proposed order submitted by complaint counsel in order to make clear that the overriding purpose of divestiture here is to enable McClintock to be restored as a going concern and effective competitor in the manufacture and sale of commercial meat-handling equipment. Complaint counsel's proposed order would have required divestiture of the acquired assets used in the rubber greens manufacturing business, as well as the acquired assets used in the manufacture and sale of commercial meat-handling equipment, on the ground of the intimate historical and marketing relationship which rubber greens bear to commercial meat-handling equipment. However, rather than determine at this time precisely what assets must be divested, we deem it more appropriate simply to require such divestiture, within the broad framework of the order, as may be necessary to ensure the restoration of McClintock as a viable competitor in the commercial meat-handling equipment industry. Details of compliance with the requirements of the order need not and cannot be determined at this stage of the proceeding. See Section 3.26 of the Commission's Procedures and Rules of Practice (effective August 1, 1963).

We have also modified complaint counsel's proposed order to eliminate the requirement that respondent may not, within one year following divestiture, re-enter the commercial meat-handling equipment market. While such a covenant not to compete may be appropriate, that should be left to mutual determination by respondent and the purchaser of the assets required to be divested, subject to the Commission's approval.

competitor, Ekco should be precluded from entering the industry by corporate acquisition. Its entry into this industry should, if the policy underlying the enactment of the antimerger act is to be effectuated, take the form of internal expansion. Cf. *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 370. In view of the monopolistic structure of the industry, respondent must be prevented from entering it, in the future, by elimination through acquisition of any of the few companies active in the industry. For example, the remedial objectives of the Commission's divestiture order would not be served were respondent to acquire Chesley Industries, at present the only significant competitor of Ekco-McClintock in the commercial meat-handling equipment field. Thus a ban on future acquisitions is, in conjunction with divestiture, necessary to remedy effectively the conditions brought about by respondent's unlawful conduct.[3]

Commissioner Reilly did not participate.

Final Order

Pursuant to the Commission's order of April 21, 1964, complaint counsel and respondent have submitted proposed forms of order and supporting briefs. The Commission has considered these proposals and has concluded, for the reasons stated in the accompanying opinion, that the following order is appropriate in the light of the Commission's decision in this matter and the public interest, and that it should be adopted and issued forthwith as the Commission's final order. Accordingly,

It is ordered, That:

I

Respondent, Ekco Products Company, a corporation, and its officers, directors, agents, representatives, employees, subsidiaries, affiliates, successors and assigns, within one (1) year from the date this order becomes final, shall divest, absolutely and in good faith, the following assets acquired by Ekco Products Company as a result of the acquisition by Ekco Products Company of the McClintock Manufacturing Company, together with all additions thereto and replacements

[3] We have decided to modify the absolute ban on future acquisitions contained in complaint counsel's proposed order. In the circumstances, a 20-year ban would appear to offer sufficient protection of the public interest. Respondent's proposed 5-year ban, however, would be clearly insufficient. In the life of an industry, five years is a very short time. It is too unlikely that a 5-year period will see sufficient improvement in the health of competition in this industry to justify permitting respondent a free hand in re-entering the industry through acquisition at the end of that period. We have also modified complaint counsel's proposed ban to narrow its product coverage to commercial meat-handling equipment.

thereof which have been made since the acquisition: (1) the McClintock trade name, and all patents, trademarks, trade secrets, lists of customers and accounts, inventories of goods furnished and in process, distribution agreements, supply and requirements contracts, tools, dies, punches and patterns, that are used in the manufacture or sale of commercial meat-handling equipment; (2) all other assets peculiar to the manufacture or sale of commercial meat-handling equipment, but not leaseholds, stamping machinery, industrial fork-lift trucks and other such assets not peculiar to the manufacture or sale of commercial meat-handling equipment; and (3) all other assets as may be necessary to reconstitute McClintock Manufacturing Company as a going concern and effective competitor in the manufacture and sale of commercial meat-handling equipment.

II

By such divestiture, none of the assets described in paragraph I of this order shall be sold or transferred, directly or indirectly, to any person who at the time of the divestiture is an officer, director, employee, or agent of, or under the control or direction of, respondent or any of respondent's subsidiary or affiliated corporations, or owns or controls, directly or indirectly, more than one (1) percent of the outstanding shares of common stock of Ekco Products Company, or to any purchaser who is not approved in advance by the Federal Trade Commission.

III

For a period of one (1) year following the divestiture required by paragraph I of this order, respondent shall, at its own expense, furnish such technical and marketing information within its possession or control as may be reasonably requested by the purchaser.

IV

For a period of twenty (20) years following the date that this order becomes final, respondent shall not, without the prior approval of the Federal Trade Commission, acquire, directly or indirectly, through subsidiaries or otherwise, the whole or any part of the stock, share capital or assets of any corporation which is engaged in the manufacture or sale of commercial meat-handling equipment.

V

Respondent shall periodically, within sixty (60) days from the date this order becomes final and every ninety (90) days thereafter until

divestiture is fully effected, submit to the Commission a detailed written report of its actions, plans, and progress in complying with the provisions of this order and fulfilling its objectives.

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

IN THE MATTER OF

PROCINO-ROSSI CORPORATION

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SECS. 2(a), (d), AND (e) OF THE CLAYTON ACT

Docket C-765. Complaint, June 30, 1964—Decision, June 30, 1964

Consent order requiring an Auburn, N.Y., manufacturer of macaroni and macaroni products, egg products, sauces and other food products—selling to a large number of wholesalers, independent and chain retailers, and institutions, principally in Massachusetts, New York, Ohio, Pennsylvania, and Vermont—to cease discriminating in price between different purchasers of its products by such practices as granting rebates to a retail food chain and giving certain purchasers merchandise for which no charge was made, while not giving rebates or free goods to competitors of customers so favored, thus violating Sec. 2(a) of the Clayton Act; by paying certain customers an allowance for advertising based on total purchases of certain of its products, granting a large Pennsylvania retail food chain a special allowance of $200 per three-month period for additional advertising services, including in-store display, furnished by the customer, and by making payments to certain customers for advertising in catalogs, newspapers and on radio, while not making such allowances available on proportionally equal terms to all competitors of the favored customers, in violation of Sec. 2(d) of the Clayton Act; and by installing special "demonstrators" in the places of business of certain customers while not making such services available on proportionally equal terms to all other purchasers competing with such favored customers, in violation of Sec. 2(e) of the Clayton Act.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter more particularly designated and described, has violated, and is now violating the provisions of subsections (a), (d) and (e) of Section 2 of the Clayton Act, as amended (U.S.C. Title 15, Sec. 13), hereby issues its complaint, stating its charges with respect thereto as follows:

COUNT I

PARAGRAPH 1. Respondent Procino-Rossi Corporation 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 48 Washington Street, Auburn, New York.

PAR. 2. Respondent has been and is now engaged in the manufacture, sale and distribution of macaroni, macaroni products, egg products, sauces and other food products. Respondent sells its products to a large number of customers located principally in the states of Massachusetts, New York, Ohio, Pennsylvania and Vermont, purchasing such products for use, consumption, or resale. Respondent's customers include wholesalers, independent retailers, retail chain stores, and institutions. Respondent's sales of its products are substantial, exceeding $3,300,000 in 1961.

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

PAR. 4. In the course and conduct of its business in commerce, respondent sells its products of like grade and quality to purchasers who are in substantial competition with each other in the resale and distribution of such products within the trading areas where said purchasers are located.

PAR. 5. In the course and conduct of its business in commerce, and particularly since 1959, respondent has been, and is now discriminating in price between different purchasers of its products by selling said products to some purchasers at higher and less favorable prices than the prices charged competing purchasers for such products of like grade and quality.

For example, within the State of Pennsylvania, respondent has sold, and is now selling, certain of its products of like grade and quality to purchasers thereof at net prices substantially higher than the net prices charged other purchasers who compete in the sale and distribution of said products with the purchasers paying the higher prices. In one instance a retail food chain purchasing respondents' products is granted a rebate or allowance not granted to competing purchasers. In other instances, certain favored purchasers of respondent's products receive merchandise for which no charge is made, resulting in said favored purchasers paying net prices which are lower than the prices paid by competing purchasers who do not receive such free merchandise.

PAR. 6. The effect of the discriminations in price made by respondent in the sale of its products to competing purchasers, as hereinbefore set forth, may be substantially to lessen competition or tend to create a

monopoly in the lines of commerce in which the favored purchasers are engaged, or to injure, destroy or prevent competition with the favored purchasers who receive the benefit of such lower net prices.

PAR. 7. The discriminations in price made by respondent in the sale of its products, as hereinbefore alleged, are in violation of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

COUNT II

PAR. 8. Paragraphs One through Four of Count I hereof are hereby set forth by reference and made a part of this Count as fully and with the same effect as if quoted herein verbatim.

PAR. 9. In the course and conduct of its business in commerce, and particularly since 1959, respondent has paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished by or through such customers in connection with their offering for sale or sale of products sold to them by respondent, and such payments have not been made available on proportionally equal terms to all other customers competing in the sale and distribution of respondent's products.

For example, respondent has in effect with certain of its customers cooperative advertising agreements whereby said customers are paid an allowance for advertising respondent's products based on total purchases of certain of respondent's products. Said allowance is not made available on proportionally equal terms to all other competing customers. In addition to said cooperative advertising allowance, respondent has granted to a large retail food chain in the State of Pennsylvania a special allowance of two hundred dollars ($200) per three-month period for additional advertising services, including in-store display, furnished by said customer. Said special allowance has not been made available on proportionally equal terms to all other competing customers. Respondent has also made payments to customers for advertising furnished by said customers in catalogs, newspapers and on radio. Said payments have not been made available on proportionally equal terms to all other competing customers.

As a further example, respondent has, directly or indirectly, through Storecast Corporation of America, a corporation located in New York City engaged in the business of furnishing background music and other promotional services or facilities to retailers within the State of Pennsylvania, made or made available, substantial payments in the form of cash rebates, merchandising aid and background music to a large retail food chain as compensation or in consideration for certain

promotional services or facilities furnished by retail outlets of said retail food chain in connection with the resale of respondent's products. Respondent has not made such payments available to competitors of the aforesaid favored customer on proportionally equal or on any terms.

PAR. 10. The acts and practices of respondent, as alleged herein, are in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

COUNT III

PAR. 11. Paragraphs One through Four of Count I hereof are hereby set forth by reference and made a part of this Count as fully and with the same effect as if quoted herein verbatim.

PAR. 12. In the course and conduct of its business in commerce, and particularly since 1959, respondent has discriminated in favor of certain purchasers of its products bought for resale by contracting to furnish, or furnishing, or by contributing to the furnishing to such favored purchasers of services or facilities connected with the handling, sale, or offering for sale of such products so purchased while not according such services or facilities to all competing purchasers on proportionally equal terms.

As one example of such practices, respondent has furnished certain of its purchasers the services and facilities of special personnel known as "demonstrators", while not according such services or facilities to all other competing purchasers on proportionally equal terms. Such personnel, compensated and furnished by respondent, are installed in the places of business of favored purchasers to assist in promoting the sale of respondent's products to customers of said favored purchasers.

PAR. 13. The acts and practices of respondent as alleged herein, are in violation of subsection (e) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereof with violation of subsections (a), (d) and (e) of Section 2 of the Clayton Act, as amended, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint

to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Procino-Rossi Corporation 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 48 Washington Street, Auburn, New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent.

ORDER

It is ordered, That respondent Procino-Rossi Corporation, a corporation, and its officers, employees, agents and representatives, directly or through any corporate or other device, in or in connection with the offering for sale, sale or distribution of any of its products in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from discriminating, directly or indirectly, in the price of such products of like grade and quality:

> By selling such products to any purchaser at net prices higher than the net prices charged any other purchaser who competes in the resale or distribution of such products with the purchaser paying the higher price.

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

> 1. Paying or contracting for the payment of anything of value to, or for the benefit of, any customer of respondent as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the offering for sale, sale or distribution of respondent's products, unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such products;

2. Furnishing, contracting to furnish, or contributing to the furnishing of services or facilities in connection with the handling, processing, sale or offering for sale of respondent's products to any purchaser from respondent of such products bought for resale, when such services or facilities are not accorded on proportionally equal terms to all other purchasers from respondent who resell such products in competition with such purchasers who receive such services or facilities.

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

IN THE MATTER OF

IDEAL MACARONI COMPANY

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

Docket C-766. Complaint, June 30, 1964—Decision, June 30, 1964

Consent order requiring a Bedford Heights, Ohio, manufacturer of macaroni, macaroni products, egg products, sauces and other food products—selling to wholesalers, independent and chain retailers, restaurants, institutions and food processors in Ohio and Pennsylvania—to cease discriminating in price in violation of Sec. 2(d) of the Clayton Act by such practices as making available to the Solon, Ohio Division of a national grocery chain operating 79 retail stores in Ohio and Pennsylvania, payments and allowances amounting to approximately $8,000 including (1) free merchandise for store openings and other promotional purposes, (2) a "stamp promotion" among other promotional discounts and allowances, (3) payments and allowances for newspaper and television advertising, and (4) payments for coupon sales unless such payments and allowances are available on proportionally equal terms to all other customers of respondent competing in the sale of such products.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter more particularly designated and described, has violated, and is now violating the provisions of subsection (d) of Section 2 of the Clayton Act, as amended (U.S.C. Title 15, Sec. 13), hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Ideal Macaroni Company is a corporation organized, existing, and doing business under and by virtue of the

laws of the State of Ohio, with its office and principal place of business located at 26001 Richmond Road, Bedford Heights, Ohio.

PAR. 2. Respondent has been and is now engaged in the manufacture, sale and distribution of macaroni, macaroni products, egg products, sauces and other food products. Respondent sells its products to a large number of customers located principally in the states of Ohio and Pennsylvania, purchasing such products for use, consumption, or resale. Respondent's customers include wholesalers, independent retailers, retail chain stores, restaurants, institutions and food processors. Respondent's sales of its products are substantial, exceeding $1,000,000 in 1962.

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

PAR. 4. In the course and conduct of its business in commerce, respondent sells its products of like grade and quality to purchasers who are in substantial competition with each other in the resale and distribution of such products within the trading areas where said purchasers are located.

PAR. 5. In the course and conduct of its business in commerce, and particularly since 1959, respondent has paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished by or through such customers in connection with their offering for sale or sale of products sold to them by respondent, and such payments have not been made available on proportionally equal terms to all other customers competing in the sale and distribution of respondent's products.

For example, during 1962 respondent made available to the Solon, Ohio Division of a national retail grocery chain, operating seventy-nine retail grocery stores in Ohio and Pennsylvania through the aforesaid Division, various payments and allowances amounting to approximately eight thousand dollars ($8,000). These payments and allowances included, but were not limited to: (1) free merchandise for store openings and other promotional purposes; (2) discounts or allowances for various promotional purposes, including a "stamp promotion"; (3) payments and allowances for newspaper and television advertising; and (4) payments and allowances for coupon sales.

Respondent has not offered to pay, or paid, or otherwise made such payments or allowances available on proportionally equal terms to

all customers competing with said favored national retail grocery chain customer.

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

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Restraint of Trade proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of subsection (d) of Section 2 of the Clayton Act, as amended; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent 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 the respondent that the law has been violated as alleged in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission having reason to believe that the respondent has violated subsection (d) of Section 2 of the Clayton Act, as amended; and having determined that complaint should issue stating its charges in that respect; and having determined that the agreement would afford an adequate basis for appropriate disposition of the proceeding; and

The Commission, subsequent to the foregoing determinations, having issued on March 12, 1964, its order accepting the aforesaid agreement but deferring service on the respondent of the decision and order of the Commission in this proceeding until issuance by the Commission of its decision and order in a related Commission proceeding in which Notice of Determination to issue complaint was directed by the Commission on such date; and the Commission having now determined that such condition is met inasmuch as the decision and order in disposition of such related proceeding, namely, *In the Matter of Procino-Rossi Corporation*, Docket No. C–765 [p. 1230 herein], is issuing simultaneously with the Commission's action herein;

Now, therefore, the Commission hereby issues its complaint in this proceeding in the form contemplated by the aforesaid agreement, makes the following jurisdictional findings, and enters the following order:

1. Ideal Macaroni Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 26001 Richmond Road, Bedford Heights, Ohio.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent.

ORDER

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

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

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

IN THE MATTER OF

GIOIA MACARONI COMPANY, INC.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SECS. 2(a), (d) AND (e) OF THE CLAYTON ACT

Docket C-767. Complaint, June 30, 1964—Decision, June 30, 1964

Consent order requiring a Buffalo, N.Y., manufacturer of macaroni, macaroni products, sauces and prepared foods—selling to a large number of wholesalers, independent retailers and chain stores in New York, Pennsylvania, Ohio, Illinois, and Vermont—to cease discriminating in price between different purchasers by, for example, granting a discount to a retail food chain but not to the chain's competitors, in violation of Sec. 2(a) of the Clayton Act; by paying a substantial amount to the operator of a radio station to install FM radio receivers in the stores of some of its retail food chain customers which transmitted music and from time to time advertised its prod-

ucts, and employing female "merchandisers" to assist the stores receiving the "Beam Cast" service, while not offering proportionally equal services and payments to competitors of favored chain, in violation of Sec. 2(d); and by furnishing demonstrators in business places of certain customers while not furnishing such services to all competing purchasers on proportionally equal terms, in violation of Sec. 2(e).

Complaint

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter more particularly designated and described, has violated, and is now violating the provisions of subsections (a), (d) and (e) of Section 2 of the Clayton Act, as amended (U.S.C. Title 15, Sec. 13), hereby issues its complaint, stating its charges with respect thereto as follows:

COUNT I

Paragraph 1. Respondent Gioia Macaroni Company, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 1700 Elmwood Avenue, Buffalo, New York.

Par. 2. Respondent has been and is now engaged in the manufacture, sale and distribution of macaroni, macaroni products, sauces and prepared foods. Respondent sells these products to a large number of customers located in the States of New York, Pennsylvania, Ohio, Illinois and Vermont. Respondent's customers include wholesalers, retailers and retail chain stores who purchase these products for resale. Respondent's sales of its products are substantial, exceeding $3,000,000 annually.

Par. 3. Respondent manufactures these products in Buffalo, New York and Odessa, Delaware and ships them to purchasers in other states of the United States. There has been at all times mentioned herein a continuous course of trade in said products in commerce, as "commerce" is defined in the Clayton Act, as amended.

Par. 4. In the course and conduct of its business in commerce, and particularly since 1958, respondent has been, and is now, discriminating in price between different purchasers of its products of like grade and quality by selling said products to some purchasers at higher and less favorable prices than the same products are sold to other purchasers who are in competition with the purchasers paying the higher prices.

Par. 5. For example, in one trading area in the State of Ohio, respondent granted a discount on its macaroni and macaroni products to a retail food chain and did not grant said discount to other purchasers of products of like grade and quality who compete with the

favored retail food chain in the sale and distribution of respondent's products. The purchasers not receiving said discount therefore paid higher net prices for respondent's products than the favored retail food chain receiving the aforesaid discount.

PAR. 6. The effect of such discriminations in price made by respondent in the sale of its products, as hereinbefore set forth, may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which the favored purchasers from respondent are engaged, or to injure, destroy or prevent competition with the favored purchasers from respondent who receive the discriminatory lower prices.

PAR. 7. The discriminations in price made by respondent in the sale of its products, as hereinbefore alleged, are in violation of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

COUNT II

PAR. 8. Paragraphs One through Three of Count I hereof are hereby set forth by reference and made a part of this Count II as fully and with the same effect as if quoted here verbatim.

PAR. 9. In the course and conduct of its business in commerce, and particularly since 1958, respondent paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished by or through such customers in connection with their offering for sale or sale of products sold to them by respondent, and such payments were not made available on proportionally equal terms to all other customers competing in the sale and distribution of respondent's products.

PAR. 10. For example, respondent has provided some of its retail food chain customers with a promotional service known as "Beam Cast". Respondent pays a substantial amount of money to a company known as Beam Cast, Inc., which owns an FM radio station. FM radio receivers are installed by Beam Cast, Inc. in the stores owned and operated by the said retail food chain customers. The FM radio station then transmits music into the stores of the said retail food chain customers and from time to time advertises respondent's products which are available for sale in the stores.

Beam Cast, Inc., also employs female "merchandisers" who go into the stores of the said retail food chains which are given the "Beam Cast" service at various time intervals and check respondent's stock on the shelves, rearrange the stock, check inventory, and provide the stores with advice on how to move respondent's products.

Respondent has not offered the "Beam Cast" service to other customers whom compete with the retail food chains which receive "Beam Cast", nor has it made available any other proportionally equal promotional service or facility to other customers who compete with the said retail food chains in the sale and distribution of products of like grade and quality purchased from respondent.

PAR. 11. The acts and practices of respondent, as alleged herein, are in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

COUNT III

PAR. 12. Paragraphs One through Three of Count I hereof are hereby set forth by reference and made a part of this Count III as fully and with the same effect as if quoted here verbatim.

PAR. 13. In the course and conduct of its business in commerce, and particularly since 1958, respondent has discriminated in favor of certain of its purchasers buying its products by contracting to furnish, or furnishing, or by contributing to the furnishing of, such favored purchasers services or facilities connected with the handling, sale, or offering for sale of such products so purchased while not according such services or facilities to all other competing purchasers on proportionally equal terms.

PAR. 14. As illustrative of such practices, respondent has furnished certain of its purchasers the services and facilities of special personnel known as "demonstrators", while not according such services and facilities to all other competing purchasers on proportionally equal terms. Such personnel, compensated and furnished by respondent, are installed in the places of business of favored purchasers to assist in promoting the sale of respondent's products to customers of said favored purchasers.

PAR. 15. The acts and practices of respondent, as alleged herein, are in violation of subsection (e) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Restraint of Trade proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of subsections (a), (d) and (e) of Section 2 of the Clayton Act, as amended; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent 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 any admission by the respondent that the law has been violated as alleged in such complaint and waivers and provisions as required by the Commission's rules; and

The Commission having reason to believe that the respondent has violated subsections (a), (d) and (e) of Section 2 of the Clayton Act, as amended; and having determined that complaint should issue stating its charges in that respect; and having determined that the agreement would afford an adequate basis for appropriate disposition of the proceeding; and

The Commission, subsequent to the foregoing determinations, having issued on March 12, 1964, its order accepting the aforesaid agreement but deferring service on the respondent of the decision and order of the Commission in this proceeding until issuance by the Commission of its decision and order in a related Commission proceeding in which Notice of Determination to issue complaint was directed by the Commission on such date; and the Commission having now determined that such condition is met inasmuch as the decision and order in disposition of such related proceeding, namely, *In the Matter of Procino-Rossi Corporation*, Docket No. C–765 [p. 1230 herein], is issuing simultaneously with the Commission's action herein;

Now, therefore, the Commission hereby issues its complaint in this proceeding in the form contemplated by the aforesaid agreement, makes the following jurisdictional findings, and enters the following order:

1. Gioia Macaroni Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 1700 Elmwood Avenue, Buffalo, New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent.

ORDER

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

do forthwith cease and desist from discriminating, directly or indirectly, in the price of such products of like grade and quality:

By selling such products to any purchaser at net prices higher than the net prices charged any other purchaser who competes in the resale or distribution of such products with the purchaser paying the higher price.

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

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

2. Furnishing, contracting to furnish, or contributing to the furnishing of services or facilities in connection with the handling processing, sale or offering for sale of respondent's products to any purchaser from respondent of such products bought for resale, when such services or facilities are not accorded on proportionally equal terms to all other purchasers from respondent who resell such products in competition with such purchasers who receive such services or facilities.

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

IN THE MATTER OF

PRINCE MACARONI MANUFACTURING COMPANY

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SECS. 2(a), (d), and (e) OF THE CLAYTON ACT

Docket C-768. Complaint, June 30, 1964—Decision, June 30, 1964

Consent order requiring a Lowell, Mass., manufacturer of macaroni, macaroni products, sauces and prepared foods—selling to a large number of wholesalers, retailers and chain stores in various states—to cease discriminating

in price between different customers by, for example, (1) giving substantial price discounts on certain products to two food chains but not to their competitors, in violation of Sec. 2(a) of the Clayton Act; (2) paying a substantial amount of money to a New England food chain with stores in various states, for advertising or other services furnished in connection with the sale of its products, but not making proportionally equal payments available to the chain's competitors, thus violating Sec. 2(d) of the Clayton Act; and (3) furnishing demonstrators to certain purchasers but not to their competitors, in violation of Sec. 2(e).

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter more particularly designated and described, has violated, and is now violating the provisions of subsections (a), (d), and (e) of Section 2 of the Clayton Act, as amended (U.S.C. Title 15, Sec. 13), hereby issues its complaint, stating its charges with respect thereto as follows:

COUNT I

PARAGRAPH 1. Respondent Prince Macaroni Manufacturing Company is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Massachusetts, with its office and principal place of business located at Prince Avenue, Lowell, Massachusetts.

PAR. 2. Respondent has been and is now engaged in the manufacture, sale and distribution of macaroni, macaroni products, sauces and prepared foods. Respondent sells its said products to a large number of customers located throughout the United States purchasing such products for use, consumption, or resale therein, including wholesalers, retailers, and retail chain stores. Respondent's sales of its products are substantial, exceeding $8,000,000 annually.

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

PAR. 4. In the course and conduct of its business in commerce, respondent sells its products of like grade and quality to purchasers who are in substantial competition with each other in the resale and distribution of respondent's like products.

PAR. 5. In the course and conduct of its business in commerce, and particularly since 1958, respondent has been, and is now discriminat-

ing in price between different purchasers of its products of like grade and quality by selling said products to some purchasers at higher and less favorable prices than the prices charged competing purchasers for such products of like grade and quality.

PAR. 6. For example, in one New York trading area, respondent gave substantial price discounts on certain of its products to two retail food chains, but did not offer or grant such discounts to other purchasers who compete with the said two favored retail food chain purchasers in the sale and distribution of respondent's like products.

PAR. 7. The effect of such discriminations in price made by respondent in the sale of its products, as hereinbefore set forth, may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which the favored purchasers from respondent are engaged, or to injure, destroy or prevent competition with the favored purchasers from respondent who receive the discriminatory lower prices.

PAR. 8. The discriminations in price made by respondent in the sale of its products, as hereinbefore alleged, are in violation of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

COUNT II

PAR. 9. Paragraphs One through Four of Count I hereof are hereby set forth by reference and made a part of this Count II as fully and with the same effect as if quoted here verbatim.

PAR. 10. In the course and conduct of its business in commerce, and particularly since 1958, respondent paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished by or through such customers in connection with their offering for sale or sale of products sold to them by respondent, and such payments were not made available on proportionally equal terms to all other customers competing in the sale and distribution of respondent's products.

PAR. 11. For example, during the year 1959, respondent contracted to pay, and did pay, a substantial amount of money to a New England retail food chain with stores located in various States, as compensation or as an allowance for advertising or other services or facilities furnished by or through said retail food chain in connection with its offering for sale or sale of products sold to it by respondent. Such compensation or allowance was not offered or otherwise made available on proportionally equal terms to all other customers competing with said favored retail food chain in the sale and distribution of products purchased from respondent.

PAR. 12. The acts and practices of respondent, as alleged herein, are in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

COUNT III

PAR. 13. Paragraphs One through Four of Count I hereof are hereby set forth by reference and made a part of this Count III as fully and with the same effect as if quoted here verbatim.

PAR. 14. In the course and conduct of its business in commerce, and particularly since 1958, respondent has discriminated in favor of certain of its purchasers buying its products by contracting to furnish, or furnishing, or by contributing to the furnishing of such favored purchasers services or facilities connected with the handling, sale, or offering for sale of such products so purchased while not according such services or facilities to all other competing purchasers on proportionally equal terms.

PAR. 15. As illustrative of such practices, respondent has furnished certain of its purchasers the services and facilities of special personnel known as "demonstrators" while not according such services and facilities to all other competing purchasers on proportionally equal terms. Such personnel, compensated and furnished by respondent, are installed in the places of business of favored purchasers to assist in promoting the sale of respondent's products to customers of said favored purchasers.

PAR. 16. The acts and practices of respondent, as alleged herein, are in violation of subsection (e) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Restraint of Trade proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of subsections (a), (d) and (e) of Section 2 of the Clayton Act, as amended; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent 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 the respondent that the law has been violated as alleged in such com-

plaint, and waivers and provisions as required by the Commission's rules; and

The Commission having reason to believe that the respondent has violated subsections (a), (d) and (e) of Section 2 of the Clayton Act, as amended; and having determined that complaint should issue stating its charges in that respect; and having determined that the agreement would afford an adequate basis for appropriate disposition of the proceeding; and

The Commission, subsequent to the foregoing determinations, having issued on March 12, 1964, its order accepting the aforesaid agreement but deferring service on the respondent of the decision and order of the Commission in this proceeding until issuance by the Commission of its decision and order in a related Commission proceeding in which Notice of Determination to issue complaint was directed by the Commission on such date; and the Commission having now determined that such condition is met inasmuch as the decision and order in disposition of such related proceeding, namely, *In the Matter of Procino-Rossi Corporation*, Docket No. C–765 [p. 1230 herein], is issuing simultaneously with the Commission's action herein;

Now, therefore, the Commission hereby issues its complaint in this proceeding in the form contemplated by the aforesaid agreement, makes the following jurisdictional findings, and enters the following order:

1. Prince Macaroni Manufacturing Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Massachusetts, with its office and principal place of business located at Prince Avenue, Lowell, Massachusetts.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent.

ORDER

It is ordered, That respondent Prince Macaroni Manufacturing Company, a corporation, and its officers, employees, agents and representatives, directly or through any corporate or other device, in or in connection with the offering for sale, sale or distribution of any of its products in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from discriminating, directly or indirectly, in the price of such products of like grade and quality:

> By selling such products to any purchaser at net prices higher than the net prices charged any other purchaser who competes in the resale or distribution of such products with the purchaser paying the higher price.

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

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

2. Furnishing, contracting to furnish, or contributing to the furnishing of services or facilities in connection with the handling, processing, sale or offering for sale of respondent's products to any purchaser from respondent of such products bought for resale, when such services or facilities are not accorded on proportionally equal terms to all other purchasers from respondent who resell such products in competition with such purchasers who receive such services or facilities.

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

IN THE MATTER OF

THE ALLIGATOR COMPANY

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

*Docket C–769. Complaint, June 30, 1964—Decision, June 30, 1964**

Consent order requiring a St. Louis seller of wearing apparel to cease violating Sec. 2(d) of the Clayton Act by discriminating in the payment of promotional allowances among competing resellers of its products, effective date postponed until further order of the Commission.

*This order was made effective on, Aug. 9, 1965, see *Abby Kent Co., Inc., et al.*, docket No. C–328, et al., Aug. 9, 1965.

COMPLAINT

The Federal Trade Commission, having reason to believe the respondent named in the caption hereof has violated and is now violating the provisions of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C., Title 15, Sec. 13), and it appearing to the Commission that a proceeding by it in respect thereto is in the interest of the public, the Commission hereby issues its complaint stating its charges as follows:

PARAGRAPH 1. The respondent is a corporation engaged in commerce, as "commerce" is defined in the amended Clayton Act, and sells and distributes its wearing apparel products from one state to customers located in other states of the United States. The sales of respondent in commerce are substantial.

PAR. 2. The respondent in the course and conduct of its business in commerce paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services and facilities furnished by or through such customers in connection with their sale or offering for sale of wearing apparel products sold to them by respondent, and such payments were not made available on proportionally equal terms to all other customers competing with favored customers in the sale and distribution of respondent's wearing apparel products.

PAR. 3. Included among, but not limited to, the practices alleged herein, respondent has granted substantial promotional payments or allowances for the promoting and advertising of its wearing apparel products to certain department stores and others who purchase respondent's said products for resale. These aforesaid promotional payments or allowances were not offered and made available on proportionally equal terms to all other customers of respondent who compete with said favored customers in the sale of respondent's wearing apparel products.

PAR. 4. The acts and practices alleged in Paragraphs One through Three are all in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and subsequently having determined that complaint should issue, and the respondent having entered into an agreement containing an order to cease and desist from the practices being investigated and having been furnished a copy of a draft of complaint to issue herein

charging it with violation of subsection (d) of Section 2 of the Clayton Act, as amended, and

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

The Commission, having considered the agreement, hereby accepts the same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent The Alligator Company is a corporation organized and existing under the laws of the State of Delaware, with its office and principal place of business located at 4153 Bingham Avenue, St. Louis, Missouri.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent.

ORDER

It is ordered, That respondent THE ALLIGATOR COMPANY, a corporation, its officers, directors, agents and representatives and employees, directly or through any corporate or other device, in the course of its business in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

(1) Paying or contracting for the payment of anything of value to, or for the benefit of, any customer of the respondent as compensation or in consideration for advertising or promotional services, or any other service or facility, furnished by or through such customer in connection with the handling, sale or offering for sale of wearing apparel products manufactured, sold or offered for sale by respondent, unless such payment or consideration is made available on proportionally equal terms to all other customers competing with such favored customer in the distribution or resale of such products.

It is further ordered, That the effective date of this order to cease and desist be and it hereby is postponed until further Order of the Commission.

IN THE MATTER OF

SPORTSWEAR BY REVERE, INC.

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

*Docket C-770. Complaint, June 30, 1964—Decision, June 30, 1964**

Consent order requiring a Wakefield, Mass., seller of wearing apparel to cease violating Sec. 2(d) of the Clayton Act by discriminating in the payment of promotional allowances among competing resellers of its products, effective date postponed until further order of the Commission.

COMPLAINT

The Federal Trade Commission, having reason to believe the respondent named in the caption hereof has violated and is now violating the provisions of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C. Title 15, Sec. 13), and it appearing to the Commission that a proceeding by it in respect thereto is in the interest of the public, the Commission hereby issues its complaint stating its charges as follows:

PARAGRAPH 1. The respondent is a corporation engaged in commerce, as "commerce" is defined in the amended Clayton Act, and sells and distributes its wearing apparel products from one state to customers located in other states of the United States. The sales of respondent in commerce are substantial.

PAR. 2. The respondent in the course and conduct of its business in commerce paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services and facilities furnished by or through such customers in connection with their sale or offering for sale of wearing apparel products sold to them by respondent, and such payments were not made available on proportionally equal terms to all other customers competing with favored customers in the sale and distribution of respondent's wearing apparel products.

PAR. 3. Included among, but not limited to, the practices alleged herein, respondent has granted substantial promotional payments or allowances for the promoting and advertising of its wearing apparel products to certain department stores and others who purchase re-

*This order was made effective on Aug. 9, 1965, see *Abby Kent Co., Inc., et al.*, docket No. C-328, et al., Aug. 9, 1965.

spondent's said products for resale. These aforesaid promotional payments or allowances were not offered and made available on proportionally equal terms to all other customers of respondent who compete with said favored customers in the sale of respondent's wearing apparel products.

PAR. 4. The acts and practices alleged in Paragraphs One through Three are all in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and subsequently having determined that complaint should issue, and the respondent having entered into an agreement containing an order to cease and desist from the practices being investigated and having been furnished a copy of a draft of complaint to issue herein charging it with violation of subsection (d) of Section 2 of the Clayton Act, as amended, and

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

The Commission, having considered the agreement, hereby accepts the same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Sportswear By Revere, Inc., is a corporation organized and existing under the laws of the State of Massachusetts, with its office and principal place of business located at 11 Lake Street, Wakefield, Massachusetts.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent.

ORDER

It is ordered, That respondent SPORTSWEAR BY REVERE, INC., a corporation, its officers, directors, agents and representatives and employees, directly or through any corporate or other device, in the course of its business in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

(1) Paying or contracting for the payment of anything of value to, or for the benefit of, any customer of the respondent as compensation or in consideration for advertising or promotional services, or any other service or facility, furnished by or through such customer in connection with the handling, sale or offering for sale of wearing apparel products manufactured, sold or offered for sale by respondent, unless such payment or consideration is made available on proportionally equal terms to all other customers competing with such favored customer in the distribution or resale of such products.

It is further ordered, That the effective date of this order to cease and desist be and it hereby is postponed until further Order of the Commission.

IN THE MATTER OF

SPORTEMPOS, INC.

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

*Docket C-771. Complaint, June 30, 1964—Decision, June 30, 1964**

Consent order requiring a New York City seller of wearing apparel to cease violating Sec. 2(d) of the Clayton Act by discriminating in the payment of promotional allowances among competing resellers of its products, effective date postponed until further order of the Commission.

COMPLAINT

The Federal Trade Commission, having reason to believe the respondent named in the caption hereof has violated and is now violating the provisions of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C., Title 15, Sec. 13), and it appearing to the Commission that a proceeding by it in respect thereto is in the interest of the public, the Commission hereby issues its complaint stating its charges as follows:

PARAGRAPH 1. The respondent is a corporation engaged in commerce, as "commerce" is defined in the amended Clayton Act, and sells and distributes its wearing apparel products from one state to customers located in other states of the United States. The sales of respondent in commerce are substantial.

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*This order was made effective on, Aug. 9, 1965, see *Abby Kent Co., Inc., et al.*, docket No. C-328, et al., Aug. 9, 1965.

PAR. 2. The respondent in the course and conduct of its business in commerce paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services and facilities furnished by or through such customers in connection with their sale or offering for sale of wearing apparel products sold to them by respondent, and such payments were not made available on proportionally equal terms to all other customers competing with favored customers in the sale and distribution of respondent's wearing apparel products.

PAR. 3. Included among, but not limited to, the practices alleged herein, respondent has granted substantial promotional payments or allowances for the promoting and advertising of its wearing apparel products to certain department stores and others who purchase respondent's said products for resale. These aforesaid promotional payments or allowances were not offered and made available on proportionally equal terms to all other customers of respondent who compete with said favored customers in the sale of respondent's wearing apparel products.

PAR. 4. The acts and practices alleged in Paragraphs One through Three are all in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and subsequently having determined that complaint should issue, and the respondent having entered into an agreement containing an order to cease and desist from the practices being investigated and having been furnished a copy of a draft of complaint to issue herein charging it with violation of subsection (d) of Section 2 of the Clayton Act, as amended, and

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

The Commission, having considered the agreement, hereby accepts the same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Sportempos, Inc., is a corporation organized and existing under the laws of the State of New York, with its office and principal place of business located at 525 Seventh Avenue, New York, New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent.

ORDER

It is ordered, That respondent SPORTEMPOS, INC., a corporation, its officers, directors, agents and representatives and employees, directly or through any corporate or other device, in the course of its business in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

(1) Paying or contracting for the payment of anything of value to, or for the benefit of, any customer of the respondent as compensation or in consideration for advertising or promotional services, or any other service or facility, furnished by or through such customer in connection with the handling, sale or offering for sale of wearing apparel products manufactured, sold or offered for sale by respondent, unless such payment or consideration is made available on proportionally equal terms to all other customers competing with such favored customer in the distribution or resale of such products.

It is further ordered, That the effective date of this order to cease and desist be and it hereby is postponed until further Order of the Commission.

IN THE MATTER OF

TEAL TRAINA, INC.

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

*Docket C-772. Complaint, June 30, 1964—Decision, June 30, 1964**

Consent order requiring a New York City seller of wearing apparel to cease violating Sec. 2(d) of the Clayton Act by discriminating in the payment of promotional allowances among competing resellers of its products, effective date postponed until further order of the Commission.

*This order was made effective on, Aug. 9, 1965, see ***Abby Kent Co., Inc., et al.***, docket No. C-328, et al., Aug. 9, 1965.

COMPLAINT

The Federal Trade Commission, having reason to believe the respondent named in the caption hereof has violated and is now violating the provisions of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C., Title 15, Sec. 13), and it appearing to the Commission that a proceeding by it in respect thereto is in the interest of the public, the Commission hereby issues its complaint stating its charges as follows:

PARAGRAPH 1. The respondent is a corporation engaged in commerce, as "commerce" is defined in the amended Clayton Act, and sells and distributes its wearing apparel products from one state to customers located in other states of the United States. The sales of respondent in commerce are substantial.

PAR. 2. The respondent in the course and conduct of its business in commerce paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services and facilities furnished by or through such customers in connection with their sale or offering for sale of wearing apparel products sold to them by respondent, and such payments were not made available on proportionally equal terms to all other customers competing with favored customers in the sale and distribution of respondent's wearing apparel products.

PAR. 3. Included among, but not limited to, the practices alleged herein, respondent has granted substantial promotional payments or allowances for the promoting and advertising of its wearing apparel products to certain department stores and others who purchase respondent's said products for resale. These aforesaid promotional payments or allowances were not offered and made available on proportionally equal terms to all other customers of respondent who compete with said favored customers in the sale of respondent's wearing apparel products.

PAR. 4. The acts and practices alleged in Paragraphs One through Three are all in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and subsequently having determined that complaint should issue, and the respondent having entered into an agreement containing an order to cease and desist from the practices being investigated and

having been furnished a copy of a draft of complaint to issue herein charging it with violation of subsection (d) of Section 2 of the Clayton Act, as amended, and

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

The Commission, having considered the agreement, hereby accepts the same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Teal Traina, Inc., is a corporation organized and existing under the laws of the State of New York, with its office and principal place of business located at 550 Seventh Avenue, New York, New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent.

ORDER

It is ordered, That respondent TEAL TRAINA, INC., a corporation, its officers, directors, agents and representatives and employees, directly or through any corporate or other device, in the course of its business in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

(1) Paying or contracting for the payment of anything of value to, or for the benefit of, any customer of the respondent as compensation or in consideration for advertising or promotional services, or any other service or facility, furnished by or through such customer in connection with the handling, sale or offering for sale of wearing apparel products manufactured, sold or offered for sale by respondent, unless such payment or consideration is made available on proportionally equal terms to all other customers competing with such favored customer in the distribution or resale of such products.

It is further ordered, That the effective date of this order to cease and desist be and it hereby is postponed until further Order of the Commission.

313-121—70——80

IN THE MATTER OF

MAX WIESEN & SONS, INC.

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

*Docket C-773. Complaint, June 30, 1964—Decision, June 30, 1964**

Consent order requiring a New York City seller of wearing apparel to cease violating Sec. 2(d) of the Clayton Act by discriminating in the payment of promotional allowances among competing resellers of its products, effective date postponed until further order of the Commission.

COMPLAINT

The Federal Trade Commission, having reason to believe the respondent named in the caption hereof has violated and is now violating the provisions of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C., Title 15, Sec. 13), and it appearing to the Commission that a proceeding by it in respect thereto is in the interest of the public, the Commission hereby issues its complaint stating its charges as follows:

PARAGRAPH 1. The respondent is a corporation engaged in commerce, as "commerce" is defined in the amended Clayton Act, and sells and distributes its wearing apparel products from one state to customers located in other states of the United States. The sales of respondent in commerce are substantial.

PAR. 2. The respondent in the course and conduct of its business in commerce paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services and facilities furnished by or through such customers in connection with their sale or offering for sale of wearing apparel products sold to them by respondent, and such payments were not made available on proportionally equal terms to all other customers competing with favored customers in the sale and distribution of respondent's wearing apparel products.

PAR. 3. Included among, but not limited to, the practices alleged herein, respondent has granted substantial promotional payments or allowances for the promoting and advertising of its wearing apparel products to certain department stores and others who purchase respondent's said products for resale. These aforesaid promotional pay-

*This order was made effective on, Aug. 9, 1965, see *Abby Kent Co., Inc., et al.*, docket No. C-328, et al., Aug. 9, 1965.

ments or allowances were not offered and made available on proportionally equal terms to all other customers of respondent who compete with said favored customers in the sale of respondent's wearing apparel products.

PAR. 4. The acts and practices alleged in Paragraphs One through Three are all in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and subsequently having determined that complaint should issue, and the respondent having entered into an agreement containing an order to cease and desist from the practices being investigated and having been furnished a copy of a draft of complaint to issue herein charging it with violation of subsection (d) of Section 2 of the Clayton Act, as amended, and

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

The Commission, having considered the agreement, hereby accepts the same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Max Wiesen & Sons, Inc., is a corporation organized and existing under the laws of the State of New York, with its office and principal place of business located at 463 Seventh Avenue, New York, New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent.

ORDER

It is ordered, That respondent MAX WIESEN & SONS, INC., a corporation, its officers, directors, agents and representatives and employees, directly or through any corporate or other device, in the course of its business in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

(1) Paying or contracting for the payment of anything of value to, or for the benefit of, any customer of the respondent as

compensation or in consideration for advertising or promotional services, or any other service or facility, furnished by or through such customer in connection with the handling, sale or offering for sale of wearing apparel products manufactured, sold or offered for sale by respondent, unless such payment or consideration is made available on proportionally equal terms to all other customers competing with such favored customer in the distribution or resale of such products.

It is further ordered, That the effective date of this order to cease and desist be and it hereby is postponed until further Order of the Commission.

IN THE MATTER OF

LANZ ORIGINALS, INC.

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

*Docket C-774. Complaint, June 30, 1964—Decision, June 30, 1964**

Consent order requiring a Los Angeles, Calif., seller of wearing apparel to cease violating Sec. 2(d) of the Clayton Act by discriminating in the payment of promotional allowances among competing resellers of its products, effective date postponed until further order of the Commission.

COMPLAINT

The Federal Trade Commission, having reason to believe the respondent named in the caption hereof has violated and is now violating the provisions of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C., Title 15, Sec. 13), and it appearing to the Commission that a proceeding by it in respect thereto is in the interest of the public, the Commission hereby issues its complaint stating its charges as follows:

PARAGRAPH 1. The respondent is a corporation engaged in commerce, as "commerce" is defined in the amended Clayton Act, and sells and distributes its wearing apparel products from one state to customers located in other states of the United States. The sales of respondent in commerce are substantial.

PAR. 2. The respondent in the course and conduct of its business in commerce paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in con-

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*This order was made effective on, Aug. 9, 1965, see *Abby Kent Co., Inc., et al.*, docket No. C-328, et al., Aug. 9, 1965.

sideration for services and facilities furnished by or through such customers in connection with their sale or offering for sale of wearing apparel products sold to them by respondent, and such payments were not made available on proportionally equal terms to all other customers competing with favored customers in the sale and distribution of respondent's wearing apparel products.

PAR. 3. Included among, but not limited to, the practices alleged herein, respondent has granted substantial promotional payments or allowances for the promoting and advertising of its wearing apparel products to certain department stores and others who purchase respondent's said products for resale. These aforesaid promotional payments or allowances were not offered and made available on proportionally equal terms to all other customers of respondent who compete with said favored customers in the sale of respondent's wearing apparel products.

PAR. 4. The acts and practices alleged in Paragraphs One through Three are all in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and subsequently having determined that complaint should issue, and the respondent having entered into an agreement containing an order to cease and desist from the practices being investigated and having been furnished a copy of a draft of complaint to issue herein charging it with violation of subsection (d) of Section 2 of the Clayton Act, as amended, and

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

The Commission, having considered the agreement, hereby accepts the same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Lanz Originals, Inc., is a corporation organized and existing under the laws of the State of California, with its office and

principal place of business located at 6150 Wilshire Boulevard, Los Angeles 48, California.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent.

ORDER

It is ordered, That respondent LANZ ORIGINALS, INC., a corporation, its officers, directors, agents and representatives and employees, directly or through any corporate or other device, in the course of its business in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

(1) Paying or contracting for the payment of anything of value to, or for the benefit of, any customer of the respondent as compensation or in consideration for advertising or promotional services, or any other service or facility, furnished by or through such customer in connection with the handling, sale or offering for sale of wearing apparel products manufactured, sold or offered for sale by respondent, unless such payment or consideration is made available on proportionally equal terms to all other customers competing with such favored customer in the distribution or resale of such products.

It is further ordered, That the effective date of this order to cease and desist be and it hereby is postponed until further Order of the Commission.

IN THE MATTER OF

SMOLER BROS., INC.

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

*Docket C-775. Complaint, June 30, 1964—Decision, June 30, 1964**

Consent order requiring a Chicago, Ill., seller of wearing apparel to cease violating Sec. 2(d) of the Clayton Act by discriminating in the payment of promotional allowances among competing resellers of its products, effective date postponed until further order of the Commission.

*This order was made effective on, Aug. 9, 1965, see *Abby Kent Co., Inc., et al.*, docket No. C-328, et al., Aug. 9, 1965.

COMPLAINT

The Federal Trade Commission, having reason to believe the respondent named in the caption hereof has violated and is now violating the provision of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C., Title 15, Sec. 13), and it appearing to the Commission that a proceeding by it in respect thereto is in the interest of the public, the Commission hereby issues its complaint stating its charges as follows:

PARAGRAPH 1. The respondent is a corporation engaged in commerce, as "commerce" is defined in the amended Clayton Act, and sells and distributes its wearing apparel products from one state to customers located in other states of the United States. The sales of respondent in commerce are substantial.

PAR. 2. The respondent in the course and conduct of its business in commerce paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services and facilities furnished by or through such customers in connection with their sale or offering for sale of wearing apparel products sold to them by respondent, and such payments were not made available on proportionally equal terms to all other customers competing with favored customers in the sale and distribution of respondents' wearing apparel products.

PAR. 3. Included among, but not limited to, the practices alleged herein, respondent has granted substantial promotional payments or allowances for the promoting and advertising of its wearing apparel products to certain department stores and others who purchase respondent's said products for resale. These aforesaid promotional payments or allowances were not offered and made available on proportionally equal terms to all other customers of respondent who compete with said favored customers in the sale of respondent's wearing apparel products.

PAR. 4. The acts and practices alleged in Paragraphs One through Three are all in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and subsequently having determined that complaint should issue, and the respondent having entered into an agreement containing an order to cease and desist from the practices being investigated

and having been furnished a copy of a draft of complaint to issue herein charging it with violation of subsection (d) of Section 2 of the Clayton Act, as amended, and

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

The Commission, having considered the agreement, hereby accepts the same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Smoler Bros., Inc., is a corporation organized and existing under the laws of the State of Illinois, with its office and principal place of business located at 2300 Wanansia Avenue, Chicago, Illinois.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent.

ORDER

It is ordered, That respondent Smoler Bros., Inc., a corporation, its officers, directors, agents and representatives and employees, directly or through any corporate or other device, in the course of its business in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

(1) Paying or contracting for the payment of anything of value to, or for the benefit of, any customer of the respondent as compensation or in consideration for advertising or promotional services, or any other service or facility, furnished by or through such customer in connection with the handling, sale or offering for sale of wearing apparel products manufactured, sold or offered for sale by respondent, unless such payment or consideration is made available on proportionally equal terms to all other customers competing with such favored customer in the distribution or resale of such products.

It is further ordered, That the effective date of this order to cease and desist be and it hereby is postponed until further Order of the Commission.