

Decision and Order

93 F.T.C.

IN THE MATTER OF

THE PILLSBURY COMPANY, ET AL.

DISMISSAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED  
VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT  
AND SEC. 7 OF THE CLAYTON ACT*Docket 9091. Complaint,\* Nov. 11, 1976 — Dismissal Order, June 15, 1979*

This order dismisses a complaint issued on November 11, 1976 charging a Minneapolis, Minn. manufacturer of food products with violating Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by acquiring Fox Deluxe Foods, Inc., a Chicago, Ill. producer and seller of frozen pizza. The Commission dismissed the complaint on ground that the merger is not illegal since it is unlikely to have significant anticompetitive effect in the national market for frozen prepared pizza.

*Appearances*

For the Commission: *Roger J. Leifer, Joseph Tasker, Jr. and Patricia S. Bangert.*

For the respondent: *John French and Randy L. Miller, Faegre & Benson and Dwight H. Oglesby, The Pillsbury Company, all of Minneapolis, Minn.*

## COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondents have entered into an agreement which, if consummated, would result in a violation of Section 7 of the Clayton Act, as amended, (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45), and that said agreement therefore constitutes a violation of Section 5(a)(1) of the Federal Trade Commission Act, as amended, (15 U.S.C. 45(a)(1), and the Federal Trade Commission having reason to believe that the above-named respondent The Pillsbury Company has acquired the above respondent Fox Deluxe Foods, Inc. in violation of Section 7 of the Clayton Act, as amended, (15 U.S.C. 18) and Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) and having found that a proceeding with respect to said violations is in the public interest, issues its complaint stating its charges as follows:

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\* Reported as amended by order of the administrative law judge dated June 17, 1977.

Definitions

(1) The term "The Pillsbury Company" as used herein means the Pillsbury Company and any parent companies thereof, and all of its subsidiaries, divisions, affiliates and the predecessors of any of the foregoing.

(2) The term "Fox Deluxe Foods, Inc." as used herein means Fox Deluxe Foods, Inc. and any parent companies thereof, and all of its subsidiaries, divisions, affiliates and the predecessors of any of the foregoing.

(3) The term "Frozen Prepared Pizza" means pizza which is cooked, processed or manufactured and frozen for sale.

The Pillsbury Company

(4) Respondent The Pillsbury Company (hereinafter "Pillsbury") is a Delaware corporation with its principal office at the Pillsbury Building, 608 Second Ave. South, Minneapolis, Minnesota.

(5) Pillsbury is a leading manufacturer and marketer of a wide range of food products, including prepared baking mixes, refrigerated dough products, flour and frozen prepared pizza.

(6) In its fiscal year ending May 31, 1976, Pillsbury had revenues in excess of \$1.5 billion and net income in excess of \$41 million. Pillsbury is among the two hundred largest United States corporations.

(7) In November 1975, Pillsbury entered the frozen pizza business by acquiring Totino's Finer Foods, Inc., a leading manufacturer and seller of frozen prepared pizza, with sales in excess of \$39 million in its fiscal year ending October 31, 1975, which Pillsbury now operates as its frozen foods division. For its fiscal year ending October 31, 1976, Pillsbury's frozen food division had frozen prepared pizza sales in excess of \$48 million. Retail sales of Pillsbury's frozen prepared pizza under the Totino's brand amounted to approximately \$66.2 million for the fifty-two week period ending August 27, 1976, which makes Pillsbury the third largest frozen prepared pizza manufacturer in the United States.

(8) At all times relevant herein, Pillsbury has engaged and is engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, and the agreement between Pillsbury and Fox set forth in Paragraph (13a) is a method of competition in commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended.

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Fox Deluxe Foods, Inc.

(9) Respondent Fox Deluxe Foods, Inc. (hereinafter "Fox") is an Illinois corporation with offices at 222 South Riverside Plaza, Suite 442, Chicago, Illinois.

(10) Before the acquisition set forth in Paragraph (13b), Fox manufactured or processed, and sold, food products including poultry, butter, eggs and frozen prepared pizza.

(11) In its fiscal year ended February 29, 1976, Fox had net sales of approximately \$12.2 million, and assets in excess of \$3.1 million. In that year, Fox had sales of frozen prepared pizza in excess of \$7.3 million. Retail sales of Fox's frozen prepared pizza amounted to approximately \$8.1 million for the fifty-two week period ending August 27, 1976, which made Fox the tenth largest frozen prepared pizza manufacturer in the United States, prior to its acquisition by Pillsbury set forth in Paragraph (13b).

(12) At all times relevant herein, Fox has engaged and is engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, and the agreement between Fox and Pillsbury set forth in Paragraph (13a) is a method of competition in commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended.

The Acquisition Agreement

(13a) On or about October 6, 1976, Pillsbury and Fox agreed in principle to the acquisition by Pillsbury of assets of Fox used in the production and sale of frozen prepared pizza (the "pizza assets"). On or about November 3, 1976, Pillsbury and Fox entered into an agreement which provides, *inter alia*, for the sale of the pizza assets in exchange for approximately \$3 million worth of Pillsbury common stock. The practical result of the agreement, if consummated, would be the end of Fox's existence as an independent business entity.

The Acquisition

(13b) On or about November 15, 1976 Pillsbury acquired the pizza assets of Fox for approximately \$3 million worth of Pillsbury common stock.

TRADE AND COMMERCE

Relevant Line of Commerce

(1) The manufacture and sale of frozen prepared pizza is a separate, distinct and relevant line of commerce. Frozen prepared

pizza is one of the largest and fastest growing of all retail food sales categories. Calendar 1975 national retail frozen prepared pizza sales were estimated at approximately \$394 million and, by the end of the fifty-two week period ending August 27, 1976, were estimated to have increased to approximately \$447.6 million.

(15) Totino's brand frozen prepared pizza manufactured and sold by Pillsbury's frozen foods division and frozen prepared pizza manufactured and sold by Fox were, at the time of the acquisition set forth in Paragraph (13b), and had been for some time, in direct and substantial competition.

#### Relevant Section of the Country

(16) The relevant section of the country is the United States taken as a whole and certain metropolitan marketing areas within the United States.

#### Market Concentration

(17) Pillsbury and Fox, at the time of agreement and acquisition referenced in Paragraphs (13a) and (13b), and at all times relevant herein were substantial and direct competitors in the manufacture and sale of frozen prepared pizza in the United States as a whole and in a number of major metropolitan marketing areas.

(18) The United States frozen prepared pizza market is highly concentrated with the combined market share of the four largest firms (including Pillsbury) estimated to be in excess of 61%, before Pillsbury's acquisition of Fox, and the combined share of the eight largest firms estimated to be in excess of 84%, before Pillsbury's acquisition of Fox. At the time of the agreement and acquisition referenced in Paragraphs (13a) and (13b) and at all times relevant herein Pillsbury had approximately 14% of the national market while Fox had approximately 2%.

(19) At the time of the agreement and acquisition referenced in Paragraphs (13a) and (13b) and at all times relevant herein Fox and Pillsbury were substantial and direct competitors in the following highly concentrated marketing areas:

a. In the St. Louis marketing area, the four largest firms accounted for more than 78% of all retail frozen prepared pizza sales. Pillsbury was the largest in St. Louis with a market share of 22.13%; Fox was ranked seventh with 4.39%.

b. In the Houston, Texas marketing area the four largest firms accounted for approximately 90% of all retail frozen prepared pizza

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sales. Pillsbury was the largest in Houston with a market share of 39.0%; Fox was ranked fifth with a market share of 4.57%.

c. In the Charlotte, North Carolina marketing area, the four largest firms accounted for about 75% of all retail frozen prepared pizza sales. Fox was the third largest in that market with a market share of 14.65%; Pillsbury was ranked sixth with a market share of 6.01%.

d. In the Dallas/Ft. Worth marketing area the four largest firms accounted for about 78% of all retail frozen prepared pizza sales. Pillsbury was the largest in that market with a market share of 26.48%; Fox was ranked sixth with a market share of 7.5%.

(20) Fox and Pillsbury at the time of the agreement and acquisition referenced in Paragraphs (13a) and (13b) and at all times relevant herein were also substantial and direct competitors in certain other metropolitan marketing areas.

(21) Concentration in the frozen prepared pizza market has steadily increased over time.

Effects of the Acquisition

(22) The effects of the acquisition set forth in Paragraph (13b) may be substantially to lessen competition or tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended, (15 U.S.C. 18), and the acquisition and the agreement antecedent to the acquisition set forth in Paragraph (13a) each constitute an unfair method of competition and an unfair act or practice within the meaning of Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45), in the following ways among others:

- a. the elimination of actual competition between Pillsbury and Fox in the United States frozen prepared pizza market;
- b. the elimination of actual competition between Pillsbury and Fox in several major metropolitan marketing areas;
- c. increased concentration in the manufacture and sale of frozen pizza in each of the areas described in (a) and (b) above;
- d. the encouragement of further acquisitions and mergers by and among the other leading firms in the frozen prepared pizza market.

Violations

(23) The acquisition by Pillsbury of Fox's pizza assets for the reasons set forth herein constitutes a violation of Section 7 of the Clayton Act, as amended, (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45).

(24) By entering into the agreement giving rise to the violation described in Paragraph (23), herein, Pillsbury and Fox have violated Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45).

INITIAL DECISION BY JOSEPH P. DUFRESNE, ADMINISTRATIVE  
LAW JUDGE  
MAY 15, 1978

#### BACKGROUND

In a complaint dated November 11, 1976, the Commission charged that respondents, The Pillsbury Company and Fox Deluxe Foods, Inc. (Pillsbury and Fox) would violate Section 7 of the Clayton Act, as amended, (15 U.S.C. 18), and Section 5(a)(1) of the Federal Trade Commission Act (FTCA) (15 U.S.C. 45) if they consummated an agreement they had made for Pillsbury to acquire Fox. It also was alleged that by entering into the agreement, Pillsbury and Fox had violated FTCA Section 5(a)(1). (Complaint, ¶¶ 1, 23 and 24.) [2]

Section 7, in pertinent part, reads as follows:

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

Section 5(a)(1) reads as follows:

Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

On November 12, 1976, the day after the complaint originally issued, the United States District Court for the Northern District of Illinois, Eastern Division, in response to complaint counsel's request, issued a Temporary Restraining Order to prohibit consummation of the acquisition. Thereafter, on November 15, 1976, Fox and Pillsbury stipulated to a Preliminary Injunction (No. 76C-4190) which permitted the consummation of the acquisition upon certain conditions.

Pursuant to complaint counsel's motion, the complaint was amended on June 14, 1977, with the acquiescence of Pillsbury's counsel, to reflect that the challenged acquisition had taken place on or about November 15, 1976, and to thus seek divestiture of after-acquired property, relief which was not originally requested. (Amended complaint, ¶ 13B.)

The printed "First Amended Complaint" is dated June 22, 1977, and contains allegations that:

(a) The manufacture and sale of frozen prepared pizza is a separate, distinct and relevant line of commerce. Frozen prepared pizza is one of the largest and [3] fastest growing of all retail food sales categories. Calendar 1975 national retail frozen prepared pizza sales were estimated at about \$394 million and by the end of the fifty-two week period ending August 27, 1976, were estimated to have increased to approximately \$447.6 million. (¶ 14.)

(b) "Totino's" brand frozen prepared pizza manufactured and sold by Pillsbury's frozen foods division and frozen prepared pizza manufactured and sold by Fox were, at the time of the acquisition . . . and had been for some time, in direct and substantial competition. (¶ 15.)

(c) The relevant section of the country is the United States taken as a whole and certain metropolitan marketing areas within the United States. (¶ 16.)

(d) The United States frozen prepared pizza market is highly concentrated with the market share of the four largest firms (including Pillsbury) estimated to be in excess of 61%, before Pillsbury's acquisition of Fox and the combined share of the eight largest firms estimated to be in excess of 84%, before Pillsbury's acquisition of Fox. At the time of the agreement and acquisition . . . and at all times relevant . . . Pillsbury had approximately 14% of the national market while Fox had approximately 2%. (¶ 18.)

(e) The adverse effects of the acquisition alleged were:

1. The elimination of actual competition in the frozen prepared pizza market between Pillsbury and Fox in the United States as a whole and in several major metropolitan marketing areas (St. Louis, Mo.; Houston, Texas; Charlotte, N.C. and Dallas/Ft. Worth, Texas); [4]

2. Increased concentration in the manufacture and sale of frozen pizza in each of the areas described . . . above;

3. The encouragement of further acquisitions and mergers by and among the other leading firms in the frozen prepared pizza market. (¶ 22.)

Pillsbury's original Answer dated December 16, 1976, was changed and in lieu thereof, the Answer dated May 26, 1977, was substituted per my "Order Permitting Amendments to Answer," dated June 13, 1976. Fox's Answer was received by the Commission's Secretary on January 11, 1977; however, further consideration thereof is not warranted because complaint counsel advised on April 12, 1977, on the first day of the hearings, that the charges against Fox would not be pressed (Brickfield, Tr. 11-13).

In its Answer, Pillsbury made a general denial of each "allegation, matter, statement or thing" set forth in the complaint, except as

otherwise expressly admitted or qualified in the Answer (Answer, ¶1). In addition, several affirmative defenses were asserted as follows:

- (1) the complaint failed to state a claim upon which relief may be granted;
- (2) the proceeding is not in the public interest;
- (3) the acquisition of Fox by Pillsbury violated neither Clayton §7 nor FTCA §5 because Fox was a failing company at all times material to the acquisition;
- (4) dismissal of the complaint with attorney's fees, costs and disbursements to Pillsbury, as provided by law, was requested. (Answer, pp. 4-5.)

A separate Answer to the Amended Complaint was not filed (French, Tr. 7). [5]

However, the first two affirmative defenses asserted by Pillsbury were negated by the Preliminary Injunction, entered into by all the parties. It provided that:

1. The complaint stated a claim upon which relief under Section 13(b) of the FTCA might be granted; and that an order would be in the public interest;
2. A new company would be formed by Pillsbury to carry on Fox's frozen prepared pizza business viably, separately and independently so that future divestiture would not be hindered if Pillsbury lost the case;
3. Commission representatives upon written request and reasonable notice could have access to any information relating to matters contained in the Court's Order and would be permitted to interview officers and employees of Pillsbury regarding any such matters;
4. The injunction is to continue in full force and effect until the complaint is dismissed by the Commission, set aside by a court on review or the Commission order has become final;
5. The parties agreed to expedite the administrative proceeding.

Pursuant to the Stipulation and Order, Pillsbury caused a new company, Fox Deluxe Pizza Company (Fox Pizza), to be established to carry on the frozen prepared pizza business of Fox. Pillsbury was also required to cause Fox Pizza to hire adequate personnel; to transfer \$1,000,000 to Fox Pizza to be used to acquire manufacturing equipment and improve the Fox facilities; to cause at least 700,000 cases, or one-third of Fox Pizza's total annual production, to be Fox Pizza's own brand; to cause Fox Pizza to reinvest all earnings and

pay no dividends; to cause Fox Pizza not to become insolvent; to enter into an Agreement whereby Fox Pizza manufactured pizza for Pillsbury; to use its best efforts to maintain the Fox Pizza brand in the marketplace and to improve the quality of the Fox Pizza product; [6] to refrain from using Fox Pizza's trade secrets or know-how; to notify all brokers selling the Fox Foods brand of pizza that Fox Pizza would continue to market and distribute product independently and in competition with Pillsbury; to refrain from interfering with the independent judgment of Fox Pizza or make any changes other than in the ordinary course of business; and not to permit any deterioration of Fox Pizza which might impair its capacity for the manufacture, distribution or sale of frozen prepared pizza. (Stipulation and Order, November 16, 1976; RPF 14.)

On November 24, 1976, the Commission instructed the administrative law judge to take all appropriate steps to expedite the proceedings and to submit brief, written quarterly reports to it as to the procedural status of the matter and the steps taken to effect expedition. ("Instructions to Administrative Law Judge" dated November 24, 1976.) The last of five such reports was submitted on February 14, 1978.

The case-in-chief was presented in Washington, D.C., on April 12-13, June 14, 20-23, 27-30, July 5-8, 11-14 and September 15, 1977. The case-in-defense was presented in Joplin, Missouri, on October 19-20, in Minneapolis, Minnesota, on October 25-28, and in Washington, D.C. on November 2, 3 and 8-11, 1977. Complaint counsel's case-in-rebuttal was presented in Washington, D.C. on December 7-8 and 13, 1977. Counsel for Pillsbury did not present a case-in-rebuttal after certain stipulations were worked out with complaint counsel, he had reviewed the complete transcript and had offered more evidence. Additional evidence, some offered by each side, was accepted per my Order dated February 13, 1978. The record was closed on February 14, 1978, per my Order dated January 23, 1978.

In total, 43 witnesses testified; 29 for the Commission and 14 for Pillsbury. There are 76 Commission exhibits and 72 Pillsbury exhibits. In accord with Commission Rule 3.43(g) those few exhibits which were rejected have been retained in the official record. There are 3818 pages of transcript of the adjudicative hearings. [7]

#### Bases for the Findings of Fact; Abbreviations Used

The findings of fact following are based on a review of the allegations made in the complaint, respondents' answers, the documentary evidence, and consideration of the demeanor of the witnesses. In addition, the proposed findings of fact, conclusions and

proposed orders, together with reasons and briefs in support thereof filed by each side have been given careful consideration. To the extent not adopted by this decision in the form proposed or in substance, they are rejected.

For convenience, the findings of fact include references to supporting evidentiary items in the record. Such references are intended to serve as guides to the testimony, evidence, and exhibits supporting the findings of fact. They do not necessarily represent complete summaries of the evidence considered in arriving at such findings. The following abbreviations have been used:

- Tr. - Transcript, preceded by the name of the source of the information, followed by the page number.
- CX - Commission's Exhibit, followed by its number.
- RX - Respondents' Exhibit, followed by its number.
- CCPF and CCB - Complaint counsel's Proposed Findings and Brief
- RPF and RB - Respondents' Proposed Findings and Brief.

#### FINDINGS OF FACT

##### Commission Jurisdiction

1. Pillsbury is engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act (Complaint and Answer, ¶ 8; RPF 5). Section 11 of the Clayton Act authorizes the Commission to enforce compliance with Section 7 of that Act (and other sections as well) with regard to acquisitions by corporations such as Pillsbury [8] (15 U.S.C. 21).

2. To and including November 15, 1976, Fox was engaged in commerce as defined in Section 1 of the Clayton Act. (Complaint and Answer, ¶12; RPF 9.) Being "in commerce," as defined in the Clayton Act also constitutes being "in commerce" under the FTC Act.

##### The Pillsbury Company

3. Pillsbury is a Delaware corporation with its principal office at the Pillsbury Building, 608 Second Ave. South, Minneapolis, Minnesota (Complaint and Answer, ¶4, RPF 1.)

4. Pillsbury is a manufacturer and marketer of a wide range of food products, including prepared baking mixes, refrigerated dough products, flour and frozen prepared pizza (Complaint and Answer, ¶5; RPF 2.) It also operates restaurant chains (*i.e.*, "Burger King," "Steak and Ale" and "Poppin Fresh Pie Shops") as subsidiaries. (Behnke, Tr. 19.)

5. In its fiscal year ending May 31, 1976, Pillsbury had revenues

in excess of \$1.5 billion and net income in excess of \$41 million. Pillsbury is among the 200 largest United States corporations. (Complaint and Answer, ¶6; RPF 3.)

6. Pillsbury acquired Totino's Finer Foods, Inc. (Totino's) in November 1975, a manufacturer and seller of frozen prepared pizza. Totino's gross sales for its fiscal year ended October 31, 1975, were approximately \$39 million. For the twelve-month period ended October 31, 1976, Totino's gross sales as a Pillsbury subsidiary were approximately \$48 million. (Complaint and Answer, ¶7; RPF 4.)

7. Pillsbury projects its profits from 1977 to 1981 to be a 10.6% return on invested capital, which is slightly lower than the average 11% return on investment for all manufacturing industries during the period 1960 to 1970. (Cady, Tr. 3340-41.) [9]

#### Fox Deluxe Foods, Inc.

8. Fox was an Illinois corporation with offices at 222 South Riverside Plaza, Suite 442, Chicago, Illinois. (Complaint and Answer ¶9; RPF 6.)

9. Immediately before its acquisition by Pillsbury on November 15, 1976, Fox was a manufacturer or processor and seller of food products including poultry, butter, eggs and frozen prepared pizza. (Complaint and Answer, ¶ 10; RPF 7.)

10. Fox had net sales of approximately \$12.2 million and assets of approximately \$3.1 million in its fiscal year ended February 29, 1976. Frozen pizza sales by Fox in that fiscal year were \$7.3 million gross, \$6.1 million net. (Complaint and Answer, ¶ 11; RPF 8.)

11. Fox was a "price brand" of frozen prepared pizza. The firm relied on the brand's relative low cost and frequent discount promotions, rather than high advertising activity, to attract business. (Francis, Tr. 660-61; DeLapa, Tr. 1206; CCPF 190.)

12. Prior to the acquisition, Fox's ability to obtain and keep geographic distribution varied. Its pizza was sold in a variety of areas in the Midwest and Southwest but did not remain in distribution in smaller areas within these larger ones for long periods. (Nickel, Tr. 493; RPF 112.)

13. As a part of the case-in-defense, there was a tour of the Fox plant in Joplin, Missouri on October 19, 1977 by the administrative law judge and counsel. Testimony was taken (Tr. 2144-2317). The witnesses were Donald E. Balster, Vice President of Operations of Fox Pizza (Balster, Tr. 2144), Rupert Spencer, Maintenance and Engineering Manager of Fox Pizza (Spencer, Tr. 2145), and John Jordan, Quality Assurance Manager of Fox Pizza (Jordan, Tr. 2218-

19). Areas observed and/or described during the tour are identified on floor plans entered in evidence as RX 12, RX 13, and RX 14.

14. Prior to the acquisition, 50 Fox production employees had been laid off. Since the acquisition, employment at the plant has grown from 75 to 180 production personnel and the plant has moved from one shift to two. (Balster, Tr. 2279-80; RPF 221.) [10]

15. The parties stipulated that had Dr. R.E. Baird, the U.S.D.A. circuit supervisor having jurisdiction over the Joplin plant testified, he would have said that before the acquisition: (a) the Fox plant was never completely rodent-proofed; (b) the meat room floor was deteriorating rapidly; (c) the cooker in the meat room leaked; (d) the oven in the bakery was difficult to clean and frequently caused fires among the pizza crusts; and (e) peeling paint on the walls of the sauce room and meat room necessitated daily scraping. Dr. Baird also would have said that at the time of the acquisition by Pillsbury, Fox had agreed with him to install a new ceiling in the bakery, correct deficiencies of the floor and walls in the meat room, and rodent-proof all exterior walls; however, it had not accomplished any of these corrections. (CX 76, ¶21; RPF 223.)

16. In mid-1975, there was a meeting between Mr. Joe Fox, chairman of the board of Fox, and Mr. William Bokman, a vice-president of Peavey Company. Mr. Bokman concluded that, although the company was for sale, it was not attractive to Peavey because: (a) Fox's frozen prepared pizza product was in the low-quality, low-price segment of the pizza business, in which Peavey had no interest; (b) there was very little or no management strength in the company; and (c) the new building, as described to him, did not sound like a major asset. (Bokman, Tr. 2597, 2599-2600; RPF 198.)

17. Previously, a Vice-President for Corporate Planning and Business Development of Anderson-Clayton Company, Houston, Texas, a food and food related producer/distributor had looked into the possibility of acquiring Fox. (Glasgow, Tr. 2854.) Mr. Glasgow met Mr. Fox and concluded that, although Fox was for sale, he perceived it as a relatively small company, with small sales, an old plant, a limited geographical area of operation, and a small regional brand at the low-price end of the market with nothing to recommend it to Anderson-Clayton. (Glasgow, Tr. 2858.) Mr. Fox did not recall discussions with anyone other than Peavey, Anderson-Clayton, and Pillsbury. (Fox, CX 46, p. 32; RPF 199.)

18. During the period 1972 to 1975, Fox earned substantial profits. Its sales increased from \$6.4 million to \$11.2 million; its total debt declined from \$1.4 million to \$860,000. The company reportedly had a current structure with working capital of \$900,000 and current

ratio [11] of 2.15. Its net worth increased by over 50% to \$1.7 million. However, in December of 1975, the company obtained a loan of \$300,000 from Harris Trust and Savings Bank of Chicago, Illinois (Harris) to help finance its new plant at Joplin, Missouri. Harris was aware that the company was using short-term financing to finance long-term assets, but concluded that the proposed loan could be repaid in a year by means of liquidation of Fox's Hotel and Restaurant ("H&R") Division, which had become "a drag on profits" by generating "large losses." (RX 48; RX 49; RPF 179.)

19. In January of 1976, credit analysts at Harris expressed concern over losses by Fox in October and November 1975. (RX 51.)

20. Fox began pizza operations in Joplin on February 16, 1976. (CX 49, p. 1.) On March 22, 1976, production at Joplin was at 50-80% of capacity. On May 17, 1976, in a report to the directors of Fox, it was reported that: (a) sales for the first two months in Joplin were 20% below projections; (b) production efficiency was unfavorable; (c) severe competition, including competitive pricing below the Fox break-even point, was being encountered; and (d) losses at the H&R Division were draining off capital needed in the pizza business. (RX 16; RPF 186.)

21. On March 23, 1976, the Harris employee monitoring the loan, Barbara J. Pite, recommended a 90-day extension of the \$300,000 loan. The sale of the H&R Division, which was to have enabled Fox Foods to repay the loan, had not taken place, and the H&R Division was continuing to incur losses. While the overseer of the loan thought that Fox's pizza operation had good earning potential, she told her supervisors that the frozen prepared pizza business "is very competitive and margins are narrow." Extension of the loan was approved, but with recognition of an uncertain operating outlook, the unprofitability of the H&R Division, and possible start-up problems in the company's new plant. (RX 52 and 53; RPF 180.)

22. On May 18, 1976, Ms. Pite recommended an additional \$50,000 for Fox Foods from Harris. The operations in Joplin were not going as well as hoped with production costs running too high and margins being squeezed. (RX 54.) This \$50,000 additional loan was approved but concern was expressed over Fox's failure to sell the H&R Division. (RX 55; RPF 181.) [12]

23. By May 19, 1976, "excessive downtime" appeared to require a further capital investment in equipment. At the same time more money was needed for co-op (supplier-reseller shared cost) advertising programs. (RX 17.) By June 8, 1976, intense competitive activity, with resulting price wars, appeared likely to force Fox to rely more

