Syllabus

IN THE MATTER OF

CECIL C., HAMILTON, JOHN, AND SIDNEY C. HOGE, AND BARBARA OBOLENSKY DOING BUSINESS AS HUBER HOGE AND SONS ET AL.

CONSENT SETTLEMENT IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 6097. Complaint, May 6, 1953—Decision, Dec. 16, 1953

Where four partners engaged in business as an advertising agency and mail order promotion house, and two individuals engaged in the mail order sale and distribution of various items, including books; in advertising a book entitled "TV Owner's Guide to Operation and Repair" in newspapers and periodicals of general circulation, and through broadcasts and direct mail advertising—

(a) Represented falsely that the usual television receiving set purchased after the spring of 1947, if cared for according to the instructions in their said book, would give sharp and distinct reception without special electronic equipment up to 100 miles away from the transmitting station;

(b) Represented falsely that through the information and instructions contained in said book, an owner would be able to trace each trouble to its source, make needed repairs, and locate and replace worn-out parts; that the book gave an effective method of locating burned-out tubes, and that, through following such instructions, the owner could prevent major breakdowns and keep his set in perfect operating condition;

(c) Represented falsely that such instructions would enable the owner to convert his set to color, save $65 to $100 per year in service charges, and obtain 40% discount when purchasing a new set; and

(d) Falsely represented that by following such instructions, repairs of and replacements in television sets might be made by inexperienced persons without danger:

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice and injury of the public and of competitors and constituted unfair and deceptive acts and practices in commerce and unfair methods of competition therein.

Before *Mr. Abner E. Lipscomb*, hearing examiner.

Mr. W. J. Tompkins for the Commission.

Mr. James R. Withrow, Jr., *Mr. Thomas J. McFadden* and *Donovan, Leisure, Newton & Irvine*, of New York City, for Huber Hoge and Sons.

Conrad & Smith, of New York City, for Harry Schneiderman and Louis Linetsky.

CONSENT SETTLEMENT[1]

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on May 6, 1953, issued and served its complaint on the respondents named in the caption hereof, charging them with unfair and deceptive acts and practices in commerce within the intent and meaning of said Act.

The respondents, desiring that this proceeding be disposed of by the consent settlement procedure provided in Rule V of the Commission's Rules of Practice, solely for the purpose of this proceeding, any review thereof and the enforcement of the order consented to, and conditioned upon the Commission's acceptance of the consent settlement hereinafter set forth, and as to respondents Cecil C. Hoge, Hamilton Hoge, John Hoge, Sidney C. Hoge and Barbara Obolensky in lieu of answer to said complaint, and as to respondents Harry Schneiderman and Louis Linetsky, also known as Louis Linett, in lieu of the answer to said complaint heretofore filed by them and which, upon acceptance by the Commission of this consent settlement, is to be withdrawn from the record, hereby:

1. Admit all of the jurisdictional allegations set forth in the complaint.

2. Consent that the Commission may enter the matters hereinafter set forth as its findings as to the facts, conclusion and order to cease and desist. It is understood that the respondents in consenting to the Commission's entry of said findings as to the facts, conclusion and order to cease and desist specifically refrain from admitting or denying that they have engaged in any of the acts or practices stated therein to be in violation of law, or that such acts and practices, if engaged in, would be in violation of law.

3. Agree that this consent settlement may be set aside in whole or in part under the conditions and in the manner provided in Paragraph (f) of Rule V of the Commission's Rules of Practice.

4. Assert that they have ceased advertising and selling the products here involved, namely, a book entitled "TV Owner's Guide to Operation and Repair."

The admitted jurisdictional facts, the statement of the acts and practices which the Commission has reason to believe are unlawful,

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[1] The Commission's "Notice" announcing and promulgating the consent settlement as published herewith, follows:

The consent settlement tendered by the parties in this proceeding, a copy of which is served herewith, was accepted by the Commission on December 16, 1953, and ordered entered of record as the Commission's findings as to the facts, conclusion, and order in disposition of this proceeding.

The time for filing report of compliance pursuant to the aforesaid order runs from the date of service hereof.

the conclusion based thereon and the order to cease and desist, all of which the respondents consent may be entered herein in final disposition of this proceeding, are as follows:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondents Cecil C. Hoge, Hamilton Hoge, John Hoge, Sidney C. Hoge and Barbara Obolensky are individuals and copartners and prior to October 1, 1952, were engaged in business as an advertising agency and mail order promotion house under the trade name of Huber Hoge and Sons with their office and principal place of business at 699 Madison Avenue, New York, New York. Effective October 1, 1952, the business known as Huber Hoge and Sons was incorporated under the laws of the State of New York as Huber Hoge and Sons, Inc., with respondents Cecil C. Hoge, Sidney C. Hoge and John Hoge as directors and president, vice president and secretary, respectively. Respondent Harry Schneiderman is an individual doing business under the trade name of Bedford Company with his office and principal place of business at 799 Broadway, New York, New York. He is engaged in the mail order business and sells and distributes in the course of such business various items, including books. Respondent Louis Linetsky is an individual and is employed in the business known as Bedford Company. He is also known as Louis Linett. His address is the same as that of respondent Harry Schneiderman. All of the respondents have participated in the performance of the acts and practices hereinafter set forth, except as otherwise specifically stated.

PAR. 2. Beginning in 1952 the respondents engaged in the sale and distribution of a book entitled "TV Owner's Guide to Operation and Repair". Respondents caused said book, when sold, to be transported from the State of New York to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondents maintained a substantial course of trade in their said book in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 3. In the course and conduct of their said business, and for the purpose of inducing the purchase of said book, respondents have made many statements with regard to the ability of owners of television sets to keep their sets in proper working order by following the instructions contained in said book. These representations have been made by means of advertisements inserted in newspapers and other periodicals having a general circulation in the United States, by radio broadcasts, and by means of direct mail advertising.

PAR. 4. Through the use of various statements made in said advertisements, respondents represented, directly and by implication, that, if cared for according to the instructions in their book, the usual television receiving set purchased after the spring of 1947 will give a sharp and distinct reception, without special electronic equipment, up to 100 miles away from the transmitting station; that through the information and instructions contained in said book a television owner will be able to trace each trouble to its source, make needed repairs, locate and replace wornout parts; that the book gives an effective method of locating burned-out tubes; that by following the instructions in the book the owner can prevent major breakdowns and keep his set in perfect operating condition, convert his set to color, save $65 to $100 per year in service charges and obtain 40% discount when purchasing a new set; and that, by following the instructions in said book, repairs of, and replacements in, television sets may be made by inexperienced persons without danger.

PAR. 5. The said representations as set forth in Paragraph Four hereof are false, deceptive, and misleading. In truth and in fact, the failure to receive sharp and distinct pictures over a television receiver is sometimes governed by factors outside of the receiving set. Many television sets are so located as to make sharp and distinct picture reception an impossibility. Even those set owners whose sets are favorably located cannot always get sharp and distinct pictures because present day telecasting conditions make perfect or even satisfactory reception impossible in many instances. By using the most modern electronic equipment available and by following all of the instructions contained in respondents' book, a sharp and distinct picture reception cannot under all circumstances be obtained on present day television receivers from a telecasting station located as much as or slightly less than 100 miles away. The book contains information that should enable the television owner to make a number of different kinds of simple repairs but will not enable him to trace every trouble to its source or make all needed adjustments. The book does not inform the set owner as to how he may himself locate or replace wornout parts. The information contained therein may enable the owner to locate burned-out tubes in some instances. The majority of tube failures, however, are not due to burnout. The method of detecting defective tubes recommended is not an effective method of detecting a defective tube. Compliance with the instructions set out in this book will not enable a set owner to maintain his set in perfect working condition or prevent major breakdowns, will not enable a set owner to convert his set for colored reception; furthermore, colored television pictures are not now obtainable.

It is impossible to estimate the annual cost of television upkeep. Many sets give good reception for a year or longer without any servicing either by the owner or a repairman. It is therefore not possible to state what amount, if any, can be saved by reason of the information contained in said book. While information in the book may enable a person to select a television set more suitable for his purposes than would ordinarily be possible without such information, its use will not enable him to obtain a discount, the matter of price being entirely under sole control of the dealer. There is an element of danger to an inexperienced person who attempts to repair or replace parts in a television receiver. Some picture tubes retain an electric charge for a considerable time after the wall plug is removed and are capable of giving a shock which may have serious consequences.

CONCLUSION

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

ORDER TO CEASE AND DESIST

It is ordered, That respondents Cecil C. Hoge, Hamilton Hoge, John Hoge, Sidney C. Hoge and Barbara Obolensky, individually and as copartners doing business under the name of Huber Hoge and Sons, or under any other name, and respondent Harry Schneiderman, doing business under the name of Bedford Company or under any other name, and respondent Louis Linetsky, also known as Louis Linett, and the respective respondents' agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of the book entitled "TV Owner's Guide to Operation and Repair," whether sold under the same or any other name, or any book of substantially the same contents, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing that ownership of and compliance with the instructions set forth in the "TV Owner's Guide to Operation and Repair" will enable a television set owner to maintain his set in perfect operating condition or prevent major breakdowns;

(a) Trace the source of all troubles;

(b) Make all needed repairs;

(c) Locate or replace all worn-out parts;

(d) Convert television sets to color;

(e) Save any stated amount in service charges;

(f) Obtain a discount upon purchase of a television set.

2. Representing that said book gives an effective method of detecting defective tubes.

3. Representing that, by following the instructions in said book, repairs or replacements may be made without danger.

4. Misrepresenting the distance from transmitting stations at which television sets, maintained in accordance with the instructions in said book, will give sharp and distinct reception.

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

Dated: Oct. 20, 1953.

(sgd.) *Cecil C. Hoge*
CECIL C. HOGE

Dated: Oct. 23, 1953.

(sgd.) *Hamilton Hoge*
HAMILTON HOGE

Dated: Oct. 20, 1953.

(sgd.) *John Hoge*
JOHN HOGE

Dated: Oct. 23, 1953.

(sgd.) *Sidney C. Hoge*
SIDNEY C. HOGE

Dated: Oct. 23, 1953.

(sgd.) *Barbara Obolensky*
BARBARA OBOLENSKY
Individually and as copartners doing business as Huber Hoge and Sons.

Dated Oct. 21, 1953.

(sgd.) *Harry Schneiderman*
HARRY SCHNEIDERMAN,
doing business as Bedford Company.

Dated: Oct. 21, 1953.

(sgd.) *Louis Linett*
LOUIS LINETSKY,
also known as Louis Linett.

The foregoing consent settlement is hereby accepted by the Federal Trade Commission and ordered entered of record on the 16th day of December 1953.

Syllabus

IN THE MATTER OF

CHARLES ANTELL CO., INC. ET AL.

DECISION IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 6102. Complaint, June 8, 1953—Decision, Dec. 19, 1953

Where the corporation and its three officers, joint owners of its entire stock, engaged in the interstate sale and distribution of their "Charles Antell Formula No. 9" for the hair, "Charles Antell Shampoo," and "Hexachlorophene Soap"; together with an advertising agent whose principal client they were; in advertising their said "Formula No. 9" and "Shampoo" in daily papers and by broadcasts from many radio and television stations, directly and by implication—

(a) Represented falsely that the main ingredient in said "Formula No. 9" was lanolin, that lanolin was the only natural oil or grease that is absorbed by the hair or scalp, that the lanolin therein would reach the roots of the hair, and that it would cleanse the hair;

(b) Represented that the use of said "Formula" would loosen the scalp and constitute an effective treatment for infected scalp, dandruff, and cracked and split hair; and would remedy the damage caused by improper dyeing, permanents, burning and other harmful practices;

The facts being that it would not alone loosen the scalp; while use thereof as directed with massage and brushing would remove dandruff, it was not an effective treatment for said condition or infected scalps; and while its use would make the hair less brittle and more pliable and improve the appearance of hair which was cracked, split, or otherwise damaged by improper dyeing, permanents, burning and other harmful practices, it would not remedy the cause of cracked or split hair;

(c) Represented that use thereof would promote the growth of hair and improve the hair by imparting to it health and vitality, would change the color thereof, and would not leave grease on the hair;

The facts being that, while brushing, pulling, and massaging the hair regularly with said "No. 9" served as a stimulant to the circulation in and around the hair roots and thus helped maintain normal scalp and hair health, it would not grow hair; and, while used in excessive amounts, it might darken and leave grease on the hair of some persons, use as directed or in moderate amounts would not bring about such results;

(d) Represented falsely that use thereof would cause the hair to curl and would prevent loss of hair and baldness;

(e) Represented that the hormones contained in said "Shampoo" cleaned or aided in the cleaning of the hair and scalp; the facts being that it had not contained hormones for more than a year, and hormones have no cleansing action;

(f) Represented falsely that their said "Hexachlorophene Soap" would remove twenty-five times more dirt and other foreign matter from the skin than ordinary soap;

(g) Falsely represented that said soap would prevent the development of impetigo and cradle cap in the case of babies; and pimples, boils, blackheads, or other skin blemishes of external origin generally; and

(h) Represented that said "Formula No. 9" came in sizes that normally sell at $3.98 and $4.95, but that said prices were reduced to $2.00 and $3.00, respectively, as special introductory offers; when in fact said so-called special introductory prices were the regular prices at which said product has been sold for a long time:

Held, That such acts and practices constituted unfair and deceptive acts and practices in commerce.

Before *Mr. John Lewis*, hearing examiner.

Mr. William L. Pencke, for the Commission.

Mr. Bernard H. Herzfeld, of Baltimore, Md., for respondents.

Decision of the Commission

Pursuant to Rule XXII of the Commission's Rules of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance", dated December 19, 1953, the initial decision in the instant matter of hearing examiner John Lewis, as set out as follows, became on that date the decision of the Commission.

Initial Decision by John Lewis Hearing Examiner

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on June 8, 1953, issued and subsequently served its complaint in this proceeding upon the respondents named in the caption hereof, charging them with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of said Act. After the issuance of said complaint and the filing of respondents' answer thereto, hearings were held before the above-named hearing examiner, theretofore duly designated by the Commission, at which hearings counsel for respondents and counsel supporting the complaint entered into a stipulation as to the facts in this proceeding in lieu of oral testimony and other evidence in support of or in opposition to the allegations of the complaint, said stipulation being spread upon the record at said hearings and duly filed in the office of the Commission. Thereafter, the proceeding regularly came on for final consideration by the hearing examiner upon the complaint, answer, and stipulation, counsel having elected not to file proposed findings and conclusions for consideration by the hearing examiner, and oral argument not having been requested; and said hearing examiner, having duly considered the record herein, finds that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusion drawn therefrom, and order:

Findings as to the Facts

Paragraph 1. Respondent Charles Antell, Inc., (incorrectly named in the complaint as Charles Antell Co., Inc.) is a corporation, organ-

ized and existing under the laws of the State of Maryland, with its office and principal place of business located at 112 South Street, Baltimore, Maryland.

Respondent T. A. A., 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 1710 Broadway, New York, New York, and another place of business at 4 West Eager Street, Baltimore, Maryland. The individuals named in the complaint are not officers of T. A. A., Inc.

Respondent Charles D. Kasher is President of Charles Antell, Inc. Respondent Leonard L. Rosen is Vice President, Secretary and Chairman of the Board of Charles Antell, Inc. These individuals direct, manage and control the policies and activities of said corporate respondent. Respondent Julius J. Rosen is Vice-President and Treasurer of Charles Antell, Inc. This individual participates in the direction, management and control of the policies and activities of said Charles Antell, Inc.

The principal office and place of business of respondent Charles D. Kasher is located at 1710 Broadway, New York, New York; that of Julius J. Rosen is located at 112 South Street, Baltimore, Maryland, and that of respondent Leonard L. Rosen is located at 4 West Eager Street, Baltimore, Maryland.

PAR. 2. For more than two years last past, respondents Charles Antell, Inc., Charles D. Kasher, Leonard L. Rosen and Julius J. Rosen, have been, and are now, engaged in the sale and distribution of certain cosmetic products, as "cosmetics" are defined in the Federal Trade Commission Act, and a soap.

Respondent T. A. A., Inc., has been and is, the advertising agent for respondent Charles Antell, Inc., and it, as well as the individual respondents Charles D. Kasher and Leonard L. Rosen have prepared and caused the dissemination of, or participated in the preparation and dissemination of, the advertising matter to which reference is hereinafter made.

Respondents Charles D. Kasher, Leonard L. Rosen and Julius J. Rosen, jointly own all of the stock of respondent Charles Antell, Inc. Said corporate respondent is the principal client of respondent T. A. A., Inc., and there exists a close business relationship between all of said respondents.

The designations used by respondents for said cosmetic products and soap, the essential information in regard to the composition thereof, and the directions for use of the cosmetic products, are as follows, except that hormones have not been used in either Charles Antell Formula No. 9 or Charles Antell shampoo since approximately June 1952:

Designation: *CHARLES ANTELL Formula #9*

Composition:	*Parts*
Lanolin	13
Petroleum	8
Mineral Oil	20.5
Paraffin	8.05
Cetyl Alcohol	.49
Stearic Acid	10.4
TEA (triethanolamine)	2.47
Propylene Glycol	3.21
Vee Gum (colloidal clay)	.36
Methyl Parasept	.092
Water	32.35
Perfume	.25

Hormone
6.9 cc of a 3% Alpha Estradiol in Propylene Glycol solution for every 1000 lbs. of finished cream.

Directions for use:

Before applying, massage scalp thoroughly with finger tips to stimulate circulation. Then apply a small portion of Formula No. 9 to finger tips. Liquefy by rubbing in palms of hands. Massage thoroughly into scalp and through hair. Should be repeated daily for best results.

Designation: *CHARLES ANTELL SHAMPOO*

Composition:	*Percent*
Oleic Acid	7.37
Coconut Oil Fatty Acid	6.42
G-1441 (derivative of lanolin sorbitol)	0.883
MEA (monoethanolamine)	2.19
TEA (triethanolamine)	3.64
Protovac 8894 (protein caseinate derivative)	0.475
Propylene Glycol	8.94
Sequestrene AA (ethylene diamine tetra acetic acid)	0.357
Perfume	0.208
Water	69.5

Horomone (Alpha estradiol 160cc of a 3% solution of Alpha Estradiol in Propylene Glycol for 42,000 lbs. of finished shampoo.)

Directions for use:

Wet Hair Thoroughly and Apply a small amount of Shampoo. Work Shampoo into Generous Lather. Rinse with tepid water. Repeat these steps For a Thorough Cleansing.

Designation: *HEXACHLOROPHENE SOAP*

Composition:	*Max. %*	*Min. %*
Moisture and matter volatile at 105 degrees C.	15.0	
Sum of free alkali, total matter insoluble in alcohol and sodium chloride	1.7	
Free alkali, calculated as NaOH	0.1	
Matter insoluble in H_2O	0.4	
Unsaponified saponifiable (free fat)	0.3	
Anhydrous Soap		83.0

Lanolin—one percent
Chlorophyll—1/100 percent
Hexachlorophene—Two percent

PAR. 3. Respondents Charles Antell, Inc., and Charles D. Kasher, Leonard L. Rosen and Julius J. Rosen cause said cosmetic products and soap, when sold, to be transported from their place of business in the State of Maryland to purchasers thereof located in various other States of the United States and in the District of Columbia. Said respondents maintain, and at all times mentioned herein have maintained, a course of trade in said products and soap in commerce, between and among the various States of the United States and in the District of Columbia, and such trade has been and is substantial.

PAR. 4. In the course and conduct of said business, respondents have disseminated and caused the dissemination of certain advertisements concerning said cosmetic products by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to newspaper advertisements in the Evening Bulletin, Providence, Rhode Island, of February 19, 1952, the Baltimore, Maryland, News Post of November 13, 1951, and the Sunday Star, Washington, D. C., of May 18, 1952; and radio and television broadcasts entitled "Hair Raising Tale," "Some of My Best Friends are Women," "Hollywood Story" and "Hare Magic," transmitted over radio and television stations WFIL–TV and WIP at Philadelphia, Pennsylvania, KFRC at San Francisco, California, and many other radio and television stations in the United States, said broadcasts being of sufficient power to carry them across State lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of their said products; and respondents have also disseminated, and caused the dissemination of, advertisements concerning said products by various means including, but not limited to newspaper advertisements and the aforesaid radio and television broadcasts, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of their said cosmetic products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

In the further course and conduct of said business, respondents made certain statements more than a year ago and which have not been repeated since that time concerning their hexachlorophene soap including, but not limited to, television broadcasts over television station WMAL–TV at Washington, D. C. Among and typical of said statements, but not all inclusive, were the following:

Even if you are one of the two out of five people who bathe daily, you're only 1/25 as clean as you could be. For if we're really clean after a bath why do we spend millions of dollars on deodorants to prevent body odor. * * * A beautifying, soothing soap because of the lanolin, and a soap that will make you 25 times cleaner than ordinary soap because of the hexachlorophene.

Why is a baby that is bathed carefully every day in danger of impetigo, diaper rash and cradle cap? Why do people have externally caused skin blemishes—pimples, boils and blackheads? Because ordinary soap cannot kill the millions of skin bacteria that are the cause of body odor of babies' impetigo and skin rashes and of skin blemishes of external origin. All ordinary soap can do is wash a few of these bacteria away * * *. For the first time there is an ingredient that, added to soap, will kill these bacteria on contact and will continue to kill them as they get on your skin. One bath with this soap is as effective as a bath every hour for 24 hours with ordinary soap.

PAR. 5. Through the use of the advertisments referred to in Paragraph 4 with respect to Charles Antell Formula No. 9 and Charles Antell Shampoo and the advertisements quoted in said paragraph with respect to Hexachlorophene Soap, respondents have made, directly and by implication, the following representations:

A. With respect to Charles Antell Formula No. 9:

1. That the main ingredient in said product is lanolin; that the lanolin is full strength or maximum potency and that no other oils or greases are present.

2. That lanolin is the only natural oil which will or can be absorbed by the hair and scalp and that the lanolin in said product will be absorbed to the extent that it will reach the roots of the hair; that lanolin will cleanse the hair.

3. That the use of said Formula No. 9, according to directions, will loosen dry scalp and constitute an effective treatment for infected scalp, dandruff and cracked and split hair; will remedy the damage caused by improper dyeing, permanents, burning and other harmful practices; will promote the growth of hair and improve the hair by imparting to it health and vitality; will not change the color of the hair and will not leave grease on the hair.

4. That the use of said product will cause the hair to curl.

5. That its use will prevent loss of hair and baldness.

B. With respect to Charles Antell Shampoo:

That said shampoo contains substantial quantities of lanolin and that the hormones contained in said product clean or aid in the cleaning of the hair and scalp.

C. With respect to Hexachlorophene Soap:

1. That said soap will remove twenty-five times more dirt and other foreign matter from the skin than ordinary soap.

2. That said soap will prevent the development of impetigo and cradle cap in the case of babies, and pimples, boils, blackheads or other skin blemishes of external origin generally.

PAR. 6. The foregoing representations with respect to the said cosmetic products and soap are false and misleading in material respects and, with respect to said cosmetic products, constitute "false

advertisements" as that term is defined in the Federal Trade Commission Act. In truth and in fact:

A. With respect to Charles Antell Formula No. 9:

1. The main ingredient in said product from a percentage standpoint is not lanolin, but the lanolin present in the product is of full strength or maximum potency.

2. Lanolin is not the only natural oil or grease that is absorbed by the hair or scalp. Lanolin may be absorbed into the scalp but will not reach to the roots of the hair. Lanolin will not cleanse the hair.

3. Said Formula No. 9 alone will not loosen the scalp. While the use of said product as directed with massage and brushing of the hair will effectively remove dandruff, it is not an effective treatment for dandruff or infected scalp. While the use of said product will make the hair less brittle and more pliable and improve the appearance of hair that is cracked, split or otherwise damaged by improper dyeing, permanents, burning and other harmful practices, its use will not remedy the cause of cracked or split hair. Formula No. 9 will not grow hair. However, brushing, pulling and massaging of the hair with Formula No. 9 regularly, serves as a stimulant to the circulation in and around the hair roots and, since a healthy condition of the hair and scalp is aided by proper circulation, stimulation by this procedure will help maintain normal scalp and hair health. Formula No. 9 used in excessive amounts may darken the hair and leave grease on the hair of some persons. However, the use of Formula No. 9 as directed, or in moderate amounts, will not darken the hair nor leave grease on the hair.

4. When the hair has been set in curls or in some other manner Formula No. 9 will help keep it as so set or arranged. However, said product will not curl the hair.

5. It will not prevent the loss of hair or baldness.

B. With respect to Charles Antell Shampoo:

Said shampoo does contain lanolin by the presence of G–1441 which is described as a modified or refined or processed lanolin product. However, said shampoo has not contained hormones for more than one year and has not been so advertised for more than one year. Moreover, hormones, if present, have no cleansing action.

C. With respect to Hexachlorophene Soap:

1. Respondents' soap is no more effective than ordinary soap as a cleansing agent for the removal of dirt, grit, and other soil.

2. Respondents' soap will not prevent impetigo and cradle cap in case of babies nor prevent the development of pimples, blackheads or other skin blemishes generally, however caused.

PAR. 7. In the course and conduct of their business, respondents represent and have represented that said Formula No. 9 comes in sizes

that normally sell at $3.98 and $4.95, respectively, but that said prices are reduced to $2.00 and $3.00, respectively, as special introductory offers. In truth and in fact, said so-called special introductory prices are the regular prices at which said products are and have been sold for a long period of time.

PAR. 8. The use by respondents of the said false advertisements with respect to the cosmetic products and the false, misleading and deceptive statements made with respect to the said soap, has had, and now has, the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into erroneous and mistaken belief that the statements and representations contained in the advertisements are true; and into the purchase of substantial quantities of said products by reason of said erroneous and mistaken belief.

CONCLUSION

The acts and practices of respondents, as hereinabove found, are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce, within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That the respondent Charles Antell, Inc., a corporation, and its officers, and respondents Charles D. Kasher, Leonard L. Rosen and Julius J. Rosen, individually, and respondent T. A. A., Inc., a corporation, and its officers, and respondents' respective agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of Charles Antell Formula No. 9 and Charles Antell Shampoo, or any products of substantially similar composition or possessing substantially similar properties, whether sold under the same names or any other names, do forthwith cease and desist from, directly or indirectly:

1. Disseminating or causing to be disseminated any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement represents, directly or through inference,

(a) With respect to Charles Antell Formula No. 9:

(1) That the main ingredient in said product is lanolin;

(2) That lanolin is the only natural oil or grease that is absorbed by the hair or scalp or that the lanolin in said product is absorbed by the scalp to the extent that it will reach the roots of the hair;

(3) That the lanolin in said product will cleanse the hair;

(4) That its use will loosen the scalp or constitute an effective treatment for dandruff or infected scalp;

(5) That it will remedy the cause of cracked or split hair or will remedy the damage caused by improper dyeing of the hair, permanents, burning or other harmful practices having to do with the hair;

(6) That the use of said products, as directed or otherwise, will promote the growth of the hair;

(7) That the use of said product will give the hair health or vitality, except to the extent that brushing, pulling and massaging of the hair and scalp with said product regularly serves as a stimulant to circulation around the hair roots and thereby helps maintain normal scalp and hair health;

(8) That the use of said products will not change the color of the hair or will not leave grease on the hair, unless such representation is limited to cases where said product is used in moderate amounts as directed;

(9) That its use will cause the hair to curl;

(10) That its use will prevent the loss of hair or baldness.

(b) With respect to Charles Antell Shampoo:

That the hormones present in said product will have any cleansing action on the hair.

2. Disseminating, or causing the dissemination of any advertisement by any means for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase in commerce, as "commerce" is defined in the Federal Trade Commission Act, of either of said products, which advertisement contains any of the representations prohibited in Paragraph 1 hereof.

It is further ordered, That respondents Charles Antell, Inc., a corporation, and its officers, and respondents Charles D. Kasher, Leonard L. Rosen, and Julius J. Rosen, individually, and respondent T. A. A., Inc., a corporation, and its officers, and respondents' respective agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce as "commerce" is defined in the Federal Trade Commission Act, of the product known as Hexachlorophene Soap, or any other soap or product of substantially similar properties, whether sold under the same name or any other name, do forthwith cease and desist from:

1. Misrepresenting, directly or by implication, the effectiveness of said soap as a cleansing agent.

2. Representing, directly or by implication, that the use of said soap will prevent impetigo or cradle cap in case of babies or prevent the development of pimples, boils, blackheads or other skin blemishes generally.

It is further ordered, That respondents Charles Antell, Inc., a corporation, and its officers, and respondents Charles D. Kasher, Leonard L. Rosen, and Julius J. Rosen, individually, and respondent T. A. A., Inc., a corporation, and its officers, and respondents' respective agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of any article of merchandise do forthwith cease and desist from representing, directly or by implication:

That it is being sold at a reduced price when such price is the price at which the article is usually and regularly sold.

ORDER TO FILE REPORT OF COMPLIANCE

It is ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist [as required by said declaratory decision and order of December 19, 1953].

IN THE MATTER OF

MANCO WATCH STRAP CO., INC.

Docket 5854. Complaint, Feb. 23, 1951—Decision, Dec. 21, 1953

Charge: Advertising falsely and neglecting to disclose source of watch bands.

Before *Mr. Clyde M. Hadley* and *Mr. Earl J. Kolb*, hearing examiners.

Mr. Jesse D. Kash for the Commission.

Sperry, Weinberg & Ruskay, of New York City, for respondent.

ORDER GRANTING RESPONDENT'S APPEAL FROM INITIAL DECISION OF HEARING EXAMINER AND DECISION OF THE COMMISSION DISMISSING COMPLAINT

This matter came on to be heard upon the complaint of the Commission, respondent's answer thereto, testimony and other evidence in support of and in opposition to the allegations of the complaint, initial decision of the hearing examiner and the appeal therefrom by respondent, and briefs and oral argument of counsel.

The complaint alleges that the respondent imports watch bands from Occupied Japan and China in bulk and also expansion bands from China, to which respondent attaches end pieces of domestic manufacture to make completed bands, and that these bands bear words showing the country of origin imprinted on a link on the inside of a band in words so small and indistinct as to be practically illegible to the naked eye. Those of such products as are not resold in bulk are attached to cards, in a manner which conceals the aforesaid markings, the complaint additionally alleges, and it is further charged that the sale thereof in commerce under the manner aforesaid has the tendency and capacity to mislead retailers and members of the purchasing public into the erroneous and mistaken belief that said bands are wholly of domestic origin.

The hearing examiner in his initial decision concluded that the allegations of the complaint in substance have been supported by the evidence in the record, and the order contained in such initial decision would require respondent, among other things, to cease offering watch or wrist bands or similar products imported from any foreign country without affirmatively disclosing thereon, or in immediate conjunction therewith, the fact that they are of foreign origin.

It appears from the record that many of the bands distributed by respondent in commerce are sold to the purchasing public through the channels of variety store chains.

The evidence in the record indicates that there are no domestic watch or wrist bands which are sold at prices comparable to the prices at which respondent's imported bands are sold. There is no evidence in the record showing a preference on the part of a substantial number of members of the purchasing public for the higher priced domestic bands over respondent's lower priced imported bands. The Commission is therefore of the opinion that the complaint herein should be dismissed. This determination accordingly renders it unnecessary to rule more specifically on each of the objections to the initial decision raised in respondent's appeal.

The Commission having duly considered the matter and being now fully advised in the premises, and having concluded in such connection that respondent's appeal should be granted:

It is ordered, *therefore*, That respondent's appeal from the initial decision of the hearing examiner be, and it hereby is, granted, and that the complaint herein be, and it hereby is, dismissed.

Commissioner Mead dissenting and Commissioners Howrey and Gwynne not participating for the reason that oral argument on respondent's appeal from the initial decision of the hearing examiner was heard prior to their appointment to the Commission.

Interlocutory Order

IN THE MATTER OF

PILLSBURY MILLS, INC.

Docket 6000. Order and opinions, Dec. 21, 1953

Before *Mr. Everett F. Haycraft*, hearing examiner.

Mr. L. E. Creel, Jr., *Mr. J. Wallace Adair* and *Mr. Brockman Horne* for the Commission.

Hogan & Hartson and *Mr. E. Barrett Prettyman, Jr.*, of Washington, D. C., and *Mr. Terrance Hanold*, of Minneapolis, Minn., for respondent.

ORDER GRANTING APPEAL IN PART, SETTING ASIDE INITIAL DECISION AND REMANDING PROCEEDING TO HEARING EXAMINER

This matter is before the Commission upon an appeal by counsel supporting the complaint from an initial decision of the hearing examiner dismissing the complaint without prejudice, briefs in support of and in opposition to said appeal and oral argument of counsel.

In support of this appeal, it is contended that the hearing examiner erroneously held that the allegations of the complaint are not supported prima facie by reliable, probative and substantial evidence. For the reasons stated in the written opinion of the Commission, which is being issued simultaneously herewith, the Commission is of the opinion that a prima facie case has been made out and that the complaint was improperly dismissed.

Counsel supporting the complaint in their appeal also take exception to rulings of the hearing examiner excluding evidence relating to alleged price discriminations by respondent in Arkansas and Louisiana, excluding certain market surveys made by several Scripps-Howard newspapers, by Good Housekeeping Magazine and by the New York World-Telegram, excluding a summary of family flour and mix purchases made by the Weona Food Stores of Memphis and granting respondent's motion to strike all evidence relating to Oven Ready Biscuits.

The evidence as to the alleged price discrimination relates to prices at which respondent sold family flour in regions outside of the southeast area. At the most, such evidence could only tend to show that respondent in the past may have abused economic power in the family flour market in other areas than the flour market with which this proceeding is concerned. It is believed that such evidence was properly excluded from this record.

The hearing examiner did not reject all evidence of the results of market surveys. His rulings on this type of evidence which are excepted to in this appeal are based on the lack of materiality of the results of the surveys rejected. He excluded the Scripps-Howard survey which shows the brands of family flour and mixes on the store shelves in a cross section of stores in twelve cities in 1950 and in thirteen cities in 1951 as not having any bearing on sales. He excluded the Good Housekeeping survey, consisting of the answers of 1,717 of its subscribers as to the brands of mixes they used, and the survey of the New York World-Telegram showing the sales of mixes in 200 retail stores in the New York City area, conducted in 1949 and 1950, respectively, as being too remote in time to be of any value in determining the effect of the acquisitions. The Commission is of the opinion that this evidence was erroneously excluded. Market information for 1949 and 1950 is of value in determining the issues in this proceeding. Such surveys, if properly conducted, while certainly not conclusive are indicators of market trends and the existence of competitive products in the market surveyed. Such indicators, along with other information, may be of value in assisting the Commission in determining the actual market conditions.

The summary of purchases of family flour and mixes by the Weona Food Stores of Memphis was properly rejected as the employee of that company who identified the rejected exhibits was not sure that they were complete or correct. His testimony as to the circumstances under which the date in these exhibits were collected casts serious doubts on their correctness.

The evidence as to Ballard's Oven Ready Biscuits was properly stricken. Respondent did not make any comparable product and did not compete in the biscuit market. The fact that Oven Ready Biscuits are made from biscuit mixes does not make these products competitive except indirectly.

The Commission, therefore, being of the opinion that the complaint herein should not have been dismissed and being of the further opinion that certain evidence was erroneously excluded from the record:

It is ordered, That the appeal of counsel supporting the complaint from the initial decision is granted in part and denied in part in the manner and to the extent hereinabove indicated.

It is further ordered, That the initial decision is hereby set aside.

It is further ordered, That this matter is hereby remanded to the hearing examiner for further appropriate proceedings in due course in accordance with this order.

OPINION OF THE COMMISSION

Chairman HOWREY delivered the Opinion of the Commission.

The complaint in this case charges the respondent Pillsbury Mills, Inc. has violated Section 7 of the Clayton Act, as amended, by acquiring the assets of two of its competitors, namely, Ballard and Ballard Company and Duff's Baking Mix Division of American Home Products Corporation. It alleges that Pillsbury and Duff were, prior to the acquisitions, leaders throughout the United States (including the southeast) in the sale of flour-base mixes and that Pillsbury and Ballard were leaders in the southeastern part of the United States in the sale of family flour, bakery flour, and mixes.

A considerable amount of testimony was taken by attorneys in support of the complaint in Minneapolis, Louisville, Cincinnati, New York City and in many cities throughout the southeastern states. Subpoenas duces tecum were served on respondent to produce production and sales figures for a period of time before and after the dates of acquisition, and to produce other data to show competitive market shares and universe figures prepared for respondent by the Market Research Corporation of America. Respondent refused to honor these subpoenas and refused to produce the data requested.

Instead of seeking enforcement of the subpoenas in court and instead of seeking to subpoena figures from respondents' competitors as suggested by the hearing examiner, counsel supporting the complaint relied on figures and estimates for the fiscal year 1949–1950 furnished by respondent during the course of the preliminary investigation. In an effort to corroborate these estimates, counsel introduced surveys of specific market areas made by newspapers and other independent agencies.

At the close of the case-in-chief of attorneys supporting the complaint, respondent moved to dismiss on the ground that a *prima facie* case had not been made.

Without expressing an opinion as to whether Section 7 had been violated, the hearing examiner granted the motion to dismiss on the ground that the "allegations of the complaint were not supported by reliable, probative and substantial evidence in the record as required by the Administrative Procedure Act."

Section 7 of the Clayton Act, as amended December 29, 1950, which is now before us for construction for the first time, provides in relevant part:

"That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade

Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." [1]

The salient facts as shown by the partial record now before us—respondent has not yet put in its case—are set forth below. We reserve until later the question as to the reliability of the evidence.

Respondent Pillsbury is the second largest flour miller in the United States. Prior to the acquisition it was the 2nd largest seller of family flour, the 2nd largest seller of flour-base mixes, the 3rd largest seller of bakery flour, and among the 15 largest sellers of formula feed in the United States.

In the southeast, that is, the area east of the Mississippi River and South of the Ohio and Potomac Rivers, respondent was the 5th largest seller of family flour, the 3rd largest seller of bakery flour, and the largest seller of mixes.

On June 12, 1951, respondent acquired all the assets of Ballard for approximately $5,172,000.[2] On March 7, 1952, it acquired Duff for about $2,238,000.[3]

By these acquisitions respondent increased its capacity for milling flour approximately 6 percent, for manufacturing mixes about 40 percent,[4] and for manufacturing commercial feed by almost 57 percent; its total sales of bakery flour increased 2.8 percent, family flour 23.8 percent, feeds 34.4 percent, and mixes 40.9 (32.8) percent;[5] its feed position improved from "among the first fifteen" to tenth place.

In the southeast respondent's sales of bakery flour increased 40 percent, mix sales increased 78 percent, and family flour sales increased 154 percent.[6] Respondent's feed sales in this market increased from

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[1] 64 Stat. 1125, 15 U. S. C., sec. 18.

[2] Purchase was accomplished by issuing 115,000 shares of respondent's stock and turning them over to Ballard in exchange for all its assets and liabilities. Ballard's net worth as stated in its balance sheet of May 31, 1951, was $5,172,000.

[3] This amount was set forth in a statement which respondent filed with Securities and Exchange Commission.

[4] The attorneys supporting the complaint claim that the acquisitions increased respondent's mix capacity about 48 percent. We think this should be 40 rather than 48 percent. The latter figure seems to be based on the assumption that the capacity increased at Springfield, Illinois, resulted from the acquisition. Neither Duff nor Ballard had a plant at that location.

[5] These percentage figures, except the 40.9 percent for mixes, were arrived at by dividing the Pillsbury net dollar sales for the fiscal year ending May 31, 1950, into the Ballard net dollar sales for a similar fiscal year. Comparable fiscal year figures for Duff were not available so 1949 calendar year net sales were used to arrive at the 40.9 percent figure for mixes; if 1950 calendar year net sales were used the figure would be 32.8 percent.

[6] These percentage figures for the southeast were based on the 1949–1950 sales of respondent and the acquired companies and were arrived at by dividing the derived dollar

20,000 tons per year to 175,000 tons per year.

Attorneys supporting the complaint contend that the foregoing shows a "substantiality" of acquisitions sufficient to bring the mergers within the "substantiality doctrine" of the *Standard Stations* and *International Salt* cases.[7]

The record, however, contains much more in the way of economic and business facts—facts about Pillsbury, Ballard and Duff, about their respective shares of the market, and about the structure, behavior and characteristics of the flour market in general.

During the 11 year period ending in 1951 Pillsbury's net sales grew from approximately $47,000,000 to $224,500,000; its total assets increased from $30,000,000 to $95,500,000; and its net worth grew from $23,000,000 to $42,000,000. Its history during this period was marked by a number of acquisitions. It acquired a California milling company, two Iowa companies, four grain elevators in different parts of the country, and two Canadian flour mills.

During the 10 year period from 1940 to 1950 Ballard's net sales grew from approximately $8,000,000 to $30,000,000 and its assets increased from $2,600,000 to $11,300,000. The market for all of Ballard's relevant products was within the southeastern region. In this area it was the 3rd largest seller of family flour, the 3rd largest seller of mixes, and the 9th largest seller of bakery flour.

Duff, in 1950, was the 5th largest seller of mixes in the United States and the 5th largest seller of mixes in the southeast. Its gross sales for the 11 month period ending November 30, 1951 were about $6,500,000 and its gross profits were $1,919,404. Duff's inventory and fixed assets as of November 30, 1951 were $2,396,320.

By the acquisitions respondent was promoted in the southeastern area from 5th to 2nd place in family flour, from 3rd to 1st place in bakery flour, and increased its 1st place position in the mix market in the southeast from 22.7 percent to almost 45 percent.[8]

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sales figure for respondent into the actual dollar sales figures for Ballard and the derived sales figures for Duff.

The figures for the three companies were arrived at as follows:

Ballard's actual dollar sales for each class of products for the fiscal year 1949–1950 are in the record. As it sold only in the southeast, these were its dollar figures in that area.

For respondent and Duff, the record contains total dollar sales, total unit sales by product, and unit sales for each class of product in the southeast. Dollar sales in the southeast were calculated from its dollar sales for the country on the assumption that the percentage of its total dollar sales in the southeast would be the same as the percentage of unit sales in that area.

[7] *Standard Oil Co. of California* v. *United States* (Standard Stations), 337 U. S. 293 (1949); *International Salt Co.* v. *United States*, 332 U. S. 392 (1947).

[8] Market positions and percentage figures were arrived at by combining respondent's figures with those of the acquired companies for 1950 and using them as a basis for estimating sales positions after the acquisitions.

The wheat flour milling industry in the United States has decreased in size from a peak of 11,691 mills in 1909 to 1,799 mills in 1951. In 1945 there were 2,571 mills with a total capacity of 1,349,699 cwt. daily. By 1951 the country's 1,799 mills had an aggregate daily capacity of 1,282,796 cwt. with about 97 percent of all flour products being accounted for by the 355 largest mills.

In 1945 the ten largest firms in the United States, measured by milling capacity, controlled about 34 percent of the industry's capacity. In 1951 the ten largest companies—the same firms as in 1945—had 40 percent of the capacity. Between 1945 and 1951, while the industry was losing about 67,000 cwt. in daily capacity, the ten largest companies increased their daily capacity by 57,000 cwt. Of this total increase, over 39,000 cwt. or 68 percent resulted from acquisitions. If the acquisition of Ballard by Pillsbury is included, the daily capacity gain is 62,000 cwt. with acquisitions accounting for over 71 percent of the increase.

Although the southeast had 21 percent of the country's population (1950) and 34 percent of the number of mills (January, 1951), it had only 11 percent of the nation's milling capacity. The number of mills in this area declined from 805 in 1945 to 660 in 1951; the total daily capacity declined from 154,073 cwt. to 142,907 cwt.[9] No new mills, of any size, have been established in the southeast in recent years.

For many years Ballard had offered effective competition to Pillsbury in the southeast.[10] In 1945 the Ballard flour mill had the largest capacity of any mill in this area. In 1951 it shared this distinction with the General Mills plant in Louisville. At the time it was acquired by Pillsbury it owned and operated one of the largest and most modern formula feed plants in the southeast. The Ballard brands of flour, formula feeds and prepared mixes enjoyed widespread consumer acceptance. Ballard had shown a profit for many years prior to its acquisition. It had sizable net earnings for the eleven month period just before its acquisition. It was an important factor in the competitive market.

Through its acquisition of Ballard respondent increased its share of the family flour market in the southeast from 3.66 percent to 8.31

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[9] According to the trade publication, The Northwestern Miller, there were 805 mills in the southeast in 1945 of which capacity figures were given for only 757; namely, 154,073 cwt. Similarly, there were 660 mills in the southeast in 1951 of which capacity figures were given for only 615, namely, 142,907 cwt. It is assumed that the listed mills for which The Northwestern Miller could get no figures, were very small.

[10] Ballard's unit volume of sales of family flour and bakery flour combined in the southeast for the fiscal year 1949–1950 was slightly larger than respondent's and second only to General Mills.

percent; it increased its share of the bakery flour market from 4.93 percent to 8.55 percent.[11]

While there were a large number of mills selling flour in the southeast, respondent's sales were more concentrated in urban areas and it competed with relatively few flour millers in each of said urban areas.[12]

Respondent's and Ballard's prices differed in different locations prior to the acquisition. Afterwards the prices of the two brands became identical.

In the mix market, prior to the acquisitions, respondent was the largest seller in the southeast (22.7%) and the second largest seller in the United States (16%). It was in competition with both Ballard and Duff in the southeast and with Duff on a national basis. As a result of the acquisitions respondent increased its share of the market in the southeast to 44.9 percent.[13] In the national mix market, its position advanced from second to first place, or approximately 23 percent of the national market.[14]

Three questions are presented by brief and argument on appeal:

1. Do recent cases decided under Section 3 of the Clayton Act[15] apply to Section 7 cases; that is, where "substantiality" of the acquisition has been established, is it necessary to examine economic consequences or determine the probable effects of the acquisition?

2. If Section 3 cases are not applicable, what tests do apply under Section 7; do Sherman Act tests apply or does Section 7 have tests of its own?

3. Does the record show *prima facie*, by reliable evidence, that the effect of the acquisitions may be substantially to lessen competition or tend to create a monopoly in certain market areas?

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The attorneys supporting the complaint rely, in the first place, on the "substantiality" doctrine of *International Salt*, *Standard Stations* and

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[11] These figures were arrived at by combining Ballard's and respondent's percentage of the market during the 1949–1950 fiscal year.

[12] It is the policy of the chain stores to carry the leading national brands, the top one or two local brands, and one or two cheap priced brands or a total of five or six brands. Store movement records of certain chain stores, testimony of grocery wholesalers, and testimony of certain of respondent's regional managers taken together show that respondent's sales of flour in urban areas in the southeast are a much greater percentage of the total sales in such markets than its percentage of the entire southeast flour market. They also show that only a few brands are sold in all areas. Many local brands are important only in their own areas.

[13] This percentage figure was arrived at by combining respondent's, Ballard's, and Duff's percentages of the market during the fiscal year 1949–1950.

[14] Id.

[15] *Standard Oil Co. of California* v. *United States, supra; International Salt Co.* v. *United States, supra; United States* v. *Richfield Oil Corp.*, 343 U. S. 922 (1952); *Automatic Canteen Co. of America* v. *F. T. C.*, 194 F. 2d 433 (C. A. 7, 1952), reversed on grounds not presently pertinent, 346 U. S. 61 (1953).

other Section 3 cases.[16] To be on the safe side, however, they also introduced proof of market structure and characteristics which they claim are sufficient, even if the Commission rejects the substantiality theory, to show that respondent's acquisitions will substantially lessen competition.

Section 3 of the Clayton Act prohibits the use of tying and exclusive dealing contracts the effect of which "may be to substantially lessen competition or tend to create a monopoly." [17] The *International Salt* case,[18] brought under this section, involved a tying of the company's salt to the patented salt dispensing machine it leased to its customers. The tying device was struck down by the Supreme Court which held that the test of potential injury to competition was satisfied by proof that in one year the company had sold for use in its machines 119,000 tons of industrial salt valued at $500,000. Such a market, the Court said, was not "insignificant or insubstantial" and it is "unreasonable, *per se*, to foreclose competitors from any substantial market." [19]

In the *Standard Stations* case,[20] also brought under Section 3, the Supreme Court applied a like doctrine to requirements contracts in the retailing of gasoline by a major company through independent stations. In its holding, the Court appeared to read out of the qualifying clause any real consideration of the effect upon competition and declared that the requirement was satisfied by proof that a substantial share of the market was affected by the practice. Under the exclusive supply contracts which Standard Oil had entered into with independent service stations in a 7 State market area, $57,646,233 worth of gasoline, amounting to 6.7 percent of the total, was held to be a "substantial share." [21]

Although there is a considerable difference between the two cases,[22] it may be assumed for present purposes that in each case the Court held that the "qualifying clause of Section 3 is satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affected.[23]

It does not follow, however, that because the qualifying clauses of Sections 3 and 7 are expressed in the same language they prescribe the

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[16] Id.

[17] 38 Stat. 731, 15 U. S. C. sec. 14.

[18] 332 U. S. 392 (1947).

[19] Id. at 396.

[20] 337 U. S. 293 (1949).

[21] Id. 295, 314 (1949).

[22] In the *Standard Stations* case—unlike the *Salt* case—the Supreme Court spoke of the "share" of the market foreclosed; it also showed a full awareness of the important difference between tying contracts and requirement contracts.

[23] 337 U. S. 293, at 304, 314, and 332 U. S. at 394–397.

same tests. "Familiar but loose language affords too ready a temptation for comprehensive but loose construction." [24]

"It is not unusual for the same word to be used with different meanings in the same act, and there is no rule of statutory construction which precludes the courts from giving to the word the meaning which the legislature intended it should have in each instance." [25] Accordingly, the respective tests prescribed by Sections 3 and 7 are to be determined in the light of the purpose of each section.

The primary purpose of Section 3 is the protection of buyers and sellers in the marketing process—to guarantee to buyers the right to handle any goods they see fit, and to sellers the opportunity to obtain the business of any buyer whose trade they wish to seek.[26]

Section 7, on the other hand, is directed toward adverse changes in competitive patterns that may result from mergers. It is concerned with the effects of acquisitions on the character of competition, with the maintenance of competition in every market to the end that business rivalry may produce better products at lower costs.

While both sections are designed to protect the competitive process, they reach this goal by different routes—one by protecting the seller and buyer segment of our economy, the other by protecting competition on an over-all basis.

The impact of a tying contract or a requirements contract is different from that of an acquisition. The forces of the former falls principally upon buyers or upon competitors of the company which imposes the contract, the effect of such contracts is thus to cut off these competitors from what would otherwise be part of their natural market.[27] In contrast, an acquisition seldom has such an immediate impact upon competitors. The reason that acquisitions are, under certain circumstances, to be regarded as illegal is not because of their effect on buying and selling practices but because of their probable effect on competition.[28]

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[24] *Automatic Canteen Co. of America* v. *F. T. C.*, 346 U. S. 61 at 65 (1953).

[25] *Atlantic Cleaners and Dyers* v. *United States*, 286 U. S. 427, at 433 (1932); see also *F. T. C.* v. *Morton Salt Co.*, 334 U. S. 37, at 46, Footnote 14.

[26] *Cf.* McAllister, "Where the effect may be to substantially lessen competition or tend to create a monopoly," Proceedings of the American Bar Association, Section of Antitrust Law, August 26–27, 1953, p. 131.

"Specifically, exclusive dealing and tying arrangements are forbidden when the restricted freedom of the buyer to purchase from competing suppliers injures his competitive position or that of the competing supplier."

[27] As the Commission said *In the Matter of Automatic Canteen Company of America*, 46 F. T. C. 861, and 894 (1950), "It is apparent that [respondent's exclusive dealing contracts] entirely foreclosed the sale and leasing of vending machines to respondent's distributors by anyone but respondent and that other sellers and suppliers of candy, gum, nuts and other confectionery products have been completely and effectively foreclosed from selling these products to respondent's distributors." Affirmed 194 F. 2d 433 (C. A. 7, 1952), reserved on grounds not presently pertinent, 346 U. S. 61 (1953).

[28] In determining the effect on competition under Section 7 the Commission is, of course, concerned with the relationships between an acquiring company and other parties, such as, competitors, suppliers and outlets, insofar as such relationships may affect competition in a given market.

Moreover, a further distinction can be drawn from the fact that tying and exclusive dealing contracts are frequently coercive, while acquisitions are usually voluntary in nature.

Competition cannot be directly measured; no single set of standards can be applied to the whole range of American industries. No single characteristic of an acquisition would of itself be sufficient to determine its effect on competition. For this reason it would not be sufficient to show that an acquiring and an acquired company together control a substantial amount of sales, or that a substantial portion of commerce is affected.[29]

Much as the simplified test laid down in *Standard Stations* and *International Salt* may aid in the presentation of proof in cases under Section 3, it is not in itself a reliable guide for the Commission in carrying out its long-run responsibility to prevent reductions in competition through acquisitions of assets or stock.

Furthermore, neither case can be construed as depriving the Federal Trade Commission, as an administrative agency, of the right to examine relevant economic factors and competitive effects (even in Section 3 cases) in the event it desires to do so.[30]

In creating the Federal Trade Commission, Congress had two principal ideas in mind: first, to create a "body of experts" competent to deal with complex competitive practices "by reason of information, experience, and careful study of business and economic conditions"; [31] and second, to authorize this body of experts to deal with unfair competitive methods in their incipient stages.[32]

The driving impulse in creating this, and other administrative agencies, was the need for specialization and expertise.[33] The complexities of modern American trade and industry had made it apparent that effective trade regulation could neither be accomplished by "self-executing legislation nor the judicial process." See *F. C. C.* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 142 (1940); Oppenheim, *Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy*, 50 Mich. L. Rev. 1139, 1221, n. 215 (1952).

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[29] The attorneys supporting the complaint suggest the following test for Section 7 cases: "Where a leading factor in the relevant market having a substantial share of that market, acquires another factor in that market also having a substantial share of that market, the inference arises that competition may be substantially lessened in the lines of commerce involved."

[30] *In the Matter of The Maico Company, Inc.*, decided by F. T. C. December 7, 1953.

[31] Sen. Rep. No. 597, 63d Cong., 2d Sess., pp. 9, 11 (1914); *F. T. C.* v. *The Cement Institute*, 333 U. S. 683, 727 (1948); *F. T. C.* v. *R. F. Keppel & Bro., Inc.*, 291 U. S. 305, 314 (1934).

[32] *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, 356 (1922).

[33] The Commission was to be staffed with lawyers, economists, accountants, statisticians and other business experts. It was understood that this staff would become specialists in preventing improper business practices which interfered with the competitive process or were against the public interest. *Cf. United States* v. *Morton Salt Co.*, 338 U. S. 632, 640 (1940).

The laws given to the Commission to administer are, for the most part, general in nature and not clear of policy elements. "Congress advisedly left the concept flexible to be defined with particularity by the myriad of cases from the field of business." [34] It contemplated clarification and completion by the Federal Trade Commission. If the administrative tribunal to which such discretion is delegated does nothing but promulgate *per se* doctrines, the rationale for its creation disappears.[35] If a particular competitive act is automatically to be presumed unlawful, the administrative process of the Commission loses its purpose, and the justification for limiting the scope of judicial review and for exempting the Commission from executive control no longer remain. In such event the administrative agency may as well give way to the prosecutor.

As we understand it, the Federal Trade Commission has a greater task than this in administering the broad provisions of Section 7 of the Clayton Act. There must be a case-by-case examination of all relevant factors in order to ascertain the probable economic consequences.

The most recent decision interpreting Section 7, prior to its amendment, is *Transamerica Corporation* v. *Board of Governors of the Federal Reserve System*, 206 F. 2d 163 (1953), cert. den. November 30, 1953. The Federal Reserve Board had ordered divestiture of stock in a number of banks comprising the so-called Giannini group in the West Coast and Rocky Mountain area. The Board pointed out that the Giannini banks did a large proportion of the banking business in five western states, invoked the *Standard Stations* case, and held that Section 7 was violated. The Third Circuit reversed, saying:

"* * * such acquisition is a violation only if its effect may be in fact to substantially lessen competition between such corporations, to restrain commerce or to tend to create a monopoly. Otherwise the acquisition is entirely lawful, so far as Section 7 is concerned. It necessarily follows that under Section 7, contrary to the rule under Section 3, the lessening of competition and the tendency to monopoly must appear from the circumstances of the particular case and be found as facts before the sanctions of the statutes may be invoked. Evidence of mere size and participation in a substantial share of the line of business involved, the 'quantitative substantiality' theory relied on by the Board, is not enough." [36]

The court was impressed by the "tremendous concentration of banking capital * * * in the hands of the Transamerica group," and

[34] *F. T. C.* v. *Motion Picture Advertising Service Co., Inc.*, 344 U. S. 392 (1952); *F. T. C.* v. *Keppel & Bro., supra*, 310–312.

[35] See dissenting opinion of Mr. Justice Jackson in *The Ruberoid Co.* v. *F. T. C.*, 343 U. S. 470 (1952).

[36] 206 F. 2d 163, at 170 (C. A. 3, 1953), cert. den. Nov. 30, 1953.

thought that legislative or administrative action might well be desirable to decrease it.[37] But the Court held that no case had been made under Section 7. Lessening of competition or tendency to monopoly were market phenomena, and could only refer to some particular market or set of markets. But the Board had not attempted to show any undesirable effect or dangerous probability in any given markets. The five state area was but an artificial segment of the United States, unrelated to any market activity. Hence, said the Court, the contention of the Reserve Board could not be sustained.[38]

While the *Transamerica* case does not question *Standard Stations* so far as Section 3 is concerned, it does seem to seal off Section 7 from the *per se* rule of that case. The fact that the *Transamerica* case was decided under old Section 7 does not in our opinion lessen its applicability in this respect. While the 1950 amendment modified Section 7 in many ways it did not change the basic purpose to protect competition in a given market.

II

This does not mean that we are thrown back on Sherman Act tests. In fact, one of the purposes of amended Section 7 was to reestablish the difference between Sherman Act and Clayton Act violations and to restate the legislative view, largely repudiated by the case law,[39] that the tests of the Sherman Act have no proper place in the application of Section 7.

"Monopoly and competition, as economic facts, are the same no matter what law is applied to them." [40] Market control, restraint of trade, injury to competition, tendency toward monopoly are the subjects of both the Sherman and Clayton Acts. But the standard of illegality is different; otherwise Congress would have been wasting its time by enacting duplicating legislation. The difference is usually said to be that under Section 7 the undesired condition may not yet be in existence; there is only a reasonable probability that it will come to pass if nothing is done to stop it. This, of course, was the underlying purpose of the original Clayton Act. It was designed to "supplement" the Sherman Act, to prohibit practices which singly and in themselves

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[37] Id. 169.

[38] Id.

[39] *International Shoe Co.* v. *F. T. C.*, 280 U. S. 291 (1930); *V. Vivaudou* v. *F. T. C.*, 54 F. 2d 273 (C. A. 2, 1931); *Temple Anthracite Coal Co.* v. *F. T. C.*, 51 F. 2d 656 (C. A. 3, 1931); *United States* v. *Republic Steel Corp.*, 11 F. Supp. 117 (N. D. Ohio, 1935); see Irvine, "The Uncertainties of Section 7 of the Clayton Act," 14 Cornell L. Q. 28, 40 (1928) for a review of the earlier cases.

[40] See Adelman, "Acquire the Whole or Any Part of the Stock or Assets of Another Corporation," Proceedings of the American Bar Association, Section of Antitrust Law, Aug. 26–27, 1953, pp. 111, 117.

were not covered by that act, to arrest potential violations of the Sherman Act in their incipiency and before consummation.[41]

The trouble is that his sort of language, lawyer's language some call it, is not very meaningful until applied to a particular set of facts —facts which suffice for the Clayton Act but do not constitute a showing of evidence sufficiently impressive under the Sherman Act. The courts and the Commission have frequently paid homage to the incipiency doctrine and the difference between the Sherman and Clayton Act tests, but not clear standards have emerged.

Putting aside the broad concepts of competition and monopoly, the essential difference seems to be that the Clayton Act requires a lower standard of proof of the same kind of facts—"evidence which is quantitatively or qualitatively less impressive than where the Sherman Act is invoked."[42] More specifically, the merger in *U. S.* v. *Columbia Steel Co.*, 334 U. S. 495 (1948), which was examined under the Sherman Act, would probably not have been approved had new Section 7 been in existence and invoked against it.[43]

Section 7, before it was amended, prohibited corporate acquisitions of stock which might have any one of the following effects: (1) substantial lessening of competition between the merging companies, (2) restraint of commerce in any section or community, or (3) tendency to create a monopoly. This language, if taken literally, would have precluded almost every merger where competition existed between the two merging companies. As we have indicated, the courts shied away from this drastic interpretation and invoked the rule of reason of the Sherman Act.[44]

Section 7, as amended, prohibits the acquisition of assets as well as stock, thus closing the long-standing loophole on this point. The acquisition is prohibited "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." [45]

The earlier test as to competition between the acquiring and acquired companies is eliminated and so is the earlier alternative test of "to restrain such commerce in any section or community." The elimination of the first test eliminates the possibility of a strict and literal interpretation which would strike down local and unimportant acquisitions; the elimination of the second test removes any likelihood that broad Sherman Act tests will again be applied.[46] The legislative history is clear on this point.

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[41] Sen. Rep. No. 698, 63d Cong., 2d Sess., p. 1 (1914); *Standard Fashion Company* v. *Magrane-Houston Co.*, 258 U. S. 346, 356 (1922).

[42] See Adelman, *supra*, 118.

[43] H. R. Rep. No. 1191, 81st Cong., 1st Sess., pp. 10–11 (1949).

[44] See also McAllister, *supra*, 142–143.

[45] 64 Stat. 1125, 15 U. S. C., Sec. 18.

[46] See McAllister, *supra*, 143.

The Senate Committee said:

"The purpose of H. R. 2734 was to make this legislation extend to acquisitions which are not forbidden by the Sherman Act. * * *

"The Committee believe that the excessive sweep that has been given to Section 7 of the present Clayton Act by these two features of that Section has been largely responsible for the tendency of the courts in cases under that Section to revert to the Sherman Act test. By eliminating the provisions of the existing Section that appear to reach situations of little economic significance, it is the purpose of this legislation to assure a broader construction of the more fundamental provisions that are retained than has been given in the past. The Committee wish to make it clear that the bill is not intended to revert to the Sherman Act test. The intent here, as in other parts of the Clayton Act, is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding." [47]

This is confirmed in the House Report:

"Acquisitions of stock or assets by which any part of commerce is monopolized or by which a combination in restraint of trade is created are forbidden by the Sherman Act. The present bill is not intended as a mere reenactment of this prohibition. It is not the purpose of this committee to recommend duplication of existing legislation.

"Acquisitions of stock or assets have a cumulative effect, and control of the market sufficient to constitute a violation of the Sherman Act may be achieved not in a single acquisition but as the result of a series of acquisitions. The bill is intended to permit intervention in such a cumulative process when the effect of an acquisition may be a significant reduction in the vigor of competition, even though this effect may not be so far-reaching as to amount to a combination in restraint of trade, create a monopoly, or constitute an attempt to monopolize. Such an effect may arise in various ways: such as elimination in whole or in material part of the competitive activity of an enterprise which has been a substantial factor in competition, increase in the relative size of the enterprise making the acquisition to such a point that its advantage over its competitors threatens to be decisive, undue reduction in the number of competing enterprises, or establishment of relationships between buyers and sellers which deprive their rivals of a fair opportunity to compete." [48]

The House and Senate committees also took the occasion to make clear that "may be" means reasonable "probability," not "possibility." The Senate Report said:

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[47] Sen. Rep. No. 1775, 81st Cong., 2d Sess., pp. 4–5 (1950).

[48] H. R. Rep. No. 1191, 81st Cong., 1st Sess., p. 8 (1949).

"The use of these words ["may be"] means that the bill, if enacted, would not apply to the mere possibility but only to the reasonable *probability* of the prescribed effect, as determined by the Commission in accord with the Administrative Procedure Act." [49]

Under amended Section 7 "the Government must define and prove the relevant market and the relevant products involved in the acquisitions. The 'line of commerce' need not be industry-wide; any part of the domestic commerce is included. 'In any section of the country' apparently is intended to cover any market area in the United States in which the acquiring or acquired corporation is doing business and to embrace potential as well as actual competition. * * * The Government, therefore, has a lesser burden of proof under Section 7 than under the Sherman Act, which requires a proof of an unreaasonable restraint of trade." [50]

As we see it, amended Section 7 sought to reach the mergers embraced within its sphere in their incipiency, and to determine their legality by tests of its own. These are not the rule of reason of the Sherman Act, that is, unreasonable restraint of trade, nor are Section 7 prohibitions to be added to the list of *per se* violations. Somewhere in between is Section 7, which prohibits acts that "may" happen in a particular market, that looks to "a reasonable probability," to "substantial" economic consequences, to acts that "tend" to a result. Over all is the broad purpose to supplement the Sherman Act and to reach incipient restraint.[51]

While these are far from specific standards—specificity would in any event be inconsistent with the "convenient vagueness" of antitrust prohibitions—they can, we believe, be applied on a case-by-case basis. We think the present case is the type Congress had in mind—one that presents a set of facts which would be insufficient under the Sherman Act but nonetheless establishes, *prima facie*, a violation of Section 7 of the Clayton Act.

Commission action, under Section 7 (c) of the Administrative Procedure Act, must be supported by "reliable, probative, and substantial evidence." [52] It is said that "These are standards or principles usually applied tacitly and resting mainly upon common sense which people engaged in the conduct of responsible affairs instinctively understand." [53] This is in reality a restatement of the

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[49] Sen. Rep. No. 1775, 81st Cong., 2d Sess., p. 6 (1950).

[50] Oppenheim, "Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy," 50 Mich. L. Rev. 1197 (1952).

[51] See McAllister, *supra*, 148.

[52] 60 Stat. 241, 5 U. S. C., Sec. 1006c.

[53] H. R. Rep. No. 1980, 79th Cong., 2d Sess., p. 36 (1946); Sen. Rep. No. 752, 79th Cong., 1st Sess., p. 22 (1945); (Sen. Doc. No. 248, 79th Cong., 2d Sess., pp. 208, 270 (1946).

"substantial evidence rule." [54] Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 229 (1938).

Under Section 7 (c) it is clear that, as heretofore, the technical rules of evidence are not applicable to administrative hearings.[55] Thus it is stated that "the mere admission of evidence is not to be taken as prejudicial error (there being no lay jury to be protected from improper influence)." [56] "But this assurance of the desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force." [57]

The principal evidence in this case which the hearing examiner refused to accept as reliable, consists of several letters addressed to the Commission, in which respondent set forth (1) its sales of the relevant products in the southeast and in the nation,[58] (2) the acquired companies' sale of the relevant products in the southeast and in the nation,[59] and (3) respondent's best estimates of its major competitor's shares of the relevant markets. Respondent's counsel did not object to the introduction of these letters as not being competent evidence. In fact, respondent said at the time that there were no accurate, absolute figures available in the flour industry showing competitors' sales or total sales.

Whether or not respondent's estimates of competitors' shares of a particular market can be accepted as reliable depends upon the circumstances. According to the testimony of respondent's market analyst, the best data available showing the market position and trend of sales of respondent and certain of its competitors in the flour industry are surveys prepared by the Market Research Corporation of America. This organization makes a random sample audit of retail stores which the witness described as the only random sample available which he considered projectionable. Respondent must have considered this information reliable enough for its own purposes inasmuch as it paid about $50,000 per year for same.[60]

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[54] Attorney General's Manual on the Administrative Procedure Act, p. 76 (1947).

[55] Id. "Furthermore, administrative agencies like the Federal Trade Commission have never been restricted by the rigid rules of evidence. *Interstate Commerce Comm'n.* v. *Baird*, 194 U. S. 25, 44. And, of course, rules which bar certain types of evidence in criminal or quasi-criminal cases are not controlling in proceeding like this, where the effect of the Commission's order is not to punish or to fasten liability on respondents for past conduct but to ban specific practices for the future in accordance with the general mandate of Congress." *F. T. C.* v. *The Cement Institute et al., supra*, 705.

[56] See footnote 53.

[57] *Consolidated Edison Co.* v. *National Labor Relations Board, supra*, p. 230 (1938).

[58] The letters contained actual figures for respondent for the fiscal year 1949–1950.

[59] The letters set forth actual sales for Ballard for the fiscal year 1949–1950 and respondent's best estimates for Duff for the same period.

[60] The admissibility of commercial reports is well recognized. As Wigmore points out, "The * * * [exception to the Hearsay rule] is capable of liberal expansion to include

Respondent prepares periodic market analyses of flour and mix markets for its use in the regular course of business, in which it uses the information supplied by the Market Research Corporation. The market position information contained in these reports was used, together with respondent's own data, in the preparation of the estimates in question.

The reports containing the data supplied by the Market Research Corporation were subpoenaed by counsel supporting the complaint but respondent refused to comply on the ground that it was not at liberty to divulge such information.

The estimates were prepared by respondent and submitted to the Commission during the course of the preliminary investigation, and respondent asked the Commission to rely upon them in reviewing the case prior to the culmination of the acquisitions. Presumably respondent at that time, as an advocate, "put its best foot forward."

Under all the circumstances,[61] it is believed that the "common sense" and "reasonable mind" tests have been met and the estimates are *prima facie* evidence of respondent's market position, the market position of the acquired companies and the market position of its major competitors. *Prima facie* evidence is the minimum quantity necessary to raise a presumption of fact or is sufficient, if not rebutted, to establish the fact. *Otis & Co.* v. *S. E. C.*, 176 F. 2d 34 (C. A. D. C., 1949). Respondent, when it puts in its case will have full opportunity to rebut, explain, or contradict. It is important to remember in this connection that the issue here does not go to the absolute sales of respondent, the acquired companies or its competitors, but to the question as to the effect which the mergers may have on competition.

A few words should be said about the problem of proof in antitrust cases. Competition is a complex and constantly changing phenomenon. It has never been sharply defined. Injury to competition, as distinguished from injury to a competitor, is seldom capable of proof by direct testimony and may therefore be inferred from all the surrounding circumstances. "An antitrust charge may * * * be proved by circumstantial evidence, and the circumstances may include actions affecting any of the broad issues of fact posed in the complaint." [62]

Analysis of the competitive effects of an acquisition should begin, we believe, with the relevant facts concerning the competitive pattern

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* * * commercial and industrial records, made by persons disinterested in the particular litigation, published or kept accessible to third persons, and customarily relied upon by them in the conduct of particular occupations." 6 Wigmore on Evidence, sec. 1708 (3rd ed. 1940), p. 38.

[61] These circumstances include the fact that respondent refused to comply with Commission subpoenas seeking the basic data upon which the estimates were based.

[62] See McAllister, "The Big Case: Procedural Problems in Antitrust Litigation," 64 Harvard L. R. 27 at 28.

of the industry as a whole and its markets, particularly in the period preceding the acquisition. From such facts, and from information about the specific merger, it should be possible to determine what changes the acquisition can be expected to make in the character of competition in the markets concerned.

Counsel supporting the complaint say they have made such an analysis; that the evidence was not limited to the application of Section 3 cases to Section 7, but included in addition "an extensive showing of the character of the markets and the market setting in which the acquisitions took place."

To summarize the evidence, respondent, whose rapid growth during the past few years has been due in part to acquisitions and mergers, has now acquired two more substantial competitors. By these acquisitions it has substantially increased its milling and production capacity and its market position. In one of the relevant products, namely, mixes, its position in the southeast increased to about 45 percent.

These acquisitions have taken place in an industry which has steadily declined in size and capacity, and in which the big companies have increased their percentage share. This increase has been largely due—71 percent of it—to mergers. In the southeast the number of mills has not only declined but there have been no new entries of any size into the industry. The number of competitors in the southeast, more particularly in the urban markets, has been materially reduced by the acquisitions; in the mix business, for example, Ballard with 12 percent and Duff with 10.2 percent of the market, have been eliminated.

This establishes, it seems to us, a *prima facie* case.[63] The pattern of competition in the southeast, particularly in the cities, has undergone a considerable change as a result of the mergers. Unless explained, contradicted, or rebutted, and respondent will have every opportunity to do this when it puts in its case, it is a change which constitutes a move away from healthy competitive conditions.

There is nothing in the record to indicate that the mergers will at present convert the industry in the southeast from a competitive to a noncompetitive pattern. The inference, in fact, must be to the contrary inasmuch as large national distributors, such as General Mills and Quaker Oats, and large regional distributors remain to furnish effective competition to Pillsbury Mills. However, in the urban

[63] As stated *In re Chicago Rys. Co.*, 175 F. 2d 282 (C. A. 7, 1949), *cert. denied, (Illinois v. Sullivan)*, 338 U. S. 850 (1949), a *prima facie* case is established by evidence adduced by the plaintiff in support of its case up to the time such evidence stands unexplained and uncontradicted.

markets at least, the mergers lead in the direction of what is sometimes called oligopolistic or "monopolistic" competition, that is, to a situation where the remaining competition in the particular market is between big companies.

If, for example, respondent should continue to acquire competitors at the rate it has since 1940, and other large companies should do the same, the urban markets in the southeast may come to be dominated by a few large milling companies. This, of course, has been the trend in other industries. In some of them, under the policy of the Sherman Act, competition between the big companies continues to protect the consumer interest. But, as we understand it, it was this sort of trend that Congress condemned and desired to halt when it adopted the new Clayton Act antimerger provision.[64]

This matter, therefore, should be remanded to the hearing examiner for further consideration in conformity with this opinion.

* * * * * * *

Mr. Mead, while concurring in the result, will file a separate concurring opinion.

CONCURRING OPINION OF COMMISSIONER MEAD

The Chairman in the very able Opinion of the Commission has stated the facts in this case and has discussed the applicable law in detail. I concur with his analysis of the facts and with his conclusion that the revelant evidence now in the record establishes "prima facie" that Pillsbury violated Section 7 of the Clayton Act by buying Ballard and Ballard Company and the Duff Division of American Home Products Corporation.

In view of the very important questions discussed in the Opinion, and of the fact that this is the first case considered by the Commission under the revised Section 7 of the Clayton Act, I deem it advisable to comment briefly.

The Opinion of the Commission in this matter (as well as in the recently decided Maico case, Docket 5822, brought under Section 3 of the Clayton Act) discusses broadly the necessity of "a case by case examination of all relevant factors in order to ascertain the probable economic consequences." In my opinion this language should not be interpreted as encouraging the introduction into trial records of remotely relevant economic evidence which is unnecessary for a determination of the issues.

Certain court opinions have suggested that the Commission is better equipped than courts to consider economic data. As to the extent

[64] Sen. Rep. No. 1775, 81st Cong., 2d Sess., p. 5 (1950) ; H. R. Rep. No. 1191, 81st Cong., 1st Sess., p. 8 (1949).

to which economic or other data is necessary in trial records, I believe there is a difference between the Federal Trade Commission Act and the Clayton Act. In the Federal Trade Commission Act the Congress used broad sweeping language. It declared illegal unfair methods of competition in commerce. The Act does not define what the Congress meant by unfair methods of competition. The definition is left initially to the Federal Trade Commission. The only method by which the Commission can properly and adequately define such term is by a process of administrative inclusion and exclusion as complaints are issued and cases decided. Under the Trade Act, if the Commission in issuing its complaint has reason to believe that a practice not theretofore determined to be illegal is illegal, then the trial of such case should fully develop the facts so that the Commission in its role of expert would be fully informed in deciding the case of first impression. The Commission should then make adequate findings "with sufficient clarity" to enable a court to review the order. (See the dissent of Mr. Justice Frankfurter in *FTC* vs. *Motion Picture Advertising Service Co., Inc.*, 344 US 392 which was a Trade Act case.)

In Section 7 of the Clayton Act as distinguished from the Federal Trade Commission Act, the Congress specifically declared that the merger of certain types of corporations is illegal provided only that the effect of the mergers may be substantially to lessen competition or tend to create a monopoly. Other sections of the Clayton Act also describe in comparatively specific language the act or practice which may be illegal.

Mr. Justice Jackson in his dissent in FTC vs. Ruberoid Co., 343 US 470 (a Section 2(a) Clayton Act case) had specific reference to the remedy in the order to cease and desist and not to the elements of proof or evidence necessary to support a finding of illegality by the Commission. As I understand it, Mr. Justice Jackson indicated that the Congress, in writing legislation in the antitrust field, must necessarily limit the legislation to principles or policies. The Commission, in drafting its orders to cease and desist, should give meaning and purpose to the general legislative policy. This should be done where feasible, not by parroting the words of the statute but by prescribing a definite remedy within the general policy. The remedy should be adapted to the facts of the particular case. The Commission, guided by the Congressional mandate and using its expertness, should devise remedies which are effective and informative.

The question of whether or not certain types of corporate mergers are questionable has been determined by the Congress. The only issues other than jurisdictional which the Commission must decide

are whether or not the particular merger may cause the injury described in the statute. The extent and character of economic or other data which is necessary in any particular case in order for the Commission to make an informed decision is a matter which must be determined by the facts of that particular case.

Economics is not an exact science. The economic factors and economic theories available for exposition relating to what effect a merger, an exclusive dealing contract or a discriminating price may have on competition may be so many and so changing that proceedings attempting to explore thoroughly all facets would have no foreseeable termination dates.

Many distinguished officials of Government and members of the Bar have been disturbed because of the length of trial records in administrative hearings. Consideration is now being given to various means to shorten these records so as to reduce the expense for all the parties, including the Government. Shorter yet adequate records should result in a reasonably prompt determination of issues. We certainly do not desire to take any action which will unnecessarily lengthen the records in cases before this Commission.

In my opinion the Commission does not desire economic or other data in trial records just for the sake of the data. We are trying cases in order to determine public legal rights. We are not in this forum making extensive economic investigations for the purpose of adding to the general store of knowledge. The facts to be determined may be so apparent that a reasonable man could fairly decide the issues without the benefit of extensive data. In such cases extensive hearings should be avoided.

The Commission was established so that the public would get prompt informed action when there is a reasonable probability that a trade act or practice will injure competition. Prompt informed action is particularly necessary in cases of mergers which may be finally found to be illegal. The passage of time may make much more difficult the task of unscrambling the assets of the merged companies and restoring competition to its original form.

In short, I agree with the result of the Commission's action in this case. I approve of the dispatch with which this decision was reached. In my opinion, however, the Commission does not desire to "gild the lily" by encouraging hearing examiners to admit in trial records interesting but unnecessary factual data. An expert can practice his expertness and yet act decisively and with dispatch. An expert can also be a reasonable man.

IN THE MATTER OF

MERCANTILE STORES COMPANY, INC., ET AL.

DECISION IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 6094. Complaint, Apr. 24, 1953—Decision, Dec. 21, 1953

Where a corporation and its wholly owned subsidiary engaged in the interstate sale and distribution of children's shoes under the brand name "Health-Flex" which, thus stamped and boxed, were shipped from their place of manufacture to a number of retail stores' wholly owned subsidiaries in various other states and were by said stores in turn advertised and sold as "Health-Flex" shoes with the knowledge, consent, and approval of the aforesaid corporation—

Represented directly and by implication that said shoes were constructed in such a manner that their use would prevent and correct abnormalities and deformities and ailments of the feet and keep them healthy, through use of the word "Health" as a part of the trade or brand name therefor, and as stamped in and on said shoes and on the boxes in which they were sold;

The facts being said shoes were merely stock shoes, made on order by quantity production methods by the manufacturer from which said subsidiary bought the same and upon which, and upon the containers thereof, said name was stamped at its direction; and while said shoes might contain some features not found in other stock shoes, effect thereof upon the feet in the prevention or correction of abnormalities, deformities, or ailments or in keeping the feet healthy was insignificant:

Held, That such acts and practices constituted unfair and deceptive acts and practices in commerce.

Before *Mr. James A. Purcell*, hearing examiner.

Mr. B. G. Wilson and *Mr. George E. Steinmetz* for the Commission.

DECISION OF THE COMMISSION, AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on April 24, 1953, issued and subsequently served its complaint in this proceeding upon the respondents named in the caption hereof, charging them with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of said Act. The respondents filed a joint answer admitting all of the material allegations of the complaint and waiving all intervening procedure and further hearing as to the said facts, but reserving the right to withdraw said answer if the Commission failed to grant respondents' request for an extension of the effective date of any order to cease and desist which might be entered to a date specified

by respondents. On July 24, 1953, the hearing examiner filed his initial decision.

The Commission, having reason to believe that said initial decision did not constitute an adequate and appropriate disposition of this matter, subsequently placed this case on its own docket for review. On October 5, 1953, the respondents filed their consent to the withdrawal of the portion of their admission answer relating to the effective date of the order to cease and desist which might be entered, and the Commission, on November 9, 1953, issued, and thereafter served upon the parties, its order setting time within which objections to a tentative decision of the Commission attached to said order, and reply thereto, might be filed. No objections having been filed within the time permitted, the proceeding regularly came on for final consideration by the Commission upon the record herein on review; and the Commission, having duly considered the matter and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts, conclusion drawn therefrom, and order, the same to be in lieu of the initial decision of the hearing examiner.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Mercantile Stores Company, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 100 West 10th Street, Wilmington, Delaware. Respondent Mercantile Stores Company, Inc. (N. Y.) is a corporation organized under and by virtue of the laws of the State of New York, with its office and principal place of business located at 128 West 31st Street, New York 1, New York. The said New York corporation is a wholly owned subsidiary of the said Delaware corporation. The two corporations act in conjunction and cooperation with each other in the performance of the acts and practices hereinafter set forth.

PAR. 2. Respondents are now, and for more than two years last past have been, engaged in the sale and distribution in commerce of children's shoes bearing the brand name "Health-Flex." Respondents cause, and have caused, their said shoes, when sold, to be transported from the place of their manufacture in Ephrata, Pennsylvania, to purchasers thereof located in various States of the United States. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in commerce in said shoes.

PAR. 3. Respondents' method of operation is as follows: Said shoes are manufactured on order of respondent New York corpora-

tion by the Eby Shoe Corporation of Ephrata, Pennsylvania. At the time of manufacture, in accordance with the direction of respondent New York corporation, the name "Health-Flex" is stamped in and on the shoes and on the boxes in which they are packed and sold. This is done with the consent and approval of, and inures to the benefit of, respondent Delaware corporation, which is the owner of the registered trade-mark "Health-Flex". Respondent New York corporation sells and causes said shoes, so stamped and boxed, to be shipped from the place of their manufacture in Pennsylvania to a number of retail stores, located in various other States of the United States, which are wholly owned subsidiaries of respondent Delaware corporation. These various retail stores in turn advertise and sell said shoes as "Health-Flex" shoes with the knowledge, consent and approval of respondent, the Delaware corporation.

PAR. 4. Through the use of the word "Health" as a part of the trade or brand name for said shoes and as stamped in and on said shoes and on the boxes in which they are sold, respondents have represented, directly and by implication, that said shoes are constructed in such a manner that their use will prevent and correct abnormalities, deformities and ailments of the feet and will keep the feet healthy.

PAR. 5. The said representation is false, deceptive, and misleading. In truth and in fact, the use of said shoes will not prevent or correct any abnormalities, deformities or ailments of the feet or keep the feet healthy. Respondents' shoes are merely stock shoes, made by quantity production methods, and while they may contain some features not found in other stock shoes, the effect of such features upon the feet in the prevention or correction of abnormalities, deformities or ailments of the feet or in keeping the feet healthy, is insignificant.

PAR. 6. The use by the respondents of the foregoing false, deceptive and misleading representation with respect to said shoes has had and now has the tendency and capacity to, and does, mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said shoes are constructed in such a manner that their use will prevent and correct abnormalities, deformities and ailments of the feet and will keep the feet healthy, and into the purchase of substantial quantities of said shoes because of such erroneous and mistaken belief. Furthermore, respondents' said practices place in the hands of retailers of said shoes and others a means and instrumentality to mislead and deceive members of the purchasing public into the erroneous and mistaken belief that said shoes are constructed in such a manner that their use will prevent and correct abnormalities, deformities and ailments of the feet and keep the feet healthy.

CONCLUSION

The aforesaid acts and practices of the respondents, as herein found, are all to the prejudice and injury of the public, and constitute unfair and deceptive acts and practices in commerce, within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That the respondents, Mercantile Stores Company, Inc., a corporation, and Mercantile Stores Company, Inc. (N. Y.), a corporation, their officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of shoes now designated as "Health-Flex," or any other shoe of substantially the same constitution, do cease and desist from:

1. Using the name "Health-Flex" or any name in which the word "Health" appears as a trade or brand name therefor.

2. Representing, directly or by implication, that the said shoes are constructed in such a manner that their use will prevent or correct abnormalities, deformities, or ailments of the feet or will keep the feet healthy.

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

IN THE MATTER OF

GEORGE'S RADIO AND TELEVISION COMPANY, INC. ET AL.

CONSENT SETTLEMENT, IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 6140. Complaint, Nov. 4, 1953—Decision, Dec. 22, 1953

Where a corporation and its two officers, engaged in the District of Columbia in the sale of electrical appliances including home freezers and television sets in selling their said freezers in connection with arrangements whereby purchasers were enrolled in a food distributing organization operated by a concern unaffiliated with them and under which members were entitled to purchase certain food items in bulk quantities—

(a) Represented through radio broadcasts and other means of advertising that participants in said plan could buy food at wholesale prices or from a wholesaler; when in fact said organization was not a wholesaler and the prices at which participants purchased were not wholesale prices;

(b) Represented that participants therein could effect overall monetary savings through the general use of frozen foods in place of corresponding foods in other forms;

The facts being, in the main, frozen foods thus purchased would cost more per edible pound than corresponding foods in other available forms normally consumed by the public; and no overall saving in food costs would be accomplished by the general substitution of frozen foods, thus available for corresponding foods in other forms;

(c) Represented that substantial overall reductions in food costs would be effected by participation in said plan; the facts being that, in the main, food plan prices were considerably in excess of usual retail prices of corresponding foods in other forms, and were close to and in some instances identical with usual retail prices of similar frozen foods; and no substantial overall reductions in food costs would thereby be effected; and

(d) Represented that net monetary savings could be effected by all who purchased and used their home freezers;

The facts being that in a substantial number of instances increase in expense directly attributable to the purchase and use of a home freezer including cost of financing where credit is used, and cost of operation, maintenance, and depreciation would eliminate savings, if any, which might be effected through the purchase of food in bulk quantities and in such instances purchase and use of such a product would not result in net monetary savings; and

Where said corporation and individuals in thus advertising their television sets —

(e) Represented through such statements as "brand new", that the particular sets offered were sets of the current year's models when in fact many of said sets were not such when advertised;

(f) Represented that higher prices shown for their "Mirrortone" sets in advertisements in which they were offered at a lower figure represented the usual price at which they were customarily offered for sale and sold in the recent regular course of their business;