

forth in detail the manner and form in which they have complied with the order to cease and desist.

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IN THE MATTER OF  
ERIE SAND AND GRAVEL COMPANY

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

*Docket 6670. Complaint, Oct. 30, 1956—Order, Oct. 26, 1959*

Order requiring absolute divestiture of all assets, etc., acquired in the acquisition by the second largest supplier of the largest supplier of lake sand in the southern shore area of Lake Erie extending from Buffalo, N.Y., to Sandusky, Ohio, thus eliminating the largest supplier and resulting in concentration in a single supplier of 92% of all lake sand sales in the area concerned.

*Mr. William R. Tincher and Mr. Thomas A. Deveny III* for the Commission.

*Gifford, Graham, MacDonald & Illig, by Mr. John S. Britton and Mr. A. Grant Walker, of Erie, Pa., and Daniel & Smith, by Mr. D. C. Daniel and Mr. Edward L. Smith, of Washington, D.C., for respondent.*

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

The complaint in this proceeding was issued on October 30, 1956, charging the respondent corporation with violating §7 of the Clayton Act (15 U.S.C. §18) as amended, by acquiring on or after March 1, 1955, for the sum of one million dollars, the assets and business of the Sandusky Division of the Kelley Island Company, an Ohio corporation engaged in the same line of commerce as that of the respondent. The pertinent part of §7 of the Clayton Act is as follows:

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

Consideration has been given to the entire record herein, including proposed findings as to the facts, proposed conclusions, and briefs

and oral argument in support thereof. Each of those proposals which has been accepted has been, in substance, incorporated into this initial decision. All proposals not so incorporated are hereby rejected.

#### THE ISSUES

The controlling issues in this proceeding, arising from the pleadings herein and the provisions of §7 of the Clayton Act, are as follows:

1. Is the respondent corporation engaged in "trade or commerce among the several states" within the intent and meaning of the Clayton Act?
2. Was the Sandusky Division of the Kelley Island Company, which Respondent acquired, also so engaged at the time of such acquisition?
3. Does the dredging, sale and distribution of lake sand, as distinguished from the digging, sale and distribution of bank and pit sand, constitute a "line of commerce" within the intent and meaning of §7 of the Clayton Act?
4. Does the area covered by respondent's operations constitute a "section of the country" within the intent and meaning of §7 of the Clayton Act?
5. May the acquisition here involved have the effect of substantially lessening competition, or may it tend to create a monopoly?

#### The Corporate Respondent, Its Subsidiaries and Business

As admitted in its answer and otherwise, Respondent Erie Sand and Gravel Company is a corporation organized and existing under the laws of the State of Pennsylvania, with its office and principal place of business located at the foot of Sassafras Street, Erie, Pennsylvania. Respondent is primarily engaged in the business of selling sand and gravel, which are dredged in Lake Erie off Erie, Pennsylvania; Fairport, Vermilion and Marblehead, Ohio; and in the Detroit River, under licenses from the States of Pennsylvania and Ohio, respectively. The sand so dredged is transported across state lines and sold to purchasers who take delivery along the shoreline of Lake Erie in Ohio, Pennsylvania and New York.

Respondent carries on its business, in large part, through a group of wholly-owned subsidiaries, namely:

The Erie Sand & Steamship Company, a Delaware corporation;  
Hydro-Navigation Company, a Delaware corporation;  
Rockwood Navigation Company, a Delaware corporation;

Presque Isles Transportation Company, a Delaware corporation;  
Cemico Oil Company, a Pennsylvania corporation; and  
Cement Mix Concrete Company, a Pennsylvania corporation.

The addresses and officers of all these subsidiaries are the same as respondent's, and all of their stock is owned by the parent corporation. The four Delaware corporations each hold title to one self-unloading dredging-type vessel, employed in dredging lake sand. Although the respondent sells sand itself, its subsidiary, the Erie Sand & Steamship Company, in addition to holding title to one vessel, acts as sales agent for its parent corporation in the sale of sand and other products. Cement Mix Concrete Company is the producer of Transit-Mix Concrete, which it transports from a plant at the Erie Sand and Gravel Company's dock direct in trucks to various road-building and domestic constructions. Cemico Oil Company operates a heating-oil service, receiving oil by water and land from approximately six refineries. The activities of all these concerns are under the direct control of respondent.

#### The Acquired Property

Prior to April, 1955, the Kelley Island Limestone and Transportation Company, referred to hereinafter and in the complaint as the Kelley Island Company, was an Ohio corporation with its office and principal place of business in the Leader Building, Cleveland, Ohio. This corporation had a continuing existence from its inception in 1890 until its final liquidation on December 29, 1955. It was engaged in a number of kinds and types of businesses, including, through its division known as the Sandusky Division, the dredging of sand and gravel from the Detroit River and from Lake Huron and Lake Erie, and the delivery of the material so dredged to purchasers thereof at docks at Lake ports from Saginaw, Michigan, to Tonawanda, New York, involving interstate transportation, and also by operating retail docks at Erie, Pennsylvania, and Ashtabula, Grand River, Lorrain and Sandusky, Ohio.

On December 30, 1954, by vote of its stockholders, the Kelley Island Company formally decided to liquidate all its businesses. On January 1, 1955, a news item concerning that resolution appeared in the Cleveland Plain Dealer. This news item came to the attention of the officials of the respondent corporation, who thereafter submitted a bid in the amount of one million dollars for the Sandusky Division. There were three other bidders, including the Standard Slag & Gravel Company, which offered \$800,000 for the property in question.

Thereafter, on February 21, 1955, the Kelley Island Company, by memorandum, confirmed an agreement to sell to the respondent the following property:

- A. The vessels: Kelley Island..... 683 gross tons,  
                   Motor Vessel Rockwood..... 1,290 " " ,  
                   Hydro..... 1,282 " " ;
- B. Dock property in Lorain, Ohio;
- C. Interest of seller in docks:  
                   Sandusky, Ohio..... 3 docks,  
                   Lorain, Ohio..... 1 dock,  
                   Fairport, Ohio..... 1 dock,  
                   Ashtabula, Ohio..... 1 dock,  
                   Erie, Pennsylvania..... 1 dock;
- D. Unfilled orders;
- E. Automotive vehicles;
- F. Inventories.

On March 1, 1955, the provisions of the above memorandum of sale was consummated, with certain exceptions. The lease which Kelley Island Company had to docks at Ashtabula was not transferred, and the title to the vessels Hydro and Rockwood was conveyed from Kelley Island Company to the Erie Sand & Steamship Company, one of the wholly-owned subsidiaries of the respondent corporation. The price which Kelley Island Company received for the Sandusky Division was \$1,074,309.12. All the assets of the Kelley Island Company which were sold in its liquidation process, including those sold to respondent, amounted to \$6,374,015.36.

In the year ending December 31, 1954, prior to the acquisition in question, the Sandusky Division sold 900,000 tons of sand and realized a gross profit, before deduction of taxes, of \$295,000. The market value of its assets as acquired by the respondent and as shown by the bids for its purchase was between \$800,000 and one million dollars.

In 1954, the year prior to the acquisition, respondent's sales of lake sand amounted to 37.3%, and Sandusky Division's sales to 54.5%, of all lake sand sold by domestic producers in the relevant market area. Thus the two concerns combined sold 91.8% of all lake sand sold by domestic producers in the year 1954. During the year 1955, and prior to the acquisition in question, the Sandusky Division sold lake sand from its stockpile during the period of the winter season, when all dredging of sand in Lake Erie is normally suspended due to icing conditions on the Lake. During the dredging season in 1954, preceding the sale of the Sandusky Division to Re-

spondent in 1955, the Sandusky Division dredged sand as usual, filled its customers' orders therefor, and stored the remainder, which stored sand constituted the stockpile from which sales were made by Sandusky during the winter season of 1954-55. Accordingly, it is apparent that the Sandusky Division never actually ceased operation, and was therefore a going concern, engaged in interstate commerce, when it was acquired in 1955 by the respondent.

#### Lake Sand and Its Distribution

The sand sold by the respondent and its competitors is dredged principally from Lake Erie by authority of licenses issued by the States of Ohio and Pennsylvania. It is generally measured in cubic yards, whereas bank or pit sand, which is dug from sandbanks away from the shores of Lake Erie, is measured in tons. One cubic yard of lake sand equals, on the average, 1.32 tons of bank sand. It is used largely in the making of concrete. It is generally of higher quality and meets Government specifications for sand much more consistently than does bank or pit sand, which does not have the advantage of the automatic washing process natural to lake sand. Because of the difficulties and dangers of dredging lake sand during the winter months, and the higher insurance rates charged for operation during that season, the dredging of sand in Lake Erie is generally limited to the period from April 15th through November. Although sand can be unloaded on the shore without benefit of a dock, by using equipment particularly designed for that purpose, it is usually unloaded either at the dredger's own dock or delivered to the dock of the customer. Accordingly, dock space is deemed a necessary adjunct to the working equipment of a producer of lake sand. Lake sand is generally not advertised by conventional means, but is sold on contract through personal contact between seller and buyer. The producer occasionally bids on and supplies sand for special projects, such as the construction of large buildings or highways.

#### Section of the Country

Paragraph 3 of the complaint alleges that respondent sells sand along the southern shore of Lake Erie from Buffalo, New York, to Sandusky, Ohio, including docks in the port cities of Buffalo and Dunkirk, New York; Erie, Pennsylvania; and Conneaut, Ashtabula, Plainsville, Cleveland, Lorain and Sandusky, Ohio. The evidence sustains this allegation. Paragraph 3 of the complaint alleges further that the sale of sand along the shores of Lake Erie extends inland approximately 25 miles. This latter allegation was amended to

conform to proof showing that within this 25-mile strip along the shore of Lake Erie, there are few sales of lake sand made to purchasers located more than ten or twelve miles from the docks; that the great majority of sales have been made to purchasers within ten or twelve miles of the docks; and that sales in the larger cities, such as Cleveland, Ohio, have been still further confined to within three to five miles of the lake shore.

Respondent contends that the above-described area does not constitute a "section of the country" within the meaning of §7 of the Clayton Act. The Senate Report on Amended §7 of the Clayton Act, in discussing the meaning of the phrase "section of the country," states as follows:

What constitutes a section will vary with the nature of the product. Owing to the difference in the size and character of markets, it would be meaningless, from an economic point of view, to apply for all products a uniform definition of section, whether such a definition was based on miles, population, income, or any other unit of measurement. A section which would be economically significant for a heavy durable product, such as large machine tools, might well be meaningless for a light product such as milk (Senate Report 1775, 81st Cong., 2d Sess., pp. 5-6).

The report further states:

It should be noted that although the section of the country in which there may be a lessening of competition will normally be one in which the acquired company or acquiring company may do business, the bill is broad enough to cope with a substantial lessening of competition in any other section of the country as well.

The House Committee, in spaking of this problem, states that:

The test of substantial lessening of competition or tending to create a monopoly is not intended to be applicable only where the specified effect may appear on a nation-wide scale. The purpose of the bill is to protect competition in each line of commerce in each section of the country (H.R. Rep. No. 1191, 81st Cong., 1st Sess., A 8 (1949)).

Furthermore, the Commission, in the recently-decided matter of *Crown Zellerbach, Inc.*, Docket 6180, stated that:

It may be fairly concluded with consideration given to all the evidence that sales of the papers involved in this proceeding in the Eleven Western States from producers outside this area were relatively insignificant. The record shows that Western suppliers of the relevant coarse papers and the products into which they are converted have come primarily from Western mills. Factors such as the preferences of purchasers and particularly the high cost of shipping over long distances have resulted in effectively separating the West as a competitive area from the rest of the country with respect to the relevant product line.

The above authoritative interpretations of the meaning of the phrase "section of the country" clearly indicate the answer to our

problem. The various phases of the business in question, such as the weight of the product involved in relation to its price, the high cost of transportation, the preference of purchasers for lake sand over pit or bank sand, the difference in price between bank sand and lake sand, result "in effectively separating" the sand produced in the lakeshore area from the sand produced inland, and create a natural market for lake sand within a naturally-defined area which obviously can only be termed a "section of the country" within the intent and meaning of §7 of the Clayton Act.

#### The Line of Commerce

The respondent contends that sand is sand, regardless of whether it is pit, bank or lake sand; that it is all used primarily for the purpose of making concrete; that the two sands are in competition, and that, accordingly, the sale of lake sand is not a line of commerce separate and distinct from the sale of bank sand within the intent and meaning of §7 of the Clayton Act.

The evidence shows that lake sand is generally of finer quality than bank sand, pit sand, or river sand, and more consistently meets Government-project specifications than does any other kind of sand. A natural market for lake sand exists along the southern shore of Lake Erie from Buffalo, New York, to Sandusky, Ohio, extending inland from ten to twelve miles. In Cleveland, Ohio, this area of sale is reduced, in most instances to three to five miles. Bank and pit sand are not competitive with lake sand in this area for several reasons. Bank and pit sand, in its area of production, is cheaper than lake sand, and generally poorer in quality. If shipped into the lake-sand area, however, its cost would become prohibitive, since the expense of hauling would increase its price, in most areas, above that of lake sand, while its quality would remain inferior. Furthermore, there is a demand for lake sand which the pit product cannot satisfy. Some major consumers do, in fact, purchase both types of sand, but their purchases and use of each type of sand are segregated. Each type of sand has its own customers and trading area, and consumers do not, as a rule, use one sand in lieu of the other. Therefore, there is no substantial competition between the sale of lake sand and of bank or pit sand in the area described. The Supreme Court of the United States, in the case of *U.S. v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957) points out that competitive reality defines for us those parts which constitute a "line of commerce," and has rejected the contention that the relevant market should be expanded to include products not produced by either the acquired or the acquirer. The Court states:

Determination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition "within the area of effective competition." Substantiality can be determined only in terms of the market affected. The record shows that automobile finishes and fabrics have sufficient peculiar characteristics and uses to constitute them products sufficiently distinct from all other finishes and fabrics to make them a "line of commerce" within the meaning of the Clayton Act. Cf. *Van Camp & Sons Co. v. American Can Co.*, 278 U.S. 245. Thus, the bounds of the relevant market for the purposes of this case are not coextensive with the total market for finishes and fabrics, but are coextensive with the automobile industry, the relevant market for automotive finishes and fabrics.

The facts of record in this proceeding, as illumined by the Supreme Court's explanation above quoted, reveal that lake sand has so many characteristics not shared by pit or bank sand that the sale thereof in the area herein defined clearly constitutes a discrete "line of commerce" within the intent and meaning of §7 of the Clayton Act.

#### The Relevant Market Prior to Respondent's Acquisition

In 1954, the year prior to the acquisition in question, respondent was the second-largest producer of lake sand in the market area extending from Buffalo, New York, to Sandusky, Ohio, inclusive, and the Sandusky Division of the Kelley Island Company was, by a considerable margin, the largest producer. Sales on the open market by lake-sand suppliers in the relevant market in 1953 totaled 832,655 cubic yards, and in 1954, 943,034 cubic yards. Of these totals Respondent produced in 1954 34.7% and the Sandusky Division of Kelley Island Company 49.7%, a combined total of 83.7%, of the lake sand produced in the domestic market during that year. The remaining 16.3% of the lake sand so produced was sold by three producers with 8.9%, 4.4% and 3.7% respectively. Respondent's sales, when added to those of the Sandusky Division, amounted to 86.8% of all lake sand sold, including that sold by Canadian producers, in 1953, and 83.7% of such lake-sand sales in 1954. In 1954, Respondent sold 37.3% and the Sandusky Division sold 54.5% of all lake sand sold by domestic lake-sand producers. Thus the respondent and the Sandusky Division, combined, sold 91.8% of all domestic lake sand sold in 1954. The remaining 8.2% of lake-sand sales by domestic suppliers in 1954 was shared between two suppliers, who effected 4.97% and 3.03% thereof, respectively.

Prior to the acquisition there were at least two Lake Erie suppliers of lake sand selling in each of the port cities on Lake Erie from Buffalo, New York, to Sandusky, Ohio, with the exception that in Sandusky only the Kelley Island Company sold sand. It is also

significant to observe that prior to the acquisition the Sandusky Division was not always able to meet the demands of its customers for lake sand.

#### Relevant Market Subsequent to Respondent's Acquisition

Subsequent to the acquisition, respondent has been the leading supplier of lake sand in the relevant market area, and has had a greater rate of growth than both the entire market area and any of the other lake-sand suppliers in that area. Statistical data in the record establish this fact.

#### Benefits to the Respondent Resulting from the Acquisition

In addition to the physical assets acquired by the Respondent by the purchase of the Sandusky Division of the Kelley Island Company, respondent also acquired by assignment, lease or ownership, dock properties in Plainsville, Ashtabula, Grand River, and Lorain; two in Sandusky, Ohio; and two in Erie, Pennsylvania. It also acquired unfulfilled orders for materials purchased by Sandusky's customers but not yet delivered, and contracts, likewise unfulfilled, for supply materials which had been ordered by Sandusky and were to be delivered to respondent. By virtue of the acquisition, respondent became the only producer of lake sand selling in all the ports in the entire area from Buffalo, New York, to Sandusky, Ohio. By its acquisition Respondent increased its dredging equipment from one vessel to four. Respondent sold one of the three dredging vessels which it had obtained as part of the Sandusky acquisition, and thereafter purchased, in the place thereof, a larger dredging vessel. Also, incident to the terms of the acquisition, respondent eliminated as an independent competitor the largest supplier of lake sand other than itself, by prohibiting Kelley Island Company re-entry into the relevant market for at least ten years. Respondent also acquired the customers of the Sandusky Division. By eliminating the Sandusky Division as a competitive factor in the port cities of Dunkirk, New York; Sandusky, Ohio; and Erie, Pennsylvania, respondent became the only distributor of lake sand in those ports. Respondent's 1956 sales in cubic yards were over three times as large as its 1953 sales, and its 1957 sales showed an increase over its 1956 sales.

#### Comparative Capacity for Competition of Respondent and Other Dredgers

None of the lake-sand suppliers, other than the Respondent, have more than one small vessel each with which to dredge lake sand,

and, accordingly, their ability to compete with the Respondent is very limited. Moreover, they are limited in their business by a shortage of dock space, whereas Respondent, by virtue of the acquisition, owns or leases docks in every major port in the relevant market area. It appears, therefore, that the development of real competition to Respondent is unlikely.

#### Respondent's Sales Practices Since the Acquisition

It is significant that since the acquisition Respondent has refused to sell lake sand to certain persons for the ostensible reasons that their credit was poor, or that Respondent's prior commitments precluded accepting their orders. Also, Respondent has increased its price for lake sand to all its customers, over and above the price at which it transfers sand from its subsidiary, the Erie Sand & Steamship Company, to itself. The evidence shows that the price at which such transfers were made covered the cost of production and, in addition, gave a return to the Respondent of 17.6% gross profit in 1956. Despite this fact, Respondent increased the price of its sand to its customers generally in 1956. It appears, therefore, that such price increase, in part at least, resulted from Respondent's newly-acquired dominance in the relevant market, rather than from a business or economic necessity.

#### CONCLUSIONS

Having considered the reliable, probative and substantial evidence of record in the light of the authoritative interpretations, hereinabove cited, of §7 of the Clayton Act as amended, we must conclude that:

1. The respondent, by and through its subsidiary corporations, which it owns, dominates and controls, is engaged in "trade or commerce among the several states" within the intent and meaning of the Clayton Act.
2. The Sandusky Division of the Kelley Island Company, at the time of its acquisition by respondent, was also engaged in "trade or commerce among the several states," within the intent and meaning of the Clayton Act.
3. Respondent and its acquisition, the Sandusky Division of the Kelley Island Company, were, at the time of the acquisition, both engaged in the dredging, transportation and sale of lake sand, which is a line of commerce distinct and different from the production, sale or distribution of other sands produced in other sections of the country.

4. The area along the southern shore of Lake Erie from Buffalo, New York, to Sandusky, Ohio, and extending up to twelve miles inland, with the greatest concentration of sales being effected within the first five miles from the shore, is a "section of the country" within the intent and meaning of §7 of the Clayton Act.

5. Respondent's acquisition of the Sandusky Division of the Kelley Island Company has had and now has the reasonable and probable effect of substantially lessening competition and tending to create a monopoly in Respondent in the sale and distribution of lake sand in that section of the country extending along the southern shore of Lake Erie from Buffalo, New York, to Sandusky, Ohio, and up to twelve miles inland.

#### THE ORDER

The above conclusions compel the issuance of an order of divestiture. Counsel supporting the complaint contends that such order should require the respondent to divest itself completely of all the assets, or their equivalent, which it acquired from the Kelley Island Company, and to re-establish those assets as a competitive entity. Counsel contends further that unless the acquired property is sold as a single unit, and not disposed of piecemeal or for operation outside the competitive area, the respondent will retain many of the benefits of its original purchase and continue to dominate the relevant market. This view appears to be substantially correct. Accordingly, the acquired property must be disposed of by respondent in such a manner as to re-establish it as a competitive entity.

Counsel supporting the complaint points out that among the assets acquired by the respondent was a small vessel called the Kelley Island, which respondent subsequently sold, in January, 1956, for operation outside the relevant area. In place of the "Kelley Island" vessel, respondent then acquired from another source a substantially larger ship named the Lakewood. Counsel contends that respondent should be required to divest itself of the equivalent of the "Kelley Island" vessel, and that the method of such divestiture be devised and submitted by respondent to the Commission for its approval before execution. We believe that a just implementation of such a divestiture would tax the wisdom of Solomon.

In *Crown Zellerbach, supra*, the Commission stated:

It is noted that Crown has added new machinery and improvements to the St. Helens property valued at \$14,300,817, as found by the Hearing Examiner; but, clearly, the broad purpose of the statute cannot be thwarted merely because respondent has commingled its own assets with those of the acquired firm.

We recognize that the above language is correct as applied to the Respondent therein. The present case, however, differs basically from the *Crown Zellerbach* case, in that Crown Zellerbach, a large corporation, acquired the assets of a smaller company, while, in the present instance, we are confronted with the anomaly of a small corporation which acquired assets much greater than its own. In fact, the respondent herein originally owned only one vessel, and acquired three vessels from the Kelley Island Company, together with other property, such as docks and equipment pertaining thereto. If, therefore, Respondent be required to divest itself of all three vessels, with the property pertaining thereto, it at once becomes apparent that the purchaser thereof will have acquired the potential monopoly which we are ordering respondent to relinquish. Such a transfer of potential, instead of eliminating the tendency toward monopoly, might merely shift it from the respondent to the purchaser.

We believe, therefore, that justice will best be served if the respondent herein is required to divest itself of all the assets acquired from the Kelley Island Company, except the equivalent of the vessel "Kelley Island," of which, in effect, Respondent has already divested itself. Such a divestiture would leave the respondent with two vessels, the one originally owned and the one acquired from another source, and require it to dispose of two vessels, together with other property and assets acquired from the Kelley Island Company. We believe that this separation of property would result in the distribution of economic potential best calculated to promote fair competition in the relevant market area. Accordingly,

*It is ordered,* That the respondent, Erie Sand & Gravel Company, through its subsidiaries, officers, director, agents, representatives and employees, shall divest itself absolutely, in good faith, of all assets, properties, rights, leases and privileges acquired in the acquisition by the Erie Sand & Gravel Company of the assets of the Sandusky Division of the Kelley Island Company, as may be necessary to establish, as a competitive entity in the lake sand market of Lake Erie, a unit comparable to the former Sandusky Division of the Kelley Island Company, in substantially the same basic operating form and with substantially the same productive capacity as possessed by the said former Sandusky Division of the Kelley Island Company at or about the time of the said acquisition; except that respondent, Erie Sand & Gravel Company, shall not be required to divest itself of the equivalent of the vessel "Kelley Island."

*It is further ordered,* That in such divestiture none of the property rights, leases and privileges involved shall be sold or transferred, directly or indirectly, to anyone who, at the time of such divestiture, shall be a stockholder, officer, director, employee, or agent of respondent or any of respondent's subsidiaries or affiliated companies, or otherwise directly or indirectly connected with or under the control or influence thereof.

*It is further ordered,* That respondent Erie Sand & Gravel Company shall, within sixty (60) days from the date of service upon it of this order, submit in writing, for the consideration of the Federal Trade Commission, its plan for compliance with this order, including the date within which compliance can be effected; such compliance to be completed on or before a date to be thereafter fixed by order of the Commission.

## OPINION OF THE COMMISSION

By **SECRET**, *Commissioner*:

The respondent, Erie Sand and Gravel Company, is charged with violating the provisions of Section 7 of the Clayton Act, as amended (15 U.S.C. §18) by acquiring the assets of the Sandusky Division of the Kelley Island Company (sometimes referred to hereafter as the Sandusky Division). The hearing examiner held in his initial decision filed December 2, 1958, that Section 7 had been violated and ordered divestiture.

The matter is now before us on the appeal of the respondent from the aforesaid initial decision. Respondent has raised issues principally as to interstate commerce, relevant market, competitive injury, "public interest," and the appropriateness of the order.

## The Acquiring Company

As admitted in its answer and as found by the hearing examiner, the respondent, Erie Sand and Gravel Company, is a Pennsylvania corporation with its office and principal place of business located at the foot of Sassafras Street, Erie, Pennsylvania. Respondent's primary business is the sale of sand and gravel dredged from Lake Erie and adjoining waters. The sand, which is called lake sand, is dredged by respondent's wholly owned subsidiary, the Erie Sand Steamship Company. Respondent sells lake sand along the shoreline of Lake Erie in Ohio, Pennsylvania and New York. Some of respondent's business is transacted through wholly owned subsidiaries which operate entirely under its direction and control.

### The Acquired Property

The Kelley Island Limestone and Transport Company (Kelley Island Company) was, prior to April, 1955, an Ohio corporation with its office and principal place of business in the Leader Building, Cleveland, Ohio. This corporation, organized in 1890, was fully liquidated by December 29, 1955. Among the activities pursued by this company was the dredging of sand and gravel, through its Sandusky Division, from the Detroit River, Lake Huron and Lake Erie. The material so dredged was sold and delivered to purchasers at docks at lake ports from Saginaw, Michigan, to Tonawanda, New York. Sandusky Division also operated retail docks at Erie, Pennsylvania, and at Ashtabula, Grand River, Lorrain and Sandusky, Ohio.

### The Acquisition

The Kelley Island Company formally decided to liquidate all its businesses by vote of its stockholders on December 30, 1954. Respondent was the successful bidder for the Sandusky Division property. The assets acquired included the vessels, Kelley Island, Rockwood and Hydro, dock property in Lorain, Ohio, and the interest of Kelley Island Company in docks located in Sandusky and Fairport, Ohio, and in Erie, Pennsylvania. The transfer of these assets took place on March 1, 1955. By agreement the titles to the vessels, Hydro and Rockwood, were transferred to the Erie Sand Steamship Company, a wholly owned subsidiary of the respondent. The price received from the respondent by Kelley Island Company was \$1,074,309.12.

### Interstate Commerce

The respondent first takes issue with the finding of the hearing examiner that "the Sandusky Division never actually ceased operation, and was therefore a going concern, engaged in interstate commerce, when it was acquired in 1955 by the Respondent." Respondent maintains that there is no record support for this finding by the examiner since no sand is dredged in the winter season. Moreover, respondent argues that if lake sand is sold from docks and in an area limited to the distances mentioned in the amended complaint, there cannot be any sales during the winter season which would constitute interstate commerce.

The record shows that during the dredging season in 1954, preceding the sale of the Sandusky Division to respondent in 1955, the Sandusky Division dredged sand as usual and filled its customers'

orders. It stored the remainder of the sand which constituted the stockpile for sales made by it during the winter season 1954-1955. Although the sand was stockpiled, there was never a break in the interstate movement. The stream of commerce flowed continuously from the lake and river beds in the several states concerned to respondent's customers at various points along Lake Erie. The facts of the case in this connection are closely analogous to those in *Standard Oil Co. v. Federal Trade Commission*, 173 F. 2d 210 (1949), reversed on other grounds 340 U.S. 231 (1951).

It is also noted that the season for dredging sand ends in November or December and does not begin again at the earliest until April 1 following, because of ice or hazardous lake conditions. No insurance coverage is available during this period except at very high rates. Thus, the discontinuance of dredging by the Sandusky Division in the late Fall of 1954 was a normal procedure. At the conclusion of the 1954 dredging season, Kelley Island Company made necessary, costly repairs on its vessels in preparation for the 1955 season. Customers and orders were secured for the 1955 season. In other words, operations which normally were engaged in during the off season were continued by the Sandusky Division. A company which has been engaged in interstate commerce does not cease to be interstate commerce simply because seasonal considerations temporarily halt or curtail activities.

#### Relevant Market

Respondent argues chiefly, regarding the relevant market, that the section of the country alleged in the amended complaint is too small a geographical area to meet the statutory requirement of a "section of the country." The term as used in the Clayton Act, according to the appeal, means an extensive area, not a mere "community."

The Senate Report in amending Section 7 (S.P. 1775, 81st Cong., 2nd Sess. 1950) stated at page 4 with reference to omission of the word "community":

The use of the word "community" raised a storm of controversy, centering around the possibility that the act, so worded, might go so far as to prevent *any local enterprise in a small town from buying up another local enterprise in the same town*. As a consequence the word "community" was dropped from the subsequent versions of the bill. [Emphasis supplied.]

Obviously the examiner's "section of the country" here is considerably more than a "community." It is a contiguous geographical area embracing the south shore area of Lake Erie in the States of

New York, Pennsylvania and Ohio. The examiner's specific finding in this respect held:

The area along the southern shore of Lake Erie from Buffalo, New York, to Sandusky, Ohio, and extending up to twelve miles inland, with the greatest concentration of sales being effected within the first five miles from the shore, is a "section of the country" within the intent and meaning of Section 7 of the Clayton Act.

What constitutes a "section of the country" is not capable of rigid definition and its application will vary according to the particular facts of each case. *United States v. Bethlehem Steel Corporation, et al.*, 168 F. Supp. 576, 595 (1958). Owing to the differences in the size and character of markets, it would be meaningless, from an economic point of view, to attempt to apply for all products a uniform definition of section, whether such a definition were based upon miles, population, income or any other unit of measurement (*Ibid*). Also since it is the preservation of competition which is at stake, the significant proportion of coverage is that within the area of effective competition *Standard Oil Co. v. U.S.*, 337 U.S. 293.

In our decision in *Crown Zellerbach Corporation*, Docket No. 6180 (decided December 26, 1957), we found that the 11 state western area and the three Pacific Coast states constituted an appropriate "section of the country" for the purposes of that case. A ten state area was designated as the area of effective competition and therefore an appropriate "section" in *American Crystal Sugar Company v. The Cuban-American Sugar Company*, 259 F. 2d 524, 528-29, 1958. Consideration of freight costs there, as here, were relevant in determining what constituted the area of effective competition. In *United States v. Bethlehem Steel Corporation, supra*, a single state was held as constituting an appropriate area within which to measure the economic consequences of a merger.<sup>1</sup> Similarly in *United States v. Maryland and Virginia Milk Producers Association, Inc.*, 167 F. Supp. 799, the court found the "Washington Metropolitan Area" an appropriate "section" for measuring the effects proscribed by the statute. We believe it is clear, therefore, that there is no precept for determining what constitutes an appropriate "section of the country." Inquiry must be made into the facts of each case and we believe here that the hearing examiner correctly defined the "section of the country" for the purposes of this proceeding.

In its appeal respondent has also asserted that there are large quantities of bank and pit sand sold in competition with lake sand.

<sup>1</sup> See also *United States v. The Lucky Lager Brewing Company of San Francisco* (1958 Trade Cases, Para. 69160) and *United States v. Anheuser-Busch, Inc., et al.* (1949 CCH Case 1421, Para. 45058) wherein the challenged acquisitions included companies operating wholly within the single States of Utah and Florida.

The evidence reveals, however, that most bank and pit sand, mentioned in respondent's analysis, is sold outside of the relevant market area. The quantities sold within the market are so small that their consideration would not affect the final determination in this matter. In any event it appears that lake sand is a sufficiently distinct product to be considered a "line of commerce" within the meaning of Section 7. Accordingly, we believe that the sale of lake sand in the above-defined market area along the shore of Lake Erie from Buffalo, New York, to Sandusky, Ohio, constitutes a relevant market for the purpose of determining the competitive consequences of this merger.

#### Competitive Effect

Respondent disputes the examiner's holding that the acquisition has had and now has the probable effect of substantially lessening competition and tending to create a monopoly in the relevant market. The facts, however, are clear. As found by the examiner and not here challenged, sales on the open market by lake sand suppliers in the market area here found to be relevant totaled about 832,655 cubic yards in 1953, and 943,034 cubic yards in 1954. Respondent's sales, when added to those of the Sandusky Division, amounted to 86.8% of all lake sand sold in the relevant market in 1953 and 83.7% of such sales in 1954. Respondent and the Sandusky Division, combined sold 91.8% of all domestic lake sand sold in the relevant market in 1954. Two other domestic suppliers shared the remainder between them in 1954, with sales of approximately 4.9% and 3.3%, respectively. Thus, respondent through the merger achieved dominance in the relevant market.

There are, in addition, other significant factors. The merger eliminated a major competitor. Where formerly there had been several suppliers in port cities, such as Dunkirk, New York, Sandusky, Ohio, and Erie, Pennsylvania, now there is one. Respondent also has acquired possession or leases to most of the available docks in the market area. It is now the only producer which supplies sand at all ports from Buffalo, New York, to Sandusky, Ohio.

The facts of record further reveal that there is little likelihood of greater competition in the future. Kelley Island Company, incident to the terms of the acquisition, is prohibited from re-entry into the relevant market for ten years. Other competitors of respondent are small operators with limited means. They do not have docks or other facilities which might enable them to effectively challenge the respondent's now dominant position. It is evident that the effect of the acquisition by respondent of the assets of Sandusky

Division may be substantially to lessen competition or to tend to create a monopoly in the market as above defined.

“Public Interest”

Respondent asserts that “public interest” is a relevant test under amended Section 7 and for this proposition cites cases decided before the 1950 amendment to Section 7. The cases mentioned are grounded in the language of *International Shoe Company v. Federal Trade Commission*, 280 U.S. 291 (1930), in which it was held that a showing of public injury is required in a Section 7, Clayton Act case as well as in a Sherman Act case. Congress, however, clearly did not intend the Sherman Act tests to apply in amended Section 7 cases. *Pillsbury Mills, Inc.*, 50 F.T.C. 555, 566 (1953); *United States v. Bethlehem Steel Corporation*, 168 F. Supp. 576, 583 (1958); *American Crystal Sugar Company v. The Cuban-American Sugar Company*, 259 F. 2d 524, 527 (1958). In amending Section 7, Congress determined, in effect, that the public interest requires corrective action where the effect of the acquisition may be substantially to lessen competition or tend to create a monopoly “in any line of commerce in any section of the country.” The court cases litigated under amended Section 7 have applied this statutory test. *United States v. E. I. duPont de Nemours & Company*, 353 U.S. 586; *United States v. Bethlehem Steel Corporation*, *supra*; *American Crystal Sugar Company v. The Cuban-American Sugar Company*, *supra*. Thus, the pre-amendment cases are not controlling in determining whether the acquisition under consideration is in violation of Section 7 as amended, and respondent’s contentions in this regard are clearly without merit.

The Propriety of the Order

The objection to the order appears to be on two principal grounds: (1) that the Commission’s power to order divestiture does not include the power to require the establishment of a competitive entity comparable to the merged firm and (2) that the order applies to vessels and properties owned not by respondent but by subsidiaries and that the complaint contains no allegation that these subsidiaries are under the direction, domination and control of respondent.

The order contained in the initial decision reads in pertinent part as follows:

“*It is ordered*, That the respondent, Erie Sand & Gravel Company, through its subsidiaries, officers, directors, agents, representatives and employees, shall divest itself absolutely, in good faith, of all

assets, properties, rights, leases and privileges acquired in the acquisition by the Erie Sand & Gravel Company of the assets of the Sandusky Division of the Kelley Island Company, as may be necessary to establish, as a competitive entity in the lake sand market of Lake Erie, a unit comparable to the former Sandusky Division of the Kelley Island Company, in substantially the same basic operating form and with substantially the same productive capacity as possessed by the said former Sandusky Division of the Kelley Island Company at or about the time of the said acquisition; except that Respondent, Erie Sand & Gravel Company, shall not be required to divest itself of the equivalent of the vessel 'Kelley Island'."

The Commission has the power to issue an order which requires the divestiture of an acquired property, where there is a violation of Section 7, "in the manner and within the time fixed by said order" (15 U.S.C. 21). This is adequate authority to require divestiture of the acquired property as a going, competing concern, rather than on a piecemeal basis. In this case, the removal of an important competitor severely restricts the sources of supply for lake sand purchasers. To permit piecemeal sale of the property would not correct the harm that has been rendered to competition. *Crown Zellerbach Corporation, supra*. See also *Federal Trade Commission v. Western Meat Company, et al.*, 272 U.S. 554, 559 (1926). There, in upholding the Commission's order, the Court stated that the words of the statute must be read in the light of its general purpose and applied with a view to effectuate such purpose and that the "[p]reservation of established competition was the great end which the legislature sought to secure."

We conclude, therefore, that the order contained in the initial decision is fully justified. We have considered other contentions by respondent made in pursuance of this appeal and find that they are without merit.

Respondent's appeal accordingly is denied and it is directed that an appropriate order be entered.

#### FINAL ORDER

This matter having come on to be heard upon the appeal of the respondent from the hearing examiner's initial decision and upon the briefs and oral argument of counsel in support thereof and in opposition thereto; and

The Commission having rendered its decision denying the appeal and directing that an appropriate order be entered:

Order

56 F.T.C.

*It is ordered*, That the findings, conclusions, and order contained in the initial decision be, and they hereby are, adopted as those of the Commission.

*It is further ordered*, That respondent Erie Sand and Gravel Company, shall, within sixty (60) days from the date of service upon it of this order, submit in writing, for the consideration and approval of the Federal Trade Commission, its plan for compliance