FURR'S INC.

Docket 8581. Order and Opinion, Nov. 18, 1963

Interlocutory order setting forth guiding principles for hearing examiner as to procedure in dealing with respondent's requests for production of documents in possession of complaint counsel concerning affairs of competitors.

Opinion Accompanying Order

By the Commission:

In *Grand Union Co.*, FTC Docket 8458 (Order of February 11, 1963) [62 F.T.C. 1491], followed in *Columbia Broadcasting System, Inc.*, F.T.C. Docket 8512 (Order of February 26, 1963) [62 F.T.C. 1518], the Commission outlined certain conditions and safeguards governing the production of documents in the possession of complaint counsel sought by respondent in aid of preparing its defense, in circumstances where the Commission found that there was a substantial danger of unnecessary or improper disclosure of information, contained in such documents, concerning the operations and affairs of respondent's competitors. Respondent in the instant matter, in its request for permission to file an interlocutory appeal, raises substantial questions as to the proper application of the procedure established by the Commission's order in *Grand Union Co., supra.* However, rather than entertain an appeal at this time, the Commission deems it appropriate to return the matter to the hearing examiner for reconsideration in the light of the following principles, which should guide examiners in dealing with the kind of problem presented here.

First. The procedure established in *Grand Union* is not to be inflexibly or invariably followed in all cases in which a respondent seeks production of documents containing information concerning the operations or affairs of competitors. Whether the procedure used in *Grand Union*, as opposed to unconditional production, is necessary or appropriate depends on the circumstances of the particular case. The danger of improper or unnecessary disclosure must be balanced against the respondent's interest in the practical and expeditious preparation of its defense. Other relevant interests must also be taken into account, such as the public interest in preventing undue delay or confusion in the conduct of Commission proceedings. The number and kind of documents involved may have a bearing on the applicability of the *Grand Union* procedure. Furthermore, the circumstances of a particular case may require appropriate modification of the procedure.

Second. The question whether and to what extent the procedure established in *Grand Union* shall be followed in a particular case is a matter within the sound discretion of the hearing examiner. This is

made clear by Section 3.11 of the Commission's Rules of Practice and Procedure, which provides that the examiner's order for production "may prescribe such terms and conditions as the circumstances require." Orderly procedure requires that matters so intimately connected with the conduct of hearings as the terms and conditions of production of documents be left very largely to the responsible judgment of the examiner. See Rule 3.15(c).

Third. In exercising his discretion in this area, the hearing examiner should bear in mind the interplay between Rules 3.11 and 1.132 (5). The latter rule provides in part that "all documents received in evidence or made a part of the record in adjudicative proceedings (except evidence received *in camera*)" are public information. Accordingly, where documents sought to be produced under Rule 3.11 are intended to be introduced in evidence, it will rarely be appropriate to condition their production upon observance of the procedure established in *Grand Union*, since the documents will, in any event, eventually become a matter of public record. In *Grand Union* itself, respondent sought production not of documents which complaint counsel intended to introduce into evidence, but of documents supplying underlying information.

Fourth. In exercising his discretion in this area, the hearing examiner should further bear in mind that the Commission's order in *Grand Union* intended to make no distinction between documents obtained by orders issued under Section 6(b) of the Federal Trade Commission Act, and documents obtained through other means, whether or not compulsory. Where there is a substantial danger, not outweighed by other considerations, of unnecessary or improper disclosure, the use of the *Grand Union* procedure will be appropriate irrespective of how the documents in question were obtained.

Commissioner MacIntyre did not participate.

Order Remanding to Hearing Examiner for Further Consideration of Motion

Upon consideration of respondent's request, filed on November 4, 1963, pursuant to Section 3.20 of the Commission's Rules of Practice and Procedure, for permission to file an interlocutory appeal from the hearing examiner's order of October 29, 1963, denying respondent's "Motion For Order Delineating Rights of Counsel for Respondent With Respect to Documents to be Offered in Evidence by Counsel Supporting the Complaint", and it appearing that the questions raised by respondent's motion should be given further consideration by the hearing examiner in the light of the opinion accompanying this order,

It is ordered, That this matter be, and it hereby is, remanded to the hearing examiner for further consideration.

Commissioner MacIntyre not participating.

AMERICAN HOME PRODUCTS CORPORATION d/b/a WHITEHALL LABORATORIES

Docket 8478. Order and Opinion, Nov. 22, 1963

Order denying petition for reconsideration of final order of Sept. 27, 1963, p. 933 herein, which objected to its requirements of conspicuous disclosure of limitations in the properties and effectiveness of its medicinal product "Outgro", represented to afford relief from the pain or discomfort caused by ingrown toenails and protection against infection caused thereby.

Opinion Accompanying Order Denying Petition for Reconsideration

By the Commission:

The Commission issued its decision and final order in this matter, involving the alleged false and misleading advertising of a medicinal preparation, "Outgro", used for the treatment of ingrown toenail, on September 27, 1963 [page 933 herein]. On October 28, respondent filed a petition for reconsideration, pursuant to Section 3.25 of the Commission's Rules of Practice and Procedure, seeking modification of the Commission's order in certain respects. An answer to the petition, opposing the requested modifications in the order, was filed by complaint counsel on November 7. The petition complies with the requirements of Rule 3.25, in that it is "confined to new questions raised by the decision or final order and upon which the petitioner had no opportunity to argue before the Commission." However, the modifications of the final order requested in the petition are, in our opinion, without merit.

Respondent objects to paragraph (A) (2) of the order, which forbids respondent to represent that "Outgro" can or will relieve the pain or discomfort caused by ingrown toenail "unless respondent clearly and conspicuously states, in immediate conjunction with any such representation, that such relief is partial and temporary only and is not complete or permanent". Respondent points to a line of decisions by the Court of Appeals for the Seventh Circuit in which Commission orders limiting representations of relief of pain to "temporary" or "temporary and partial" relief were modified to excise such limitations. The court reasoned that such terms were impermissibly vague. Respondent fails to point out, however, that the most recent of these decisions, *Rhodes Pharmacal Co.* v. *F.T.C.*, 208 F.2d 382 (1953)

[5 S.&D. 582], was reversed by the Supreme Court. 348 U.S. 940 (per curiam) [5 S.&D. 728]. The Court held that the Court of Appeals' modification of the Commission's "temporary and partial" form of order was improper, and ordered the Commission's order reinstated.

Respondent also objects to the affirmative disclosures required by paragraph (A)(4) of the order, which forbids respondent to represent that "Outgro" can or will "protect, prevent or guard against . . . infection [caused by or accompanying ingrown toenail], unless respondent clearly and conspicuously states, in immediate conjunction with any such representation, that said product is preventive only and cannot relieve, improve or cure an already existing infection, and should not be used if infection has already set in". Respondent would modify this provision to read, "protect, prevent or guard against such infection, unless respondent clearly and conspicuously states that said product should not be used if infection has already set in." However, the additional disclaimers required by the Commission's order are necessary and proper to dispel possible confusion among consumers and ensure understanding that "Outgro" is not a treatment for infection. In the area of false drug advertising, where Congress has expressed its particular concern with deception by means of omission of material facts (see Section 15(a)(1) of the Federal Trade Commission Act), and where confusion or misunderstanding on a purchaser's part might lead to physical injury as well as economic loss, it is the Commission's duty to require forthright and unambiguous disclosure of material limitations of a product's advertised properties.

Respondent objects, finally, to paragraph (B) of the order, which requires certain disclaimers in immediate conjunction with use of the term "Outgro" or a similar-sounding or similar-appearing word suggestive of growth. Respondent argues that it would be impractical for it to make the required disclaimers every time the name of the product was mentioned in an advertisement, and it requests that the paragraph be modified to read, "contains the word 'Outgro' or any similar-sounding or similar appearing word suggestive of growth, unless respondent clearly and conspicuously states, once in any advertisement in which such name is used, that said product does not affect in any way the growth, shape or position of the toenail." In our opinion, such a modification would be unwise, since, depending on the length and content of a particular advertisement, a single statement of the required disclaimers might be inadequate to ensure against the deceptive possibilities inherent in the term "Outgro". On the other hand, we do not read the order (and neither does respondent in its petition) as establishing an inflexible requirement that the disclaimers be made in every instance in which the name "Outgro" is mentioned. How frequently or in what form the disclaimers must be made depends

on the particular advertisement, and cannot be prescribed in the order itself without the order becoming needlessly cumbersome. These are details of compliance, which respondent will have ample opportunity to resolve after the Commission's order becomes effective. For the order "is only the beginning of a 'marriage' under which the Commission is obliged to afford the respondent definitive advice as to whether proposed conduct would meet the requirements of the order." *Foremost Dairies, Inc.*, F.T.C. Docket No. 7475 (decided May 23, 1963), p. 7 [62 F.T.C. 1344, 1363]. See Section 3.26 of the Commission's Rules of Practice and Procedure; *Vanity Fair Paper Mills, Inc.* v. *F.T.C.*, 311 F.2d 480, 488 (2d Cir. 1962) [7 S. & D. 583, 592].

ORDER DENYING PETITION FOR RECONSIDERATION

A petition for reconsideration was filed by respondent on October 28, 1963, pursuant to Section 3.25 of the Commission's Rules of Practice and Procedure, requesting the Commission to modify in certain respects the final order in the above-captioned matter issued on September 27, 1963. For the reasons stated in the accompanying opinion, the Commission concludes that good cause to modify it has not been shown. Accordingly,

It is ordered, That the petition for reconsideration be, and it hereby is, denied.

EMPIRE SPORTING GOODS MFG. CO., INC., ET AL.

Docket C-294. Order, Dec. 5, 1963

Order reopening proceeding and suspending until further order, enforcement of deceptive pricing prohibitions of desist order of Jan. 8, 1963, 62 F.T.C. 11, requiring New York City manufacturers of athletic uniforms and accessories to cease listing fictitious prices in catalogs and other printed matter, as well as violating provisions of the Textile Fiber Products Identification Act.

ORDER REOPENING PROCEEDING AND MODIFYING ORDER TO CEASE AND DESIST

Upon consideration of respondents' petition, filed October 11, 1963, requesting reopening of this proceeding for the purpose of suspending the enforcement of the price misrepresentation prohibitions of the Commission's final order, issued January 8, 1963 [62 F.T.C. 11]; and

The Commission having concluded that a temporary cessation of respondents' duty to comply with the provisions of the above-mentioned paragraph of the order to cease and desist will not be incompatible with the public interest and that such relief will be equitable in the light of all attending circumstances:

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It is ordered, That this proceeding be, and it hereby is, reopened for the sole purpose of effecting the relief hereinafter ordered.

It is further ordered, That the enforcement of the below-quoted provision of the order of January 8, 1963 [62 F.T.C. 11, 16], and respondents' duty to comply therewith be, and they hereby are, suspended until further order of the Commission.

The suspended provisions would require respondents to cease and desist from:

"1. Representing, directly or by implication, through the use of catalogs, brochures, price lists, other point-of-sale material or by any other means, that any amount is the usual and customary retail price of merchandise in the trade area or areas where the representations are made when it is in excess of the generally prevailing retail price or prices at which said merchandise is sold in said trade area or areas.

"2. Furnishing or otherwise placing in the hands of retailers or dealers in said products the means and instrumentalities by and through which they may mislead or deceive the public in the manner or as to the things hereinabove prohibited."

It is further ordered, That with the exception of the above-quoted prohibition the decision and order of the Commission, entered January 8, 1963 [62 F.T.C. 11, 16], shall in all respects and for all purposes remain final and unaffected by this reopening.

Commissioner MacIntyre not concurring for the reason he believes it inappropriate for the Commission to take this action unilaterally in the form of an order in a consent settlement. His non-concurrence is not an expression of his judgment on the merits of the matter. He merely expresses the thought that the more appropriate method to change the terms of a consent settlement would be through the negotiation of a new consent settlement to replace the old.

STANDARD MOTOR PRODUCTS, INC.

Docket 5721. Order and Opinion, Dec. 5, 1963

Order remanding to hearing examiner respondent's motion for clarification as to violations of desist order under investigation.

Opinion Accompanying Order

By the Commission:

On February 1, 1963 [62 F.T.C. 1485], the Commission, stating that it "has reason to believe that * * * [respondent] may have violated the provisions" of an order to cease and desist entered by the Commission against respondent on December 27, 1957 [54 F.T.C. 814], ordered that public hearings be conducted "to ascertain the

extent to which such violation may have occurred". The Commission further ordered

> that the Director of Hearing Examiners shall designate the hearing examiner to preside at and conduct such public hearings with all the powers and duties provided in the Commission's Rules of Practice For Adjudicative Proceedings as though a formal complaint had been issued and an answer had been filed except that he shall certify the entire record to the Commission and shall not be required to make and file an initial decision; and that he shall grant respondent * * * all appropriate rights under the Commission's Rules such as, but not limited to, the following: due notice, pre-hearing conference, cross-examination and production of evidence in rebuttal.

Pursuant to this order, hearings were held between February and July 1963, and Commission counsel completed the presentation of his case. Defense hearings have not yet commenced. On October 30, 1963, respondent filed with the Commission a "Motion for a Clarification of the Commission's Order Dated February 1, 1963 [62 F.T.C. 1485] or in the Alternative to Dismiss the Investigation and for Other Relief." A reply by Commission counsel was filed on November 7, 1963.

In its motion, respondent asks, in essence, whether it is entitled, in a proceeding such as the present one, to a detailed statement from Commission counsel of the acts or practices of respondent which the Commission has reason to believe may violate the cease and desist order, and which are the basis of the proceeding. The reason for uncertainty as to whether respondent is entitled to such a statement appears to be that, while the hearings herein are governed by the rules governing adjudicative proceedings, as the order of February 1, 1963 [62 F.T.C. 1485], makes clear (see also *C. H. Robinson Co.*, F.T.C. Docket 4589 (Order of November 4, 1963)) [p. 2218 herein], there is no complaint. We think that, although a formal complaint is not appropriate in an investigational proceeding such as the present one, a respondent in such a proceeding is entitled to a statement of the Commission's basis for believing a violation may have occurred, and should not be compelled to proceed wholly in the dark as to the nature and extent of the Commission's case. In such a proceeding, as in adjudicative proceedings, the factual and legal issues should be clearly formulated before the commencement of evidentiary hearings. To this end, a prehearing conference will ordinarily be necessary, and, in addition, it may on occasion be appropriate to compel Commission counsel to furnish a statement containing the information that would ordinarily be included in a complaint or such other information as may be proper in the circumstances. Respondent is entitled to all the rights it would have in a formal adjudicative proceeding, except for the narrow exceptions specified in the order of February 1, 1963; and such exceptions do not impair respondent's right to obtain clarification of the issues prior to commencement of evidentiary hearings.

The hearing examiner ruled that he had no power to compel clarification of the issues in this proceeding as requested by respondent. Since that ruling was erroneous, the matter must be remanded to the examiner for reconsideration, in light of this opinion, of respondent's request for clarification. In so remanding, the Commission expresses no view on whether, in the particular circumstances and present posture of this proceeding, respondent is entitled to a statement from Commission counsel, or what form such statement should take. These questions are, in the first instance, within the sound discretion of the hearing examiner. Cf. Rule 3.15(c) of the Commission's Rules of Practice and Procedure.

All of the remaining contentions made by respondent in this motion either are without merit or should properly be addressed to the hearing examiner, rather than to the Commission. We repeat that, in the conduct of the present proceeding, the hearing examiner is clothed with all the powers possessed by hearing examiners in formal adjudicative proceedings, except for the very limited exceptions clearly enunciated in the order of February 1, 1963 [62 F.T.C. 1485].

Commissioner MacIntyre did not concur.

ORDER REMANDING TO HEARING EXAMINER FOR FURTHER CONSIDERATION

Upon consideration of respondent's motion for clarification of the Commission's order of February 1, 1963 [62 F.T.C. 1485], and for other relief, filed October 30, 1963, and the reply thereto, the Commission has determined that the matters raised in respondent's motion should be given further consideration by the hearing examiner in accordance with the principles set forth in the accompanying opinion. Accordingly,

It is ordered, That the matter be, and it hereby is, remanded to the hearing examiner for further consideration in light of the accompanying opinion.

Commissioner MacIntyre not concurring.

HUMBLE OIL & REFINING COMPANY

Docket 8544. Order and Opinion, Dec. 5, 1963

Interlocutory order ruling negatively on question certified by hearing examiner as to whether Commission's accountant should be subpoenaed at instance of respondent to determine compliance with earlier order calling for production of documents; and denying, as unnecessary at this time, request of complaint counsel for data underlying respondent's cost study.

OPINION OF THE COMMISSION

This matter is before the Commission on the question certified by the hearing examiner of whether a subpoena should issue, at the request

of respondent for the appearance of William S. Opdyke, an accountant of the Commission's staff, and on complaint counsel's request for permission to file an interlocutory appeal from the examiner's ruling of October 24, 1963, denying complaint counsel's motion for the production of certain documentary materials underlying Humble's proffered cost justification defense and respondent's answer in opposition thereto.

Both the question certified by the examiner and the request for permission to file an interlocutory appeal relate primarily to the issue of whether complaint counsel has been given adequate opportunity to examine documents basic to Humble's cost study.

Respondent desires to subpoena Mr. Opdyke for the purpose of showing:

(1) That counsel supporting the complaint had been derelict in using the time allowed by the hearing examiner to examine the documents used in the cost study of respondent.

(2) That the hearing examiner's order for production of documents used in the cost study had been complied with.

(3) That the testimony of Mr. Opdyke would show that the cost study had been properly made.

The examiner has recommended that the Commission permit Mr. Opdyke's testimony at the instance of respondent on the ground that this might permit him to determine more accurately the need for deferred cross-examination of expert witnesses called by respondent as well as the necessity for the production of additional records from Humble.

The issues presented by the examiner's certification and complaint counsel's request for permission to file an interlocutory appeal are interrelated and should be considered together.

The examiner will not be authorized to issue a subpoena for the appearance of Mr. Opdyke for the purposes specified by the respondent. Obviously, as a general rule, an accountant assigned to assist an attorney in the preparation of his case should not be called to testify concerning the alleged sins of omission or commission of counsel at the instance of the opposing party. Permitting a procedure of this nature would inevitably disrupt collaboration between counsel and persons assisting in a professional capacity in the preparation of cases for trial. Under the circumstances of this case, respondent is not entitled to call on the Commission's expert for his expert opinion to support its cost justification or to corroborate its own expert witness.

Under Rule 3.15 of the Commission's Rules of Practice it is the examiner's duty to regulate the conduct of counsel appearing before him. He has initiated no disciplinary action against complaint counsel and we must therefore assume that he has found no cause for steps of this nature. We agree with the examiner. Although respondent

made available certain documentary material as of September 25, 1963, the cost study itself was not received by complaint counsel until October 14, 1963, approximately nine or ten days before Humble sought to introduce this document in the course of the hearings. Nor has complaint counsel been furnished to date with the work papers of respondent's witness, Robert Field, who prepared the study in question. Furthermore, respondent's representatives were apparently instructed to answer no questions relating to the documentary material examined prior to the hearing. Under the circumstances, there is no reason to question complaint counsel's diligence in examining the documents made available in the period preceding the October 23 hearing.

There is no necessity for calling Mr. Opdyke to the stand to determine whether the examiner's order of August 15, 1963, calling for the production of documents has been complied with. There is apparently no factual dispute on the identity of the documents made available pursuant to the order of August 15, 1963, in Humble's Mount Vernon, New York office. The conclusion as to whether this constituted compliance with his order must necessarily be drawn by the examiner; the testimony of Mr. Opdyke cannot properly be substituted for his judgment on this point.

Mr. Opdyke should not be subpoenaed at the instance of respondent because, as an incidental matter, such testimony might give the examiner additional information on the necessity for deferred cross-examination of expert witnesses as well as for the production of additional records by Humble. There are more direct approaches available to the examiner if he requires further information for resolving these issues. Under the Commission's rules, the examiner may call a conference of counsel to assist him by furnishing him with information on these points. Should that course prove unproductive, the examiner may permit further testimony from Mr. Field, who, as the expert responsible for the study, is of necessity more intimately acquainted than accountants on the Commission's staff with those of Humble's records basic to his computations. At any rate, we note that the examiner at this point is apparently by no means unacquainted with the problems of complaint counsel in preparing for cross-examination of Mr. Field.[1]

Complaint counsel request permission to file an interlocutory appeal from the hearing examiner's refusal to grant their oral motion that respondent be ordered "to produce those documents which Mr. Field used in making the study, as well as his work papers."[2] In their

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[1] The examiner has previously stated:
HEARING EXAMINER HINKES: "* * * Some of the testimony of the witness already indicates that complaint counsel had no way of knowing how the witness [Field] reached certain conclusions." Tr. 1865.

[2] Tr. 1934, 1935.

motion to the Commission, complaint counsel indicate that they will request the Commission to instruct the examiner to issue an order requiring respondent to:

(1) produce and permit the inspection and copying of such documents, papers, books or other physical exhibits which constitute or contain evidence relevant to the respondent's proffered cost justification, including all materials underlying those documents, papers, books or physical exhibits used as the basis for the cost study summary marked as RX 56 for identification.

(2) produce and permit the inspection and copying of the work papers of witness Robert Field which are considered and held to be documents underlying the said cost study summary offered but not as yet received in evidence as RX 56.

Complaint counsel's request will be denied. The examiner indicated during the course of the November 4 hearing that with the exception of Mr. Field's work papers he had not ruled with finality on complaint counsel's requests.[3] In the course of that hearing, he advised complaint counsel that for the sake of orderly procedure they should file a written motion requesting an order for the production of the desired documents and at that time, despite a previous statement apparently to the contrary, he indicated further that complaint counsel was not precluded from again raising the issue of the production of Field's work papers in such a motion directed to him.[4]

Complaint counsel apparently has the opportunity of filing a written motion to the hearing examiner consolidating the various requests for data underlying Humble's cost study. This procedure should enable the examiner to consider more fully and carefully the issues involved than was possible in the course of the hearings. A written ruling by the examiner on these questions and his reasons therefor, moreover, would be of great value to the Commission should it once again be faced with these questions during the course of this proceeding.[5] There is no necessity for granting the request for permission to file the interlocutory appeal at this time; the examiner's mind, as far as we can determine, is not closed to complaint counsel's arguments.[6]

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[3] As we understand it, upon a reading of complaint counsel's request and the transcript of the October 23, 24 and November 4 hearings, complaint counsel in addition to Mr. Field's work papers desire to re-examine the documentary material previously made available in Humble's Mount Vernon office in the period preceding the October hearings. These documents apparently were the documents "used" by respondent's witness, Mr. Field, in preparing the cost study. Complaint counsel contend that in addition respondent should produce other material which, although it may not have been "used" by Field in making the computations going into the study, is nevertheless basic to the records actually utilized and essential to an understanding of respondent's cost defense. To identify documents in this category, complaint counsel, it appears, may have to refer again to that material already examined in October.

[4] Tr. 2074.

[5] In the November 4 hearing, complaint counsel restated his reasons for requesting production of Field's work papers. A ruling by the examiner taking account of complaint counsel's and respondent's arguments on this point would undoubtedly be helpful to both sides in this proceeding.

[6] See footnote [1], *supra*.

Absent a showing of abuse of discretion, the Commission will not disturb an examiner's rulings on procedural and evidentiary issues. Orderly procedure is best served by leaving to the examiner, who is intimately acquainted with the conduct of the proceeding, the resolution of questions relating to the scope, terms, and conditions of the production of data underlying prospective exhibits. For example, the question of whether in a particular case complaint counsel should merely be given access to documentary materials or whether the records in question should be produced for inspection and copying is peculiarly within the discretion of the examiner, since by necessity he is more closely acquainted with the situation of the parties than any reviewing body. While the hearings in this case may have engendered more than the usual share of acrimony, the examiner should not be deterred from assuming firm control of the proceeding. Clear-cut rulings by the examiner on evidentiary and procedural points are a critical factor in insuring the expeditious and orderly trial of Commission proceedings.

ORDER RULING ON QUESTION CERTIFIED BY THE HEARING EXAMINER AND DENYING REQUEST FOR PERMISSION TO FILE INTERLOCUTORY APPEAL

This matter has come before the Commission on the question certified by the examiner of whether William S. Opdyke, an accountant of the Commission's staff, should be subpoenaed at the instance of respondent and the request, filed October 31, 1963, by complaint counsel, for permission to file an interlocutory appeal from the hearing examiner's denial on October 24, 1963, of their oral motion for the production of documentary materials used in support of respondent's proffered cost justification defense and on respondent's answer in opposition thereto. The Commission has determined, for the reasons stated in the accompanying Opinion, that a subpoena should not issue against Mr. Opdyke at the instance of respondent on the grounds stated in the examiner's certification and that complaint counsel's request for permission to file an interlocutory appeal should be denied. Accordingly:

It is ordered, That the hearing examiner be, and hereby is, instructed not to issue a subpoena for the appearance of Mr. Opdyke for the reasons stated in the certification.

It is further ordered, That complaint counsels' request for permission to file an interlocutory appeal from the hearing examiner's ruling of October 24, 1963, be, and it hereby is, denied.

ATLANTIC PRODUCTS CORPORATION ET AL.

Docket 8513. Order and Opinion, Dec. 13, 1963

Order withholding the issuance of a cease and desist order prohibiting violations of Sec. 2(d) of the Clayton Act pending the completion of an industry-wide proceeding.

OPINION OF THE COMMISSION

BY ELMAN, *Commissioner:*

The complaint in this matter charges respondents, a corporation engaged in the manufacture of a variety of machine-sewn products, including luggage, and its sales subsidiary, with having violated Section 2(d) of the Clayton Act, as amended, in failing to make advertising and promotional allowances available to all competing customers on proportionally equal terms. The complaint specifically challenges that feature of respondents' 5% advertising allowance on "regular line" luggage whereby minimum purchases of $1,500 over specified six-month periods are required in order for the customer to qualify for the allowance. After hearings, the hearing examiner filed an initial decision in which he found that the minimum-purchases requirement had the effect of making the allowance unavailable on proportionally equal terms to competing customers, and concluded that respondents had violated Section 2(d). Respondents have appealed generally from the initial decision; complaint counsel has appealed the scope of the order to cease and desist contained in the decision.

We agree with the examiner that a violation of Section 2(d) has been proved, and we adopt the initial decision as the decision of the Commission on the issue of violation of law. While the inclusion of a minimum-purchases requirement in an advertising allowance plan is not *per se* a violation of 2(d), where, as here, 85–90% of the seller's customers do not purchase in sufficient amounts to qualify for the allowance, and it is not demonstrated that a lower minimum, under which a great many more such customers would qualify, would be impractical or burdensome for the seller, the conclusion seems inescapable that the seller has not made his allowance available to competing customers on proportionally equal terms, as required by the statute.

We disagree with the examiner, however, with respect to the scope of the cease and desist order. The order contained in the initial decision would prohibit respondents from "paying or contracting for the payment of anything of value to, or for the benefit of, any customer of respondents as compensation or in consideration for any advertising or promotional services (pursuant to a minimum-purchase requirement plan) furnished by or through such customer in connection

with the sale or offering for sale of respondents' line of luggage, unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such products." In two respects, we think this order is not adequate to "cure the ill effects of the illegal conduct, and assure the public freedom from its continuance" (*United States* v. *United States Gypsum Co.*, 340 U.S. 76, 88).

In the first place, we perceive no difference in the distribution or marketing of luggage, as compared with the distribution and marketing of other products manufactured and sold by respondents—golf bags, picnic cases, bowling ball bags, etc.—, such as to support an inference that respondents are not likely to extend the practice of granting advertising allowances to customers for their other products in the future. Indeed, respondents sell their golf bags to the same retailers who carry their luggage line. In the circumstances, limitation of the product coverage of the order to luggage is unwarranted. *Niresk Industries, Inc.* v. *F.T.C.*, 278 F.2d 337, 343 (7th Cir. 1960).

Secondly, we think the examiner erred in limiting the order to allowance plans containing a minimum-purchases requirement. An order so limited would invite easy circumvention. For example, if respondents were to modify their plan by abolishing the minimum-purchases requirement, yet at the same time provide that a customer who purchased below a certain level was entitled to only a very small allowance, the plan seemingly would conform to the order contained in the initial decision, though plainly evasive in purpose and effect.

In disapproving, in the circumstances of this case, an order narrowly confined to the exact conduct found to be in violation of law, we emphasize that respondents' violation was not technical, isolated, inadvertent, or insignificant (see, e.g., *Quaker Oats Co.*, F.T.C. Docket 8119 (decided April 25, 1962)) [60 F.T.C. 798]. On the contrary, the record shows that respondents have engaged in the unlawful practice of granting nonproportional advertising allowances to competing customers for many years and on a large scale. We also emphasize that, although an order broad enough to ensure adequate protection to the public against the recurrence of respondents' unlawful conduct may be somewhat less specific or precise in its coverage than an order confined to the particular practice found to be unlawful, respondents need not act at their peril in seeking to comply with the order. They are entitled to obtain from the Commission, in advance, definitive advice as to whether a proposed course of conduct would comply with the order. *Foremost Dairies, Inc.*, F.T.C. Docket 7475 (decided May 23, 1963), p. 7 [62 F.T.C. 1344, 1364]; Section 3.26(b), Rules of Practice and Procedure, effective August 1, 1963. See *Vanity Fair Paper*

Mills, Inc. v. *F.T.C.*, 311 F.2d 480, 488 (2d Cir. 1962) [7 S. & D. 583].

The Commission has reason to believe that the practice of granting unlawful advertising allowances may be widespread among luggage manufacturers, including major competitors of the instant respondents. Accordingly, the Commission has determined forthwith to institute an industry-wide proceeding looking to the promulgation of a Trade Regulation Rule or Rules, as provided for in Section 1.63 of the Commission's Rules of Practice and Procedure, which would prohibit clearly, uniformly, and equitably, such unlawful advertising allowance practices as may be found to exist in the industry.

As the Supreme Court has stated, "the decision as to whether or not an order against one firm to cease and desist from engaging in illegal price discrimination should go into effect before others are similarly prohibited depends on a variety of factors peculiarly within the expert understanding of the Commission. * * * [A]lthough an allegedly illegal practice may appear to be operative throughout an industry, whether such appearances reflect fact and whether all firms in the industry should be dealt with in a single proceeding or should receive individualized treatment are questions that call for discretionary determination by the administrative agency. It is clearly within the special competence of the Commission to appraise the adverse effect on competition that might result from postponing a particular order prohibiting continued violations of the law. Furthermore, the Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically." *Moog Industries* v. *F.T.C.*, 355 U.S. 411, 413 [6 S.&D. 382, 384].

Responsible exercise of the Commission's discretion in determining whether, and when, not to enter an immediate cease and desist order, so that a general practice may be dealt with more comprehensively, may involve consideration of circumstances going beyond those reflected in the particular record. In the circumstances here, we are inclined to withhold entry of a cease and desist order against the instant respondents pending the outcome of the projected industry-wide proceeding. Respondents have already discontinued the minimum-purchases requirement challenged by the complaint in this matter, and the Commission has received sworn assurances from the responsible officers of respondents that it will not be resumed in the future. In light of these assurances, and of the apparent industry-wide incidence of practices such as those challenged in the complaint, we have determined, as a matter of administrative discretion, that it would be in the public

interest to withhold entry of a cease and desist order to await developments in the projected industry-wide proceeding. Upon the termination of that proceeding, and in light of the conditions then obtaining, the Commission will, upon application, consider whether further action herein is required.

Commissioner Anderson did not participate.

ORDER MODIFYING AND ADOPTING HEARING EXAMINER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND DEFERRING OTHER RELIEF

This matter has been heard by the Commission on cross-appeals by complaint counsel and respondents from the initial decision of the hearing examiner. For the reasons stated in the accompanying opinion, the Commission has determined that (1) the findings of fact and conclusions of law contained in the initial decision should be adopted by the Commission insofar as they concern the question of violation; (2) the order contained in the initial decision should be rejected as too narrow and restricted; and (3) pending the termination of an industry-wide proceeding, being initiated at the Commission's direction, the issuance of an order to cease and desist herein will be withheld. Accordingly,

It is ordered, That the findings of fact and conclusions of law contained in the initial decision be modified to the extent described in the accompanying opinion, and as so modified, they are hereby adopted as the decision of the Commission.

It is further ordered, That entry of a final order to cease and desist be withheld pending termination of the industry-wide proceeding described in the accompanying opinion.

Commissioner Anderson not participating.

IN THE MATTER OF

SCOTT PAPER COMPANY*

Docket 6559. Opinion on remand, Dec. 26, 1963

In a supplementary opinion based on a post-remand survey of market shares, the Commission concluded that although there was no great increase of business immediately after acquisition, the respondent was able to maintain its existing dominant position in the market and this effect is violative of the antimerger statute.

OPINION OF THE COMMISSION ON REMAND

BY THE COMMISSION:

This case is before the Commission for the second time, on remand from the Court of Appeals for the Third Circuit [7 S.&D. 448].

*Case before Commission reported at 57 F.T.C. 1415.

The case involves the acquisition by respondent, a leading manufacturer of household waxed paper and various sanitary paper products (toilet paper, paper towels, facial tissues and paper napkins), of three corporations engaged, at the time of the acquisitions, in the production of raw materials for the finished paper products respondent makes and sells. The acquisitions in question occurred between 1951 and 1954. In 1956, the Commission issued its complaint, challenging the lawfulness of the acquisitions under Section 7 of the amended Clayton Act and Section 5 of the Federal Trade Commission Act. After extended proceedings, the Commission, in 1960, held the acquisitions unlawful and entered an order of divestiture.[1]

Although the acquisitions were "vertical" in form, being acquisitions of raw-materials suppliers by a firm manufacturing the finished products, the case was not brought or decided on a conventional vertical theory, i.e., foreclosure of a substantial segment of the market to competitors of the acquiring or acquired firms. Rather, the theory of the case was that the acquisitions had enabled respondent to increase its productive capacity and thereby to enhance its already dominant position in many of the markets in which it was active. Specifically, the Commission found that prior to the acquisitions, respondent, although the dominant firm in household waxed paper and sanitary paper products—both highly concentrated industries characterized by high barriers to new competition—was "oversold", i.e., lacked sufficient productive capacity to enlarge further, or even maintain, its dominant market position.[2] By acquiring raw-materials suppliers, respondent obtained both advantageous plant sites and useful equipment and personnel—and obtained them with no cash outlay, but simply through the issuance of new stock. Respondent invested some $109 million in the properties which it acquired. It built new plants on the property of the acquired corporations, thereby taking advantage of the proximity to raw materials provided by such plant sites, and converted the existing productive capacity of the acquired companies (for example, by rebuilding the existing machinery) to the production of respondent's finished products. In this fashion, respondent was enabled to preserve its leading position in household waxed paper and sanitary paper products during a period of sharply rising demand.

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[1] 57 F.T.C. 1415. The Commission based its finding of unlawfulness exclusively on Section 7, and dismissed the complaint as to Section 5.

[2] In the words of a vice president of respondent:

"'* * * having been in an oversold position for 14 years, we were determined to correct that situation in 1955 with Everett, Detroit and the H & W locations, machines and people to help out. [This is a reference to the three acquisitions.] A business should not be continuously oversold. Because our customers are inclined to feel they can't rely on us for the goods they need when they need them. So they feel obliged to carry one or more competitive lines for protection—to make sure they'll always have merchandise available for their customers. Those competitive lines take some business away from us * * *.'" 57 F.T.C., at 1425.

The Commission did not rest with this showing of how respondent's acquisitions had enabled respondent substantially to strengthen its hand, but sought in addition to show that respondent's percentage shares of the relevant markets had actually increased as a result of the challenged acquisitions. To this end, the Commission relied on a survey of the market shares of respondent and its competitors in 1950 and 1955. The survey showed a substantial increase in respondent's shares between those two years, but contained no figures for the intervening years.

On appeal to the Court of Appeals for the Third Circuit from the Commission's decision, respondent contended that the data from the survey did not support the Commission's finding that the increase in respondent's market shares was due to the acquisitions, since all or a large part of the increase might have occurred between 1950 and 1954; and 1954 was the first year in which productive capacity located on the acquired properties was actually utilized by respondent in the manufacture of its finished products. The Court of Appeals concluded that the case raised "novel issues of law of transcending importance in the interpretation and application of the anti-trust laws" which required assessment on a more "definitive and revealing" record. Accordingly, without expressing any opinion on the merits of these issues, the court remanded the case to the Commission for completion of the survey for the years 1951–1954.[3]

The Commission desires to state, however, that the findings, conclusions and opinion of the Commission in its 1960 decision give weight, but by no means exclusive or decisive weight, to the survey evidence.

I.

The Commission has prepared the survey ordered by the Court of Appeals, and it has been made a part of the record. A summary of the survey is appended to this opinion.[4] The survey shows that, overall, respondent's market shares in the relevant product categories increased most steeply between 1950 and 1952, and more moderately, though steadily, between 1952 and 1955. The increase between 1954 and 1955 was the smallest annual increase during this period: .34%.

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[3] 301 F.2d 579, 584 (1962). The court stated,

"On this review the Commission lays great stress, almost to the exclusion of other considerations, on what it terms 'a comprehensive market survey' on which it premised its ultimate fact-finding that Scott, by the challenged acquisitions, 'has substantially increased its shares in those markets over their prior high levels' to a degree 'that the effect of the acquisitions may be substantially to lessen competition and to tend to create a monopoly in the relevant lines of commerce.'" *Id.*, at 582.

[4] Tables I and II. In processing the new survey, the Commission has discovered errors in the original survey data ranging from a fraction of a percent to several percent. We have tabulated the revised 1950 and 1955 data along with the 1951–1954 data, to facilitate comparison of the several figures on the same basis.

Respondent contends that the survey is wholly untrustworthy. It argues that, on the average, 18% of the tonnage totals in each product category for each year consist of "estimates", rather than "precise figures", and urges that this element of approximation vitiates a survey which purports to calibrate respondent's market-shares increase within fractions of a percent.

The post-remand survey was conducted in the same fashion as the original survey, the accuracy of which has not been challenged. Pursuant to Section 6(b) of the Federal Trade Commission Act, all of the competitors of respondent in the relevant product categories were ordered to file sworn reports in writing setting forth their tonnage totals for the years in question. These 6(b) orders did not specify how the reporting companies were to obtain such information, or demand that underlying or source data be submitted to the Commission for purposes of verification. To have imposed any such requirement would have defeated the purpose of the Section 6(b) procedure, which is to enable the Commission to obtain comprehensive and reliable business information quickly, inexpensively, and without subjecting the business community to burdensome reporting requirements.[5] The information sought by the surveys in this matter was not complex or recondite. It could easily be ascertained by the reporting companies either from their normal business records or on the basis of the personal knowledge of their officers and employees. There is no reason to believe that such information was not furnished in the reports in good faith and is not substantially accurate.[6]

Respondent concedes, as we think it must,[7] that a market-shares survey is not vitiated for the purposes of a Section 7 proceeding simply because it contains a substantial element of estimation. Most business statistical data contain an element of estimation, and the line between an "estimated" and a "precise" figure is impossible to draw and vir-

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[5] "Of course, there are limits to what, in the name of reports, the Commission may demand. Just what these limits are we do not attempt to define in the abstract. But it is safe to say that they would stop the Commission considerably short of the extravagant example used by one of the respondents of what it fears if we sustain this order—that the Commission may require reports from automobile companies which include filing automobiles. In this case we doubt that we should read the order as respondents ask to require shipment of extensive files or gifts of expensive books." *United States* v. *Morton Salt Co.*, 338 U.S. 632, 653. See *United States* v. *St. Regis Paper Co.*, 181 F. Supp. 862 (S.D.N.Y.), rev'd on other grounds, 285 F.2d 607 (2d Cir. 1960), aff'd, 368 U.S. 208.

[6] Any willfully false statement made in a Section 6(b) report would, of course, constitute a federal crime. See Section 10 of the Federal Trade Commission Act, and also 18 U.S.C. § 1001.

[7] See, e.g., *A. G. Spalding & Bros.* v. *F.T.C.*, 301 F.2d 585, 611 (3d Cir. 1962); *Crown Zellerbach Corp.* v. *F.T.C.*, 296 F.2d 800 (9th Cir. 1961). In *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 342, n. 69, the Supreme Court accepted statistical procedures involving a margin of error of up to 6%, stating that "precision in detail is less important than the accuracy of the broad picture presented."

tually meaningless.[8] But respondent does contend that the post-remand survey was not sufficiently exact to support a reliable finding that respondent's overall market position increased by a fraction of 1% between 1954 and 1955. While it can be shown that not all of this increase can reasonably be accounted for by mistakes in estimation by the reporting companies,[9] there may be merit to respondent's position that the actual increase may not have been precisely .34%

We think it unnecessary to labor the issue of the trustworthiness *vel non* of the post-remand survey further, since that issue plainly has little bearing, at this point, on the central question of whether respondent has violated Section 7. Even if the post-remand survey were completely accurate, it would lend no substantial support to the theory that respondent's increased market shares are due to the challenged acquisitions. Since, in the year following respondent's first use of the acquired properties for production, its overall market position increased less than in any of the four previous years, it would be pure speculation to attribute that increase to the new productive facilities made possible by the acquisitions.

II.

The results of the survey ordered by the Court of Appeals place this case in a rather unusual posture. The purpose of the remand was to enable the record to be shored up on one of the principal grounds relied upon by the Commission, and challenged by respondent, on the appeal, in a case which, the court stated, raised "novel issues of law of transcending importance in the interpretation and application of the anti-trust laws". However, it is now clear that the Commission cannot rely on this ground, but must abandon it as unsupported by the evidence.

When this case is returned to the Court of Appeals, that court will be faced with the choice of deciding the appeal then and there on the basis of the remaining grounds advanced by the Commission in its decision, which are unaffected by the remand, or soliciting the views of the Commission on whether the remaining grounds support a finding of unlawfulness. The second alternative would necessitate remanding this case once again to the Commission. While we cannot predict which of these alternative courses of action will commend itself to the court, the second cannot be ruled out as a possibility, especially in view of the novelty and difficulty of this case and of the important

[8] The economist who conducted the post-remand survey testified that it would often happen that a reporting company, out of an abundance of caution and conservatism, would report as "estimates" what actually were highly precise figures.

[9] We have prepared Tables III and IV (appended to this opinion), the last column of which shows the percentage which the estimating companies would have had to overestimate their actual sales of each product if the entire increase in respondent's market share is to be explained by errors of overestimation.

Section 7 decisions—two of them by the Supreme Court [10]—which have occurred since this matter was last before the Court of Appeals.

In the interest of expediting this already protracted proceeding, we have decided to include in this opinion a brief statement of our view of the merits of the case in its present posture. In doing so, we desire only to clarify the rationale of the Commission's decision, so as to enable disposition of the appeal by the Court of Appeals without the necessity of a further remand to the Commission.[11]

We believe that the facts of this case, shorn of all evidence of market share trends during the period 1950–1955, nevertheless compel a finding that respondent's acquisitions violate Section 7 of the amended Clayton Act.

It is elementary market economics that a highly concentrated industry—one in which a very few firms account for a high percentage of total sales—, characterized by high barriers to entry by new competitors, is, from the stand-point of effective competition, unhealthy. The Commission has been gravely concerned with the increasing tendency toward undue concentration in the paper industry in general, a tendency that appears to be due largely to mergers.[12] As the Supreme Court recently pointed out, where an industry has already become competitively unhealthy and oligopolistic, even a slight further increase in the market power of the leading firms is extremely dangerous. It may eliminate what little competitive play remains in the industry; it may bring monopoly palpably closer; above all, it may eliminate or seriously retard, any possibility of an eventual movement toward deconcentration, toward a restoration of competitive health to the industry—the objective of antitrust policy.[13] If such a slight further

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[10] *Brown Shoe Co.* v. *United States*, 370 U.S. 294; *United States* v. *Philadelphia National Bank*, 374 U.S. 321.

[11] See note 3 above. The duty of an agency whose actions are subject to judicial review to explicate the grounds of its decisions clearly is well recognized. In the words of Mr. Justice Cardozo, the court "must know what a decision means before the duty becomes ours to say whether it is right or wrong." *United States* v. *Chicago M., St. P., & P. R. R.*, 294 U.S. 499, 511; and see *S.E.C.* v. *Chenery Corp.*, 318 U.S. 80, 94; *Erie Sand & Gravel Co.* v. *F.T.C.*, 291 F.2d 279 (3d Cir. 1961).

[12] See, e.g., *St. Regis Paper Co.* v. *United States*, 368 U.S. 208; *Crown Zellerbach Corp.* v. *F.T.C.*, 296 F.2d 800 (9th Cir. 1961); *F.T.C.* v. *International Paper Co.*, 241 F.2d 372 (2d Cir. 1956), 53 F.T.C. 1192; *Union Bag & Paper Corp.*, 52 F.T.C. 1278; *Inland Container Corp.*, F.T.C. Docket 7993; *Union Bag-Camp Paper Corp.*, F.T.C. Docket 7946. See also Mergers and Superconcentration, Staff Rep. of H.R. Select Comm. on Small Business, pp. 27–29 (1962); 1954 Census of Manufactures, MC–26A–1.

[13] The Supreme Court recently stated, "if concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great." *Philadelphia National Bank, supra*, at 365, n. 42. See also *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576, 607 (S.D.N.Y. 1958); *Procter & Gamble Co.*, F.T.C. Docket 6901 (decided November 26, 1963), pp. 57–60 [pp. 1574–1577 herein]; *Consolidated Foods Corp.*, F.T.C. Docket 7000 (decided March 22, 1963), p. 21 [62 F.T.C. 961]. The House Report on the bill to amend Section 7 expressed concern specifically with an "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". H.R. Rep. No. 1191, 81st Cong., 1st Sess. 8 (1949).

increase in market power is the product of corporate acquisition, the acquisition is clearly unlawful under Section 7.

At the time of the acquisitions challenged in this case, respondent was the dominant firm in a broad spectrum of important paper-product markets, each of these markets being highly concentrated and characterized by formidable entry barriers. Thus, respondent in 1950 had a 40% share of the household waxed paper market (52% in 1955), a 37% share of the toilet paper market (40%, 1955), and a 27% combind share of all the relevant product markets (33%, 1955). In 1950, the top 4 firms enjoyed a combined share of 76.5% of household waxed paper (85%, 1955), 59% of toilet paper (66%, 1955), and 48% of all the relevant products (58%, 1955). For the top 8 firms, these figures are 91% (96%, 1955), 70.5%, (78%, 1955), and 62% (72%, 1955).

But, because respondent was "oversold", its market position was vulnerable, its dominance insecure. In order to increase its productive capacity and so preserve its market control, respondent acquired three substantial going concerns in another branch of the paper industry. It thereby acquired strategic sites, proximate to raw-materials supplies, for new plant construction, and functioning organizations which could be, and were, integrated into respondent's production activities; and it did not have to pay cash (or incur obligations) for these assets, which had a value in excess of $100 million.[14] In fact, by 1958 38% of re-

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[14] Respondent's own documents (quoted in the Commission's factfindings, 57 F.T.C., at 1428–29) graphically describe the purpose and effect of the acquisitions:

"'* * * in November [1951] we consummated the most significant move in our history when we merged the Soundview Pulp Company of Everett, Washington into Scott. * * * [It] will not only go a long way toward solving the raw material problems in our present paper mills these next 5 years, but in addition provides us with the long-desired location for a West Coast paper mill, and under the most advantageous and efficient conditions * * *.

"'Invaluable assets contributed by Soundview to this merger are the high competence of its management and the demonstrated skill of its technicians and operating personnel. If Scott had to start from scratch in the building of such a large West Coast pulp plant, it would take years and large expenditures of money for the selection and training of such an organization.

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"'The additions of the Detroit and Hollingsworth & Whitney Divisions in 1954 brought us productive facilities at a cost far lower than that for new construction of comparable plants. We also joined forces with two experienced and trained organizations which could only have been developed to their present high degree of proficiency through the expenditure of thousands of dollars and many years of effort.

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"'* * * The Detroit plant is already producing and successfully finishing one Scott brand in addition to the paper stock for Cut-Rite wax paper. * * *

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"'For better control of costs, improved customer service and more efficient operations, it is imperative to have integrated plants located near controlled timber reserves and with transportation facilities available to carry finished products economically to the principal markets of the country.

"'The strategic locations of the newly added plants provide the opportunity not only for improving the efficiency of the Company's operations but for its further development and growth. National advertising and sales activities are more effective with the support of production facilities located in key areas throughout the country * * *.'"

spondent's total output of trademarked products was manufactured on the acquired properties. The conclusion seems inescapable that respondent not only maintained but actually increased its market power substantially through these acquisitions.

To be sure, respondent might have increased its productive capacity by other means, had the merger route been unavailable. But it is hardly likely that such other means would have been as practicable and effective. The chances are remote that, without acquiring the assets of substantial firms already active in the paper industry, respondent could have (1) obtained plant sites adjacent to a captive supply of raw materials, (2) obtained full corporate establishments, in being, which could be readily converted to respondent's production needs, and (3) avoided a prohibitively large cash outlay.

In short, had respondent taken the route of internal growth, its success in preserving its market dominance would have been less assured, and the prospects that its market power might be eroded and competition thereby increased would have been greater. Section 7 was intended to foreclose the easy path, through corporate acquisitions, to maintaining or achieving market dominance, and to encourage firms to take the harder, but socially more beneficial, path of internal growth.[15] In our view, the critical fact is that the cumulative effect of respondent's acquisitions was to expand its production capacity and competitive resources in a manner which would have been impossible had it relied entirely on internal growth, and which was absolutely essential if respondent was to preserve its position of market power. For the early 1950's were a period in which the market for household waxed paper and sanitary paper products was expanding rapidly, as can be seen from a comparison between Tables I and II: respondent's shipments of all relevant products in the period 1950–1955 increased almost 60%, while its market-shares increase was less than 25% (from 27% to 33% overall).

Of course, the antitrust laws are not designed to punish the successful competitor. "The successful competitor, having been urged to compete, must not be turned upon when he wins." *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 430 (2d Cir. 1945). But even under the Sherman Act, the methods of growth employed by a firm have been considered intensely relevant to the question of the legality of its conduct; and methods innocuous in themselves may be forbidden where they are shown to be steps in a plan or scheme to monopolize a market. *Id.*, at 429–31. Here, respondent used the technique of mergers to achieve what it could not achieve by

[15] As the Supreme Court recently said, "surely one premise of an antimerger statute such as § 7 is that corporate growth by internal expansion is socially preferable to growth by acquisition." *Philadelphia National Bank, supra*, at 370.

"natural", internal growth, that is, the entrenchment of its market control to the detriment of competition. And respondent's merger behavior was part of a larger, industry-wide pattern of merger activity (see note 12 above), the probable result of which, if allowed to continue, would be to transform the entire structure of the paper-products industry in a direction inimical to free and vigorous competition.

Had respondent's merger activity been shown to have been accompanied by an intent to monopolize the markets in which it was interested, respondent might well have been found to have engaged in a forbidden attempt to monopolize under Sherman Act principles. The amended Section 7 of the Act goes beyond the Sherman Act. Congress recognized that mergers were a unique method of growth, and that the various merger movements in American history had brought about grave and irreversible changes in the structure of the American economy. It therefore forbade all mergers whose probable effect was to lessen competition substantially, or tend to create a monopoly. Congress did not intend Sherman Act principles to govern the interpretation and application of the amended Section 7. *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 318. Nor was its concern limited to any particular type of mergers; it was concerned with the probable effects on competition of any merger, vertical, horizontal, or other. We think that respondent's merger activity, while falling short of a Sherman Act attempt to monopolize, clearly violates Section 7.

Our conclusion is unaffected by the fact, as it now appears, that respondent's percentage shares in the relevant markets did not suddenly spurt upward in the year following respondent's first use of the new productive capacity obtained through the challenged acquisitions. It is now clear, as it may not have been when this proceeding was commenced, that evidence of post-acquisition anti-competitive effects is not essential to a finding of a Section 7 violation.[16] If an acquisition increases market power in the degree forbidden by the section, it is unlawful whether or not the anti-competitive effects of the increase are immediately apparent in changed market shares; and this principle holds true whether the challenged acquisition be classified as "horizontal", "vertical", "conglomerate", or other, since the legal test of Section 7 is identical for all corporate acquisitions.[17] In this, as in most Section 7 cases, what evidence of post-acquisition

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[16] See, e.g., *Brown Shoe Co., supra,* at 322–23 and nn. 38–39; *Philadelphia National Bank, supra,* at 362; cf. *Standard Oil Co.* v. *United States,* 337 U.S. 293, 308–09. In fact, as the Commission recently observed, evidence of post-acquisition competitive effects is not only not necessary, but rarely is it of much probative value. *Procter & Gamble Co.,* F.T.C. Docket 6901 (decided November 26, 1963), p. 38 [p. 1559 herein].

[17] H.R. Rep. No. 1191, 81st Cong., 1st Sess. 11 (1949); *Brown Shoe Co.* v. *United States, supra,* at 317; *Procter & Gamble Co., supra,* pp. 20–21.

Table I: Shipments by Scott (in tons)

	1950(rev.)	1951	1952	1953	1954	1955(rev.)
All Products Covered by the Survey	317, 213	354, 056	366, 521	414, 684	451, 077	504, 216
All Resale Products	278, 070	306, 271	324, 113	367, 231	406, 399	452, 668
All Industrial Products	39, 143	47, 785	42, 408	47, 453	44, 678	51, 548
All Toilet Paper	194, 029	222, 658	221, 182	247, 108	259, 829	280, 125
Resale	185, 199	208, 199	211, 464	236, 383	248, 987	267, 423
Regular Grade	146, 735	169, 022	165, 693	182, 613	190, 589	205, 127
Facial Grade	38, 464	39, 177	45, 771	53, 770	58, 398	62, 296
Industrial	8, 830	14, 459	9, 718	10, 725	10, 842	12, 702
All Paper Towels	61, 479	67, 210	75, 502	87, 786	95, 328	113, 879
Resale	31, 166	33, 884	42, 812	51, 058	61, 492	75, 033
Industrial	30, 313	33, 326	32, 690	36, 728	33, 836	38, 846
Facial Tissue	24, 033	25, 165	24, 719	30, 126	33, 770	38, 901
All Paper Napkins	0	7	134	1, 267	8, 376	17, 509
Resale	0	7	134	1, 267	8, 376	17, 509
Regular Grade	0	0	0	0	0	0
Facial Grade	0	7	134	1, 267	8, 376	17, 509
Industrial	0	0	0	0	0	0
Household Waxed Paper	36, 672	39, 016	44, 984	48, 397	53, 774	53, 802

anti-competitive effects there is is equivocal. Respondent's relatively stable market position during 1954–1955 may be consistent with an inference that its acquisitions did not enhance its market power; but it is equally consistent with an inference that they enabled respondent to maintain its market shares at their existing high level.

Finally, we wish to emphasize that our conclusion that respondent has violated Section 7 is not founded on any *per se* rule of unlawfulness. It is not the Commission's view that, merely because respondent is a leading firm in a number of oligopolistic markets, any corporate acquisition it may make is violative of, or necessarily suspect under, Section 7. This case was not tried or decided on any such theory. Rather, an extensive record was compiled, establishing in great factual detail the probable effects of the challenged acquisitions on the market power of respondent. See 57 F.T.C., at 1416–34. Our finding of unlawfulness rests on an appraisal of the particular facts of this case; no short-cuts have been attempted. The Commission has not relied upon, and does not urge adoption of, any sweeping theories of Section 7 liability.

Commissioner Anderson concurred in the result and Commissioner MacIntyre did not participate.

Table II: Scott's Percentage Share of Market

	1950 (rev.)	1951	1952	1953	1954	1955 (rev.)
All Products Covered by the Survey	27. 05	29. 18	31. 51	32. 12	32. 76	33. 10
All Resale Products	32. 56	35. 89	38. 60	39. 05	40. 36	40. 74
All Industrial Products	12. 28	13. 27	13. 10	13. 53	12. 07	12. 51
All Toilet Paper	36. 89	40. 38	42. 84	42. 56	41. 82	40. 23
Resale	41. 00	44. 99	47. 54	47. 29	46. 51	44. 49
Regular Grade	45. 06	49. 90	51. 77	51. 82	51. 48	49. 53
Facial Grade	30. 53	31. 58	36. 70	36. 48	35. 36	33. 34
Industrial	11. 88	16. 31	13. 59	13. 27	12. 61	13. 34
All Paper Towels	23. 55	23. 67	27. 86	29. 33	29. 82	31. 35
Resale	41. 28	47. 47	56. 06	56. 59	60. 97	63. 42
Industrial	16. 34	15. 68	16. 80	17. 57	15. 46	15. 86
Facial Tissue	14. 05	16. 11	16. 42	17. 43	18. 79	20. 34
All Paper Napkins	0	0. 01	0. 10	0. 91	5. 47	10. 34
Resale	0	0. 01	0. 18	1. 63	9. 55	17. 99
Regular Grade	0	0	0	0	0	0
Facial Grade	0	0. 09	1. 59	11. 40	43. 67	60. 21
Industrial	0	0	0	0	0	0
Household Waxed Paper	40. 70	40. 88	47. 31	48. 47	52. 11	52. 12

Table III: Comparison of 1953–1955

Item	Scott's market share		Percentage of total tonnage represented by estimating companies	Overestimation required as a percent of actual tonnage [1]
	1953	1955		
Toilet tissue	42. 56	40. 23	19. 8	----------
Towels—Total	29. 33	31. 35	12. 9	98. 4
Facial tissue	17. 43	20. 34	15. 9	890. 1
Napkins—Total	0. 91	10. 34	25. 3	[3]
Household waxed paper	48. 47	52. 12	13. 6	106. 6
Combined	32. 12	33. 10	17. 8	20. 3

Footnotes at end of table

Table IV: Comparison of 1954–1955

Item	*Scott's market share*		*Percentage of total tonnage represented by estimating companies*	*Overestimation required as a percent of actual tonnage* [2]
	1954	*1955*		
Toilet tissue	41. 82	40. 23	19. 4	----------
Towels—Total	29. 82	31. 35	13. 5	57. 0
Facial tissue	18. 79	20. 34	15. 8	92. 7
Napkins—Total	5. 47	10. 34	24. 3	[3]
Household waxed paper	52. 11	52. 12	14. 0	0
Combined	32. 76	33. 10	17. 7	5. 9

[1] Assuming that Scott's "true" market share in 1953 is equal to that of 1955, this is the extent of the net total *overestimation*, by those companies submitting estimates, required to depress Scott's 1953 market share to that shown above.

[2] Assuming that Scott's "true" market share in 1954 is equal to that of 1955, this is the extent of the net total *overestimation*, by those companies submitting estimates, required to depress Scott's 1954 market share to that shown above.

[3] Scott's 1955 market share of paper napkins sales would have been greater than its 1953 and 1954 shares even if the estimating companies' sales were excluded entirely from the universe in 1953 and 1954.