

IN THE MATTER OF
TILLIE LEWIS FOODS, INC., ET AL. FORMERLY FLOTILL
PRODUCTS, INC.

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

Docket 7226. Complaint, Aug. 6, 1958—Decision, June 26, 1964

Order requiring Stockton, Calif., canners of various fruits and vegetables to cease paying or granting to any buyers of its products, or to anyone acting in their behalf or subject to their control, anything of value as brokerage in the sale of respondent's products to such buyers, and to cease granting promotional allowances to certain customers without making such payments available on proportionally equal terms to other purchasers competing with such favored customers.

COMPLAINT

The Federal Trade Commission having reason to believe that the respondents named above have violated, and are now violating, the provisions of Sections 2(c) and 2(d) of the amended Clayton Act (U.S.C. Title 15, Sec. 13), hereby issues its complaint as follows:

Count I

PARAGRAPH 1. Respondent Flotill Products, Inc., is a California corporation with its principal office and place of business located at Fresno and Charter Way Street, Stockton, California.

Respondents Mrs. Meyer L. Lewis, Albert S. Heiser, and Arthur H. Heiser are individuals, principal stockholders, and officers of respondent Flotill Products, Inc. These individual respondents maintain their office and place of business at the same address as that of the corporate respondent. As officers and principal stockholders, the individual respondents exercise authority and control over the corporate respondent.

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ent and its business activities, including the direction of its sales and distribution policies referred to in this complaint.

PAR. 2. Flotill is principally engaged in the processing, canning and sale of various fruit and vegetable items such as peaches, fruit cocktail, and tomatoes, in a variety of sizes under 12 or more company-owned and numerous private labels.

PAR. 3. These products are sold by respondents for use, consumption or resale within the United States and respondents cause them to be shipped and transported from the state of location of their principal place of business to purchasers located in states other than the state wherein shipment or transportation originated.

Respondents maintain, and at all times mentioned herein have maintained, a course of trade in commerce in such products, among and between the states of the United States.

PAR. 4. Respondents maintain and operate the plants in Stockton and one plant in Modesto, California. From these plants they ship and sell throughout the United States directly to large chain groceries and through brokers to smaller wholesale and retail grocers.

Flotill's annual volume of sales for the year ending December 31, 1956, was in excess of \$21,000,000.

PAR. 5. In the course and conduct of their business in commerce, respondents make substantial sales direct to certain favored buyers without utilizing the services of their brokers, and on these direct sales respondents have granted or allowed, and are now granting and allowing, discounts in lieu of brokerage, or have made sales to these direct buyers at reduced prices which reflect brokerage. In other instances respondents have made sales to at least one favored buyer through brokers on which sales the favored buyer was granted a discount in lieu of brokerage, or a lower price which reflects brokerage, which discount or lower price was partially offset by reducing the amount of the brokerage the respondents usually pay their brokers.

Among and including the methods or means employed by respondents in so doing are the following:

(a) Granting or allowing to certain buyers discounts or allowances of approximately $2\frac{1}{2}\%$, or by granting lower net prices by this amount, where the services of brokers are not utilized.

(b) Granting or allowing to at least one favored customer on certain sales through brokers a discount or allowance of approximately 2 percent on which sales the amount of brokerage the respondents usually granted amounted to $2\frac{1}{2}$ percent.

PAR. 6. The foregoing acts and practices of respondents, as alleged, violate Section 2(c) of the amended Clayton Act (U.S.C. Title 15, Sec. 13).

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Count II

PAR. 7. Each of the allegations contained in Paragraphs One through Four of this complaint are now realleged and incorporated in this Count as if they were set forth in full.

PAR. 8. Respondents, in the course and conduct of their business in commerce, have been paying advertising and promotional allowances to certain favored purchasers without making the allowances available on proportionally equal terms to all other purchasers competing in the distribution of their products.

For example, respondents have given special promotional allowances to certain of their purchasers which in some instances amounted to one percent of the purchase price. Such allowances were not made available on proportionally equal terms by respondents to other purchasers competing in the resale of respondents' products with those receiving the allowances.

PAR. 9. The acts and practices of respondents, as alleged, violate Section 2(d) of the amended Clayton Act, (U.S.C. Title 15, Sec. 13).

Mr. Basil J. Mezines and Mr. John H. Brebbia for the Commission.
Howrey, Simon, Baker & Murchison, Washington, D.C., by *Mr. William Simon and Mr. J. Wallace Adair*; and
Mr. Jefferson E. Peyser, San Francisco, Calif., for respondents.

INITIAL DECISION BY WILMER L. TINLEY, HEARING EXAMINER

MARCH 25, 1963

The Federal Trade Commission on August 6, 1958, issued and subsequently served its complaint charging the respondents named in the caption hereof with violations of subsections (c) and (d) of Section 2 of the Clayton Act, as amended. Answers were filed on November 17, 1958, denying the violations alleged in the complaint.

Subsequent to motions and orders with respect to subpoenas and other matters, the initial hearing was held in San Francisco, California, on July 7, 1959, at which time the respondents refused to comply with a subpoena duces tecum. Thereafter the proceedings were in abeyance during litigation for enforcement of the subpoena, which was concluded on December 12, 1960, by the Supreme Court's denial of respondents' petition for certiorari.

The present hearing examiner is the third to be assigned to this proceeding. On September 12, 1961, he was substituted for the hearing examiner then presiding. On February 23, 1962, a pre-hearing conference was held in Washington, D.C., the transcript of which, by agreement of counsel, was made a part of the public record herein. No ob-

jection was made to the substitution of the hearing examiner, and at the pre-hearing conference counsel agreed that the record theretofore made in this proceeding may be considered a part of the record for consideration by the present hearing examiner.

Hearings were thereafter held in support of the complaint in San Francisco, California, on April 16, 17 and 18, 1962, and in Boston, Massachusetts, on June 18 and 19, 1962. Defense hearings were held in San Francisco, California, on November 13, 14 and 15, 1962. A final hearing was held in Washington, D.C., on January 2, 1963, at the conclusion of which the record was closed for the reception of evidence. The transcript of testimony, including the pre-hearing conference, covers 1,293 pages. Almost 300 exhibits offered by counsel supporting the complaint, and 17 exhibits offered by respondents, were received in evidence, and the record also contains numerous motions and orders disposing of them. Proposals and replies thereto have been timely filed by the parties.

After having carefully considered the entire record in this proceeding and the proposals and contentions of the parties, the hearing examiner issues this Initial Decision. Findings proposed by the parties, which are not adopted herein, either in the form proposed or in substance, are rejected as not being supported by the record or as involving immaterial matters.

FINDINGS OF FACT

1. Respondent Flotill Products, Inc. (now Tillie Lewis Foods, Inc.) is a California corporation, with its principal office and place of business located at Fresno Avenue and Charter Way, Stockton, California. The name of the corporate respondent was changed to Tillie Lewis Foods, Inc. in June 1961, but since the evidence relates essentially to its operations under its original name, it will be referred to herein as Flotill or Flotill Products, Inc.

2. Respondents Mrs. Meyer L. Lewis, Albert S. Heiser and Arthur H. Heiser are individuals and are stockholders and officers of Flotill. These individual respondents maintain their office and place of business at the same address as that of the corporate respondent. The complaint alleges, in effect, that these individual respondents are responsible for the acts and practices of Flotill which are challenged in the complaint. Counsel supporting the complaint contend that each of them should be included in their individual capacities in any order to cease and desist which may be entered herein. The responsibility of the individual respondents is discussed more fully below.

3. Flotill is principally engaged in the processing, canning and sale of various fruit and vegetable items, such as peaches, fruit cocktail,

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asparagus and tomatoes, in the standard grades and in a variety of sizes. Its products are sold under a number of company owned labels and numerous private labels owned by its customers or by brokers. Approximately 75% of its sales of labeled canned goods are packed under such private labels. The company also packs a line of dietetic foods, but no question is raised with respect to Flotill's practices in connection with such products. References herein to Flotill products are intended, therefore, to exclude its line of dietetic foods except as otherwise specifically noted.

4. Its products are sold by Flotill for use, consumption or resale within the United States, and it causes them to be shipped and transported from the state of location of its principal place of business to purchasers located in states other than the state wherein shipment or transportation originated. Flotill maintains, and at all times mentioned herein has maintained, a course of trade in commerce in such products, among and between the states of the United States.

5. Respondent Flotill maintains and operates plants in Stockton and one plant in Modesto, California. From these plants it sells and ships throughout the United States, directly or through brokers, to approximately six hundred buyers, including chain groceries and retail grocers. Flotill's volume of sales for the year ending December 31, 1956, including its sales of dietetic foods, was in excess of \$21,000,000.

Responsibility of Individual Respondents

6. Respondent Mrs. Meyer L. Lewis, also known as Tille Lewis, owns 94.5% of the stock of the corporate respondent and, as its President and executive officer, she sets its policies and controls its general management. She started the company in 1935, and until the early 1940's she personally participated in the details of all of its affairs, including its sales and pricing policies and practices. During the years 1956 through 1958, to which period the evidence relates, she had delegated to Albert S. Heiser full authority for the sales practices, programs, prices, allowances, and similar activities of the corporation, and did not actively participate in those matters. She was, however, fully responsible for the conduct of those affairs by Albert S. Heiser on behalf of the corporation.

7. Respondent Albert S. Heiser owns 2.744% of the stock of the corporate respondent and is its Vice President in charge of sales. He has responsibility for, and exercises active direction and control of the sales program of the company and of its advertising and pricing policies. He has had such duties and responsibilities continuously since some time prior to 1956.

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8. Respondent Arthur H. Heiser owns 2.748% of the stock of the corporate respondent and is its Vice President in charge of production. He does not participate in determining or effectuating the sales, advertising or pricing policies of the corporation. Such responsibility as he has in those matters derives only from his position as an officer of the corporate respondent.

9. The respondent corporation is closely held, and its activities are directed and controlled by the three individual respondents. Albert S. Heiser has primary responsibility for the activities of the corporation challenged in this proceeding, and Mrs. Meyer L. Lewis is also fully responsible for those activities, although she does not actively participate in them personally. Arthur H. Heiser does not participate in the challenged activities of the corporation, and his only responsibility for them is by virtue of his position as a corporate officer. In these circumstances, counsel supporting the complaint contend that all three of these officers should be included in the order to cease and desist in their individual capacities.

10. In support of this contention, reliance is placed primarily upon *F.T.C. v. Standard Education Society*, 302 U.S. 112, 119 (1937). In that case, the Supreme Court pointed out that the Commission had properly found that the corporation was organized by the individual respondents for the purpose of evading any order which might be issued, and said:

Since circumstances, disclosed by the Commission's findings and the testimony, are such that further efforts of these individual respondents to evade orders of the Commission might be anticipated, it was proper for the Commission to include them in its cease and desist order.

11. The quoted language provides the standard which, expressly or by implication, appears to have been followed by the Commission and the courts since that decision. The January 17, 1963, decision of the United States Court of Appeals for the Fourth Circuit in *Patipart, Inc., et al. v. F.T.C.* [7 S.&D. 639], which relies upon the *Standard Education Society* case, adopts the same reasoning and reaches essentially the same result.

12. In 1956, the Commission sustained dismissal of a complaint against an individual respondent who was Chairman of the Board and Treasurer of the respondent corporation. In doing so, it stated, *inter alia*:

There is no showing, moreover, of any special circumstances which would indicate a likelihood that Joseph Shapiro would cause an evasion of the order against the corporation. He is, in any event, bound by the order as a corporate officer. In the absence of some special reason for naming Joseph Shapiro personally, the order against the corporation, and its officers, representatives,

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agents, and employees would seem to be adequate (*In the Matter of Maryland Baking Company, et al.*, Docket 6327, 52 F.T.C. 1679, 1691.)

13. On the basis of similar reasoning, the Commission reached essentially the same results *In the Matters of Wilson Tobacco Board of Trade, Inc., et al.*, 53 F.T.C. 141, 190 (1956); *Newville, Inc., et al.*, 53 F.T.C. 436, 444-445 (1956); and *Kay Jewelry Stores, Inc., et al.*, 54 F.T.C. 548, 560-561 (1957). In the latter case, in a *per curiam* opinion, the Commission stated in pertinent part:

The Commission has wide discretion in determining the necessity of attaching individual liability to insure the full effectiveness of an order to cease and desist. But where there is no record evidence showing justification and where "no other circumstances appear pointing to the necessity of directing the order against these parties in their individual as distinguished from their official capacities" (citing *Wilson Tobacco Board of Trade, Inc., et al., supra*), their inclusion as individuals should not be approved (citing *Newville, Inc., et al.* and *Maryland Baking Company, et al., supra*).

14. In *Clinton Watch Co., et al. v. F.T.C.*, 291 F. 2d 838, 841 (7th Cir., 1961), the Court affirmed the authority of the Commission to bind two officers "in their capacities as corporate officials". The decision of the Commission in that case specifically held that the circumstances justified "dismissal of the complaint as to these persons in their individual capacities". (57 F.T.C. 222, 231.)

15. Careful consideration has been given to the other cases cited by counsel supporting the complaint in support of their position. Those cases do not, however, alter or materially affect the principle followed by the Commission in the exercise of its "wide discretion in determining the necessity of attaching individual liability to insure the full effectiveness of an order to cease and desist" (*Kay Jewelry Stores, Inc., et al., supra*). That principle, whether expressed or implied, is that persons will not be included in orders to cease and desist in their individual as distinguished from their official capacities, except upon a showing of special circumstances which would indicate a likelihood that failure to do so may cause an evasion of the order against the corporation.

16. No circumstances warranting attaching liability to the individual respondents are present here. The corporate respondent is a stable organization which has long been engaged in its present line of business. It is not a sham corporation, and there is no history of corporate reorganizations or of any disposition to use the corporate form as a device to evade legal responsibility. There is no showing and no suggestion of any special circumstances which would indicate a likelihood that the individual respondents would cause an evasion of any order which may be entered herein against the corporation. In these circum-

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stances, an order "against the corporation and its officers, representatives, agents and employees, would seem to be adequate." (*In the Matter of Maryland Baking Company, et al., supra.*)

17. The complaint will accordingly be dismissed as to the officers of the corporation in their capacities as individuals, but they will, of course, be bound by the order as officers of the corporation.

Section 2(c) of the Clayton Act

18. Briefly stated, Count I of the complaint charges that Flotill violated Section 2(c) of the Clayton Act by granting discounts in lieu of brokerage to direct buyers. Counsel supporting the complaint contend that the evidence with respect to this charge discloses that Flotill made sales to certain parties described as field brokers, "and on such sales granted brokerage or an allowance or discount in lieu thereof"; and that it made sales to a favored customer, Nash-Finch Company, on which it "granted brokerage, labeled as an advertising allowance", and on which it paid brokerage to a broker "acting for Nash-Finch in arranging pool car shipments of merchandise from Flotill". The transactions with field brokers and with Nash-Finch have distinctly different characteristics which require separate consideration.

Transactions With Field Brokers

19. There is little dispute concerning the basic facts with respect to the operations of field brokers, but there is wide disagreement concerning the significance of those facts and the application of the law to them. On this phase of the case, the evidence relates to transactions of Flotill involving three field brokers, A. M. Beebe Company, Harcourt-Greene Company, and Walter M. Field & Company, all located in San Francisco, California. On these transactions, which were substantial, Flotill paid brokerage to the field brokers. Although the specific evidence relates to 1956 and 1957 transactions, the testimony of the witnesses indicates that the same type of transactions have continued to the present time.

20. Counsel supporting the complaint contend that these field brokers were acting as buyers and resellers for their own accounts, and that the transactions constituted sales to them for their own accounts. Counsel for respondents contend that the field brokers operate as nation-wide sales agents for canners and are compensated on a commission basis, that they invoice the buyers for the "convenience of", as an "accommodation to", or as "agents for" the canners, and that they do not purchase for their own accounts, but act solely as brokers for and on behalf of canners.

21. Food brokers who may be generally referred to herein as local brokers, and who have also been variously referred to in this record as direct, regular, traditional, or conventional brokers, or as sub-brokers, deal directly with the buyers, usually wholesale grocers or large retail grocers such as retail chain stores. They are usually located in the same general areas as the buyers to whom they sell and at considerable distances from the areas in which the canners are located. They are in close touch with the buyers in their areas, and are in position constantly to know, and often to anticipate, their requirements.

22. Because of the distances involved, however, the local brokers are not in as close contact with the canners as with the buyers, and in many instances have found it advantageous to deal with the canners through intermediaries who are generally designated in the trade as field brokers. The local brokers, whether they negotiate sales to the buyer directly by the canner or through the intervention of a field broker, perform the functions and operate in the manner customarily associated with brokers, and ordinarily receive a brokerage commission of $2\frac{1}{2}\%$ on canned fruits and asparagus, and 2% on other canned vegetables.

23. There is some indication in the record, which is far from conclusive, that there are as many as 150 field brokers in the United States. It appears, however, that only about four or five are now operating in California, and it is the operations of the field brokers in California with which this proceeding is concerned. Representatives of three of the California field brokers, Beebe, Harcourt-Greene and Field, referred to above, appeared as witnesses in this case, and all of them had dealt with and received brokerage payments from Flotill. This discussion of field brokers is, accordingly, based entirely upon the characteristics of the operations of those three field brokers.

24. These field brokers are located in San Francisco in proximity to the California canners of fruits and vegetables. All of them deal to some extent with all of the California canners, and to a very limited extent they also deal with canners in nearby states. The field brokers are in close touch with the California canners and keep informed concerning their current and potential stocks and the availability of particular items from each of them.

25. The familiarity of the field brokers with conditions of supply and demand among the California canners accounts for a substantial volume of their business in the form of inter-canner sales. In these transactions, they assist canners to dispose of items with which they may be over-supplied, and to obtain items to complete or supplement their packs or sales requirements. These are quantity sales which re-

quire relatively little sales effort and in which sub-brokers do not participate, and on these transactions the field brokers ordinarily receive a commission of 1%. Inter-canner sales, and the payment of brokerage to the field brokers on such sales, are not challenged in this proceeding. Reference is made to them, however, as one of the important activities of field brokers, and one which contributes to their effective performance of the functions for which they receive the challenged brokerage payments.

26. On sales which they make to wholesale grocers or large retail grocers such as chain stores, the field brokers ordinarily receive from the canners generally, and from Flotill specifically, brokerage commissions of 5% on fruits and asparagus, and 4% on other vegetables. In such sales the field brokers function primarily as intermediaries between the California canners and local brokers, and the local brokers ordinarily receive from the field brokers half of the brokerage commission paid by the canners. In some instances, apparently quite limited, the field brokers sell directly to the purchaser without the intervention of local brokers, and in these instances the full brokerage commission is retained by the field brokers.

27. The record shows in considerable detail the nature and course of Flotill's transactions with field brokers. Typically, orders are obtained by a field broker from a local broker, and to a less extent directly from wholesale or large retail grocers. The merchandise is then ordered by the field broker from Flotill. In many instances, Flotill does not at that time know the identity of the customer of the field broker, or the identity of the local broker, and does not necessarily know whether or not a local broker is involved in the transaction. When it receives shipping instructions, however, Flotill can usually determine the identity of the ultimate purchaser. The merchandise is invoiced by Flotill to the field broker. Flotill looks to the field broker for payment, and not to the ultimate purchaser.

28. Respondent Albert S. Heiser testified that a field broker always takes title to the merchandise, that it is his understanding that the sale is made to the ultimate purchaser in the name of the field broker, and that the field broker competes with Flotill's traditional broker (Tr. 310-11). He said that the field broker does not want the customer to know who the packer is because the packer may go directly to the customer; and that Flotill does not want to become known as the packer because it has a local representative who is also trying to get the business (Tr. 315). For the most part, merchandise involved in transactions with field brokers is sold under private labels owned either by the field broker or by the customer (Tr. 315-16). Shipments are made by Flotill directly to the ultimate purchaser, and the field

broker is shown as the shipper (Tr. 318). Other testimony makes it clear that the field broker pays Flotill for the merchandise under the terms of its invoice to him, and his payment to Flotill does not depend upon when or if he receives payment from the ultimate purchaser (Tr. 438-39, 449).

29. The field broker does not have a warehouse, the merchandise is not shipped to him, and it does not come into his possession. He does not purchase from Flotill for speculative resale. Except for a rare situation referred to below, the merchandise is invoiced by the field broker at the same price he pays to Flotill, and he passes on to the purchaser the same discounts and allowances, including cash discounts, label allowances, etc., which he receives from Flotill. Any price adjustments which he receives, due to market fluctuations or other causes, are also passed on to the purchaser.

30. The field broker's total profit or compensation is the brokerage which he receives from Flotill, half of which he passes on to the local broker when one is involved in the transaction. The field broker does not pass on to the ultimate purchaser any part of the brokerage which he receives from Flotill, but retains it all, except to the extent of his payments to local brokers.

31. The evidence disclosed that in a few instances one of the field brokers whose representative testified, Harcourt-Greene Company, invoiced the ultimate purchaser at a price slightly higher than the price at which the merchandise had been billed by Flotill. For example, Flotill's price on a particular item was \$1.20, and Harcourt's price was \$1.22½. With respect to these instances, the witness stated:

Yes, on some of the small orders that converge on retail orders, we have increased the price slightly to take care of the additional expense involved, the collection charges, the interest on money outstanding, and so forth. It costs us two or three dollars more just to handle the paper work on something of this type. (Tr. 513.)

32. There is nothing to indicate that these transactions are typical of any substantial portion of Harcourt's business. On the contrary, they appear to be exceptional instances, and there is no contention that there were any in addition to the few specific instances which appear in evidence. It is clear that even these instances did not represent speculative transactions, but represented a genuine effort to cover additional expenses incident to these small sales.

33. There is no evidence and no suggestion that either of the other field brokers whose representatives testified ever invoiced merchandise to ultimate buyers at higher or different prices than those received from Flotill. While these transactions of Harcourt-Greene demonstrate that the field broker may, in rare instances, invoice merchandise

at higher prices than they pay, the record as a whole makes it clear that they do not do so on any significant scale, and that, because of competitive conditions, they would probably be unsuccessful if they attempted to do so. These instances represent sharp departures from the method of operations of field brokers as disclosed by this record, and provide no substantial basis for a conclusion that, in dealing with Flotill, field brokers buy and sell on a speculative basis. They will, accordingly, be disregarded in the further consideration of this issue.

34. Reference should also be made to evidence of another sharp departure from the customary practices of field brokers. Flotill gives the field brokers a discount of 2% for payment in ten days, which discount is passed on to the ultimate purchaser. The witness representing Walter M. Field & Company testified that this cash discount is usually passed on to the ultimate purchaser even if he does not pay the bill within ten days. He was able to recall one instance, however, when "a big New York firm" did not pay Field "quite a large sum of money" for about six weeks, and in that instance the 2% cash discount was not allowed to the purchaser (Tr. 1176-77). The evidence of this instance serves to illustrate by its rarity that cash discounts, even though not always earned, are customarily passed on to the ultimate purchaser by the field brokers.

35. From the record as a whole, the conclusion seems clear that in the transactions here in question Flotill deals with the field brokers and not with the ultimate purchasers. It sells and invoices the merchandise to the field broker, extends credit to him, and looks only to him for responsibility in the transactions. It is believed that in these circumstances title to the merchandise passes from Flotill to the field broker, and that legally the field broker is "the other party" to the transaction. It would seem to follow, therefore, that, as contended by counsel supporting the complaint, in its transactions with field brokers Flotill pays brokerage to the other parties to such transactions in violation of Section 2(c) of the Clayton Act.

36. If this is the legal effect of the transactions, it seems obvious that minimally all of the field brokers with which Flotill deals, and substantially all of the California canners of fruits and vegetables, are also engaged in violations of Section 2(c) because of similar transactions. Respondents urge that this practice has never heretofore been challenged by the Commission, and that it has long been followed by members of the industry confident in the belief that it involved no question of illegality. While not controlling, these considerations warrant a careful examination of the legal and economic consequences of the practice, particularly so in the light of the Commission's recent

decision in the *Hruby* case (Docket 8068, Opinion on Order Dismissing Complaint, December 29, 1962) [61 F.T.C. 1437].

37. What real purpose do the field brokers serve? What advantages or disadvantages accrue to the canners, local brokers, and ultimate purchasers from the activities of the field brokers? Why is the merchandise invoiced by the canners to the field brokers, rather than to the ultimate purchasers? These and similar questions were discussed by various witnesses, and the answers to them are probably fairly summarized by the representative of one of the field brokers on pages 447 through 452 of the transcript.

38. Based on the evidence as a whole, it is apparent that the field brokers perform useful and valuable services to the canners, particularly those not large enough to have their own nation-wide sales and distribution organizations, or to have adequate supplies or complete assortments of canned fruits and vegetables. It is also apparent that they perform equally useful and valuable services to local brokers and ultimate purchasers, particularly those purchasers not large enough to have their own buying organizations or to buy from a single canner in sufficient quantities for carload shipment.

39. Because they are able to combine merchandise from various canners, field brokers are frequently able to secure orders which some of the smaller canners might not otherwise get because of incomplete lines of products or inadequate supplies of particular items. Without the field brokers, many such orders might go only to the few large canners with sufficiently complete lines to make carload shipments.

40. Most of the merchandise handled through field brokers is sold under private labels, either those owned by the broker or by the ultimate buyer. The field broker can more effectively accomplish the coordinated sale and labeling of such private label merchandise, particularly when various items or quantities of the same item are supplied by several canners.

41. The field brokers perform many of the functions of regular brokers, but, because of their proximity to the California canners and their consequent familiarity with conditions of supply and demand in that area, they afford services to both buyers and sellers which in many instances cannot be efficiently provided by the distantly located local brokers. They are able more effectively to fulfill the demands of the ultimate purchasers from the available supplies of the California canners, and, because of their wide contacts with local brokers, they are able more effectively to sell the merchandise of small canners in distant markets.

42. As stated by one of the field broker witnesses:

* * * we act as an agent to bring all these phases of operations together for the benefit of both the buyer and the canner, and in most cases for a number of canners at a time. (Tr. 448.)

All of these circumstances indicate that the field broker is performing substantial brokerage functions, and raise the question as to why the canner invoices the merchandise to him, rather than to the ultimate buyer. Several reasons for this have been assigned by the witnesses.

43. Canners, including Flotill, are represented by regular brokers on an exclusive basis in various local areas. When orders come to Flotill from those areas through a field broker, it prefers not to bill the buyer directly. It does not desire to become identified as the supplier and raise questions of conflict with its regular broker in the area. The field broker thus provides the canners with alternative local broker representatives in particular areas in competition with the canners' regular brokers.

44. On the other hand, field brokers frequently do not want the canners to know the identity of the ultimate buyers. They desire to avoid, as much as possible, the likelihood of direct dealings between the canner and the buyer which may result in the elimination of the field broker. As stated by the representative of one of the field brokers:

We are trying to keep the customers coming to us instead of bypassing us, * * * (Tr. 451).

45. The small canners sometimes need financing in order to get merchandise released from warehouses where it may be held under collateral loans. By invoicing the field broker and receiving advance or prompt payment from him, instead of waiting for the money from the buyer, these financing needs are frequently met.

46. In the light of the foregoing considerations, it is apparent that the field brokers here occupy "a functional level midway between the producers of foodstuffs and the wholesalers who serve retail grocery stores" (*Hruby* case, *supra*) and, indeed, between the producers and local brokers. They sell to a class of purchasers which ordinarily buys from producers, and they do not sell as wholesalers in competition with those purchasers.

47. The many cases relied upon by counsel supporting the complaint are discussed at pages 62 through 69 of their proposals and at pages 4 through 6 of their reply brief. Those cases have been carefully considered, and, without undertaking a detailed analysis of each of them in this discussion, the hearing examiner has not been able to find in any of them the crucial factual situation presented for decision here. The contention of counsel supporting the complaint seems to turn essentially upon the factual conclusion contained in their summation

at page 24 of their proposals "that field brokers set their own prices." This is the basic ingredient of speculative buying and selling. It is the opinion of the hearing examiner, however, that the evidence does not support that factual conclusion.

48. The crucial finding on this question which is required by the record in this proceeding, is that the field brokers to whom Flotill sells do no *speculative* buying and selling for their own accounts. They do not buy any merchandise before they have orders for it; they do not operate warehouses and do not take physical possession of the merchandise which they buy; they resell the merchandise at the same prices which they pay to Flotill and pass on to their customers the same terms, discounts, allowances, and price adjustments which are accorded to them; and they take no speculative risks except the limited risk of collecting from their customers. The field brokers do not pass on to their customers any of the brokerage which they receive from Flotill. Their profit or compensation is measured entirely by the brokerage which they are paid by Flotill, half of which they pay to local brokers except in those limited number of instances in which no local brokers are involved and in which they retain the entire brokerage.

49. The only proceedings by the Commission involving payments of brokerage to field brokers on their own purchases, which have been found by the hearing examiner, are six proceedings in 1940 and one in 1941, which were disposed of on admission answers. [*Albert W. Sisk & Sons*, 31 F.T.C. 1543 (1940); *C. F. Unruh Brokerage Co.*, 31 F.T.C. 1557 (1940); *C. G. Reaburn & Co.*, 31 F.T.C. 1565 (1940); *William Silver & Co.*, 31 F.T.C. 1589 (1940); *H. M. Ruff & Son*, 31 F.T.C. 1573 (1940); *American Brokerage Co., Inc.*, 31 F.T.C. 1581 (1940); *W. E. Robinson & Co.*, 32 F.T.C. 370 (1941).] In those cases it was found, *inter alia*, that in sales in which local brokers did not participate the field brokers passed on to the purchasers half of the brokerage fee received from the sellers; and the findings also indicate that in some of the transactions shipments were made by the sellers to the field brokers. Those proceedings are, therefore, clearly distinguishable from the present situation.

50. As indicated by counsel supporting the complaint, the decision of the Supreme Court in *F.T.C. v. Henry Broch & Co.*, 363 U.S. 166, 176-77 (1960), in substance ratified the 20-year-old administrative interpretation by the Commission that "the practice of brokers who, whether buying and selling on their own account or acting on behalf of the seller sold goods to purchasers who bought through them direct at a reduced price reflecting savings made by the elimination of the services of a local broker" violated Section 2(c) of the Act. That is not

the factual situation presented here, but it is significant that in ratifying the Commission's interpretation the Court said in footnote 19 at page 177:

We need not view this administrative practice as laying down an absolute rule that § 2(c) is violated by the passing on of savings in broker's commissions to direct buyers for here, as we have emphasized, the "savings" in brokerage was passed on to a single buyer who was not shown in any way to have deserved favored treatment.

51. Because of factual differences the Commission's decision in the *Hruby* case (*supra*) is not controlling here, but its reasoning is instructive and must be carefully considered in connection with the circumstances under which the field brokers operate. Applying the rationale of the Commission in that case to the present situation it should be considered that: the field broker does not give any of his customers an advantage over their competitors by passing on to them any of the brokerage received from Flotill; he is an intermediary who serves "a legitimate and useful economic function in the channels of distribution of the particular industry"; he "does not compete at the wholesale level"; and he "performs much the same function that in other transactions is performed by a broker on direct sales from a producer to wholesalers". It is also apparent that none of the possible competitive consequences suggested in the dissenting opinion in the *Hruby* case are present here.

52. In a strict legal sense the field broker is the purchaser or "the other party to such transaction". He is, however, uniformly considered by the parties to "such transaction" to be a broker, and he performs many of the functions of conventional brokers, and additional functions, which are useful and valuable to canners, buyers and local brokers. He is, for all practical purposes, and intermediary rather than a buyer and seller. The field broker functions in a very real sense in this industry as a wholesale broker to local brokers, or as a broker's broker.

53. Based upon the realities of the economic functions performed in this industry, it is concluded that the payments by Flotill to the field brokers are payments of brokerage to intermediaries "acting in fact for or in behalf" of "the person by whom such compensation is granted or paid"—Flotill. The payments by Flotill to the field brokers, therefore, do not constitute violations of Section 2(c) of the Clayton Act.

Transactions With Nash-Finch Company

54. Nash-Finch Company, with its headquarters office in Minneapolis, Minnesota, is a wholesale grocer operating 56 branches in eight midwestern states. Its total annual sales amount to approximately

\$125,000,000, about two-thirds of which represent its sales of the "dry line" of grocery products which includes canned goods.

55. The record does not disclose when Nash-Finch started buying Flotill products, but it seems clear that it was buying from Flotill at least as early as 1950. It purchased practically the full line of Flotill products, and from 95% to 99% of its purchases from Flotill were under "Our Family" and "Golden Valley" labels, which were private brands of Nash-Finch. On rare occasions when items did not fit the Nash-Finch label program, they were bought under Flotill labels or other labels.

56. During the period beginning as early as 1950 and continuing through 1957, purchases of canned fruits and vegetables by Nash-Finch from various suppliers on the West Coast were made primarily through Bushey & Wright, Inc., a broker which now operates under the name "Red and White Corporation". Although Flotill made some sales to Nash-Finch through at least one other broker (Tr. 171-72), there is much in the record to indicate that, to the extent that Nash-Finch made purchases from Flotill through a broker during this period, the broker was customarily Bushey & Wright.

57. During the years for which specific figures are in evidence, Flotill's sales to Nash-Finch amounted to \$197,910.94 in 1955 (RX-17A); \$569,994.43 in 1956; \$764,573.75 in 1957; and \$734,745.23 in 1958 (CX-61). The record does not disclose what proportion of sales by Flotill to Nash-Finch were made through Bushey & Wright during the period before the last half of 1954. Thereafter, however, through 1956, very small brokerage payments were made to Bushey & Wright by Flotill on its sales to Nash-Finch, such brokerage amounting in the last half of 1954 to \$281.20; in 1955 to \$226.84; and in 1956 to \$358.14 (RX-17A).

58. It is concluded, therefore, as contended by counsel for respondents, that, at least from the last half of 1954 through 1956, the great bulk of Flotill's sales to Nash-Finch were made directly without the payment of brokerage thereon to Bushey & Wright. There is no contention that Flotill granted any brokerage or discount or allowance in lieu thereof on direct sales to Nash-Finch prior to December, 1955.

59. During the 1954-1956 period Nash-Finch was making substantial purchases from other California canners and such purchases were ordinarily made through Bushey & Wright. All California canners who sold to Nash-Finch through Bushey & Wright, or any other broker, paid the customary brokerage commission, usually 2½%, to the broker on such sales.

60. Nash-Finch did a considerable amount of newspaper and other advertising, particularly of products sold under its "Our Family"

private brand. Such products included canned food items purchased from Flotill and other canners, and items not produced by Flotill, such as cake mixes, raisins, coconut, dates, peanut butter, popcorn, etc. (Tr. 834; RX-2 and 3). In 1955 it was spending more in advertising its "Our Family" line than its Board of Directors thought it ought to spend (Tr. 840).

61. The relations of Nash-Finch with Flotill "were friendly as a result of a good many years of business contacts of varying intensities from year to year" (Tr. 836). Those relations were particularly close during the spring of the year when plans were being made for the 1956 year pack. At that time, Flotill was the first choice of Nash-Finch for the items which Flotill supplied. It accounted for the largest volume of purchases by Nash-Finch of such items under the "Our Family" label, but Nash-Finch was also purchasing such items from other packers.

62. Some time prior to December, 1955, the official of Nash-Finch responsible for its canned food purchases discussed with Flotill representatives the amount of money Nash-Finch was spending for advertising, particularly of its "Our Family" brand. He explained that he was receiving promotional allowances on other commodities, particularly from Libby, McNeill & Libby (referred to herein as Libby) and California Packing Corporation (referred to herein as Cal-Pack), and that Nash-Finch was expanding its line under its "Our Family" label on a quality basis. In these circumstances, the Nash-Finch representative said, in effect: "If you are going to continue to enjoy our business and if you are going to be the principal source of our supply, we have got to have some help from you" (Tr. 839-40).

63. Thereafter, the Flotill representative advised the Nash-Finch representative that Flotill would pay to Nash-Finch 2½% of its gross sales to Nash-Finch "as an advertising and promotional allowance" (Tr. 841). The evidence discloses that the payment of this allowance became effective on purchases from December 1, 1955 (Tr. 914; CX-6), and, except to the extent modified by the pool car agreement discussed below, that it continued at least through 1956 and 1957 (Tr. 850; CX-714 and 715). There is no contention that it has been abandoned.

64. Many of the direct purchases by Nash-Finch from Flotill were made in sufficient quantities to permit the shipment of straight carloads directly from Flotill to Nash-Finch. By far the larger volume of Nash-Finch purchases from Flotill, however, was shipped in pool cars (Tr. 904), the organizing and scheduling of which required skilled and specialized service.

65. The Nash-Finch association with Bushey & Wright had covered a great many years, and during that period Nash-Finch had relied upon the skill of the Bushey & Wright personnel in assembling merchandise for pool car shipment and moving it expeditiously. This is a service frequently performed by brokers, and is included in the services for which they receive the customary brokerage fees. The Nash-Finch pool cars frequently included the merchandise of as many as twelve different canners (Tr. 934-45; RX-4), but they were for shipment only to Nash-Finch, and did not include merchandise for any other buyers (Tr. 987).

66. Less than carload quantities of Flotill products which were purchased directly from Flotill by Nash-Finch, and on which no brokerage was paid to Bushey & Wright, were customarily included by Bushey & Wright, without any direct compensation, in pool car shipments of merchandise to Nash-Finch from other canners. Bushey & Wright was willing to provide this service on Flotill products without direct compensation because it received its regular brokerage on the merchandise of other canners (except Cal-Pack) which was included in the pool cars, and because its providing this service created a better relationship with Nash-Finch for potential business in the future (Tr. 958-59, 986-88). Except for these considerations, Bushey & Wright would not have performed this enclosure service in connection with Flotill products without compensation (Tr. 1000-02).

67. Nash-Finch wanted to continue to utilize the Bushey & Wright service of including Flotill products in pool cars, in spite of the fact that it was "giving a great volume of business to Flotill without any reward, without any brokerage, or any other compensation to Bushey & Wright * * *" (Tr. 853). Through 1954 and 1955 Bushey & Wright did a "tremendous amount of work" for Nash-Finch in connection with enclosures of Flotill products in pool cars without much compensation (Tr. 853, 904; RX-17A). This situation pricked the conscience of the Nash-Finch representative responsible for the arrangements with Flotill, particularly so since he considered that the 2½% promotional agreement with Flotill deprived Bushey & Wright of brokerage on the Nash-Finch purchases from Flotill (Tr. 909).

68. Early in 1956 he discussed this with the Flotill representative and said, in effect: "With all the work that this office is doing for us, the convenience, the help involved, we must give them some compensation" (Tr. 853). The Flotill representative proposed to pay Bushey & Wright a fee of 1% for its service of enclosing Flotill products in Nash-Finch pool cars if Nash-Finch would contribute half of this fee by accepting a reduction of one-half of 1% from its allowance of 2½% on Flotill shipments which were made in such cars (Tr. 853).

69. That proposal was accepted, and the agreement was entered into, probably in March or April, 1956 (Tr. 913-14). It was retroactive, however, to all transactions after the first of 1956 (Tr. 857-59; CX-7D). Thereafter, Flotill paid to Bushey & Wright 1% on its sales to Nash-Finch of merchandise enclosed in pool cars by Bushey & Wright, and reduced its allowance to Nash-Finch from 2½% to 2% on such sales. On its sales of straight cars to Nash-Finch, on which sales it did not utilize the pool car service of Bushey & Wright, Flotill continued to grant to Nash-Finch an allowance of 2½%, and no payment was made to Bushey & Wright.

70. This 1% payment to Bushey & Wright did not alter its method of operation or affect the service which it thereafter rendered in connection with enclosing Flotill products in Nash-Finch pool cars (Tr. 960). It did not have this arrangement with any canner other than Flotill or with respect to any buyer other than Nash-Finch (Tr. 1000-02). This service has not been performed, and the 1% payment has not been received from Flotill since approximately the beginning of 1958 (Tr. 933). The reasons for discontinuance of the pool car fee arrangement are not disclosed, however, and the record provides no basis upon which it can be determined that it is not likely to be resumed.

71. Counsel supporting the complaint contends, in effect, that the 2½% allowance, which was granted by Flotill to Nash-Finch, was a discount or allowance in lieu of brokerage in violation of Section 2(c) of the Clayton Act; and that the 1% pool car fee paid to Bushey & Wright represented the payment by Flotill of compensation to an agent acting in behalf of Nash-Finch, also in violation of Section 2(c) of the Clayton Act.

72. Counsel for respondents, on the other hand, contend that the allowance to Nash-Finch was a promotional allowance which was granted in good faith to meet the promotional allowances of Cal-Pack and Libby in connection with the sale of canned goods; and that the service for which the 1% pool car fee was paid was advantageous both to Flotill and to Nash-Finch, and that Bushey & Wright was not acting as a broker for either party in arranging the pool car shipments.

The 1% pool car payment to Bushey & Wright.

73. Consideration should first be given to the contentions of the parties with respect to the 1% pool car payment to Bushey & Wright. It was made by Flotill pursuant to an agreement with Nash-Finch which was subsequent to and collateral with its allowance of 2½% to that customer. Half of it was contributed by Nash-Finch by accepting a reduction to that extent from the allowance which it received from Flotill.

74. The payment to Bushey & Wright of 1% was for a service which was advantageous both to Nash-Finch and to Flotill. It was a type of service frequently performed by brokers which is included in the customary brokerage services for which they are compensated by the regular brokerage fees paid by the canners. Bushey & Wright received its regular brokerage commission, usually $2\frac{1}{2}\%$, from all canners whose products were included in the pool cars, except Flotill and Cal-Pack.

75. Bushey & Wright received no brokerage or other compensation from Cal-Pack for this service. Cal-Pack did not require the service because it has its own straight car movements, and can ship its own merchandise in its own cars at any time, but it generally agreed to the arrangement at the request of the buyer (Tr. 1002). Flotill, on the other hand, needed the service and by far the greater part of its sales to Nash-Finch were shipped in the pool cars assembled by Bushey & Wright (Tr. 904; CX-6, 7, 14, 15 and 294D). This was, therefore, a very valuable service to Flotill, which was apparently well worth the one-half of 1% which it contributed to pay for it.

76. Without the pool car enclosure service, it would have been much more difficult for Flotill to sell to Nash-Finch, and the volume of its sales to that account undoubtedly would have been materially reduced. The service was as important to Flotill as it was to the other canners shipping in the pool cars. Bushey & Wright was clearly acting in behalf of the canners from which it received brokerage on merchandise in the Nash-Finch pool cars. It seems equally clear that it was also acting in behalf of Flotill in enclosing its merchandise in those cars, even though the pool cars represented a facility which also benefited Nash-Finch.

77. It is concluded that the 1% pool car fee was a payment by Flotill for services rendered to it by Bushey & Wright in connection with the shipment of its products to Nash-Finch; and that it was not a payment by Flotill to an agent of Nash-Finch in violation of Section 2(c) of the Clayton Act.

The $2\frac{1}{2}\%$ allowance to Nash-Finch.

78. Determination as to whether the $2\frac{1}{2}\%$ allowance by Flotill on its total sales to Nash-Finch was an allowance made in good faith to meet the advertising and promotional allowances granted to Nash-Finch by competitors of Flotill, or was a discount or allowance in lieu of brokerage, cannot be controlled by the designation given to it by the parties. Careful consideration must be given to the nature, purpose, and characteristics of the allowance and the circumstances under which it was granted.

79. In past years, Nash-Finch had purchased Red and White label products, a private brand controlled by Bushey & Wright, and other products, extensively through Bushey & Wright from various California canners, including Flotill. On such transactions Bushey & Wright had received the regular brokerage commission, usually $2\frac{1}{2}\%$, from the canners. By the middle of 1954, Nash-Finch was making the bulk of its purchases of Flotill products directly from Flotill under its own private labels, particularly "Our Family", and on such transactions no brokerage or discount or allowance in lieu thereof was paid or granted to Bushey & Wright or to Nash-Finch.

80. Over the years Nash-Finch lost its enthusiasm for the Red and White brand, and expanded its line under its "Our Family" private brand on a quality basis. Flotill became its first choice for the "Our Family" items which Flotill supplied, and its largest volume of such items were purchased from Flotill. In 1955, Nash-Finch advised Flotill that, if it was going to be the principal source of supply for such items, "we have got to have some help from you" (Tr. 839-40). In response to this prodding, beginning on December 1, 1955, Flotill granted Nash-Finch an allowance of $2\frac{1}{2}\%$ on its total sales to Nash-Finch, which it designated as a "special promotional allowance" (CX-6A).

81. On sales to wholesalers and retailers through its regular brokers, Flotill paid a brokerage commission of $2\frac{1}{2}\%$ on fruits and asparagus, and 2% on other vegetables. On sales to Nash-Finch through Bushey & Wright, Flotill and other canners paid the regular brokerage commission to Bushey & Wright, usually $2\frac{1}{2}\%$.

82. For some time, at least since the middle of 1954, Flotill had not been paying this commission to Bushey & Wright, or any other broker, on the bulk of its sales to Nash-Finch, but had been making such sales directly without the intervention of a broker. When confronted with the necessity of giving some "help" to Nash-Finch in order to become, or remain, its principal source of supply for items produced by Flotill, it granted an allowance equivalent to the customary brokerage commission on its total sales to Nash-Finch.

83. When this occurred, it disturbed the conscience of the responsible Nash-Finch representative because Bushey & Wright was continuing to provide a valuable pool car enclosure service for the bulk of the Nash-Finch purchases of Flotill products without any direct compensation. In this connection, he stated:

When we made the advertising and promotional agreement and they were deprived of the brokerage on those goods, then we made the one per cent agreement with Bushey & Wright for the handling of the laborious paper work, maybe within two or three months. (Tr. 909.)

84. The pool car enclosure service on Flotill products had been provided by Bushey & Wright for some time without compensation. It is clear, however, that the Nash-Finch representative, who retired at the beginning of 1958, and who testified from memory, associated the 2½% allowance from Flotill with the brokerage which his experience and memory indicated would, under customary circumstances, be paid to Bushey & Wright.

85. Respondents contend that the allowance to Nash-Finch was made in good faith to meet promotional allowances which Libby and Cal-Pack were granting to Nash-Finch. For a number of years Libby and Cal-Pack had been giving to all of their customers in the Nash-Finch area promotional allowances of a certain amount per case on various items of their nationally-advertised brands, and, in addition, had been supplying promotional help through their sales representatives and in the form of advertising material. There were different scales of allowances for various items under the Libby and Cal-Pack labels, but they did not amount to 2½% unless the undisclosed value of the advertising material and field work supplied by those companies is also considered.

86. Flotill's allowance to Nash-Finch was granted almost wholly upon products under the Nash-Finch private labels. The basis, rate and amount of the allowance, and the circumstances under which it was granted, were wholly dissimilar from the promotional allowances Nash-Finch received from Libby and Cal-Pack. There is no reasonable relationship between them, and no basis is shown in this record on which the Flotill allowance to Nash-Finch may properly be considered as an allowance made in good faith to meet the promotional allowances of its competitors.

87. Counsel for respondents correctly point out that the record indicates that during the period of this agreement Nash-Finch spent greatly in excess of the amounts received from Flotill for advertising and promoting the sale of Flotill products. The record also indicates, however, that Nash-Finch was making very substantial expenditures in advertising its "Our Family" line before it began receiving the allowance from Flotill, and there is nothing in the record to indicate that there was any percentage increase in such expenditures after it began receiving the Flotill allowance. Nash-Finch was expanding its "Our Family" line on a quality basis, and it is clear that this policy required substantial advertising expenditures, regardless of whether the products were supplied by Flotill or by others. Many items sold under the "Our Family" label, which were included in the Nash-Finch advertising expenditures for this line, were not produced by Flotill.

88. Council for respondents also correctly point out that the record discloses that after Flotill began paying the allowances, sales of Flotill products to Nash-Finch increased enormously. This increase was from approximately \$198,000 in 1955 to over \$764,000 in 1957 (RX-17A; CX-61). The record does not disclose, however, that this increase was due to the fact that Nash-Finch was able to do a more effective job in promoting the "Our Family" line after receiving the allowance from Flotill, as argued by counsel for respondents. On the contrary, the logical inference to be drawn from this increase in the sales of Flotill to Nash-Finch is that the allowance, which had the effect of decreasing Flotill's prices to Nash-Finch $2\frac{1}{2}\%$ below its regular prices, caused Nash-Finch to divert its purchases from other canners and to concentrate them with Flotill.

89. In the circumstances here presented, it is clear that Flotill, in response to insistence by Nash-Finch, simply agreed to grant a credit to Nash-Finch in an amount equivalent to the brokerage savings which it effected by selling to Nash-Finch directly, rather than through brokers. The designation of such amount as a "special promotional allowance" does not alter its essential characteristics so as to avoid the provisions of Section 2(c) of the Clayton Act.

90. It is concluded that the $2\frac{1}{2}\%$ allowance by Flotill to Nash-Finch was not a promotional allowance, but was a discount or allowance in lieu of brokerage, in violation of Section 2(c) of the Clayton Act.

Section 2(d) of the Clayton Act

91. Count II of the complaint charges in effect that Flotill paid "advertising and promotional allowances to certain favored purchasers without making the allowances available on proportionally equal terms to all other purchasers competing in the distribution of their products," in violation of Section 2(d) of the Clayton Act. It is clear from the complaint and evidence that, as used in this allegation, the word "purchasers" has the same significance as the word "customers" used in Section 2(d) of the Act.

92. The evidence with respect to this charge is limited to Flotill's transactions with customers in the Boston, Massachusetts, area during 1956 and 1957. Counsel for respondents assert that a long investigation was made of Flotill's pricing practices, and emphasize that this was the only evidence offered in support of the Section 2(d) charge. Their position seems to suggest that failure to offer evidence of other transactions carries the implication that the extensive investigation disclosed that those in evidence were the only transactions by Flotill which raised any question under Section 2(d) of the Act.

93. The limitation of the evidence gives rise to no such implication, either for or against Flotill. It means only that counsel supporting the complaint limited their proof to those transactions, and that the Section 2(d) charge must be determined on the basis only of those transactions without regard to whether or not they may be representative of Flotill's pricing practices.

94. The evidence discloses that Flotill paid advertising and promotional allowances to two chain stores located in the Boston area, such allowances being paid to Elm Farm Foods Company in 1956 and 1957, and Stop & Shop, Inc. in 1956. Counsel supporting the complaint contend that these two companies competed with each other and with other customers of Flotill in the distribution of Flotill products; that the allowances were not made available to Elm Farm and to Stop & Shop on proportionally equal terms; and that the allowances were not made available on proportionally equal terms, or on any terms, to other customers of Flotill competing with the favored customers in the distribution of its products.

95. In summary, counsel for respondents contend that Flotill made available a promotional allowance on proportionally equal terms to its only two competing customers in the Boston area. They contend that four of the other five companies, with respect to which evidence was offered, did not purchase canned goods from Flotill in Boston, but purchased on a company basis for national distribution through buying offices in San Francisco, California; and that the fifth company was a wholesale grocer which did not sell at retail, and accordingly did not compete with Elm Farm and Stop & Shop.

96. Elm Farm Foods Company operates retail grocery supermarkets in New Hampshire, Massachusetts and Maine. About 25 or 30 of its stores are in the Boston area. It purchased canned goods from Flotill through a local broker, and such products were under its own private labels and under Flotill's labels. Its purchases from Flotill in 1956 amounted to \$194,124, and in 1957 to \$249,893 (Tr. 579-80). Flotill products were shipped to the central warehouse of Elm Farm and were stocked in its stores in the Boston area. Elm Farm advertised Flotill products under its own label and under the Flotill label.

97. Elm Farm received a promotional allowance from Flotill of 1% on its total purchases from Flotill during each of the years 1956 and 1957. Pursuant to an agreement of November 21, 1956, it also received an additional payment of \$1,000 to promote the products being sold to it by Flotill.

98. Stop & Shop, Inc. operates retail grocery supermarkets in all of New England except Maine and Vermont. During the years 1956 to 1958, it operated approximately 100 stores, of which probably

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between 40 and 50 were in the Boston area. Its purchases from Flotill were made through a local broker, and were primarily under the private labels of Stop & Shop, but approximately 25% to 30% were under the Flotill label. The Flotill products, together with products from other suppliers, usually went into the Stop & Shop warehouse, from which they were distributed to the individual stores. No effort was made to keep the products from various suppliers segregated in the warehouse, and they were distributed from the warehouse to the stores on a rotation basis. The Flotill products were purchased for all the Stop & Shop stores, and were probably distributed to all of its stores in the Boston area. In 1956, purchases by Stop & Shop from Flotill amounted to \$148,149.17, and in 1957 they were greater (Tr. 618-19).

99. Stop & Shop received a promotional allowance from Flotill of 1% on its total purchases from Flotill during 1956 (CX-52). No additional promotional allowance or payment of \$1,000, or any other amount, was given or offered to Stop & Shop by Flotill in 1956; and no promotional allowance of 1% or any other amount was given or offered to Stop & Shop by Flotill in 1957.

100. The 1956 promotional allowance received from Flotill was used by Stop & Shop for assisting the sale of Flotill products under both the Flotill and the Stop & Shop labels, and the amount received was very small compared to the amount spent for promoting the line. It did more promotional work for the line in each of the years 1957 and 1958 than it did in 1956. Whether or not a promotional allowance was received had very little to do with its decision to promote a particular commodity.

101. The Somerville, Massachusetts, Division of First National Stores, which operated about 180 stores in the Boston area during the 1956-1958 period, made very substantial purchases from Flotill during that period, including products under its private label and some under the Flotill label. These purchases were made by the company's San Francisco office. The goods were shipped and invoiced by Flotill to the Somerville Division, and were distributed by that division to its stores in the Boston area. No promotional allowance of 1%, or any other amount, was given or offered for the use of this division of First National Stores by Flotill during 1956 or 1957.

102. The Great Atlantic & Pacific Tea Company operated about 100 to 125 stores in the Boston area during the 1956-1958 period, and those stores were serviced from its warehouse located in Somerville, Massachusetts. During that period very substantial purchases for the Boston area were made by the San Francisco office of A&P from Flotill, and such purchases included products only under the A&P label. They were invoiced by Flotill for shipment to the Somerville warehouse of

A&P. No promotional allowances of 1%, or of any other amount, was given or offered to A&P by Flotill for use in connection with its operations in the Boston area during 1956 and 1957.

103. Star Market Company, during the 1956-1958 period, operated seven stores located respectively in Watertown, Newton, Wellesley, Medford, Somerville, Cambridge and Stoneham, which are outlying areas of Boston. In 1956, its purchases from Flotill amounted to about \$15,000, and in 1957 to about \$16,000 or \$17,000, and included products under the Flotill label and under the private label of Topco Associates. Such purchases were made through Topco, a buying organization with its principle office located in Chicago and with a buying office in San Francisco. Star Market, one of 28 members of that organization, sent its orders for the products of the type here in question to the San Francisco office of Topco, which then purchased the products on behalf of Star Market from Flotill and other canners as, in its judgment, circumstances warranted. During 1956 and 1957 no promotional allowance or payment of any amount was given or offered to Star Market by Flotill, either directly or through Topco.

104. Supreme Markets, Inc. operated four grocery supermarkets prior to 1956, and added one in 1956 and another in 1957. All six of these stores are located in the Boston area, the most distant being in Weymouth, about 30 miles from the center of Boston. In 1956, its purchases from Flotill amounted to \$10,428.34, and in 1957 to \$11,818.50, and consisted of products only under the private label of Topco Associates. Supreme Markets sent its orders for products of the type here in question to the San Francisco office of Topco, which then purchased the products on behalf of Supreme Markets from Flotill and other canners as, in its judgment, circumstances warranted. Such purchases from Flotill were invoiced and shipped by Flotill to Supreme Markets. During 1956 and 1957 no promotional allowance or payment of any amount was given or offered to Supreme Markets by Flotill.

105. Food Center Wholesale Grocers, Inc., which will sometimes herein be referred to as Food Center, is a wholesale grocer located in Charlestown, Massachusetts. Among its customers are four grocery supermarkets in the Boston area, each of which does business under the name New England Food Fair, and only three of which were operating during 1956 and 1957. Each of those three supermarkets, which will sometimes herein be referred to as the Food Fair stores, was a separate corporation. The officers, directors, and stockholders of Food Center and of each of the Food Fair stores were the same.

106. Each of the Food Fair stores obtained its food supplies from Food Center, and they did not buy any Flotill products from any other source. Food Center also sells to from 500 to 600 retail accounts in ad-

dition to the Food Fair stores, and included in its sales to such accounts are products under the Food Center private label. Although there is no showing as to what proportion of its total sales are made to the Food Fair stores, the record warrants the presumption that such sales represented only a small percentage of the total. Food Center did not promote Flotill products, and the record does not show that the Food Fair stores promoted such products.

107. During 1956 and 1957 Food Center purchased from Flotill through a local broker a variety of Flotill products, both under the Flotill label and under the Food Center private label. The Food Fair stores obtained Flotill products under both labels from Food Center, and resold them in competition with Flotill products sold by Elm Farm and Stop & Shop. No sales were made by Flotill to the Food Fair stores. During 1956 and 1957 no promotional allowance or payment of any amount was given or offered to Food Center or to the Food Fair stores by Flotill.

108. Counsel supporting the complaint contend, in effect, that Food Center was operating at the retail level through the Food Fair stores. They urge that because of the common ownership, control and operation of Food Center and the Food Fair stores, sales by Flotill of products to Food Center which were sold at retail in the Food Fair stores, are equivalent to sales by Flotill to the Food Fair stores. Counsel for respondents contend, on the contrary, that Food Center was not in competition in the retail sale of Flotill products with Elm Farm and Stop & Shop, and that since Flotill made no sales to the Food Fair stores it was under no obligation to grant an advertising allowance on the basis of sales by the Food Fair stores of Flotill products.

109. Although there was a community of ownership, direction and control of Food Center and the Food Fair stores, they did not operate in fact as a single unit. Food Center was a wholesale grocer which sold to many retail grocers, and only a relatively small proportion of its sales were made to the Food Fair stores. The Food Fair stores obtained their "food supplies" only from Food Center, but the record does not disclose to what extent, if any, they obtained other supplies from other sources. The circumstances disclosed by this record do not warrant a finding that the separate corporate organizations may be disregarded, and that Food Center was actually competing at the retail level through the Food Fair stores. Nor does the record disclose that Flotill dealt directly with the Food Fair stores and controlled the terms upon which they bought so as to bring them within the "indirect customer" doctrine discussed by the court in *American News Company, et al. v. F.T.C.*, 2 Cir., 300 F.2d 104 (February 7, 1962).

110. It is concluded, therefore, that Food Center, which purchased from Flotill, and which sold Flotill products only to retailers, did not compete with Elm Farm and Stop & Shop in the distribution of such products. Flotill's sales to Food Center will, accordingly, be disregarded in the further consideration of this issue.

111. The advertising and promotional allowances which were granted by Flotill to Elm Farm and to Stop & Shop were not for use only in connection with selected items, but were for use generally in the promotion of all Flotill products, both under Flotill labels and under private labels. There was no material difference in the grade and quality of Flotill products sold to its various customers, or in the grade and quality of particular items sold under private labels and under Flotill labels.

112. The competitive retail grocery market represented by the Boston area, as used herein, may be loosely defined to include an area within a radius of approximately 25 to 50 miles of the center of Boston. The record makes it abundantly clear that in 1956 and 1957 Elm Farm and Stop & Shop were in substantial competition with each other in the retail sale of Flotill products in the Boston area; and that First National Stores, The Great Atlantic & Pacific Tea Co., Star Market Company and Supreme Markets, Inc., were in substantial competition with Elm Farm and with Stop & Shop in the retail sale of Flotill products in the Boston area in those years.

113. Flotill granted a promotional allowance of 1% to both Elm Farm and Stop & Shop on their total purchases of its products in 1956, and no question of proportional inequality between those two customers is raised with respect to that allowance.

114. Flotill also made an additional payment of \$1,000 to Elm Farm to promote the products being sold to it by Flotill in 1956, and did not make or offer to make such additional payment to Stop & Shop in the same or in a proportionally equal amount, or in any amount. Accordingly, the promotional payment of \$1,000 by Flotill to Elm Farm in 1956 was not made available to Stop & Shop on proportionally equal terms, or on any terms, and was in violation of Section 2(d) of the Clayton Act.

115. The 1% promotional allowance was also paid by Flotill to Elm Farm on its 1957 purchases, but was not made available to Stop & Shop for that year. Counsel for respondents point out that Stop & Shop promoted Flotill products more in each of the years 1957 and 1958 than it did in 1956, and was not greatly influenced by a promotional allowance in deciding to promote certain items. They contend that under such circumstances there was no justification for Flotill to continue

the 1% allowance to Stop & Shop in 1957. It is not clear in what respect these circumstances constitute justification for failure to make allowances to competing customers available on proportionally equal terms. Insofar as these considerations may be relevant, however, the record also indicates that Elm Farm spent more in promoting Flotill products in 1956 and 1957 than the allowance which it received from Flotill for that purpose, and that it made no accounting to Flotill as to the money spent; and there is no showing concerning the extent to which Elm Farm was required or influenced to promote certain items as a result of the allowance. In any event, Flotill did not make the allowance *available* on proportionally equal terms, or on any terms, to Stop & Shop in 1957, and its allowance to Elm Farm in that year, accordingly, violated Section 2(d) of the Clayton Act.

116. Counsel for respondents contend that the Boston stores of First National, A&P, Star Market, and Supreme Markets did not buy direct, but purchased from Flotill through agents who had offices located in California, and, accordingly, that Flotill had no reason to know that the goods would actually be shipped to Boston. They urge, in effect, that because of this lack of knowledge that its goods would ultimately be sold by these companies in the Boston area in competition with Elm Farm and Stop & Shop, there was no occasion for Flotill to grant a promotional allowance to them.

117. Although they cite no authority to support this contention, the statement of the situation seems to present equitable considerations which warrant examination. It is clear from the record that throughout 1956 and 1957 Flotill was invoicing its products to the Boston area warehouses of these companies, and that it was shipping its products or knowingly delivering its products for shipment, to those warehouses. Advance bookings or reservations are generally made at the time the fruits and vegetables are canned, and deliveries are made over the period of the next one to twelve months, ordinarily at prices prevailing at the time of shipment. At the time the San Francisco buying offices of First National, A&P and Topco placed advance bookings or reservations with Flotill, there were no detailed specifications as to where the merchandise would be shipped, but when shipping instructions were given, Flotill knew the destination of the goods.

118. The testimony of the Flotill official responsible for its sales and pricing policies and practices disclosed that he was well acquainted with the Boston market, and with the fact that the chain stores to which Flotill sold in that area included First National, A&P, Star Market and Supreme Markets (Tr. 201, 254). He made no claim that he was unaware that they were selling Flotill products in the Boston

area. On the contrary, he explained that the 1% advertising allowance was not offered to them because "from our judgment on the basis of past history and on the knowledge of the chain's operation, they couldn't use this particular type of promotion" (Tr. 202).

119. It is concluded that in 1956 and 1957 Flotill's customers in the Boston area included First National, A&P, Star Market and Supreme Markets; that each of those customers was in competition with Elm Farm and Stop & Shop in the distribution of Flotill products; and that Flotill's failure to make available to those customers on proportionally equal terms the advertising and promotional allowances which it granted to its two favored customers, Elm Farm in 1956 and 1957, and Stop & Shop in 1956, constituted violation of Section 2(d) of the Clayton Act.

CONCLUSIONS

1. In Flotill's transactions with field brokers, title to the merchandise passes from Flotill to the field brokers, and from the field brokers to the buyers on the same terms. The field brokers do not place orders with Flotill until they have orders for the particular merchandise from specific buyers, and they do not purchase any merchandise from Flotill for their own accounts. In such transactions the field brokers are not in fact the buyers, but are intermediaries acting for Flotill in selling to the buyers. The payments by Flotill to field brokers, therefore, do not violate Section 2(c) of the Clayton Act.

2. The payments by Flotill to Bushey & Wright of 1% for its services in enclosing Flotill products in pool car shipments to Nash-Finch, were for services to Flotill in connection with the shipment of its products. They were not payments to an agent of Nash-Finch in violation of Section 2(c) of the Clayton Act.

3. The allowance by Flotill to Nash-Finch of $2\frac{1}{2}\%$ on its total purchases of Flotill products was not a promotional allowance; and it was not made in good faith to meet the advertising and promotional allowances received by Nash-Finch from competitors of Flotill. It was a discount or allowance in lieu of brokerage, in violation of Section 2(c) of the Clayton Act.

4. Flotill granted a promotional allowance of 1% to two of its competing customers, Elm Farm and Stop & Shop, on their total purchases of its products in 1956, which was not made available on any terms to other customers of Flotill competing with them in the distribution of Flotill products. It also granted a promotional allowance to Elm Farm on its total purchases from Flotill in 1957, and made an additional payment of \$1,000 to Elm Farm to promote the

products being sold to it by Flotill in 1956, which allowance and additional payment were not made available on any terms to Stop & Shop or to other customers of Flotill competing with Elm Farm in the distribution of Flotill products. Such promotional allowances and payment were, accordingly, made in violation of Section 2(d) of the Clayton Act.

5. The corporate respondent named in the complaint herein is Flotill Products, Inc. Subsequent to the issuance of the complaint, however, the name of that corporation was changed to Tillie Lewis Foods, Inc. The order to cease and desist should, accordingly, identify the corporate respondent by its present name, Tillie Lewis Foods, Inc.

6. The circumstances in this proceeding do not warrant attaching liability to the individual respondents Mrs. Meyer L. Lewis, Albert S. Heiser and Arthur H. Heiser. They are responsible as officers of the corporate respondent, and should be bound by the order to cease and desist as officers of the corporation; but they should not be bound in their individual capacities.

ORDER

It is ordered, That respondent, Tillie Lewis Foods, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device in, or in connection with, the sale of food products in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from:

1. Paying, granting or allowing, directly or indirectly, to Nash-Finch Company, or to any other buyer, or to anyone acting for or in behalf of, or who is subject to the direct or indirect control of any such buyer, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, upon or in connection with any sale of respondent's products to any such buyer for his own account.

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

It is further ordered, That the complaint be, and it hereby is, dismissed as to respondents Mrs. Meyer L. Lewis, Albert S. Heiser and Arthur H. Heiser, in their individual capacities.

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JUNE 26, 1964

By Dixon, *Commissioner*:

The complaint in this matter charges the corporate respondent ¹ and three of its principal officers with violating Section 2(c)² and Section 2(d)³ of the Clayton Act, as amended, in the sale of canned fruits and vegetables. The hearing examiner sustained the Section 2(d) charge and that aspect of the Section 2(c) charge relating to corporate respondent's dealings with the Nash-Finch Company. He further held that respondents' dealings with field brokers did not violate Section 2(c) and that the persons named as respondents in the complaint should not be held in their individual capacities for the violations found to exist. The case is before us on cross-appeals.

The proceeding is concerned with three separate factual complexes, two alleged to involve the payment of brokerage or allowances in lieu thereof in violation of Section 2(c) and one the payment of disproportionate promotional allowances prohibited by Section 2(d). Because they are essentially unrelated, the three situations were afforded seriatim treatment by the hearing examiner and such will be our course here.

Respondents' Dealings with Field Brokers

The facts as to these transactions are not seriously disputed and the hearing examiner's findings with respect thereto are carefully and accurately drafted. The issue arises from his application of the law to these facts.

Traditionally a field broker operates in the geographic area in which as in this case, the canners, such as Flotill, are located. He maintains

¹In June 1961, the name of the corporate respondent was changed to Tillie Lewis Foods, Inc.

²Section 2(c) provides: "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid."

³Section 2(d) provides: "That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities."

close contact with all canners in his area, including many small firms whose product lines are limited or who may operate only for short periods of time during the year. These small canners are restricted in the distribution of their products by their inability to maintain a sales force and by their inability to fill large orders and make available the lower rates obtainable by shipping in carload lots. The function of a field broker is, in effect, to compensate for these limitations by providing a selling organization to enable the small canner to effect the economies of mass selling and distribution available to his large competitor.

In performing his function, the field broker usually operates through a local broker who is located in the same area as the purchasers and who deals directly with them. Occasionally, the field broker deals directly with the purchaser, usually a wholesale grocer or a large retail chain organization. Of importance in this relationship is the fact that the local broker and the purchaser are generally located at considerable distances from the canners. A small canner, with a limited or no sales force, is thus unable to make known to these potential purchasers information concerning his production capabilities and the stock which he has available. On the other hand, the field broker, by reason of his location and constant contact with all canners in his area, maintains this information on a current basis. Through bulletins, letters and principally by telephone, he relays this information regularly to numerous local brokers. The field broker, upon receipt of an order from a local broker or direct purchaser, may split the order up among several small canners and coordinate the pooling of each canner's share in shipment to the purchaser. The seller compensates the field broker for these services by a commission which is usually indicated as a deduction on the invoice. Generally, the rate of this commission is either 4% or 5% depending on the type of commodity involved. The local broker usually receives half of the field broker's commission, either 2% or 2½%, and, in those instances in which a local broker is not used, the field broker retains the full commission.

Complaint counsel argue that the transactions between Flotill and its field brokers are actual sales, thus making the field broker the "other party to such transaction" to whom, under Section 2(c), the seller is barred from paying "anything of value as a commission, brokerage, or other compensation." Their contention is based on the fact that Flotill invoices the field brokers and looks to the field brokers for payment, and upon the testimony of certain witnesses, including a Flotill official, that title to the goods passes to the field brokers. This latter issue that of title passage, has been the principal subject of controversy

throughout this aspect of the proceeding, respondents' position being that the field broker acts in the capacity of a *del credere* agent.

We have given careful consideration to the facts of record which detail the relationship between Flotill and its field brokers. In summary, these facts are as follows:

The field broker operates from a small office, maintains no warehousing or handling facilities, and never takes possession of any goods. Usually at the beginning of the packing season, the local broker estimates the future needs of the customers in his area and forwards this information to the field broker. He, in turn, places a reservation with Flotill which, in effect, merely serves as a guide as to what should be canned for the season and is in no way binding on any customer. Upon receiving a specific order from a customer through the local broker, during or after the packing season, the field broker forwards the order to Flotill. In this connection, it is the testimony of respondents' principal field broker, A. M. Beebe Company, that from 90% to 95% of the business it places with Flotill is for goods under the purchaser's private label. Thus, when the order has been confirmed, the purchaser forwards his labels directly to Flotill. At the time the order is placed or shortly thereafter, the field broker issues shipping instructions to Flotill. These instructions give the name and location of the customer and the method and time of delivery.

In many instances, goods of other canners are needed to fill a freight car and thus avoid the expense of less than carload shipments. The field broker, usually working with the local broker, will perform the necessary paperwork and issue instructions to the canners and to the carrier in order to combine shipments. Flotill products are loaded on the car by Flotill employees. Upon completion of the loading, the goods are shipped directly to the ultimate purchaser, never to the field broker. Upon shipment, Flotill sends directly to each purchaser having goods loaded in the car, a copy of the shipping manifest (the original is placed in the car) listing the merchandise shipped, showing the order in which it is loaded, and bearing Flotill's name as the canner. All three of Flotill's field brokers testifying herein stated that the goods become the purchaser's inventory when shipped, and that the purchaser may borrow money thereon at that time. Moreover, they testified that at no stage of the transaction could they borrow money on this merchandise.

As to the method of billing for the goods, the three field brokers testified that Flotill bills them at the time the goods are shipped.⁴ It is the testimony of one of the field brokers that the bill he receives

⁴ Tr. 583, 1164, 1263.

from Flotill is usually accompanied by the shipping documents. The field broker then remits payment to Flotill⁵ and at that time or shortly thereafter, bills the ultimate purchaser at the same price he paid Flotill. The Beebe representative testified that his company "just make(s) a transcript of the canner's invoice," passing on the same price to the ultimate buyer. In this regard, it is to be noted that the billing form used by the A. M. Beebe Company bears in its heading the wording "Accommodation Billing For Account Of Seller."

In billing the purchaser, the field broker passes on all discounts and allowances granted by the canner, including any cash discount for prompt payment as well as any price adjustments due to market fluctuations. In this latter regard, the evidence discloses that the prices on canned goods fluctuate rapidly. Shown in the record are two instances of price reductions in the sale of certain canned goods between the time Flotill billed Beebe and the time that Beebe billed the purchaser. Beebe billed the purchaser at the lower of the two prices and received credit from Flotill for the difference.⁶

The record discloses a few instances in which a field broker, Harcourt-Greene Company, billed the purchaser at a slightly higher price than the field broker was billed by Flotill. This field broker testified that the slight increase was to compensate for additional expenses incurred in handling paperwork on certain small orders. However, there is no evidence that Flotill's principal field broker or its other field broker who testified herein ever billed goods to the purchaser at either higher or lower prices. The hearing examiner concluded that these few instances were not typical of any substantial portion of Harcourt's business. Moreover, he found that these instances represent sharp departures from the method of operation of field brokers. From our review of the record, we fully agree with the examiner's finding, and, in view of the importance of the question of the legality of the normal operation of field brokers, we feel that in making a determination on this question in this case these isolated instances should be disregarded.⁷

It is, of course, well settled that Section 2(c), while permitting a seller to compensate a broker for services actually rendered on the seller's behalf, bars the direct or indirect payment of brokerage to a

⁵ It appears from the testimony of one of the field brokers that on some occasions the field broker pays the canner in advance of shipment in order to enable small canners in need of financing to have their goods released from a warehouse.

⁶ RX 12 k-n, 16 p-t.

⁷ If the evidence were otherwise and it were established that a field broker customarily bills purchasers at a price higher than he pays Flotill, such fact might well support a conclusion that such field broker is acting for and on behalf of himself in his dealings with canners.

person buying on his own account for resale. As it is undisputed that Flotill pays brokerage to its field brokers, we must determine whether these field brokers are actually performing a service for Flotill in sales to others or whether they are in fact buying on their own account for resale.

Complaint counsel cite a number of so-called "buying broker" cases in which we have held that brokerage paid to brokers buying and reselling on their own accounts contravenes the statute. In those cases, however, the evidence was such as to clearly establish that ownership of the goods vested absolutely in the brokers. As an example, in the *Southgate* case,⁸ the goods were shipped to the broker who stored them in his own warehouse, paid insurance and taxes thereon, resold the goods at prices and on terms which it alone determined, filed claims in its own name against the carrier for loss or damage in transit, and made a profit or sustained a loss on each transaction depending upon market conditions subsequent to its contract with the seller. In the recent *Western Fruit Growers* case,⁹ the seller-buyer relationship was established by evidence that the goods were shipped directly to the brokers; the shipper lost control thereof after shipment, the brokers customarily invoiced their purchasers at prices higher or lower than the prices invoiced by the suppliers and, in the event the broker had to sell at a lower price, the broker sustained the loss.

The circumstances surrounding the course of dealing in those and other buying broker cases clearly established that the broker was in fact the "other party" to the transaction. The facts as we have detailed them with respect to Flotill's dealings with field brokers are to the contrary. While Flotill bills and receives payment from the field brokers, none of the indicia of actual ownership of the goods by the field brokers are present but, in fact, are negated. Viewed as a part of the entire transaction from the time of the placing of the order by the ultimate purchaser until delivery of the goods to him, we find that technical title passage, if such be the case, would not be conclusive but would be merely incidental to the services performed by the field broker for the canner.

The facts in this record establish that these field brokers do not purchase for their own account but function as intermediaries on behalf of Flotill in its sales to other parties. As such, they are entitled to brokerage commissions paid by the seller. Complaint counsel's appeal on this issue is therefore denied.

⁸ *Southgate Brokerage Co. v. Federal Trade Commission*, 150 F. 2d 607 (4th Cir. 1945).

⁹ *Western Fruit Growers Sales Co. v. Federal Trade Commission*, 322 F. 2d 67 (9th Cir. 1963), cert. denied, 376 U.S. 907 (1964).

The Alleged Brokerage Payments to Nash-Finch

In addition to Flotill, the *dramatis personae* involved in the second alleged violation of Section 2(c) are Nash-Finch Company, a large wholesale grocer with its headquarters in Minneapolis, Minnesota, and Bushey & Wright, Inc., a food broker.

Nash-Finch Company operates approximately fifty-six wholesale branches in eight midwestern states. Its volume of sales in a recent year approximated \$125,000,000. While most items sold are purchased from others, the company does produce its own vacuum-packed coffee in a plant which it wholly owns. Products are principally sold to retail grocers, but sales are also made to hotels and restaurants. A substantial portion of the food items sold by Nash-Finch is labeled with its private brands or private labels, "Our Family" and "Golden Valley."

Bushey & Wright is a large brokerage establishment, operating offices in Boston, Chicago, and San Francisco. Its selling areas are located primarily in the East, in New York State, New England, and in the Southeastern states. Bushey & Wright owns two private labels; "Blue and White" and "Red and White."

Bushey & Wright has acted as a broker for canners and processors selling to Nash-Finch for many years. One witness testified that there is a personal relationship between the two firms, going back to the time when Nash-Finch was a part of Bushey & Wright. The respondent Flotill is a substantial supplier of canned fruits and vegetables to Nash-Finch; however, only a very small percentage of its sales to this customer in recent years has been made through Bushey & Wright. By far the greater number of sales during this period was negotiated directly with Nash-Finch without the service of Bushey & Wright or any other broker. Concerning the transactions by and among Flotill, Bushey & Wright and Nash-Finch during the years 1954 to 1958, the record contains the following figures:

Year	Total sales to Nash-Finch	Commissions paid to Bushey & Wright	Estimated sales to N-F through B & W
1954 (last half)-----	\$67,006.55	\$281.21	\$11,248.00
1955-----	197,910.94	226.84	9,073.00
1956-----	569,994.43	358.14	14,325.00
1957-----	764,573.75	(1)	(1)
1958-----	734,745.23	(1)	(1)

(1) Not available.

(The figures showing the estimated sales to Nash-Finch upon which Bushey & Wright received commissions were calculated from the figures showing the commission paid, which commissions were usually at the rate of 2½ percent. The great bulk of the respondents' sales

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to Nash-Finch (95 to 99 percent) bore the buyer's private levels, "Our Family" or "Golden Valley.")

The record shows that on many of the sales made directly to Nash-Finch Flotill has granted to this purchaser a price reduction or allowance equivalent in amount to the normal brokerage fee paid to brokers on sales to other purchasers in which brokers' services have been utilized.¹⁰

The facts concerning the allowances are not complicated. The record shows that Nash-Finch's purchases from Flotill increased sharply during the last six months of 1955. Sales in the twelve months prior to June of 1955 totaled less than \$80,000. Sales for the next six months, that is, the last half of 1955, exceeded \$185,000. There is no complete explanation in the record for the sudden preference for Flotill's products.

At one place in their briefs, complaint counsel contend that Bushey & Wright was paid the usual brokerage rate of 2½ percent on the Nash-Finch purchases from Flotill during the period 1954 through 1958, but this is not correct. As found by the hearing examiner, by far the majority of the purchases in question were made directly from Flotill without the intervening sales aid of Bushey & Wright and on these purchases the broker received no compensation whatsoever. This was true as early as the last six months of 1954, for, as the record shows, Bushey & Wright received only \$281.21 in brokerage on Nash-Finch's purchases, totaling \$67,006.55, during that period. Bushey & Wright received no brokerage at all on Nash-Finch's purchases of \$12,626.25 during the first six months of 1955. The record is silent as to when Nash-Finch began dealing directly with Flotill without the aid of a broker, but from the foregoing it can be seen that this course of dealing began sometime prior to the last half of 1954.

On December 1, 1955, Flotill commenced giving a 2½ percent allowance or price reduction to Nash-Finch on all items purchased, *i.e.*, on total purchases regardless of label. The allowance was tendered in the form of credit memoranda issued at irregular periods. The first of the credit memoranda issued April 3, 1956, and credited Flotill's account \$401.86 as a "special promotional allowance" of 2½ percent on \$16,074.23 purchases during the month of December 1955. A second memorandum issued July 12, 1956, in the amount of \$3,218.22 covered purchases during the first six months of 1956. On October 19, 1956,

¹⁰ Although respondents take issue with the hearing examiner's finding that the 2½ percent allowance is equivalent to the customary brokerage commission paid by Flotill on sales to Nash-Finch through Bushey & Wright, this fact is clearly established in the record. Both the Flotill and the Bushey & Wright representatives testified directly to this effect. (Tr. 234, 962).

a third credit memorandum, in the amount of \$6,209.29 was issued, allowing credit at 2½ percent for purchases made during July, August and September of 1956. On December 10, 1956, a fourth credit memorandum issued, granting allowances in the amount of \$2,122.96 on purchases made during October and November of 1956. The total amount received by Nash-Finch from Flotill during the first twelve months of this arrangement totaled \$11,952.33. As stated, it is complaint counsel's contention that this amount represents a payment or allowance in lieu of brokerage. It is respondents' contention that the true nature of the payments is, as described on the credit memoranda, a "special promotional allowance."

There is of course, nothing unlawful in a seller making direct sales to a buyer even though he utilizes brokers in selling to other buyers. And it has been held that a seller may discharge his brokers and commence selling directly to all customers, passing on to them the savings engendered by the elimination of brokerage commissions.¹¹ However, that is not the situation in this case and we must decide whether the allowance given to Nash-Finch was produced by a savings in brokerage expense due to Flotill's direct dealing with the account. If that were the case, the allowance is unlawful, for "[a] price reduction based upon alleged savings in brokerage expenses is an 'allowance in lieu of brokerage' when given only to favored customers." *Federal Trade Commission v. Henry Broch & Co.*, 363 U.S. 166, 176 (1960).

The record does not reveal the proportion of Flotill's total sales which are made through brokers. It would appear, however, that a substantial part of their business is so transacted, for they utilize the services of more than 100 food brokers. But, as noted, there was an undetermined time lapse between the institution of direct dealings between respondents and Nash-Finch and the payment of the questioned allowances. Thus, a finding that the allowances were unlawful discounts in lieu of brokerage must depend upon an inference drawn from all the facts and circumstances. Quite obviously such an inference could be more easily drawn had the first payment occurred simultaneously with the discontinuance of Bushey & Wright as a full-time broker, as erroneously contended by complaint counsel. But the time lapse is not destructive of the reasonableness of the inference, as respondents argue, for our decision must be based upon all the facts without undue emphasis to any one. A fact tending to support the inference is the mathematical identity of the allowance and the brokerage paid on sales to many other customers. Moreover, while Flotill did grant promotional allowances to other customers, a company official testified that its arrangements with Nash-Finch were unique and that

¹¹ *Robinson v. Stanley Home Products, Inc.*, 272 F. 2d 601 (1st Cir. 1959).

it was the only customer receiving a 2½ percent allowance on all purchases.

Only one witness testified in any detail with respect to the facts surrounding the agreement to pay the allowance to Nash-Finch. This witness had been the vice-president in charge of grocery merchandising for Nash-Finch during the relevant 1954-1958 period. The witness testified that the allowance was granted to Nash-Finch at his request. He stated that Nash-Finch was spending a good deal of money promoting its "Our Family" brand of goods. In response to his request to a Flotill official for "some help," Flotill agreed to pay 2½ percent of its gross sales to Nash-Finch as an "advertising and promotional allowance." He first testified that brokerage was never discussed in connection with the negotiation and was not a part of "our thinking" but subsequently he stated " * * * when we made the arrangement with Flotill for the advertising and promotional allowance, it was agreed that there was no element of brokerage in the deal to us, to Bushey and Wright, or to anyone else, we were to use that money for promoting Our Family and Golden Valley brands in our territory. * * *"—"Eliminating the brokerage feature deprived Bushey and Wright—the Bushey and Wright office, of the brokerage income that they had had on this Flotill business prior to the agreement. * * * " He was then asked why it was decided to eliminate Bushey & Wright as a broker and responded, "Because there are certain advantages in pooling our specifications with one canner who was a full-line canner, as Flotill is. There are economies in it for him. There are economies in it for us. I didn't make any decisions as to whether they should discontinue paying brokerage to Bushey and Wright, or not. I just asked for an advertising and promotional allowance and said, 'We will deal directly with you.'" This witness was later asked point-blank whether he felt that the fact that Nash-Finch dealt directly with Flotill rather than through an intervening broker accounted for the promotional allowance received. He responded, "Well, I think the fact we were buying directly represented economies to them, a convenience to them, and a sure outlet for their goods. * * * " He stated that he had no ability to give a "definite answer" on the question of whether the Flotill "economies" included the saving of the normal 2½ percent brokerage commission.

Respondents' position, in effect, that the discount was granted as a valid promotional allowance within the exception of the "services rendered" clause of Section 2(c) must be rejected.

The evidence in support of this contention consists of a showing that on Flotill's credit memoranda to Nash-Finch, the payments were noted as "special promotional allowances," together with testimony that

the funds were placed in Nash-Finch's advertising and promotion account and that from time to time advertising tear sheets and handbills were sent to Flotill and the merchandise program was discussed with them. Additionally, there is testimony that in requesting the allowance, Nash-Finch discussed with Flotill the fact that Flotill's competitors, principally California Packing Corporation (Cal-Pack) and Libby, McNeill & Libby (Libby), were granting promotional allowances on sales of their own brands to Nash-Finch.

On the other hand, it is undisputed that Nash-Finch was spending a substantial sum of money in advertising its "Our Family" line of goods prior to receiving the discount from Flotill. Although Flotill's sales of "Our Family" items to Nash-Finch increased considerably after the granting of the discount, there is nothing in the record indicating that Nash-Finch increased the percentage of its promotional expenditures after receiving the discount. It is significant also that Flotill was not the exclusive supplier of the Nash-Finch brands and that use of this discount to promote those brands would inure, in part, to the benefit of other canners. Moreover, both Cal-Pack and Libby had granted Nash-Finch promotional allowances "for a great many years" prior to the discussion of Nash-Finch's representative with Flotill and, as found by the examiner, there is no reasonable relationship between the allowance Nash-Finch received from Flotill and that which it received from the other two companies.

A comparison of the details of Flotill's Nash-Finch arrangement with its customary promotional deals further indicates the true nature of the Nash-Finch transaction. It was Flotill's usual practice to confine its promotional allowances to a single product or to a limited geographical area. As an example, respondents' representative testified that his company was at that time in the process of granting a promotional allowance on one product—catsup. In its dealings with Nash-Finch, however, Flotill granted discounts on the purchase of all Flotill products for the entire eight-state area in which Nash-Finch operates. Also, the manner in which this allowance was paid to Nash-Finch represented a departure from Flotill's other method of paying allowances as shown in the record. In granting a promotional allowance of one percent to certain customers in the Boston area, Flotill issued a "Credit Memorandum," crediting the account of these customers with an allowance based on their purchases for a calendar year.¹² In contrast, the Nash-Finch representative testified that "When we needed some advertising and promotional money and we had some coming from Flotill, I would write a letter and say that the advertising

¹² CX 40, 52.

and promotional allowance on purchases from this date to this date are due us, and they would remit."¹³

Finally, despite the relative magnitude of the discount to Nash-Finch, Flotill had no arrangement with that company for an accounting and, in fact, never requested such an accounting.

In summary, the evidence discloses no economy to Flotill in its method of selling to Nash-Finch other than selling directly without brokerage expense. Moreover, the evidence negates a finding that in return for the allowance, Nash-Finch actually performed any services other than those which it usually performed for itself. The evidence supports a finding that the allowance was granted as a result of pressure by Nash-Finch, a large wholesaler purchaser, who advised Flotill to the effect that "If you are going to continue to enjoy our business and if you are going to be the principal source of our supply, we have to have some help from you."

It is our conclusion that the 2½ percent allowance granted by the respondents to Nash-Finch reflected the savings in brokerage expenses which the respondents had theretofore incurred in selling to Nash-Finch and that, therefore, the allowance was "in lieu of brokerage" and unlawful.

The One Percent Payment to Bushey & Wright

Bushey & Wright for a number of years had served as a broker for canners other than Flotill in sales to Nash-Finch. With the exception of one canner, California Packing Corporation, these canners paid Bushey & Wright the usual brokerage commission of 2½ percent. The majority of the sales by these other canners to Nash-Finch were in less than carload lots. As it was prohibitively expensive to ship less than a full carload of merchandise, Bushey & Wright, as a part of its normal brokerage service to these canners, arranged for the pooling of their shipments into one car. It appears that one car destined only for Nash-Finch might contain the merchandise of as many as twelve canners.

The organizing and scheduling of pool cars requires skill and specialized service. Bushey & Wright had performed this operation as a part of its brokerage service for canners in sales to Nash-Finch for a number of years. Although some time prior to 1954 Flotill began selling directly to Nash-Finch, the majority of its sales continued to be in less than carload quantities and both parties desired the pool car services of Bushey & Wright. Bushey & Wright was willing to and

¹³ Tr. 922, 923.

did provide this service for these parties for a substantial period of time without compensation.¹⁴

In early 1956, within a month or two after the initiation of the 2½ percent payments to Nash-Finch, both Flotill and Nash-Finch officials decided that Bushey & Wright should be compensated for the large amount of paperwork which the pool car service entailed. It was agreed that both parties would contribute to the fee to be paid this broker upon shipment on which it performed the service of including Flotill goods in a car destined for Nash-Finch. On such shipments the 2½ percent allowance to Nash-Finch would be reduced to 2 percent. Flotill would take this withheld ½ percent, together with another ½ percent contributed by it, to make up the full 1 percent to be paid to Bushey & Wright.

This procedure was placed into operation in January of 1956. The record reveals that by far the greater number of Flotill's shipments to Nash-Finch thereafter was in less than carload amounts, with Bushey & Wright performing the pool car service on such shipments. During the first six months of 1956, Nash-Finch received the so-called "special promotional allowance" upon purchases totaling \$156,323.37. Of this total, only \$18,349.89 was shipped without using the pool car service of Bushey & Wright.

Complaint counsel contend that the 1 percent fee paid Bushey & Wright constitutes brokerage paid by the seller to an agent of the buyer. It is our conclusion that the hearing examiner's rejection of this contention is correct. As we view it, the payment of the 1 percent to Bushey & Wright by Flotill constituted no more than payment of brokerage to the seller's broker for a service which is normally performed by such brokers. And the fact that Flotill deducted one-half of this 1 percent from the 2½ percent theretofore allowed to Nash-Finch on its purchases did not change the nature of the payment. When a seller reduces the amount of an unlawful allowance to a buyer, transferring the withdrawn money to a broker, he is lessening his violation, not enanching it.

The 2(d) Charge

Under Section 2(d) of the amended Clayton Act, the respondents are charged with having discriminated between competing buyers by granting advertising or promotional allowances to some which were not made available on proportionally equal terms to others.

Complaint counsel confined their proof to dealings which respondents had with customers reselling their products in the greater Boston,

¹⁴ The Bushey & Wright representative testified that it performed this service without pay on Flotill shipments to Nash-Finch because it received its regular brokerage commission on sales by other canners to Nash-Finch included in the car and because providing this service created a better relationship with Nash-Finch for future business.

Massachusetts, area during the years 1956 and 1957. Two of respondents' customers operating in that trade area received promotional allowances, while five of their competitors did not.

Elm Farm Foods Company is one of the favored customers. This retail grocery chain operates supermarkets in New England, with about twenty-five or thirty of its stores located in the Boston area. It made substantial purchases from Flotill during the years 1956 and 1957, and on such purchases received a promotional allowance equal to 1 percent of total purchases. In addition, it received a lump sum payment of \$1,000 from the respondents in the fall of 1956.

The other favored customer was Stop & Shop, Inc., a retail grocery chain operating in New England. Forty or fifty of its stores are in the greater Boston area. The only promotional payment received by this customer in 1956 and 1957 was a 1 percent allowance on its total purchases from Flotill during the year 1956. The grocery sales manager of this company, responsible for buying and selling groceries, testified that he was not aware that Flotill offered to pay his company a promotional allowance at any time during the year 1957, nor was the company offered any payments equivalent to or proportionally equal to the \$1,000 paid to Elm Farm in 1956. The record further shows that Stop & Shop and Elm Farm competed in the resale of Flotill products.

Thus, the evidence clearly establishes that Elm Farm and Stop & Shop were not afforded proportionally equal treatment by Flotill in the payment of advertising allowances. While these unlawful transactions alone are sufficient to justify an order to cease and desist, the record indicates that Flotill sold to several other retail companies doing business in the Boston area in competition with Elm Farm and Stop & Shop. Since these companies received no allowance of any nature, the 1 percent allowance paid to Stop & Shop in 1956 and the allowances to Elm Farm were discriminatory as to these other retailers.

Among the companies discriminated against were First National Stores, which operates about 180 stores in the Boston area; The Great Atlantic & Pacific Tea Company, operating about 100 to 125 stores in the Boston area; Star Market Company, with seven stores in the Boston area; and Supreme Markets, Inc., with about six stores in the Boston area. Respondents contend that since these companies made their purchases from Flotill through agents who had offices located in California, Flotill had no reason to know or believe that the goods would be shipped to Boston. Thus, respondents contend that these customers purchasing in California were not "customers" as that term is used in Section 2(d).

Respondents argue that The Great Atlantic & Pacific Tea Company and the First National Stores have retail outlets in many areas other

than the Boston area; that these customers take title to the goods purchased from Flotill in California and are responsible for shipment to their various outlets. Sales are made to them f.o.b. Stockton, California. Flotill, of course, places the goods in freight cars for shipment to the warehouses designated by the customers. It disclaims any knowledge as to where the products would be sold to consumers because of the possibility that the chain store customers might order the cars diverted to another destination while in transit.

But a seller is under an obligation to affirmatively offer or otherwise make available promotional allowances on proportionally equal terms to all customers who compete in the resale of its goods. This obligation entails whatever inquiry is necessary to establish whether customers in fact compete. If it were otherwise, sellers could avoid their obligations under the statute simply by closing their eyes to the obvious. A violation of Section 2(d) is determined by objective rather than subjective considerations. If the favored and nonfavored customers actually compete in the resale of the seller's goods, the Act may be violated without regard to the seller's knowledge of the lawfulness or unlawfulness of a disproportionate promotional allowance. To hold otherwise would recognize the right of a seller to discriminate in favor of or against any customer who conducts his resale operations in more than one trade area.

The hearing examiner found that Flotill was well acquainted with the Boston market; that Flotill was invoicing its products to the Boston area warehouses of these companies; and on all shipments, whether immediately made or after a delay waiting for instructions, Flotill was aware of the destination of the goods. The hearing examiner additionally points out that the responsible Flotill official testified that a 1 percent promotional allowance was not offered to these nonfavored customers because he felt that "they couldn't use this particular type of promotion." On the basis of these and other record facts, it is our conclusion that The Great Atlantic & Pacific Tea Company and First National Stores were in fact nonfavored customers of Flotill, competing with the favored customers, Stop & Shop and Elm Farm, in the Boston area. The conclusion follows that the promotional payments to the latter two companies were discriminatory as to the former two companies and hence violated Section 2(d).

Respondents' contentions with respect to two of the other allegedly disfavored customers, Supreme Markets and Star Market, differ somewhat from those discussed above. These companies purchase from Flotill through the medium of Topco, a buying organization. In ordering from Topco, the customers did not particularly specify Flotill goods and their orders could have been filled by Topco with goods ordered

from other canners. However, Topco's function appears to be largely that of a buying agent. As a matter of fact, the witnesses from Star and Supreme Markets so characterized it. After receiving an order from Topco for either Star or Supreme, Flotill ships the goods directly to the retailers and bills the retailers. These facts clearly demonstrate that Star and Supreme are customers of Flotill for the purposes of the Act, leading to the conclusion that the discriminatory payments to their competitors, Elm Farm and Stop & Shop, were unlawful. The hearing examiner's findings and conclusion with respect to this problem are correct and will be affirmed.

In the proceedings before the hearing examiner, complaint counsel contended that Food Center Wholesale Grocers, Inc., a grocery wholesaler selling to retail stores in the Boston area, should be considered as a nonfavored customer. Among Food Center's customers in 1956 and 1957 were three grocery supermarkets trading under the name New England Food Fair. Each of these three supermarkets was separately incorporated but each had the same officers, directors and stockholders as did Food Center Wholesale Grocers, Inc. It was complaint counsel's theory that this community of ownership, direction and control made Food Center in actual practice a retailer competing with the favored Stop & Shop and Elm Farm. The hearing examiner was not so persuaded, holding that Food Center was actually a wholesaler selling to many retail grocers, with only a relatively small proportion of its sales going to the Food Fair Stores. He concluded, "The circumstances disclosed by this record do not warrant a finding that the separate corporate organizations may be disregarded, and that Food Center was actually competing at the retail level through the Food Fair Stores." He further held that there was no showing sufficient to bring the transactions within the indirect customer doctrine discussed by the court in *American News Co. v. Federal Trade Commission*, 300 F. 2d 104 (2d Cir. 1962).

In their petition for review, complaint counsel indicated that they would not appeal this holding by the hearing examiner, but in their appeal brief they state that the Commission's intervening decision in *Fred Meyer, Inc.*, 63 F.T.C. 1, Docket No. 7492, March 29, 1963, makes necessary such an appeal. In the *Fred Meyer* case, we held that wholesalers whose retailer customers compete with direct buying retailers are themselves in competition with such direct buying retailers in the distribution of the supplier's goods and that they are, therefore, entitled to proportionally equal allowances. The respondents have chosen not to brief this question, arguing that the point is not properly before the Commission since it was not raised in the petition for review. They cite our decision in *Revlon, Inc.*, 62 F.T.C. 968, Docket

No. 7175, December 18, 1962, wherein we held that an exception which went beyond the questions stated in a petition for review was not properly before the Commission for determination. That decision was rendered under the Rules of Practice, issued and effective June 1, 1962, now superseded, which specifically provided in §4.21(b) that exceptions to be briefed must be “* * * limited to the questions stated in the petition for review * * *” and, in §4.21(c), “Material not included in the exceptions or brief may not be presented to the Commission in oral argument or otherwise.”

As a practical matter we see no real need to resolve the factual and legal questions here presented. The *Fred Meyer* decision places these respondents, no less than any other interstate sellers, on notice that the Commission considers wholesalers whose customers compete with direct buying retailers to be in competition in the distribution of goods with the direct buying retailers. Thus, to comply with the order to cease and desist to be entered herein, the respondents must henceforth consider Food Center and all similarly situated wholesaler customers as customers within the scope and meaning of Section 2(d). Since we have not reviewed the hearing examiner's findings and conclusions on this point (findings 105 through 110), they will not be adopted as part of the Commission's decision.

The Remedy

Respondents object to the terms of the order to cease and desist, arguing that the order is too broad and does not spell out with sufficient definition and clarity the exact conduct prohibited. Orders to cease and desist must be drawn with sufficient scope to cover the myriad forms and procedures utilized by buyers and sellers. To prohibit with exactness only the conduct actually engaged in would invite avoidance of the order by minute changes in procedure. In the words of the Supreme Court:

Orders of the Federal Trade Commission are not intended to impose criminal punishment or exact compensatory damages for past acts, but to prevent illegal practices in the future. In carrying out this function the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity. [*Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 473 (1952).]

In our opinion, the hearing examiner's order dealing with the 2(c) aspect of this proceeding “does no more than prohibit the practices found to exist in this case and closely related acts, all of which are

expressly prohibited by section 2(c)." *Western Fruit Growers Sales Co. v. Federal Trade Commission*, *supra*. Modification thereof would not be appropriate.

Likewise, while the 2(d) order issued by the hearing examiner is couched substantially in the terms of the statute, we believe that no extensive modification is required. Section 2(d) deals with a relatively precise type of unlawful activity, discrimination in the granting of promotional allowances to competing customers. The only manner in which an order narrower than the terms of the statute can be framed is to limit its application to goods, parties, and geographic areas directly involved in the violation proved. In this matter such an order would require Flotill to cease granting Elm Farm and Stop & Shop promotional allowances on nondietetic canned fruits and vegetables unless a proportionally equal allowance is available to all other customers who compete in the distribution of such products in the Boston area. Such an order would clearly not protect the public interest, for it would be directed against specific past acts which may or may not recur rather than against an unlawful practice which may be resumed in a different area with different customers. Moreover, the respondents need not proceed with any new planned course of business activity at their peril, for under our procedures, as recently codified in the Rules of Practice effective August 1, 1963, "Any respondent subject to a Commission order may request advice from the Commission as to whether a proposed course of action, if pursued by it, will constitute compliance with such order." (§ 3.26(b), 28 Fed. Reg. 7080, 7091.)

The Individual Respondents

The complaint names Mrs. Meyer L. Lewis, Albert S. Heiser and Arthur H. Heiser in a dual capacity as individuals and as officers of the respondent corporation. The hearing examiner decided that there was no need to have the order to cease and desist run against the respondent persons excepting in their capacity as officers of the corporation and he dismissed the complaint as to them as individuals. Complaint counsel feel that this is error and have appealed. In this instance and on these facts we are inclined to agree with counsel.

The record reveals that the corporate respondent was completely controlled and was almost 100 percent owned by the three named respondents. During the relevant period of time Mrs. Lewis owned 94.5 percent of the outstanding stock and her nephews, Albert S. and Arthur H. Heiser, the other two individual respondents, each owned approximately $2\frac{3}{4}$ percent. Under such circumstances, when the corporation is merely the alter ego of individuals, we have generally felt

that an order against the individuals is necessary. *Fred Meyer, Inc.*, 63 F.T.C. 1, Docket No. 7492, March 29, 1963. The reason for such decisions is obvious, for under those circumstances the corporation exists at the sufferance of its owners.

The hearing examiner held that the principal rule followed by the Commission in deciding questions of individual liability is to not attach such liability "* * *" except upon a showing of special circumstances which would indicate a likelihood that failure to do so may cause an evasion of the order against the corporation." While we feel that the hearing examiner has over-simplified the rationale of our numerous holdings on this question, the standard referred to is not an inappropriate one. But even under this standard we think these individuals should be subjected to the requirements of the order. While there is no indication that they desire to do so, the individual respondents have the absolute power to terminate the existence of this corporation at any time. A decision to abandon the corporation and continue operations as a partnership could be made for reasons entirely unconnected with this proceeding and without any intention of evading an order to cease and desist. This, however, could be the practical result, leaving the public with but doubtful protection against a resumption of the practice. On balance we believe that the public interest requires an order against the individual respondents in their individual capacity and we so hold.

An order effecting the decision herein related will issue.

Commissioner Elman has filed a separate opinion. Commissioner MacIntyre dissented in part and has filed an opinion dissenting in part. Commissioner Reilly did not participate in the decision for the reason that he did not hear oral argument.

SEPARATE OPINION

JUNE 26, 1964

By Elman, *Commissioner*:

I.

The Robinson-Patman Act was a product of concern with monopolistic tendencies in distribution. Large buyers, it was believed, were using their bargaining power to extort preferential price concessions from suppliers, thereby enhancing their power to dominate, and even destroy, small distributors compelled to pay higher prices for goods sold in competition with these large rivals. Congress considered that price discrimination should be forbidden where it reflected power, rather than efficiency, and where there was a danger of injury to com-

petition or a tendency to monopoly. Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, embodies this basic legislative determination.

Congress was aware, however, that one of the reasons for the ineffectuality of the original Section 2 of the Clayton Act in preventing the growth of monopolies in distribution was the existence of a number of subterfuges or artifices by which discriminatory discounts or allowances were passed off as transactions unrelated to price discrimination. Section 2(c) through 2(e) were added to the Clayton Act by the Robinson-Patman Act in order to prevent 2(a) from being thus outflanked.

The Federal Trade Commission's investigation of chain stores had revealed that price discrimination was frequently accomplished through manipulation of brokerage.¹ Two practices in particular were involved. The first was the practice of using "dummy" brokers.² A buyer would designate one of his employees as a broker and insist that the seller pay this "broker" a specified "brokerage" fee. The "broker"

¹ The Commission's *Final Report on the Chain-Store Investigation*, S. Doc. No. 4, 74th Cong., 1st Sess. 62-63 (1935), stated the problem as follows:

"Allowances for brokerage.—A number of the manufacturers in the grocery group stated that they give allowances in lieu of brokerage to certain chain customers. Some of these give this allowance only when the customer has a buyer at the producing center or shipping point, the amount of such allowance being equal to regular brokerage. Other manufacturers stated that they limit the payment of such allowance to a few large chain customers and then only in response to a demand. Such allowances are not uniform as between chains. Where brokerage allowance is granted, some of the manufacturers allow cooperative chains 2½ percent, while they allow corporate chains a brokerage fee of 5 percent. The reason for this discrimination is that it is necessary to grant the larger discount to the corporate chains to obtain their business.

"Some manufacturers who distribute through brokers stated that they were required to pay brokerage not only to their brokers, but also to the chain purchasers. One manufacturer, however, stated that where it pays brokerage to one of the large chain-store purchasers, no brokerage is paid to its own broker. The chain involved has established a buying agency which holds itself out to be a merchandise broker. When the chain, through this buying agency, orders a car of the products of the manufacturer for delivery to one destination, the buying agency receives brokerage. If the manufacturer has a broker located in the territory to which the products are shipped, the broker receives no brokerage. However, when the buying agency of the chain orders a car of the products of the manufacturer for delivery to more than one destination, a mixed shipment, the brokerage is divided, the agency for the chain receiving one half and the broker into whose territory the shipment is destined receiving the other half of the brokerage fee."

² The legislative history of Section 2(c) is set out in some detail in *F.T.C. v. Henry Broch & Co.*, 363 U.S. 166, 168-69:

"The Robinson-Patman Act was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power. A lengthy investigation revealed that large chain buyers were obtaining competitive advantages in several ways other than direct price concessions and were thus avoiding the impact of the Clayton Act. One of the favorite means of obtaining an indirect price concession was by setting up 'dummy' brokers who were employed by the buyer and who, in many cases, rendered no services. The large buyers demanded that the seller pay 'brokerage' to these fictitious brokers who then turned it over to their employer. This practice was one of the chief targets of § 2(c) of the Act. But it was not the only means by which the brokerage function was abused and Congress in its wisdom phrased § 2(c) broadly, not only to cover the other methods then in existence but all other means by which brokerage could be used to effect price discrimination."

Separate Opinion

65 F.T.C.

then would remit the fee to his employer without having performed any brokerage services. The second practice with which Congress was concerned was closely related. A large buyer, rather than set up a "dummy" broker and require payment of "brokerage" to him, might simply demand a discount or allowance respecting or "in lieu of" brokerage.³ Like the first practice, this was a method for extorting a brokerage fee or commission from the seller, not on account of brokerage services actually rendered, but as an indirect form of price discrimination. Congress sought, in Section 2(c), to deal with the first practice by forbidding brokerage payments to a party on the other side of the transaction where no services were rendered, and with the second by forbidding "any allowance or discount in lieu" of brokerage where such discount or allowance was not justified by any services rendered.⁴

In either case, the prohibition contained in Section 2(c) was intended to be absolute. Congress was concerned with practices which it believed to be without any redeeming social or economic value—practices whose only purpose was circumvention of the price-discrimination law. Section 2(c) is a *per se* provision, and the *per se* category is ordinarily confined to "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal. * * *" *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5. (Emphasis added.) It is because the section is directed at practices which are inherently pernicious and unjustifiable that the ordinary defenses to a *prima facie* case of price discrimination are not available and that competitive injury need not be proved.

The corollary to this is that Section 2(c) applies only to transactions in which no brokerage services are actually rendered. Spurious, false, unearned brokerage is forbidden; but if a businessman performs a valuable and substantial service or function in the distribution of goods, he is entitled to be compensated for it, and Section 2(c) does not apply.

³ "In the Final Report on the Chain-Store Investigation * * * Congress had before it examples not only of large buyers demanding the payment of brokerage to their agents but also instances where buyers demanded discounts, allowances, or outright price reductions based on the theory that fewer brokerage services were needed in sales to these particular buyers, or that no brokerage services were necessary at all. * * * These transactions were described in the report as the giving of 'allowances in lieu of brokerage' * * * or 'discount[s] in lieu of brokerage.'" *Broch, supra*, note 2, at 169, n. 5.

⁴ Section 2(c) provides "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom the compensation is so granted or paid."

Edward Joseph Hruby, F.T.C. Docket 8068 (decided Dec. 26, 1962) [61 F.T.C. 1437]. That is so even if he is not a conventional broker yet performs services which in other situations are performed by brokers. *Central Retailer-Owned Grocers, Inc. v. F.T.C.*, 317 F. 2d 410 (7th Cir. 1963). If a price discrimination does not involve phony brokerage, but takes the form of an express, undisguised price reduction or discount, Section 2(c) has no application. A discrimination that has been forced into the open is dealt with not under 2(c) but under 2(a), the price-discrimination provision of the Act.⁵

Thus, Section 2(c) has only a limited though important role to play in the enforcement of the Robinson-Patman Act. It is not a general regulation of brokers or other intermediaries, or of methods of distribution. It was not intended to freeze the brokerage function at what it may have been in 1936, or to tell brokers whether they may buy and resell on their own account, or to prevent buyers from performing brokerage functions, or otherwise to discourage changes or innovations in traditional forms of distribution. It is not concerned with legitimate, *bona fide* transactions at all, but strictly with phony, unearned brokerage. The common characteristic of all transactions prohibited by 2(c) is that brokerage or other legitimate and valuable services in distribution are *not* performed.

To be sure, excerpts will be found in the Congressional debates on Section 2(c) indicating some confusion as to what was deemed to be "legitimate" brokerage.⁶ Viewed as a whole, the brokerage payments and allowances with which Congress was concerned were payments and allowances of fake or dummy brokerage. The legislative history is replete with "assertions that the act would not inhibit the realiation of savings based on genuine efficiencies",⁷ and the statute as finally enacted expressly allows brokerage payments or allowances "for services rendered". As the Supreme Court has held, the provisions of the Robinson-Patman Act must be construed to harmonize with overall antitrust

⁵ "If, after ceasing to employ brokers, a manufacturer improperly discriminates between customers, section 2(a) will accomplish the purposes of the act." *Robinson v. Stanley Home Products, Inc.*, 272 F. 2d 601, 604 (1st Cir. 1959). " * * * [T]he purpose of attaching per se illegality to the section 2(c), (d), and (e) prohibitions was precisely to force unearned commissions out in the open. False brokerage qua brokerage is absolutely forbidden. False brokerage qua 'a naked quotation in price' does not fall into the 'masquerade' category; rather it falls into the trap deliberately set for it by the law. Discriminator-concessions which cannot disguise themselves as brokerage or 'allowances' are thus forced to show their true character, and to be measured by the sections of the law dealing with discrimination." H.R. Rep. No. 2966, 84th Cong., 2d Sess. 97-98 (1956). See *F.T.C. v. Simplicity Pattern Co.*, 360 U.S. 55, 68.

⁶ See H.R. Rep. No. 2951, 74th Cong., 2d Sess. 7 (1936); H.R. Rep. No. 2287, 74th Cong., 2d Sess. 15 (1936); 80 Cong. Rec. 9418 (1936) (remarks of Congressman Utterback). But see 80 Cong. Rec. 9420 (1936) (remarks of Congressman Celler).

⁷ Note. 77 Harv. L. Rev. 1308, 1313 (1964). See H.R. Rep. No. 2287, 74th Cong., 2d Sess. 17 (1936); S. Rep. No. 1502, 74th Cong., 2d Sess. 3 (1936).

policy. *Automatic Canteen Co. v. F.T.C.*, 346 U.S. 61, 74. Section 2(c), therefore, cannot be invoked to insulate so-called independent brokers or any other class against competition from other businessmen performing genuine, not phony or sham, services in distribution, or in any other way to rigidify the channels of distribution and thereby discourage competition and economic progress.

Despite confusion engendered by some early Commission and lower court cases,⁸ the scope and limits of Section 2(c) are simple and clear. The function which 2(c) performs in the overall statutory scheme is, since the Supreme Court's landmark decision in *Broch* and the Commission and court cases following it, no longer open to doubt. In *Broch*, the Court plainly indicated that Section 2(c) has no application in any case where "the buyer rendered any services to the seller or . . . anything in its method of dealing justified its getting a discriminatory price by means of a reduced brokerage charge." *F.T.C. v. Henry Broch & Co.*, 363 U.S. 166, 173. *Hruby* and *CROG (Central Retailer-Owned Grocers, Inc.)* have already been mentioned. In the first, a buyer was permitted to receive "brokerage" in compensation for the valuable services performed by him for the seller; in the second, a buyer, not a broker, was permitted to be compensated for services often performed by brokers. In *Thomasville Chair Co. v. F.T.C.*, 306 F.2d 541 (5th Cir. 1962), the court held that a savings in brokerage may lawfully be passed on by the seller to the buyer if the allowance reflects actual savings in distribution costs. And today, in *Flotill*, the Commission holds that an intermediary may lawfully be compensated for brokerage services even though he is the purchaser. (See pp. 1153-1155, *infra*.)

The effect of these decisions has been to restore Section 2(c) to its proper role in the scheme of the Robinson-Patman Act. Section 2(c) prohibits only three general types of transaction. The first is the payment of unearned brokerage to a dummy who renders no services and is controlled by the other party to the transaction. (See pp. 1149-1150, *supra*.) A variation of this would be where the dummy, in an attempt to mask a violation of the statute, performs only slight or nominal services which do not entitle him to brokerage. In the second type of transaction to which 2(c) applies, the dummy is dispensed with entirely. The seller grants directly to the buyer an allowance or discount for, on account of, or in lieu of, brokerage, and no services are rendered by the buyer to the seller justifying the allowance, and no savings in distribution costs are effected.

⁸ See, e.g., *Modern Marketing Service, Inc. v. F.T.C.*, 149 F.2d 970 (7th Cir. 1945); *Southgate Brokerage Co. v. F.T.C.*, 150 F.2d 607 (4th Cir. 1945); *Webb-Crawford Co. v. F.T.C.*, 109 F.2d 268 (5th Cir. 1940); *Biddle Purchasing Co. v. F.T.C.*, 96 F.2d 687 (2d Cir. 1938); *Quality Bakers of America v. F.T.C.*, 114 F.2d 393 (1st Cir. 1940); *Columbia River Packers Assn., Inc.*, 44 F.T.C. 118; *Custom House Packing Corp.*, 43 F.T.C. 164; *Ketchikan Packing Co.*, 44 F.T.C. 158.

The third type of transaction is that involved in the *Broch* case. There a broker was actually used in a transaction in which a discriminatory price concession was granted by seller to buyer; and the broker, by accepting a reduction in the brokerage due him on the sale from the seller, helped defray the concession. The vice in such an arrangement is that if a seller is free in this manner to shift the burden of a discriminatory concession to another person, the broker, he obviously has less incentive to resist a powerful buyer's demand for preferential price treatment. If, on the other hand, the seller is absolutely forbidden to recoup such a discount or allowance from his broker, he is likely to put up more resistance to the importunings of large buyers seeking discriminatory price concessions. Section 2(c) closes the easy and inviting route to price discrimination which would be wide open if the seller could shift the cost of discrimination to a third person, the broker.

But Section 2(c) imposes no obligation on a seller to employ brokers on any or all of his sales.⁹ Suppose that a seller uses brokers on most of his transactions, and, at the same time, certain buyers in the industry employ agents to actively seek out the sellers: If such an agent, rather than a seller's broker, is instrumental in bringing together seller and buyer, he has plainly rendered a valuable service to the seller as well as to the buyer; even if he is the latter's agent he is not barred by Section 2(c) from being compensated by the seller. In *Broch*, by way of contrast, where a broker was used in the transaction, the buyer rendered no services to the seller, and the brokerage allowance granted the buyer was therefore phony and unearned. *Broch* would have been decided differently if anything in the buyer's method of dealing had justified a brokerage reduction. In that event the reduction would have been lawful and could have been passed on to the buyer without violation of 2(c).¹⁰

II.

Applying the principles which I believe govern the interpretation and application of Section 2(c) to the facts of the present case, I agree that respondents' dealings with field brokers are not unlawful under Section 2(c). There are some 150 field brokers in the country, and until the commencement of the present action it was not suggested that the services they perform are unlawful. Not only is their function a useful and legitimate one; it is essential to the survival of small business in the canning industry. Large canners are able to ship directly in car-load lots to food brokers (called "local brokers") located in the areas

⁹ "There is nothing in the bill that requires the employment of a broker; there is nothing to prevent sales direct from seller to buyer." 80 Cong. Rec. 9418 (1936) (remarks of Congressman Utterback). See *Robinson v. Stanley Home Products, Inc.*, *supra*.

¹⁰ See discussion of *Broch* and *Thomasville*, p. 1152 of this opinion, *supra*.

where their customers are, or to the customers, be they wholesalers or retailers, directly. Also, large canners are able to deal directly with local brokers because they maintain sales forces in the field. Small canners cannot distribute in this way. They lack adequate sales forces, and are unable to fill large orders or ship in carload lots. If they are to compete at all with the large canners, they must have a method of pooling orders and shipments and establishing contact with the local brokers. The traditional method of doing so has been through the use of "field brokers" located in the seller's area and familiar with the seller's needs and resources.

As the Chairman's opinion recognizes, the field broker performs an economically valuable and entirely ethical function as an intermediary. He is entitled to be compensated for it. It would be absurd to view the payment of compensation by small canners to field brokers as a sinister attempt to circumvent the price-discrimination law—the kind of thing at which Section 2(c) is aimed. Who, in this case, are the favored, and who the unfavored, buyers? Who is, or could be, injured by the field brokers' method of doing business? Where is there any threat to competition, or danger of monopoly? The field brokers perform useful services to small, independent canners; the field-brokerage system is a legitimate means by which the ability of such canners to compete with their large rivals is strengthened. To hold this system unlawful would impede, not advance, the policies of the Robinson-Patman Act.

The Chairman's opinion reaches the right result, however, by a curious route. The opinion assumes that, in their dealings with respondents, the field brokers actually take title to the goods, but concludes that such "technical title passage" is not "conclusive" but merely "incidental to the services performed by the field broker for the canner." (P. 1135.) The opinion contrasts the "buying broker" cases (*e.g.*, *Southgate Brokerage Co. v. F.T.C.*, 150 F. 2d 607 (4th Cir. 1945)), where "ownership of the goods vested absolutely in the brokers." (P. 1135.)

But under *Hruby* (*Edward Joseph Hruby*, F.T.C. Docket 8068 (decided Dec. 26, 1962)) [61 F.T.C. 1437], a *bona fide* independent intermediary, such as a field broker, is entitled to be compensated for his services even though he is a buyer and the parties denominate such compensation as "brokerage". It is therefore immaterial whether, in what sense, or to what extent the field broker acquires title to the goods. To make legality depend on whether his title is "incidental" or "absolute" is to introduce irrelevant and confusing standards into a law designed to deal with the realities of commercial transactions, not their superficial forms. As for the "buying broker" cases, they were

decided not on the basis of the quantum of possession or the nature of the title enjoyed by the intermediaries, but, rather, on the simple, and in my opinion erroneous and discredited,¹¹ notion that "brokerage" may in no circumstances be paid by a seller to a purchaser or vice versa. By upholding the lawfulness of the brokerage payments to the field brokers, while recognizing that they are purchasers taking title to the goods on the sale of which they receive brokerage, the Chairman's opinion effectively cuts the ground out from under the old "buying broker" cases.

The sum and substance of the Commission's disposition of the field-broker issue is clear: the Commission no longer accepts the dogma that Section 2(c) forbids, in any and all circumstances, the payment of compensation in the form of brokerage for services rendered by a seller to a purchaser or by a purchaser to a seller. Since this dogma is the foundation of the buying-broker cases, their precedential authority has evaporated. So far as the buying-broker issue is concerned, the actual decision of the Commission in the instant case can only be regarded as confirming and strengthening *Hruby*, and as supporting the views expressed in Part I of this opinion.

III.

The finding that the 2½% allowance, labeled a promotional allowance, given by respondent to Nash-Finch was an unlawful allowance in lieu of brokerage has an inadequate basis in the facts.

Respondent uses local brokers on some, but not all, of its sales. Since 1954, and, for all the record shows, for a much longer time, respondent has made almost all of its sales to Nash-Finch directly. Neither it nor Nash-Finch has employed brokers on such sales. The reason for the elimination of brokerage in these transactions appears to be that respondent sells in such large quantities to Nash-Finch that the services of a broker are not needed. (The Chairman's opinion does not suggest that there is anything illegitimate about eliminating brokerage on such a ground, for, as mentioned earlier, nothing in Section 2(c) requires that a broker's services be used in any or all

¹¹ In discussing the effect of the Commission's application of Section 2(c) in general, and of the "buying broker" cases in particular, a former Chief Economist of the Commission, who is certainly not unfriendly to Robinson-Patman Act objectives, has stated:

"Viewed as a whole, the brokerage cases appear to include many that did not express the central purposes of the Robinson-Patman Act and that had effects partly inconsistent with those purposes.

* * * * *

In reducing the fluidity of the activities of buying brokers, several cases have substantially impaired the competitive strength of small wholesalers who are dependent on l.c.i. purchases and of the brokers who serve them, and probably have also weakened smaller producers in their competition with large producers." Edwards, *The Price Discrimination Law* 150-51 (1959).

transactions.) In December 1955, Nash-Finch requested respondent to grant it a promotional allowance. Respondent agreed. The figure arrived at was $2\frac{1}{2}\%$, and this is approximately the brokerage rate which respondent would have had to pay if it had dealt with Nash-Finch through a broker. The record is silent on how the $2\frac{1}{2}\%$ figure was arrived at.

These facts do not permit a finding that respondent granted an unlawful allowance in lieu of brokerage. As is conceded (Chairman's opinion, p. 1138), this is not a situation, like *Broch*, in which the cost of a price concession (even assuming that the $2\frac{1}{2}\%$ allowance should be regarded in that light) was shifted to the broker. The broker was out of the picture long before the concession was conceived or made. Brokerage was eliminated in these transactions not because the buyer demanded that part of the seller's normal brokerage be deflected to him in the form of a discount or allowance, but because the parties found it economical to do business without a broker's services. (Cf. *Thomasville*.) There is, moreover, a far simpler explanation for the promotional allowance than that it was given on account of brokerage—namely, that it was given in consideration of promotional activities undertaken by Nash-Finch. I find insufficient indication in the record—and the Chairman's opinion stops short of suggesting—that the promotional allowance was not *bona fide*. While there may be circumstances in which a promotional allowance may be a forbidden allowance in lieu of brokerage (see, e.g., *F.T.C. v. Washington Fish & Oyster Co.*, 282 F. 2d 595, 598 (9th Cir. 1960); *Point Adams Packing Co.*, 55 F.T.C. 852), the circumstances of this case do not warrant the inference that the allowance to Nash-Finch was the result of the kind of brokerage manipulation at which the "in lieu" provision of Section 2(c) is directed.

In the *Broch* decision, the Supreme Court reminded the Commission: "This is not to say that every reduction in price, coupled with a reduction in brokerage, automatically compels the conclusion that an allowance 'in lieu' of brokerage has been granted. As the Commission itself has made clear, whether such a reduction is tantamount to a discriminatory payment of brokerage depends on the circumstances of each case. *Main Fish Co., Inc.*, 53 F.T.C. 88." 363 U.S., at 175-76. The *Main Fish* decision, which the Supreme Court cited approvingly, had held that where the only evidence of a 2(c) violation consisted of a simultaneous reduction in sales price and in brokerage costs on the same transaction, a *prima facie* case was not established. It is clear both from the Supreme Court's language and from its reference to *Main Fish* that the Court will not sustain a finding that Section 2(c) has been violated where the only evidence is that the seller at once

pays lower brokerage and charges a lower price on the same transaction. For an inference that the seller is passing on the brokerage discount to the favored seller by means of a price reduction to arise, "the Commission * * * may not rely solely on the fact that the seller has paid less brokerage on the sales at the lower price, but must establish a causal relationship between the reduced brokerage and the reduced sales price" (*Thomasville Chair Co.*, F.T.C. Docket 7273 (Memorandum Accompanying Final Order Dismissing Complaint, October 22, 1963 [63 F.T.C. 1048, 1049])), as was done in *Broch*.

In the present case, the elimination of brokerage was not even simultaneous with the granting of a concession, and both the elimination of brokerage and the granting of a promotional allowance to Nash-Finch are explicable without any reference to price discrimination—the first because it was economical for the parties to do without a broker's services, the second because the seller received a *quid pro quo* (i.e., promotional efforts on behalf of its products) for granting the allowance.¹²

While the arithmetical equivalence between the brokerage reduction and the promotional allowance, and some of the other circumstances mentioned in the Chairman's opinion, are somewhat suggestive of a relationship between the reduction and the allowance, in my opinion they fall short, in the circumstances, of satisfying the Commission's burden of proof under Section 2(c).¹³

OPINION, DISSENTING IN PART

JUNE 26, 1964

By MacIntyre, *Commissioner*:

I have voted for the order to cease and desist which the Commission is issuing today in this matter and I am, with one exception, in complete accord with the percipient opinion of Chairman Dixon. My sole difference with the Chairman stems from his handling of the allegation that respondents have paid illegal brokerage to field brokers. I feel that the record shows this charge to have been sustained and I would interpret the order to cease and desist as forbidding the continuation of such payments.

My beliefs in this respect do not stem from a failure to recognize the important and valuable function performed by field brokers in

¹² "[A] lower price is *not* an allowance 'in lieu of' brokerage if it is causally conceived in considerations *other* than a saved commission or fee." Rowe, Price Discrimination Under the Robinson-Patman Act 341 (1962).

¹³ With respect to the other issues in the present case, I concur in the result.

the distribution of canned foods but from a dogged conviction that there is a right way and a wrong way to conduct business affairs within the framework of the antitrust laws and I am unwilling to do violence to both facts and law in this or any other proceeding in order to put the stamp of approval upon a practice which I know is *per se* illegal.

I have carefully examined the evidence of record and find myself in complete agreement with the findings and conclusions of the hearing examiner expressed in finding number 35, stricken by the Commission's final order. This finding reads:

From the record as a whole, the conclusion seems clear that in the transactions here in question Flotill deals with the field brokers and not with the ultimate purchasers. It sells and invoices the merchandise to the field broker, extends credit to him, and looks only to him for responsibility in the transactions. It is believed that in these circumstances title to the merchandise passes from Flotill to the field broker, and that legally the field broker is "the other party" to the transaction. It would seem to follow, therefore, that, as contended by counsel supporting the complaint, in its transactions with field brokers Flotill pays brokerage to the other parties to such transactions in violation of Section 2(c) of the Clayton Act.

This conclusion by the hearing examiner who heard and considered all of the evidence and the additional facts that the wholesalers and retailers who buy Flotill goods from field brokers are not aware of the identity of the packer (much of the goods carries the field broker's private label)—see Initial Decision, Findings 27 and 28—all failed to have any impact on the Majority. To the contrary, the Majority holds that "* * * field brokers do not purchase for their own account but function as intermediaries on behalf of Flotill in its sales to other parties * * *".

It seems to me that the decision to hold Flotill's transactions with field brokers lawful has been generated more by semantics and the "tyranny of words" than the substantive facts. I cannot escape the feeling that the appellation "field broker" has influenced the decision and perhaps even been determinative. In other words, I feel the decision would have been different if the enterprises in question had been known as "field distributors" or perhaps "field buyers." A person does not become a "broker" within the meaning of the Robinson-Patman Act by so calling himself, but by reason of his function. The facts here show the "field brokers" to be in actuality buyers and resellers and as such not legally entitled to receive brokerage.

As I stated above, my comments should not be interpreted as condemnation of the field broker's position in the food distribution industry. I hold no doubt that field brokers perform a useful and valuable function in assisting canners, and especially smaller canners, to

bring their products to market. I suspect that the hearing examiner and Chairman Dixon recognize the legitimate and useful function of the typical field broker and are desirous of not interfering therewith. But much of Flotill's dealings with its field brokers was atypical in that sales were made to the field brokers with attendant title passage, leaving the field broker free to sell directly to wholesalers and retailers at speculative prices and without the aid of a local broker. Under such circumstances, Section 2(c) is clearly violated by the payment of brokerage.

As I see it, a canner must make a selection. He can either sell to a field broker, granting him such functional discounts as the character of such buyer's resale warrants, or the canner may pay brokerage to the field broker, issuing his invoices and looking for payment to the wholesalers and retailers who buy and resell the goods. But the two systems cannot be blended without doing violence to the law. Also, to permit a buyer to receive brokerage on purchases made for its own account opens the door to abuse and discrimination.

These apparent prospective results have not deterred the Majority. Here the Commission is departing from the clear route of judicial interpretation of the statute. It is off on an uncharted course. It seems to be saying that in a single transaction a trader may act as a broker for the seller, a buyer, and as an intermediary or agent of those to whom the buyer resells, and still receive brokerage from the seller for handling the transaction. Indeed, this is a blending and mixing of functions and personalities. This blending and mixing will breed and make confusion inevitable. This action by the Commission cannot be accounted for except for the fact that it is in keeping with what some requested the Commission to do in the issuance of Trade Practice Rules for the Fresh Fruit and Vegetable Industry. But that is not a good reason for the Commission doing what it has done in this case. Here the Commission has dumped the problems involved into a heap and mixed them as one would the ingredients of a tossed salad. By so doing, it would appear that the Majority is looking ahead to doing something similar in the Fresh Fruit and Vegetable situation. Perhaps tossed salads are worthwhile products from fresh fruits and vegetables, but the mixing and blending of these legal problems in either this case or in any future handling of the proposed Trade Practice Rules for the Fresh Fruit and Vegetable Industry will help no one.

FINAL ORDER

This matter having been heard by the Commission upon cross-appeals from the hearing examiner's initial decision and upon briefs

and oral argument in support of and in opposition to said appeals; and

The Commission having determined for the reasons stated in the accompanying opinion that the appeal of counsel supporting the complaint should be granted in part and denied in part, that respondents' appeal should be denied, and that certain of the hearing examiner's findings as to the facts and conclusions should be modified to conform to the views expressed in said opinion:

It is ordered, That the initial decision be modified by striking findings numbered 6 through 17 and substituting therefor that part of the accompanying opinion beginning on page 1147 with the words "The complaint names" and ending on page 1148 with the words "and we so hold."

It is further ordered, That the initial decision be modified by striking therefrom the findings numbered 35 and 52.

It is further ordered, That the initial decision be modified by striking therefrom conclusion numbered 6 on page 1130 and substituting therefor the following:

6. The circumstances of this case warrant the conclusion that the order to cease and desist should be directed against respondents Mrs. Meyer L. Lewis, Albert S. Heiser and Arthur H. Heiser in their individual capacities as well as in their capacities as officers of the corporation.

It is further ordered, That the initial decision be modified by striking the order on page 1130 and substituting therefor the following:

It is ordered, That respondents Tillie Lewis Foods, Inc. (formerly Flotill Products, Inc.), a corporation, and Mrs. Meyer L. Lewis, Albert S. Heiser, and Arthur H. Heiser, individually and as officers of said corporation, and respondents' officers, agents, representatives and employees, directly or indirectly, through any corporate or other device, in or in connection with the sale of canned fruits and vegetables in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from:

1. Paying, granting or allowing, directly or indirectly, to Nash-Finch Company, or to any other buyer, or to anyone acting for or in behalf of, or who is subject to the direct or indirect control of any such buyer, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, upon or in connection with

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

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

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

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

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

IN THE MATTER OF

ALFONSO GIOIA & SONS, INC.

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

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

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

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

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

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

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

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

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Decision

65 F.T.C.

ORDER REOPENING PROCEEDING

FEBRUARY 8, 1962

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

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

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

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

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

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

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

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

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

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

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

IN THE MATTER OF

EKCO PRODUCTS COMPANY

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

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

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

COMPLAINT

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

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

Complaint

65 F.T.C.

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

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

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

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

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

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

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

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

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

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

Geneva, New York

Lock Mills, Maine

Canton, Ohio

Elkhart, Indiana

Pico, California

Holyoke, Massachusetts

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Respondent's financial and economic strength;
2. Respondent's power and ability to control prices, terms and conditions of sale on commercial meat-handling equipment, particularly through the use of pricing practices that have the effect of lessening, restricting, restraining or eliminating competition;
3. Respondent's dominant and monopolistic position as the only manufacturer and seller of a "complete line" of commercial meat-handling equipment; and
4. Respondent's demonstrated ability to eliminate competition by acquiring or buying out competing producers and sellers of commercial meat-handling equipment.

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

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

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

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

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

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

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

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

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

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

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

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

Nature of the Proceeding—The Issues

In this case it is alleged in the complaint, and denied in the answer, that respondent corporation, Ekco Products Company (hereinafter for brevity referred to either as Ekco or as respondent), has violated § 7 of the Clayton Act, as amended, and approved December 29, 1950, 15 U.S.C.A. § 18.¹ The two acquisitions made by respondent, which are alleged to constitute such violation, are (1) its conglomerate acquisition in 1954 of the McClintock Manufacturing Company (hereinafter for brevity referred to as McClintock), which had been theretofore engaged, among other things, in the manufacture, sale and distribution

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

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

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

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

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

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

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

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

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

History of the Litigation

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

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

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

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

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

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

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

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

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

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

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

Case Submitted Generally and Considered Upon the Whole Record

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FINDINGS OF FACT

The Corporations Involved

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

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

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

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

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

Interstate Commerce—The Relevant Market

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

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

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

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

The Line of Commerce

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

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

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

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

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

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

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

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

Market for the Line of Commerce

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

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

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

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

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

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

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

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

Nature and Extent of Respondent's Business

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The McClintock Acquisition in 1954

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

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

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

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

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

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

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

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

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

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

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

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

The Blackman Acquisition in 1958

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Ease of Entry Into This Line of Commerce

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

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

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

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

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

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

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

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

A Divestiture of McClintock Would Only Aid Competitors

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

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

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

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

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

Basic Errors in the Theory of the Prosecution

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

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

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

Such a [conglomerate] merger * * * does not have the effect of automatically foreclosing to competitors any market outlet or source of supply as in a vertical merger, nor does it have the effect of automatically eliminating a competitor as in a horizontal merger * * *.

The question in this proceeding thus is whether the proscribed effect may in fact result from this particular acquisition where the only immediate effect is the replacement of one competitor by another. In making this determination, the same tests apply as in any other matter coming within the purview of § 7, but since a conglomerate acquisition does not have the above-mentioned "automatic" effects of a vertical or horizontal merger, such a determination is necessarily difficult to make from a consideration of evidence relating solely to the competitive situation existing in the relevant market prior to the acquisition and to the pre-merger status of the acquired and acquiring corporation. Consequently, a consideration of post-acquisition factors is appropriate.

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

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

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

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

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

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

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

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

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

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

Summary

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

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

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

CONCLUSIONS OF LAW

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

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

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

ORDER

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

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

OPINION OF THE COMMISSION

APRIL 21, 1964

By Elman, *Commissioner*:

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

I

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

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

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

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

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

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

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

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

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

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

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

II

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III

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

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

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

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

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

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

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

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

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

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

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

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

As for respondent's acquisition of the assets of Blackman, its unlawfulness under Section 7 is clear and is virtually conceded by respondent. A dominant firm may not lawfully eliminate its leading competitor by acquiring that competitor's assets. Such an acquisition is forbidden by Section 1 of the Sherman Act (*United States v. First National Bank & Trust Co.*, Sup. Ct. No. 36, October Term 1963 (decided April 6, 1964)), and *a fortiori* by Section 7 of the Clayton Act. See *Brillo Mfg. Co.*, F.T.C. Docket 6557 (decided January 17, 1964), p. 16 [64 F.T.C. 261]. It is, of course, immaterial that the assets acquired were a part, rather than the whole, of the corporation's assets, in view of the language of Section 7.¹⁵ Nor does the fact that the owner of Blackman Stamping & Manufacturing Company sold the assets in question because he was suffering from an incurable disease bring the acquisition within the "failing company" exception. The exception refers to business failures. See *International Shoe Co. v. F.T.C.*, 280 U.S. 291, 299-303; H.R. Rep. No. 1191, 81st Cong., 1st Sess. 6 (1949); S. Rep. No. 1775, 81st Cong., 2d Sess. 7 (1950). There is no suggestion that the company was anywhere near failing condition at the time of the acquisition.

IV

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

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

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

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

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

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

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

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

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

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

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

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

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

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

APRIL 21, 1964

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

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

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

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

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

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

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

OPINION ACCOMPANYING FINAL ORDER

JUNE 30, 1964

By Elman, *Commissioner*:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Commissioner Reilly did not participate.

FINAL ORDER

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

It is ordered, That:

I

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

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

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

II

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

III

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

IV

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

V

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

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FEDERAL TRADE COMMISSION DECISIONS

Complaint

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