Order affirming the findings of fact in the initial decision and ordering the complaint counsel to file within 30 days a proposed form of order and the respondent's counsel to file an alternative form of order.

Opinion of the Commission

By Reilly, *Commissioner:*

On May 16, 1963, the Commission issued a complaint against

Diamond Alkali Company's (Diamond)[1] acquisition of Bessemer Limestone and Cement Company (Bessemer) charging that it "constitute[d] a violation of Section 7 of the Clayton Act (U.S.C., Title 15, Section 18), as amended." The relevant section of the country was alleged to be a twenty-three county area in northeastern Ohio and northwestern Pennsylvania. For all practical purposes complaint counsel and respondent agreed, and the hearing examiner found, that the relevant line of commerce was "portland cement." The hearing examiner sustained the charges in the complaint and ordered respondent to divest itself of the stock and assets acquired from Bessemer.

In its appeal, respondent urges two main objections to the examiner's decision:

(1) The twenty-three county area is not the proper section of the country in which to measure product market shares or probable competitive effect.

(2) Even assuming that the section of the country had been properly defined, a divestiture order would be "contrary to the public interest and punitive."[2]

I

(a) *Relevant Geographic Market*

The hearing examiner found that "the relevant section of the country for evaluating the immediate and direct effects of the challenged acquisition is * * * the area of actual competition between

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[1] Diamond Alkali sells its cement under the brand name "Standard." There is another cement company called "Standard Lime & Cement Co.," which is a division of the Martin-Marietta Co. And there is also a Diamond Portland Cement Co., a division of Flintkote Co. Neither of these organizations is connected with Diamond Alkali Company.

Diamond Alkali Company, according to its "listing application" filed with the New York Stock Exchange in connection with the Bessemer acquisition, is engaged in the production of five general product categories: (1) Chlorine & By-products, (2) Alkalis, (3) Silicates, (4) Chromates, (5) Organics, (6) Miscellaneous (cement is within this category). In 1962, its assets were over $175 million, and its sales were about $158 million. Diamond's cement sales in 1962 were over six million dollars.

Bessemer, although it sells other products in a very minor way, is essentially a cement producer. In 1960, its assets were over $12 million, its sales over $9.5 million and its net income over $1.5 million.

[2] Respondent had its only cement producing facilities located within the physical boundaries of its Painesville chemical works. The facilities were referred to as "Plant A" and "Plant B" by respondent. At the end of the 1961 shipping season, approximately 5 months after the complaint had issued, respondent closed down "Plant A." In August of 1964, approximately 3 months after the hearing examiner's order, "Plant B" was sold to a Florida "white cement" producer (white cement is a specialty cement not competitive with portland cement).

respondent and Bessemer * * *." (I.D., p. 15 [72 F.T.C. 717].) In this area the examiner found eleven cement producers[3] competing with Diamond and Bessemer "in all or various portions of the 23 counties * * *." According to the examiner, within this market, Diamond had 27% of the shipments; by acquiring Bessemer it added 16%, representing a total of 43%. Complaint counsel assert that the universe, upon which these market share figures are based, should and does comprehend *only* the actual shipments made *into* this area by plants and distribution terminals within and without the 23-county area. Respondent contends that this universe figure is unrealistic in that it failed to include any or all of the following:[4]

1. Shipments by plants or distribution terminals, wherever located, into the area where Bessemer shipped, but Diamond Alkali did not.

2. Shipments outside that area[5] by plants who were shipping into that area.

3. Shipments made outside the 23-county area by plants who were at the same time shipping into the 23-county area.

Respondent, as we understand its position, also argues that total capacity[6] or total production is a more meaningful measure of competition than total shipments; and so *any* universe should be compiled on the basis of capacity or production—not on shipments. Finally, respondent argues for the inclusion within the market of potential competitors of Bessemer in that area where Bessemer did not compete with Diamond.

Specifically, according to respondent, the geographical market should be extended to encompass Ohio, Michigan, Pennyslvania, West Virginia, Maryland and the four border counties of western New York.

(b) *Legal Guidelines*

In determining the proper section of the country in a Section 7 case, we are guided by two recent statements of the Supreme Court—*Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320 (1961) (a case involving Section 3 of the Clayton Act), and *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963). Briefly, in *Tampa*,

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[3] These eleven producers are (1) Lehigh Portland Cement Company; (2) Penn Dixie Cement Corporation; (3) Universal Atlas Cement; (4) Green Bag Cement Co.; (5) Columbia Cement Corp.; (6) Southwestern Portland Cement Co.; (7) General Portland Cement Co.; (8) Dundee Cement Co.; (9) Huron Portland Cement Co.; (10) Diamond Portland Cement Company; and (11) Medusa Portland Cement Company. Almost all of these firms are significant factors in the cement business on the national level. Bessemer, according to the evidence, was the second largest producer in the area in which it operated. Diamond occupied the number one position in the 23-county area in which there was competitive overlap between Bessemer and Diamond.

[4] Although almost 100% of Diamond's shipments went to the 23-county area, approximately 33% of Bessemer's shipments went into areas where Diamond did not compete—66% of Bessemer's shipments went into areas where it was competitive with Diamond.

[5] The area into which Bessemer, but not Diamond, shipped.

[6] At the present time, few plants produce at anywhere near their actual or rated capacity.

a utility company entered into contracts with a coal supplier which bound the utility to purchase coal from that one source for twenty years. Faced with the problem of whether "respondents, * * * one of 700 coal producers who could serve the same market * * *, peninsular Florida [had illegally restrained trade], * * *" the court concluded that "* * * the contract for a period of twenty years [had not] excluded competitors from a substantial amount of trade."[7] Crucial to the court in carving out the geographic area (in which the probability of foreclosure was to be measured) was the fact that "by far the bulk of the overwhelming tonnage marketed *from the same producing area as serves Tampa* is sold outside of Georgia and Florida and the producers were eager to sell more coal in those states."[8] (Emphasis added.) Simply put, to be precluded from selling to Tampa Electric made little difference to the coal producing firms who "could serve the same market."

Confronted once more with the problem of delineating the appropriate section of the country in *Philadelphia National Bank, supra,* the Supreme Court ruled that "the proper question to be asked * * * is * * * where within the area of competitive overlap the effect of the merger on competition will be direct and immediate." The answer to such an inquiry, according to the court, in turn depended upon "the geographic structure of supplier customer relations." The court then applied the *Tampa Electric* language, urging "careful selection of the market area in which the seller operates *and to which the* purchaser can practicably turn for supplies."[9] (Emphasis in original.)

In view of the court's language, complaint counsel's contention that the 23-county area in which there is competitive overlap is by that very fact—the fact of competitive overlap alone—the relevant section of the country, is unacceptable. For any attempt to define the relevant section of the country must take into consideration economic realities—not merely the mechanical fact of competitor overlap. Indeed one of the alleged purposes of amending Section 7 of the Clayton Act from "in any section or community" to "in any section of the country" was to broaden the scope of the previous language, so that purely local acquisitions would not necessarily be condemned by Section 7.[10]

(c) *The Facts*

Respondent contends that "just as the market in *Tampa* was the

[7] 365 U.S. 320, 330 (1961).

[8] *Id.* at 332.

[9] 374 U.S. 321, 357, 359 (1963).

[10] As the Supreme Court stated in *Brown Shoe* "Where the arrangement effects a horizontal merger between companies occupying the same product and geographic market * * * [the] 1950 amendment made plain Congress' intent that the validity of such combinations was to be gauged on a broader scale: their effect on competition in an economically significant market." (370 U.S. 294, 335 (1962).)

seven-state area, so here the relevant market under *Philadelphia National Bank* and *Tampa*, is the five-state western New York area in which are located the producers who are actual and potential suppliers to the customers in the area served by Bessemer and in part, Standard." (Resp.'s Reply Brief, p. 8.)

In *Tampa,* record evidence was found that the coal companies supplying Tampa were "eager" to ship outside the Georgia and Florida area. And according to the Supreme Court, "By far the bulk of the overwhelming tonnage marketed from the same producing area as serves Tampa is sold outside of Georgia and Florida." We infer from this language that respondent here at least has the burden of coming forward with some evidence meeting the criteria implicit in the court's statement. But from our examination of the record, there is no evidence that the suppliers to the 23-county area were "eager" to ship elsewhere or that those firms shipping substantial quantities of cement into the area were shipping elsewhere to any significant degree. The evidence reveals that from 1959-1962, five firms, Standard and Bessemer ranking high on the list, had the lion's share of the business in the northeastern Ohio and northwestern Pennsylvania area. In 1959 they had 85.20% of the shipments and in 1962 these same firms had 77.13%. Approximately 100% of Diamond's shipments went into this area and between 59-66% of Bessemer's shipments went there.

Huron's Buffalo distribution terminal, some distance from the heart of the 23-county area, shipped completely insignificant amounts into the relevant geographic market. On the other hand, its Cleveland distribution facility, in the heart of the 23-county area, was shipping the vast majority of its total shipments into the northeastern Ohio, northwestern Pennsylvania area. The Toledo terminal, also some distance away, logically enough, made less than 20% of its shipments into the 23-county area.

Flintkote had two terminals, one at Middle Branch, Ohio and the other in Cleveland. The overwhelming majority of shipments from these terminals went into the 23-county area.

Medusa stated that "shipments into counties specified cannot be separated by plant or distribution facility." So its figures are not meaningful with respect to this issue.

We conclude, therefore, that the substantial suppliers to the 23-county area, did regard that area as significant to them. Thus, unlike *Tampa Electric*, what happened in that market did make a significant difference to them.

Conversely, the most persuasive evidence that distant sellers do

not regard this area (the 23-county area) as significant to them on a day-to-day basis, is their failure to ship much of their cement there.[11] Perhaps they could—but they choose not to. Since the sellers do not make significant shipments into this area, it is also reasonably clear that purchasers cannot practicably turn to suppliers in the vast section of the country which respondent proposes.

In addition, this record clearly establishes that the most substantial day-to-day market for cement producers is the local ready-mix market. (Tr. 311-312.) Cement suppliers for ready-mix concrete producers must operate almost on a stand-by basis, ready to ship additional cement on hourly schedules. To some extent, as respondent urges, the advent of truck delivery and the construction of terminal distribution points, has enabled distant producers of cement to extend their geographical markets and still meet such a demand. Moreover, as respondent points out, the admitted over-capacity in the cement business has in fact forced many producers to seek new geographical markets and to develop new techniques for entry into such markets, such as the "Bazooka" and the Flexi-Flo system.[12] But in order to present themselves as meaningful suppliers to such local markets, these distant firms depend not only on internal savings per unit achieved through increased production, but also on their ability to absorb costs incurred in shipping long distances. No one, on this record, has suggested that the costs saved by increasing production would on a regular basis overcome the significant freight costs incurred in shipping cement long distances. In fact, the record testimony indicates the opposite (Tr. 254, 256 and 471).

Witness after witness declared that today more cement was shipped by truck than by rail. The customer's demand that cement be immediately available had reduced sharply reliance on rail shipment. Thus, oftentimes the construction of a distribution terminal is a defensive maneuver to retain pre-existing customers, not an attempt to enter new markets. And as one witness put it "* * * one attempts always to distribute their major portion of their product, or all of it, in areas closely adjacent to the mill as is possible and, from that point beyond is where you reach out and get additional tonnage." (Tr. 889.)

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[11] In *Crown Zellerbach* v. *F.T.C.*, 296 F. 2d 800, 808 (1961), the circuit court stated, "We think it is correct to say that the sales statistics rather than production figures are generally speaking more significant in arriving at the relevant market both as respects product and geographical area." As indicated previously, respondent argues that capacity figures are more meaningful than shipment or production figures. The Commission, however in *Permanente Cement Company*, Docket 7939, pp. 5 and 6 (April 24, 1964) [65 F.T.C. 410, 491-492], relied on and utilized shipment figures. Respondent's contentions have not convinced us that we were mistaken in that case.

[12] A detailed explanation of these techniques for rapid transportation to distant points is set out in the initial decision at pp. 26-28 [72 F.T.C. 728-729].

Another witness stated that the "only reason we would go to any distant point from our plant was because we weren't able to dispose of our product closer to our plant." (Tr. 913.) In short, although there is excess capacity and although new techniques have been utilized to dispose of the increased production in more distant markets, a significant majority of every cement plant's production is today and, for the foreseeable future, will be made available to and purchased by consumers located within a relatively short distance of the cement plant.

Respondent has placed some emphasis on the testimony of Dr. Richard Cyert, dean of the Graduate School of Industrial Administration at the Carnegie Institute of Technology. Given certain conditions, which he asserted to exist in this case, Dr. Cyert maintained that distant firms could be an effective force in what appeared to be a local market. Because of the existence of such factors here, the relevant geographical market should be expanded greatly. Without passing on the merits of Dr. Cyert's detailed contentions, our examination of the record indicates such expansion is not justified here.[13]

In *Philadelphia National Bank, supra,* the Supreme Court recognized the clash between theory and business reality on this very point, declaring:

> Theoretically, we should be concerned with the possibility that bank offices on the perimeter of the area may be in effective competition with the bank offices within; actually this seems to be a factor of little significance.[14]

Then it added that, "There is no evidence of the amount of business done in the areas by banks with offices outside the area. * * * As a practical matter the small businessman can only satisfy his credit needs at local banks. To be sure, there is some artificiality in deeming the four-county area the relevant 'section of the country' as far as businessmen located near the perimeter are concerned. But such fuzziness would seem inherent in any attempt to delineate relevant geographical market. * * * And it is notable that outside the four county area, appellees' business rapidly thins out."[15]

The court later noted that the market share percentages did not include "banks which do business in the four county area, but have

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[13] Testifying in favor of the complaint was Dr. Samuel Loescher, an economist, specializing in the cement industry, who reached conclusions essentially opposite to those of Dr. Cyert. According to complaint counsel's proposed findings, Loescher testified that "the 23 county area [was] appropriate because it was the area where the merged companies competed prior to the acquisition and where there will be the loss of an actual and substantial source of supply. Dr. Loescher, in formulating his opinion, also took into consideration the impact of freight absorption, costs of solicitation and the ability to supply effective service [to] the market area of a cement plant." (Complaint Counsel's Proposed Findings, p. 27.)

[14] 374 U.S. at 359.

[15] *Id.* at 361, footnote 37.

no offices there; however, this seems to be a factor of little importance * * *.[16] To the extent that such a factor has importance in *this* case, shipments from plants and terminals outside the area into the area *are* included in the market share figures here.

Further, the Supreme Court has said again in *Philadelphia National Bank*, "The factor of inconvenience localizes banking competition as effectively as high transportation cost in other industries."[17] We note that there are few better examples of localized competition induced by high transportation costs than the cement industry.

Finally, the 23-county area contains several substantial urban areas including the vast Cleveland metropolitan area, Akron, Canton and Youngstown, Ohio and Erie, Pennsylvania. Such a market for cement is hardly *de minimis*. Cleveland, for instance, is located in Cuyahoga County, and in 1960 Standard had 37.76% of actual cement sales and Bessemer 10.25% of the actual cement sales in Cuyahoga County. Adding to the significance of the 23-county area, in judging the effects of the acquisition, is the fact that for many years prior to the acquisition, Standard sold 99 to 100% of its Standard Brand portland cement in the 23-county area. And, most importantly, shipments of seven of the eleven firms actually shipping into the area from the plants and distribution terminals *actually* located within the 23-county area, constituted 91% of total cement shipments to consumers within this area.

Respondent reminds us that "The recent Supreme Court opinions in *El Paso, Continental Can* and *Penn-Olin* give added emphasis to the significance of the potential suppliers not actually serving the 23 counties during the 1959-62 period." (Resp.'s Reply Brief, p. 8.)

But as this Commission recently said in the *Beatrice* case:

> * * * the adverse effects that result from an absence of *actual* competition are rarely cancelled out completely by the presence even of substantial potential competition. * * * Potential competition may tend to keep prices in a concentrated market down to entry-discouraging levels, but obviously the price low enough to dissuade a firm from trying to force its way into a new market —always a risky venture—may be substantially higher than the price that would prevail if there were vigorous competition among the sellers already there. *Beatrice Foods Co.*, Docket No. 6653, p. 29 (April 26, 1965) [67 F.T.C. 473, 717].

Under some circumstances, we would be concerned that we are condemning a merger between relatively small companies. But with competition localized as it is in the cement business, the competitive huffing and puffing of firms such as U.S. Steel, Pittsburgh Plate

[16] *Id.* at 364, footnote 40.
[17] *Id.* at 358.

Glass, etc., becomes more academic than actual. And so what appears on the surface to be a minor structural change in fact is one of some significance, in a somewhat restricted market area. Respondent has therefore made a strenous effort to destroy the 23-count area as a valid concept. But, although some of its arguments are impressive theory and prediction, there is little evidence, based on today's business realities, to support its position.

Once having defined the relevant market, within that area we find respondent's market share to be over 40% of the shipments made into that section of the country. This percentage far exceeds the standard of presumptive illegality of 30% set forth in *Philadelphia National Bank*.[18] The examiner stated that seven companies within this market area accounted for 93% of shipments; and, in addition, he found that "The cement structure in the United States has reflected a marked increase in the trend towards concentration by merger. During the period 1955 through 1961, there were 22 mergers involving cement companies." (I.D., p. 30 [72 F.T.C. 730].) Clearly, in these circumstances, the presumption of illegality established by *Philadelphia National Bank* is called into play.

The issue then is whether respondent has successfully rebutted this presumption. We hold that it has not. Briefly, while respondent's facilities may have required renovation or replacement, respondent has not proved that the challenged acquisition "was essential to [respondent's] continuing to be a competitive performer" (*Permanente Cement Company, et al.*, Docket No. 7939, p. 5 (April 24, 1964)) [65 F.T.C. 410, 491]. Nor has respondent shown that it could not or would not have found other means to remain an effective competitor. As the Supreme Court held in *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 370 (1963), Section 7 is designed to channel the growth of a company dominant in a particular market towards internal expansion rather than corporate acquisition.

II

Even if the merger violated Section 7 when consummated, the disappearance of the Painesville plant from the 23-county area has not mooted the legality or illegality of Diamond's acquisition of Bessemer. At the time of the acquisition Diamond still had a substantial cement operation at Painesville, Ohio. Admittedly they were having trouble with it in many ways.[19] And, according to re-

[18] 374 U.S. at 364.

[19] The source of limestone was a few hundred miles away; the land on which the cement plant was located was subsiding; the equipment was somewhat old; and the repair crews were poorly utilized.

spondent, it had decided to sell the plant even prior to the time of the acquisition. Counsel for respondent argue that "by the middle of 1959 respondent's management recognized that it could not continue to produce cement at the Standard plant." (Resp.'s Proposed Findings, p. 11.)

Although both sections of the plant (A & B) were in operation at the time of the acquisition, after the 1961 shipping season plant A was closed down. And on August 31, 1964, three months after the hearing examiner's divestiture order, plant B was sold to a Florida cement producer. Now Diamond is completely out of the cement business at its former location.

Simply put, the issue is whether an acquiring firm by voluntarily disposing of the physical assets which prior to the acquisition had made it a substantial competitive factor and direct competitor of the acquired firm, may thereby shield itself from Section 7 of the Clayton Act.

Thus respondent has argued—in effect—that complaint counsel's case turns on the temporal fortuity of Diamond's first making the acquisition and then divesting itself of its physical assets. But even if Diamond had rid itself of the Painesville assets a substantial period of time before acquiring Bessemer, the Commission might still have issued this complaint. True, the Commission would then have been faced with a *fait accompli.* By selling the Painesville property—regardless of the reasons—Diamond would have demonstrated its clear intention to abandon the Painesville cement operation; yet it might still be a realistic potential competitor of Bessemer.[20] And more clearly, if Diamond had simply closed down its cement facilities—not selling or destroying them, but leaving them as a realistic competitive threat—then, in *Penn-Olin* terms, Diamond Alkali would have remained "at the edge of the market, continually threatening to enter."[21] In either of these instances, Diamond by subsequently acquiring Bessemer would be eliminating Bessemer as its own potential competitor.[22] On the other hand, if it had chosen to dispose of the Painesville facilities at the same time it acquired Bessemer, keeping its [Diamond's] sales force and its trade name intact, Diamond's acquisition might still violate Section 7. On the facts in this litigated case, it waited a substantial period of time

[20] Whether or not it was such a competitor would depend on the status of its brand name, the viable existence of its sales force, its desire and/or ability to obtain cement elsewhere and the lapse in time between disposing of its own assets and acquiring Bessemer. If there was a sufficiently long period of time between Diamond's divestiture of its own assets and if its sales efforts had been dormant for a substantial period of time, then perhaps Diamond would be viewed as a new entrant, and we would be presented at once with a novel and different problem than is at issue here.

[21] 378 U.S. 164, 173 (1964).

[22] It is clear, of course, that Diamond's withdrawal from the sales market would have resulted in its previously existing market share being seized by its competitors.

after the acquisition, taking care to obtain the utmost from its own facilities, at the same time coordinating these actions with a concurrent expansion of the Bessemer facilities and thereby not missing a step in the competitive gavotte.[23]

Of course, we are not ruling that Diamond does not have the right to withdraw its facilities from the market. For Diamond never really withdrew from the market and Bessemer has been eliminated as an independent competitive factor with its facilities fused onto Diamond's still existing market share.

Moreover, one could view Diamond's voluntary "divestiture" of its own physical assets as a form of post-acquisition evidence. Although Diamond clearly is under no obligation to stay in business, its destruction of one of its own plants and the sale of the remaining plant to another firm, completely outside the relevant market, was hardly a benefit to competition in the relevant geographic market. If anything, Diamond's actions with respect to its own cement producing assets might be viewed in a broad sense as anticompetitive. And such actions in a more narrow view have not *adversely* affected the Diamond-Bessemer operations since the acquisition. For even respondent admits that the Bessemer acquisition was and has been beneficial to Diamond. We conclude therefore that Diamond's actions have not mooted this case.

III

Remedy

In ordinary circumstances there should be no antitrust inhibitions against a firm taking itself out of a business, or disposing of obsolescent assets in order to retrench its position in an existing enterprise. We do not hold therefore that Diamond Alkali was forever obligated to cling to its obsolescent assets. But having acquired Bessemer, a substantial competitive factor, Diamond cannot then use its private corporate decision—to get rid of its cement producing facilities—to frustrate the Commission's obligation to protect competition. This is particularly true where (1) those former facilities were used to supplement Bessemer's production facilities and vice versa for a not insignificant period of time[24] and (2) where Diamond never went out of the business of *selling* cement.

[23] The hearing examiner found that before "any final decision had been reached as to the future conduct or abandonment of respondent's cement business, the acquisition of Bessemer was accomplished (Tr. 1616)." Thus the facts here obviate the necessity of our deciding "* * * whether the acquisition * * * was indispensable to [Diamond's] continuance as an active and effective competitor * * *." *Permanente Cement Company, et al., supra.*

[24] The Standard brand was put on cement manufactured at Bessemer; and Bessemer "Clinker" was ground at Painesville and labeled as Standard Cement. Respondent from the time of the acquisition forward was producing cement at and shipping cement from whichever facilities—Painesville or Bessemer—returned the greatest profit to it. (See Tr. 285-289.)

We have searched for precedents bearing on this issue. The issue appears to be, however, one of first impression.

Whether this agency has the power to deal with this remedial problem might be seen as a variant on the "after acquired" property issue. For here, the acquiring firm, instead of improving the acquired company—has divested itself of allegedly obsolescent assets. In *Reynolds Aluminum*, we held that this agency in fact does have the power to order firms to divest themselves of after acquired property. (*In the Matter of Reynolds Metals Company*, 56 F.T.C. 743 (1960).) We were, however, reversed on this issue (*Reynolds Metals Company* v. *F.T.C.*, 309 F. 2d 223 (D.C. Cir. 1962)). Until recently, this was the only clear court holding on this issue under Section 7. Alcoa, however, has, within the past few months, sought Supreme Court review of that part of a lower court's order requiring divestiture of an aluminum fabricating plant built two years after the acquisition. (*U.S.* v. *Alcoa* (Cupples Acquisition), 33 U.S.L. Week 3369 (May 18, 1965).) But we are not persuaded that either of these cases casts much light on the problem.

On the surface, at least, the Commission's decision in *Ekco Products Company*, Docket No. 8122 (April 21, 1964), 65 F.T.C. 1163, offers more aid. There, the Commission commented broadly that, "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 * * *." (P. 1216.) Here, the disappearance of certain physical assets of the *acquiring* company, respondent urges, also moots the remedial problem. The distinction, we suggest, is that there is obviously more to the cement business than simply producing cement. The "disappearance" of Diamond's cement plants in no way took Diamond out of the business of *selling* cement.

We conclude, therefore, that neither *Ekco* nor *Reynolds* are dispositive of our problem. Any solution must lie in the broad remedial powers inherent in the Commission's mandate to maintain competitive conditions through enforcement of Section 7. The Supreme Court has declared: "* * * 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." (*U.S.* v. *E.I. duPont de Nemours & Co.*, 366 U.S. 316, 327 (1961).)

It is with the thought that divestiture may not be the *only* effective remedy that we have decided to allow respondent and counsel in support of the complaint to file proposed orders containing alternative remedies. And to aid both counsel in this task, we offer the following thoughts and suggestions.

Diamond's president has sworn (see affidavit filed with Respond-

ent's Reply Brief, pp. 32, 33) that his firm will not remain in the cement business if forced to sell Bessemer. And thus Diamond argues, at least implicitly, that any divestiture will not restore the competitive status quo, *i.e.*, there will still be only one firm where there previously were two. So, at best, respondent urges, forcing it to sell Bessemer will only substitute one ownership for another. We have concluded, however, that Diamond should have an opportunity to reconsider its decision to leave the cement business which was, after all, made in the heat of litigation.

But even if the number of firms is not restored, it is possible that Diamond-Bessemer could be sold to a company not in the cement business. And such an "outsider" might prove a more adventurous competitor than Bessemer or Diamond.

Assuming that Diamond decides to stay in the business of selling cement, it is possible that the Diamond and Bessemer operations might be "spun-off" from each other. If Diamond were unable to find new quarries[25] immediately, Bessemer could be sold as a unit with the new owners obliged to offer a requirement contract to Diamond for a 3-year period at an equitable price. Diamond, of course, could go elsewhere for its supplies but at least it would know that Bessemer was available as a source. Then also, any potential purchasers would have a substantial incentive to acquire Bessemer—a guaranteed market.

In sum, we have affirmed the examiner's decision on the merits and accompanying this opinion is an order in which we ask for proposed orders in line with the above discussion.

ORDER

The Commission having rendered its decision in this proceeding affirming the complaint, setting out its own reasons therefor and affirming the findings of fact contained in the initial decision; and

The Commission believing that respondent's counsel and complaint counsel should be given a further opportunity to address themselves to the problem of the form of order to be issued.

It is hereby ordered, That within thirty (30) days of the service of this order complaint counsel file alternative proposed form of order accompanied by a supporting memorandum. Within thirty (30) days of service of complaint counsel's proposed order, respondent shall file

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[25] The two sales forces are still separate, each with a different manager; both trade names still exist. In addition, the examiner found that "Present reserve deposits are ample to meet the needs of Bessemer * * * for the next fifty years, allowing for a possible doubling of productive capacity." (I.D., p. 10. [72 F.T.C. 712]) Bessemer is, however, about to exhaust its present quarry. So Bessemer is looking for a new quarry on its property. Although the record sheds no light on this point, it might be feasible for both respondent and Bessemer to have quarries on Bessemer's property through respondent obtaining a *profit á prendre* from Bessemer's new owners.

its alternative form of order and supporting memorandum. Upon consideration of all materials submitted the Commission will enter a final order.

By the Commission, without concurrence of Commissioner MacIntyre.

SCHENLEY INDUSTRIES, INC., ET AL.

Docket 6048. Order and Opinion, Oct. 25, 1965

Order denying respondent's petition to reopen an earlier order of March 2, 1954, 50 F.T.C. 747, for the purpose of eliminating parts of the order relating to fixing prices, exchanging information, and using common officers among affiliated companies.

OPINION OF THE COMMISSION

Petitioners, Schenley Industries, Inc. (herein called Schenley), and its subsidiary, Affiliated Distillers Brands Corp. (herein called Affiliated), seek to have the proceedings in the above-captioned matter reopened for the purpose of modifying the order to cease and desist entered by consent on March 2, 1954 [50 F.T.C. 747]. Complaint counsel opposes the petition.

I

The complaint in this matter was issued on September 24, 1952. It named as respondents, Schenley, a predecessor of Affiliated, and seven other manufacturing and distributing subsidiaries and affiliates of Schenley.[1] The complaint charged that Schenley and its affiliates attempted to monopolize the sale and distribution of alcoholic beverages through the use of interlocking directorates, mergers, and other acts and practices, in violation of Section 5 of the Federal Trade Commission Act. The complaint alleged that some of the respondents competed with each other in the sale of alcoholic beverages and that as a result of mergers, acquisitions and consolidations, respondents had obtained power tending towards a monopoly in the sale and distribution of alcoholic beverages. Respondents were also charged with having combined and conspired to (a) fix prices, (b) exchange information for the purpose of maintaining prices, (c) obtain retail price maintenance, (d) use an affiliated and subsidiary corporate form as a means of fixing prices, (e) use common directors

[1] At the time of the proceedings Affiliated's name was Schenley Distributors, Inc. The other subsidiaries named as respondents were: Schenley Distillers, Inc., Melrose Distillers, Inc., Gibson Distillers, Inc., The Straight Whiskey Distilling Company of America, Three Feathers Distributors, Inc., Brandy Distillers Corporation and Bernheim Distilling Co. After the entry of the consent order, all of these subsidiaries and affiliated companies were dissolved, with the exception of Affiliated.

as a means of fixing prices, (f) use affiliated and subsidiary corporations as a common means of distribution for the purpose of fixing prices, (g) enforce illegal resale price maintenance agreements, (h) preclude distributors from selling or handling competing products, (i) acquire corporations for the purpose of contributing to their monopolistic position, and (j) hinder unduly the operations of competitors by attempting to cut off access to sources of supply of products used in the manufacture of alcoholic beverages.

After more than a year of pleadings and negotiations, respondents entered into a consent settlement of this matter. Under the order as entered (which represented a substantial modification of the original order attached to the complaint), respondents agreed, among other things, to cease and desist from engaging in any conspiracy or combined action between themselves or with any other wholly or partly owned subsidiary or affiliated concern engaged in competition in the sale of alcoholic beverages to third parties, to do or perform any of the following:

(1) Raise, fix, stabilize or maintain prices;

(2) Discuss, confer or exchange information for the purpose or with the effect of establishing or maintaining prices, terms or conditions of sale, or of securing adherence to prices, terms or conditions of sale;

(3) Exchange information with or meet with any retail liquor dealer for the purpose of reaching agreement as to the employment of any resale price maintenance contract or arrangement;

(4) Use common directors or officers as a means of raising, fixing, stabilizing, or maintaining prices;

(5) Enter into any resale price maintenance contract or arrangement, or police, enforce, or attempt to police or enforce any such contract or arrangement.

Petitioners now seek by their proposed modification to eliminate points 1, 2 and 4 of the order.

II

Section 3.28(b)(2) of the Commission's Rules of Practice for adjudicative proceedings provides that:

> Whenever any person subject to a decision containing an order to cease and desist which has become final is of the opinion that changed conditions of fact or law require that said decision or order be altered, modified or set aside, or that the public interest so requires, such person may file with the Commission a petition requesting a reopening of the proceedings for that purpose.

Schenley claims that the requested modification of the order is necessary in order to enable it to reorganize its present marketing

structure and establish marketing subsidiaries which it claims it cannot do under the terms of the present order. In support of its petition, Schenley further claims that the instant order impairs its ability to compete and threatens its future operations due to the changed market conditions which have taken place in the industry since the entry of the order. Schenley also claims that it has lost market position, that its competitors are not under similar restrictions, and that the modification is specifically necessary to enable it to market a Tennessee whiskey through a separate subsidiary which is the form of organization employed by its principal competitor in the sale of this type of whiskey.

Attached to respondents' petition is a series of charts and graphs indicating the shifts in a sales volume from 1954-1964 as between various types of liquor and as between domestic and imported brands. These charts demonstrate Schenley's share of the market as a whole and its share of specific types of liquor during this 10-year period. Other charts show specific market data respecting the sale of Tennessee whiskey. A statement of Schenley's net income and accounts receivable as compared with other industry members is also attached. The sum total of this information is that Schenley's accounts receivable as a percentage of sales have increased in the last decade more than the average of its competitors, that its net income after taxes is substantially below two out of the seven other members of this industry, that demand for Tennessee whiskey has increased at a rate of three times that of total domestic whiskey, that Schenley's percentage of sales of all distilled spirits except scotch and Canadian whiskey have declined approximately 3% in this 10-year period while the industry total has increased.

We fail to see how this information constitutes a showing of changed conditions of fact, one of the requisites, under the Commission's Rules, for a modification of an outstanding order. While there apparently have been some changes in the overall distilled spirits market and in Schenley's position in the market, this in and of itself is not a sufficient basis on which to conclude that the order is inapplicable and should be modified. We believe that it is incumbent upon a respondent to demonstrate how the changes in market conditions which have taken place since the enactment of the order makes its continued enforcement inequitable. This petitioners have failed to do. They have not shown that the enactment of the order in any way caused the market conditions of which they now complain, or that the order has prevented them from adequately coping with these changed conditions.

Furthermore, petitioners have failed to show how the requested modification would enable them to meet these changed market con-

ditions. In this connection, we should point out that, as Commission counsel has noted in its brief, there is nothing now in the order which actually prevents Schenley from establishing marketing or any other kinds of subsidiaries or affiliated concerns as such. What the order does prohibit is any combination or consultation with respect to price and related matters between Schenley and any of its subsidiaries or affiliated concerns which are competing with Schenley or with each other in the sale of alcoholic beverages. This was precisely what the original complaint giving rise to the instant order charged that Schenley was doing in violation of law. Little would be accomplished if through modification we permitted Schenley to return to the same form of organization which apparently gave rise to the practices previously condemned.

In reliance upon the criteria of changed conditions of law, Schenley argues that the order is directed towards prohibiting intracorporate conspiracies and suggests that the current validity of the case law respecting the vulnerability of such conspiracies under the antitrust laws is at best questionable. We do not find any such vulnerability in the case law respecting intracorporate conspiracies.[2] We do not agree with respondent that there has been a change in law in this area of intracorporate conspiracy nor that the doctrine has been discredited over the years since 1951.

The order was the product of substantial negotiation and covered substantially fewer activities than had been originally charged as violations of law in the complaint. Its terms were apparently carefully tailored to the decision in the *Kiefer-Stewart* case, *supra*, where, in commenting upon the justification and rationale of the rule, the Supreme Court made the following observation:

> Respondents next suggest that their status as "mere instrumentalities of a single manufacturing-merchandising unit" makes it impossible for them to have conspired in a manner forbidden by the Sherman Act. But this suggestion runs counter to our past decisions that common ownership and control does not liberate corporations from the impact of the antitrust laws. . . . The rule is especially applicable where, as here, respondents hold themselves out as competitors.

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[2] The principal authority for the proposition that there can be a conspiracy between affiliated corporations is the Supreme Court's opinion in *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947), where the requirement that various controlled taxicab operating companies purchase their taxicabs from the manufacturing affiliate was held to state a cause of action under the Sherman Act. In a subsequent case, the Supreme Court held that distributing subsidiaries of a single manufacturing unit had conspired with each other to sell only to those wholesalers who would resell at prices fixed by the defendants. *Kiefer-Stewart Co.* v. *Seagram*, 340 U.S. 211 (1951). The intra-enterprise conspiracy doctrine was also followed in *Timken Roller Bearing Co.* v. *U.S.*, 341 U.S. 593 (1951). More recently the existence of the intra-enterprise conspiracy doctrine was recognized by the courts in *Balian Ice Cream Co.* v. *Arden Farms Co.*, 104 F. Supp. 796, *aff'd* 231 F. 2d 356 (9th Cir. 1952), *cert. denied*, 350 U.S. 991 (1956); *U.S.* v. *Arkansas Fuel Oil Co.*, 1960 Trade Cases, Par. 69,619 (D.C. Okla., 1960); and *Aerojet-General* v. *Aero-Jet Products*, 1963 Trade Cases, Par. 70,803 (D.C. Ohio, 1963).

On the basis of the facts presented in the instant petition, we hold that respondents have not made a sufficient showing of the need to modify this order, and accordingly we deny their petition. We also deny petitioners' request for oral argument since we do not believe that this is the appropriate vehicle to remedy the deficiencies in the instant petition, and we do not see that any other purpose could be served by oral restatement of the facts now contained in the petition.

Commissioner Elman dissented. In his view the petition and answer raise substantial issues of fact and law upon which respondent should be afforded a hearing, in accordance with Section 3.28(b) of the Commission's Rules of Practice.

Commissioner MacIntyre did not participate.

Order Denying Petition to Reopen Proceedings for the Purpose of Modifying Order to Cease and Desist and for Oral Argument

This matter having been considered by the Commission upon the petition of respondents to reopen proceedings for the purpose of modifying the order to cease and desist entered on March 2, 1954 [50 F.T.C. 747], and to present oral argument thereon, and the opposition thereto of counsel supporting the complaint, and the Commission having determined, for the reasons stated in the accompanying opinion, that the petition of respondents should be denied:

It is ordered, That the petition of respondents to reopen and modify the order to cease and desist, and to present oral argument thereon be, and it hereby is, denied.

Commissioner MacIntyre not participating. Commissioner Elman dissents. In his view the petition and answer raise substantial issues of fact and law upon which respondent should be afforded a hearing, in accordance with Section 3.28(b) of the Commission's Rules of Practice.

ALLEGHANY PHARMACAL CORP. ET AL.

Docket 7176. Order, Nov. 15, 1965

Order reopening proceedings and referring case to a hearing examiner for him to report findings, conclusions and recommendations to the Commission.

Amended Complaint

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Alleghany Pharmacal Corp., a corporation, Harry Evans and Vincent J. Lynch, in-

dividually, and Chester Carity, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, in amendment of and in substitution for its complaint issued in Docket No. 7176, June 27, 1958, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Alleghany Pharmacal Corp. is a corporation duly organized, existing, and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 16 West 61st Street, in the city of New York, State of New York. Respondents Harry Evans and Vincent J. Lynch are, or were, officers of the corporate respondent. Respondent Chester Carity is an officer of the corporate respondent. This individual dominates, controls and directs the policies, acts and practices of the respondent corporation, including the acts and practices hereinafter set out. The address of the individual respondent is the same as that of the corporate respondent.

PAR. 2. Said respondents are now, and have been for some time, engaged in the sale and distribution of a preparation which is a drug as the term "drug" is defined in the Federal Trade Commission Act.

The designation used by respondents for their said preparation, and, according to its label, the active ingredient thereof and directions for use are as follows:

Designation: "Hungrex with P. P. A."

Active Ingredient:

Phenylpropanolamine hydrochloride — each tablet containing 25.0 mg. thereof.

Directions:

Adults: 1 tablet ½ hour before each meal. To be swallowed with water and juices. Do not take more than 3 tablets in any 24 hour period.

CAUTION: Should not be used by persons with heart or thyroid disease, high blood pressure or diabetes except on medical advice.

PAR. 3. Respondents cause the said preparation, when sold, to be transported from within the State of New York to purchasers thereof located in various other States of the United States and the District of Columbia. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said preparation in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their said business, respondents have disseminated, and caused the dissemination of, certain advertisements concerning the said preparation by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements inserted in newspapers, magazines and other adver-

tising media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said preparation; and have disseminated, and caused the dissemination of, advertisements concerning said preparation by various means, including, but not limited to, the aforesaid media, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of said preparation in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Among and typical of the statements and representations contained in said advertisements, disseminated as hereinabove set forth, are the following:

SAFE REDUCING DRUG
ORDER TODAY * * *
LOSE WEIGHT BY FRIDAY

Just take a tiny Hungrex tablet before meals * * * and banish those hated extra pounds as you banish hunger! Why? Because Hungrex is the most powerful reducing aid ever released for public use without prescription! * * * Lose Weight the First Day! * * * if you're tired of halfway measures and want really effective help in reducing * * * send for Hungrex today * * * You'll be slimmer next week or your money back.

PAR. 6. Through the use of said advertisements,and others similar thereto not specifically set out herein, respondents have represented, and are now representing, directly and by implication:

1. That the preparation is safe to use by all obese persons;

2. That the preparation is an effective appetite depressant and weight-reducing agent;

3. That the preparation is adequate and effective in the treatment, control and management of obesity.

PAR. 7. In truth and in fact:

1. The preparation is not safe to use by all obese persons having heart disease, high blood pressure, diabetes, or thyroid disease;

2. The preparation has no significant pharmacological value as an appetite depressant or weight-reducing agent;

3. The preparation is not adequate or effective in the treatment, control or management of obesity.

Therefore, the advertisements referred to in Paragraph Five were and are misleading in material respects and constituted and now constitute "false advertisements" as that term is defined in the Federal Trade Commission Act.

PAR. 8. In the issuance of this, its amended complaint, the Federal Trade Commission is cognizant of and takes official notice of those proceedings in the United States District Court for the District of New Jersey entitled "The United States of America v. 60 28-Capsule Bottles, More or Less, and 47 7-Capsule Bottles, More or Less, of

an article of drug labeled in part: 'UNITROL * * *' " (211 Federal Supplement 207, September 27, 1962, affirmed, 325 Federal Reporter 2nd Series 513, December 3, 1963).

PAR. 9. The dissemination by the respondents, as aforesaid, of said false advertisements constituted, and now constitute, unfair and deceptive acts and practices in commerce, in violation of Sections 5 and 12 of the Federal Trade Commission Act.

ORDER REOPENING PROCEEDINGS

Pursuant to the authority granted in Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)), respondents were served on June 15, 1965, with an order giving them opportunity to show cause why the Commission should not reopen this proceeding, vacate and set aside the order to cease and desist issued November 7, 1958 [55 F.T.C. 705], amend the complaint as per a draft of amended complaint accompanying that order, and enter the order attached to the draft of amended complaint after appropriate proceedings. On July 12, 1965, respondents filed their answer, *inter alia*, denying factual allegations contained in the order to show cause and the proposed amended complaint.

Upon full consideration of all of the circumstances, including respondents' answer to the order to show cause, the Commission has determined that it would be in the public interest to reopen this proceeding and to issue the amended complaint accompanying this order. We have also determined that it would not be in the public interest to vacate the outstanding order to cease and desist at this time, that vacation, amendment or modification of that order, if any, that may be determined to be appropriate should be made as part of the final disposition of this matter. Accordingly,

It is ordered, That this proceeding be, and it hereby is, reopened, and that the amended complaint accompanying this order be, and it hereby is, issued; and pursuant to § 3.28(b) (3) of the Rules of Practice,

It is further ordered, That this matter be assigned to a hearing examiner for hearings to be conducted in accordance with Subparts C, D, E and F of the Rules of Practice. Upon conclusion of the hearings, the hearing examiner shall certify the record, together with a report of his findings, conclusions and recommendations with respect thereto, to the Commission for final disposition. The hearing examiner's report shall be served upon the parties in the same manner as an initial decision and the parties are granted rights of appeal therefrom in accordance with the provisions of § 3.22 of the Rules of Practice.