

to be further ordered, that the respondent, herein named, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF
LENOX, INCORPORATED

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket 8718. Complaint, Oct. 13, 1966—Decision, Apr. 9, 1968

Order requiring a Trenton, N.J., manufacturer of fine china dinnerware and giftware to cease unlawfully fixing and maintaining the resale prices at which its products are sold at retail.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (U.S.C., Title 15, Sec. 45), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Lenox, Incorporated, a corporation, and more particularly described and referred to hereinafter as respondent, has violated the provisions of Section 5 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, stating its charges in respect thereto as follows:

PARAGRAPH 1. Respondent, Lenox, Incorporated, is a corporation organized and existing under and by virtue of the laws of the State of New Jersey, with its main office and place of business at Prince and Meade Streets, Trenton, New Jersey. Respondent is now and has been for many years engaged in the manufacture, sale, and distribution of household fine china dinnerware, giftware, and artware. Respondent produces dinnerware made of porcelain and bone china. In its giftware line, respondent produces fine china vases, ashtrays, bowls, mugs, and similar items. Respondent sells its fine china dinnerware, giftware, and artware products to approximately 2,000 franchised dealers located in various States of the United States. The total gross sales of all its products are substantial, and exceed \$14,000,000 per year.

PAR. 2. In the course and conduct of respondent's business, there has been at all times mentioned herein, and is now, a continuous movement of said fine china dinnerware, giftware, and artware in interstate commerce, as "commerce" is defined by the Federal Trade Commission Act. Respondent manufactures fine china dinnerware, giftware, and artware products in various States throughout the United States and causes the manufactured merchandise to be shipped from the State of manufacture to other States for resale through its franchised distributors.

PAR. 3. Except to the extent that competition has been hindered, lessened, restricted, restrained and eliminated by the unlawful acts and practices hereinafter alleged, respondent, Lenox, Incorporated, now, and at all times mentioned herein, has been and is in competition with other individuals, partnerships, corporations or firms engaged in the manufacture, distribution, and sale of fine china dinnerware, giftware, and artware.

PAR. 4. It is now, and has been for some time, the practice and policy of respondent to adopt and employ in the various States of the United States and the District of Columbia, a system of establishing resale prices for its products by various means and methods, including the requirement that its dealers maintain or adhere to the prices established and promulgated by respondent.

PAR. 5. By various means and methods, respondent has entered into and effectuated the aforesaid practice and policy by which it can and does control, establish, manipulate, fix, and maintain the resale prices at which its products are sold by its dealers. In order to carry out the said plan or policy, respondent adopted and employed and still employs the following means among others, by which it has undertaken to pre-

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vent and has prevented dealers from selling said products at prices other than the said resale prices established by respondent:

(a) It issues resale price lists and advertising material to the trade in which the various resale prices for said products are set forth and explained;

(b) It makes it generally known to the trade, by direct or indirect means, that it expects and requires all dealers handling Lenox fine china products to maintain and enforce said resale prices or such dealerships will be terminated;

(c) It enters into formal and informal agreements, understandings, and arrangements with its dealers as a condition precedent to the opening of new accounts that such dealers will maintain resale prices;

(d) It solicits, invites and obtains from dealers handling Lenox fine china products cooperation and assistance in ascertaining information pertaining to any dealers or others who resell such products and fail to maintain resale prices established by respondent;

(e) It employs a system of policing the maintenance of resale prices by dealers which includes, among other things, "rigged" orders and examinations of these orders by an electrical process;

(f) It subscribes to and actively employs a "clipping" service to ascertain which dealers are advertising said products at resale prices below those established by respondent;

(g) It directs Lenox salesmen and other employees to secure information identifying any dealer who fails to observe the established resale prices;

(h) It threatens to terminate and does terminate the franchises of Lenox dealers who fail to observe and maintain the established retail prices;

(i) It threatens to terminate and does terminate the franchises of Lenox dealers who advertise Lenox fine china products at other than the established resale prices without Lenox's permission;

(j) It has in effect a program by which it makes known to dealers handling Lenox products that failure to maintain the established resale prices will result in termination of their franchise.

The above are among the various means and methods which have been used and are now being used by respondent in the enforcement of its system of maintaining established prices: all with the result that said prices have been and are generally observed and maintained by dealers handling Lenox products.

PAR. 6. The above acts and practices have had and still have the capacity, tendency and effect of hindering, suppressing or eliminating competition between or among all dealers handling Lenox products, by

requiring them to resell the same at prices fixed by respondent as aforesaid; such practices prevent dealers from selling these products at the prices they deem to be warranted; such practices have the capacity, tendency and effect to hinder and suppress all price competition in the resale of such products in the various States of the United States and the District of Columbia, thus tending to obstruct their free and natural flow of commerce in such products and the freedom of competition in this channel of interstate commerce.

PAR. 7. The aforesaid acts and practices of the respondent have the tendency to unduly hinder competition and have injured, hindered, suppressed, lessened or eliminated actual and potential competition, and thus are to the prejudice and injury of the public, constitute unfair methods of competition in commerce or unfair acts and practices in commerce, within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Mr. Joseph Rutberg and Mr. Howard R. Lurie supporting the complaint.

Debevoise, Plimpton, Lyons & Gates by Mr. Andrew C. Hartzell, Jr., Mr. Robert M. Buchanan, and Mr. William D. Rudolph for the respondent.

INITIAL DECISION BY EDWARD CREEL, HEARING EXAMINER

MAY 29, 1967

The Federal Trade Commission on October 13, 1966, issued its complaint in this matter alleging that respondent employed a system of establishing resale prices for its products by various means and methods, including the requirement that its dealers maintain or adhere to the prices established and promulgated by respondent. The complaint further alleged that respondent employed various practices to prevent dealers from selling its products at prices other than the resale prices established by respondent, and that these practices injured, hindered, suppressed, lessened, or eliminated actual and potential competition and constituted unfair methods of competition in commerce or unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

Answer was filed and hearings were held in New York, New York, and Philadelphia, Pennsylvania. Thereafter, proposed findings of fact, conclusions of law, and order were filed. These proposals, including replies, supporting briefs, and oral argument, have been considered, and those proposed findings not herein adopted, either in form or in substance, are rejected as not being supported by the record

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or as not being necessary; and the hearing examiner, having considered the entire record, makes the following findings of fact, conclusions drawn therefrom, and order:

FINDINGS OF FACT

Respondent, Lenox, Incorporated, is a New Jersey corporation with its main office in Trenton, New Jersey, and its manufacturing plant in Pomona, New Jersey. Respondent has three lines—Lenox fine china, Lenox giftware, and Oxford bone china. Its giftware line includes china vases, ashtrays, bowls, mugs, and similar items (Answer). Respondent sells cream-colored fine china under its Lenox trademark and white bone fine china under its Oxford trademark (Tr. 26).

Respondent sells directly to about 2,100 franchised retail dealers, who operate 3,000 outlets, but does not sell to wholesalers (Tr. 107, 111). Retail dealers handling respondent's products fall into three broad categories—department stores, jewelry stores, and specialty and gift stores (Tr. 108). Respondent operates stores selling to the public at its Trenton and Pomona facilities (Tr. 31).

Respondent ships its products from its Pomona plant to its dealers located throughout the United States. In the course and conduct of respondent's business, and at all times mentioned in the complaint, there has been a continuous movement of respondent's fine china dinnerware and giftware in interstate commerce, as "commerce" is defined by the Federal Trade Commission Act. Respondent manufactures its fine china dinnerware and giftware in Pomona, New Jersey, and causes these products to be shipped from the State of manufacture to other States and the District of Columbia for resale through its franchised dealers (Answer).

For many years respondent has been and is now in competition with other individuals, partnerships, corporations, and firms engaged in the manufacture, distribution, and sale of fine china products (Answer).

Respondent is the leading domestic producer of fine china in terms of dollar sales (Tr. 29). Its total annual gross sales exceed \$14 million (Answer).

Respondent operates through a franchise method of distribution and considers the "franchise" it bestows upon dealers to be the right to buy and sell respondent's products (Tr. 39).

Respondent's officials believe that if respondent sold to every dealer who wanted to handle its products, the prestige outlets would lose interest in selling Lenox products and would push the products of its competitors (Tr. 180-83).

Respondent's products are known for their high quality and are advertised in national magazines. Although most of this advertising does not contain prices, its giftware advertisements, which represent a small percentage of respondent's total advertising, usually contain prices (Tr. 78; Com. Exs. 269-70).

Respondent has 22 field salesmen, also called district managers. All but one of these are full-time employees, each compensated by a salary plus commissions. Each salesman has an assigned territory, which usually covers several States, and is responsible for 100 to 150 dealer accounts, many of which he visits only once or twice a year (Tr. 112-13, 167). Salesmen show new patterns to dealers, help train dealer personnel to exhibit and sell Lenox products, assist in taking a dealer's inventory, and perform similar duties (Tr. 32-34, 113).

Respondent does not lower its established resale prices generally, but it does have an annual promotion of hostess bowls and platters that dealers do not normally carry (Tr. 73-74; Com. Exs. 384-85). Prices to dealers and "suggested" resale prices of these items are lowered during this promotional period. These two items, however, account for less than one-tenth of 1 percent of Lenox's sales volume (Tr. 74). Respondent currently markets 60 or 70 different patterns of chinaware and divides its dinnerware into two categories called Group I and Group II. Group I is composed of patterns that are the most popular, and Group II is composed of less popular patterns that are not manufactured on a regular basis. Respondent permits, and at times encourages, the sale of Group II patterns at less than the prices that it had previously established (Com. Ex. 117A; Tr. 27-28).

Mr. Petty, respondent's vice president of marketing, testified that he was familiar with the *Colgate* and *Parke, Davis* decisions;¹ that since his arrival at Lenox in May 1960, company policy had been to act within the boundaries of those decisions; and that he had advised the Lenox employees, including salesmen, of this policy (Tr. 155, 186).

A few months prior to Mr. Petty's arrival at Lenox, the Supreme Court had decided *Parke, Davis*, and on March 18, 1960, Lenox had issued a memorandum to its salesmen describing what they should and should not do to comply with that decision (Tr. 187; Res. Ex. 3).

Lenox also distributed to its dealers a report, dated September 19, 1960, prepared by the Research Institute of America, Inc., that gave detailed advice regarding compliance with *Parke, Davis* (Res. Ex. 4). Mr. Petty used this report when he discussed the subject with Lenox salesmen at an annual sales meeting in December 1960. He has repeated

¹ *United States v. Colgate & Co.*, 250 U.S. 300 (1919); *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960).

similar instructions at all subsequent regional and national sales conferences (Tr. 186-90). Lenox holds one national sales conference and several regional meetings each year (Tr. 203). Apparently Mr. Petty attempted to stay within the limits that he thought were set by the *Parke, Davis* decision, but the majority of the respondent's dealers had been Lenox dealers for some years and their relationship with the respondent had already been established when he came with the company. It also appeared to be his policy to carry on the established relationships with dealers with as little disruption as possible. Although there were no agreements between respondent and its dealers to continue the dealerships for any specific period of time, there was a clear understanding between them that for such time as the agreements continued in effect the dealers would maintain prices. Respondent's plan of operation was devised to insure that its dealers would cooperate in carrying out all of its policies, including its policy to maintain resale prices, and that its dealers would adhere to such prices. The dealers knew what was expected of them and they, in turn, expected to adhere to those prices. And, with few exceptions, they did adhere to them. One example of an understanding that arose between a dealer and the respondent after 1960 was the understanding that existed regarding the reinstatement of Thalhimers, a dealer in Richmond, Virginia. In that situation it is clear that Thalhimers' vice president expected to cooperate with respondent in maintaining all of its policies (Com.Exs. 81-98).

Respondent always has applicants who wish to become Lenox dealers because they believe that they can profitably sell respondent's products (Tr. 32, 111-12).

When respondent receives a request from a potential dealer for a franchise, it notifies the appropriate district manager to call upon the prospective dealer, and it usually notifies the prospective dealer that he will be visited by a representative of respondent (Tr. 32). The district manager then visits the prospective dealer, looks over the store, reviews the franchise requirements, and when assured that the dealer understands the requirements and will do business in accordance with them, fills out a franchise application, takes an initial order and submits the franchise application and initial order to the Distribution Committee in Trenton for approval (Tr. 37-46; Com.Ex. 197).

Respondent's "Sales Manual" (Com.Ex. 391) includes the following instructions to its salesmen in connection with its distribution policy:

In selecting accounts to be franchised, it is expected that every dealer stock and display a representative assortment of the line. It is equally important that

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you review with dealer prospects the franchise requirements to assure that they are understood and that the dealer is in agreement with them.

Lenox Dinnerware

The Lenox dinnerware franchise requirements are as follows:

- 1—Account will conform to the suggested minimum retail prices.
- 2—Will not resell any Lenox products to non-dealer stores or distributors.

* * * * *

In the Lenox Franchise Application (Com.Ex. 197), which is filled out by the salesman during and after consultation with a prospective dealer, there is the statement:

- (17) Have you reviewed franchise provisions with attention to following:
(a) Price maintenance.

* * * * *

In the "Dinnerware and Giftware Franchise Provisions" (Com.Ex. 264), which is the franchise prepared for and forwarded to its Lenox brand dealers whose applications have been approved, there is the following statement:

The following points are brought to your attention so that we will have a mutual understanding of the conditions under which we are doing business. You may wish to pass this information along to the members of your organization handling these details so they, too, will be informed.

LINES AND DISCOUNTS

Lenox makes the following products and lines which are available to its dealers.

Dinnerware—45% discount
Gift items—50% discount

* * * * *

PRICES

The Lenox dinnerware and giftware price books illustrate all lines and list suggested retail prices.

Lenox distributes its products, under its trademark or name at a minimum suggested retail price. We expect the Dealer, in consideration of the franchise privilege, to conform to these prices. Lenox may from time to time change the suggested minimum retail prices by giving notice in writing to the Dealer.

In the "Oxford Bone China Dinnerware Franchise Provisions" (Com.Ex. 265), which is the franchise prepared for and sent by respondent to its Oxford brand dealers, there is this provision:

It is important the following points be reviewed so there is a mutual, clear understanding regarding the franchising of your store for Oxford Bone China.

* * * * *

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SUGGESTED RETAIL PRICES

The Oxford Bone China price book lists the suggested retail prices for all pieces in the line.

Oxford Bone China is distributed under its trademark at minimum suggested retail prices. The dealer is expected, in consideration of the franchise privilege, to conform to these prices.

From time to time the suggested retail prices may be changed by giving written notice.

Although the respondent refers to its retail prices as "suggested," respondent makes it clear to a new dealer that a mutual understanding exists regarding the "suggested" prices and that respondent considers the new dealer to have agreed to conform to those prices. There are similar references to mutual understanding in Commission Exhibit 8, which is a letter to a new dealer in 1950, and in Commission Exhibit 3, which is a letter from Mr. Petty to a new dealer in 1962. When respondent sends the franchise to the new dealer, after the Distribution Committee has approved his application, one of these letters, which are sometimes called "Welcome Aboard" letters, accompanies the franchise and calls the new dealer's attention to the franchise provisions (Tr. 44-45, 47-48).

After sending the franchise and the "Welcome Aboard" letter, respondent then sends to the new dealer various advertising and promotional material (Tr. 49-50). At later times similar material, including pattern folders, some of which contains retail prices, is sent to respondent's dealers (Tr. 124).

At the time prospective dealers were interviewed, respondent's salesmen made it clear to them that they were expected to maintain the "suggested" retail prices set by respondent and that if they sold at lower prices, they would be cut off as customers and would not be permitted to buy from respondent in the future. Respondent, nevertheless, occasionally had to remind its dealers of its price maintenance policy (Tr. 185-86, 231, 279-80, 316; Res.Ex. 2).

During the seven years since May 1960, when Mr. Petty came to Lenox, the company has terminated the franchises of less than ten dealers for price cutting (Tr. 202-3). In the four and one-half years since August 1962, when W. E. Koch became vice president of sales for Lenox, the company has terminated the franchises of approximately five or six dealers for price cutting (Tr. 133).

Lenox policy of ceasing to sell to dealers who sell its products to unauthorized dealers is an integral part of its policy of selective distribution (*i.e.*, to sell only to selected dealers but not to all dealers who would be willing to sell respondent's products). In refusing to sell to

a dealer who transships to an unauthorized dealer, Lenex does not consider whether the latter is selling at, above, or below respondent's "suggested" prices (Tr. 200-1). More than half of the unauthorized dealers who have received respondent's products by transshipment have sold these products at respondent's "suggested" prices (Tr. 200-1, 205-6). The unauthorized dealer has presumably paid more for respondent's products than the authorized dealer (Tr. 98). At least one of respondent's officials testified that he assumed the authorized dealer who sells to an unauthorized dealer would be selling respondent's products below the "suggested" retail price, but such fact has not been proved.

When respondent learns that an unauthorized dealer is selling its products, it sometimes places an order with him in such form that it is able to identify the order (Tr. 96, 98-99). Although no distinguishing mark appears on the china, respondent watches for the order when it comes to its factory and, because of the makeup of the order, is able to follow it from the authorized dealer to the unauthorized dealer to whom it is transshipped (Tr. 98-99). Respondent has never compensated anyone for shopping an unauthorized dealer (Tr. 92). On one occasion in 1961, the evidence shows that respondent had a dealer place such an order with a catalog house (Tr. 223, 430; Com.Exs. 22-26).

Respondent has obtained cooperation and assistance from its dealers in determining whether other dealers have resold respondent's products at less than the established resale prices. It does not appear that respondent solicited or invited this kind of cooperation from its dealers in recent years, but it has continued to accept such cooperation (Tr. 249-50, 342-50, 485-88; Com. Exs. 191, 258, 260). In fact, it seems that it would be virtually impossible for respondent to refuse to accept such cooperation and continue to maintain a policy of resale price maintenance.

Respondent subscribed to an advertising checking or clipping service which enabled it to ascertain which dealers were advertising respondent's products at prices below those advertised by respondent. On at least one occasion, this clipping service was utilized to obtain information relating to the price cutting of a dealer (Com. Ex. 51). In 1964 the arrangement with the clipping service was changed so that the information now obtained from it does not supply the prices at which the products are advertised but only the amount of advertising done by various dealers (Tr. 196-98; Res. Exs. 5, 6).

There were occasions in the past when respondent threatened to terminate the franchises of dealers who failed to maintain respondent's

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established prices, but in recent years respondent has made a determined effort to cause its salesmen to refrain from making threats—it has merely cut off dealers without warning (Tr. 241-42, 253; Com. Exs. 168, 309, 350, 351). The district managers were instructed in 1960 not to make agreements with dealers (Res. Ex. 3) and such understandings as there were thereafter with new dealers were presumably not designated by the company as agreements.

Respondent contends that such price maintenance activities as it engaged in were by unilateral action and were legally permissible under the Federal Trade Commission Act. Respondent, however, also contends that even if the evidence is construed as proving a price-fixing agreement with any dealer, such an agreement was legal under the so-called fair trade law of the state involved and was thus outside the proscriptions of the Federal Trade Commission Act, as amended (Tr. 508-9).

Respondent submitted evidence to establish that Lenox products met the "fair trade" prerequisites of bearing the trademark, brand, or name of the producer and were in free and open competition with commodities of the same general class produced by others. The Lenox trademark is well-known and is fired into each individual piece of Lenox china as part of the manufacturing process. The name Oxford similarly appears on items in the Oxford bone china line. The boxes or cartons in which Lenox china is shipped prominently display these trademarks. Retail outlets that carry Lenox products also prominently display these trademarks in association with Lenox products (Tr. 106-7).

Other manufacturers of china sold their products in the same general price ranges as Lenox products and displayed them side by side with Lenox. They include: Royal Doulton, Wedgwood, Rosenthal, Royal Worcester, Franciscan, Syracuse, Haviland, Picard, Ginori, Limoge, Royal Crown Darby, Spode, Flintridge, Minton, Castleton, Coalport, Hutschenreuther, and Royal Jackson (Tr. 30, 109-10, 474).

Almost every store carrying Lenox china carries a variety of china products, and every community in which Lenox china is sold offers through one or more outlets competing products (Tr. 110-11). Petty testified that at least 99 percent of all Lenox dealers carry competing lines (Tr. 436-37). A Commission witness, Robert Siegfried of P. A. Freeman, Inc., Allentown, Pennsylvania, testified that his store carried, in addition to Lenox, Wedgwood, Minton, Royal Doulton, Ginori, Ceralene, Royal Worcester, and possibly one or two others (Tr. 352).

Edwin Smoyer, another Commission witness, whose store was about one block away from Robert Siegfried's store, testified that in addition to Lenox and Oxford his store carried Syracuse (Tr. 372-73).

Jack Cheslock, a Commission witness from Baltimore, Maryland, testified that he sold Haviland, Royal Doulton, and Worcester and that he had sold Rosenthal, Flintridge, and Coalport. He added that other lines that he did not carry were available in his trading area (Tr. 328).

The evidence shows that several competing brands of china were generally sold by respondent's dealers and by others competing with its dealers (Tr. 473, 499-501, 281, 219).

Lenox does not sell to any mail-order houses, and stores carrying its products generally trade in the geographical trading area in which they are located (Tr. 108). Lenox and many other producers use the Hearst map of consumer trading areas in the United States to identify consumer trading areas (Tr. 412; Com. Ex. 99).

The only direct sales to consumers that Lenox makes are at its stores located in the home office in Trenton, New Jersey, and in the factory in Pomona, New Jersey. These stores sell in their respective local trading areas (Tr. 112).

DISCUSSION

In the Federal Trade Commission's opinion *In the Matter of Sandura Company*, 61 F.T.C. at 819, after quoting from *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 309-310, the Commission discussed the same issues that are presented in this case and stated:

The Court has also observed that "resale price maintenance is a privilege restrictive of a free economy," 351 U.S., at 316, otherwise governed by Congressional limitations on price fixing that must be strictly construed. It is in this context that respondent's defense must be appraised.

The Court's remarks underscore what was already apparent from a reading of the statute, namely, that the McGuire Act creates a limited exception to the otherwise pervasive sweep of the prohibitions against price fixing. It is a "general rule of statutory construction that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits. . . ." *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37, 44-45. And see, e.g., *Javierre v. Central Atagracia, Inc.*, 217 U.S. 502, 507-508; *Schlemmer v. Buffalo, R. & P. R. Co.*, 205 U.S. 1, 10. The gravity of the offense charged and the specificity of the exemption claimed convince us that this rule is applicable here. Respondent had the burden of proving that its resale-price-maintenance agreements were sanctioned by the statute. Beyond question, it failed to tender such proof.

In the first place, respondent's statement of the scope of the evidence begs the question. It may be that dealer testimony was elicited only from witnesses doing

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business in fair-trade states, but the totality of both dealer and distributor testimony demonstrates an enveloping nationwide pattern of price maintenance. Respondent's network of dealer franchises and distributor territories was intended to be, and, so far as possible, was, extended uniformly across the country. Its resale-price-maintenance activity was an integral part of this national program of distribution. It was therefore incumbent upon respondent to show that its resale-price agreements with distributors and dealers were everywhere sanctioned by fair-trade laws. [Footnote omitted.] No such showing was made or even attempted. Nor, we suspect, could it be, since there are no fair-trade acts in five states and the District of Columbia; in two other states they have been declared unconstitutional; and in seventeen others the non-signer provisions of the acts have been held unconstitutional. See CCH Trade Reg. Rep. Pars. 6017, 6019, 6021.

There seems to be no doubt that respondent has violated the Federal Trade Commission Act if it is concluded as is concluded herein that respondent had a price maintenance agreement with its dealers and that it failed to show that such agreements were lawful in all the States of the United States.

Counsel supporting the complaint offered numerous documents that were taken from respondent's files. Some of these documents were identified by witnesses, but most were not. With regard to most of them, the only foundation laid was the agreement that the documents came from respondent's files. These documents were received in evidence on the theory that they were admissible as being records kept in the ordinary course of business. Respondent has contended that they were not properly authenticated and not properly admitted. At the time these documents were admitted, their use was limited in that only those documents that originated with respondent, its officers, or employees were admitted to prove the truth of the matters contained in them. It is the hearing examiner's view that the documents he has relied on and has cited in this decision as supporting findings of fact constitute reliable and probative evidence.

THE PROPOSED ORDERS

Counsel supporting the complaint contend that since respondent did not purport to comply and did not, in fact, comply with the so-called fair trade laws of those States that have such laws, it cannot now contend that its contracts were lawful in such States; and, in addition to proposing a prohibition against price agreements generally, counsel supporting the complaint proposed a provision in the order that would prohibit respondent from entering into resale price maintenance contracts in the "fair trade" States for a period of three years. In view of the conclusion reached herein that the agreements were probably lawful in the "fair trade" States, and the fact that re-

spondent now expressly enters into resale price maintenance agreements in States where these agreements are lawful, such prohibition is not included in the cease and desist order.

Counsel supporting the the complaint also proposed a provision that would require the reinstatement of all the dealers terminated since January 1960 for failing to maintain respondent's resale prices. It appears that a provision in the order that would bring about the reinstatement of terminated dealers should be limited to those States that do not have valid "fair trade" statutes. There has been no showing that there are dealers who were terminated for failing to maintain respondent's resale prices in such States, and it does not appear that such a limited provision would affect any former dealers. But if there are any such dealers, their reinstatement appears to be proper.

Among the other provisions proposed by counsel supporting the complaint is one that would prohibit respondent from publishing, disseminating, or circulating to any dealer any price list, price book, or other document indicating any resale or retail prices and another provision that would prohibit respondent from advertising any resale or retail prices. Respondent objects strenuously to these provisions, contending that the dealers need price lists as essential merchandising tools, that they get such from respondent's competitors, and that respondent would be at a disadvantage if it was not able to supply price lists to its dealers. The hearing examiner does not believe that these price lists are essential marketing tools; and since the circulation of such price lists would make a continuation of unlawful price agreements simple to effectuate, it would seem that the dealers should prepare their own retail prices for such length of time as would insure that they were not still following their old agreement.

CONCLUSIONS

In view of the circumstances under which prospective dealers are advised by respondent's salesmen of respondent's price maintenance policy, and the general discussions that occur during the preparation of the dealer's application for a franchise, as well as the subsequent conduct of most of the dealers in maintaining prices set by respondent, it is deduced, concluded, and held that there was an understanding and implied agreement between respondent and its dealers that the dealers would maintain the retail prices set by respondent. The dealers further fully understood that they could terminate this agreement at any time and could sell at any price but by failing to adhere to the prices set by respondent they would be cut off from respondent as a source of supply. Thus, it is found, as alleged, that it is now and has

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been for some time the practice and policy of the respondent to adopt and employ in the various States of the United States and the District of Columbia, a system of establishing resale prices for its products.

It is further concluded and found that during most periods of time for many years past such dealers have adhered to the retail prices fixed by respondent, and the acts and practices found above have had and now have the tendency and effect of suppressing and eliminating price competition between respondent's dealers and are in violation of Section 5 of the Federal Trade Commission Act. The majority of the States of the United States have enacted valid statutes which provide that certain resale price maintenance contracts are lawful, and the McGuire Act amendment to Section 5 of the Federal Trade Commission Act provides that contracts in such States are not unlawful.

The hearing examiner is persuaded that even though respondent did not purport to enter into resale price maintenance agreements and, in fact, denies that it did so, nevertheless such agreements were made and were probably permissible in certain jurisdictions by virtue of valid statutes in those jurisdictions.

It is not essential that there be a definite holding that respondent's agreements were permissible in "fair trade" States because respondent failed to show that they were permissible throughout the country. Respondent has the right to enter into price maintenance agreements in the "fair trade" States which it now does openly and expressly. If it were necessary to decide this issue, the hearing examiner would hold that respondent's price maintenance agreements with its dealers were lawful in the "fair trade" States, although it seems clear that Congress did not intend that a manufacturer could accidentally or incidentally be afforded the protection of the McGuire Act.

ORDER

It is ordered, That respondent Lenox, Incorporated, a corporation, and its officers, agents, representatives, employees, successors, and assigns, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of fine china dinnerware, giftware, and artware, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from hindering, suppressing, or eliminating competition or from attempting to hinder, suppress, or eliminate competition between or among dealers handling respondent's products by:

1. Requiring dealers, through a franchise agreement or other means, to agree that they will resell at prices specified by respondent or that they will resell below or above specified prices;

2. Requiring prospective dealers to agree, through direct or indirect means, that they will maintain respondent's specified resale prices as a condition of buying respondent's products;

3. Requesting dealers, either directly or indirectly, to report any person or firm who does not observe the resale prices suggested by respondent, or acting on the reports so obtained by refusing or threatening to refuse sales to the dealers reported;

4. Harassing, intimidating, coercing, threatening, or otherwise exerting pressure on dealers, either directly or indirectly, to observe, maintain, or advertise established resale prices;

5. Selling to dealers at a markdown or discount from a resale or retail price for a period of two years;

6. Publishing, disseminating or circulating to any dealer, any price list, price book or other document indicating any resale or retail prices for a period of two years;

7. Utilizing any other cooperative means of accomplishing the maintenance of resale prices fixed by respondent;

8. *Provided, however*, That nothing hereinabove contained shall be construed to limit or otherwise affect any resale price maintenance contracts that respondent may enter into in conformity with Section 5 of the Federal Trade Commission Act, as amended by the McGuire Act (66 Stat. 632 (1952); 15 U.S.C. 45 (a));

9. Advertising any resale or retail prices in national or regional advertising or advertising any resale or retail prices in any State or territory except those in which contracts or agreements prescribing minimum or stipulated prices are lawful;

10. Failing to sell or refraining from selling to any dealer who was terminated after January 1, 1960, for failing to maintain respondent's "suggested" resale prices, who desires to purchase from respondent, and who is located in any State or territory of the United States in which resale price maintenance contracts or agreements are unlawful or in the District of Columbia.

OPINION OF THE COMMISSION

APRIL 9, 1968

By MacIntyre, *Commissioner*:

The complaint herein charges the Lenox company (Lenox) with violations of Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1), in connection with its household porcelain china, bone china, and giftware business. The complaint charges that Lenox employs a system of establishing resale prices for its products by var-

ious methods, including the requirement that its dealers maintain the prices established by Lenox; that Lenox employs various practices to prevent its dealers from selling its products at prices other than the resale prices established by Lenox; that these practices injure actual and potential competition; and that these practices constitute unfair methods of competition in commerce or unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act. In essence, the complaint charges Lenox with maintaining an unlawful resale price maintenance system in connection with the distribution of its products, which system has the effect of suppressing price competition in the resale of these products.

Hearings were held in this matter before an examiner, who filed his initial decision on May 29, 1967. The examiner concluded that the charges were sustained by the evidence. In brief, the examiner found that respondent adheres to a resale price maintenance system by various acts and practices which "have the tendency and effect of suppressing and eliminating price competition between respondent's dealers and are in violation of Section 5 of the Federal Trade Commission Act." (Initial decision, p. 591.) The examiner issued an order prohibiting respondent from engaging in resale price maintenance except in fair trade States, selling to dealers at a discount from suggested retail price for two years, circulating retail price lists for two years, and national or regional advertising of retail prices except in fair trade States. The examiner further ordered reinstatement of dealers in non-fair trade States terminated after January 1, 1960, for failure to adhere to respondent's suggested retail prices who desire reinstatement.

The matter is before the Commission on appeal by both parties. Complaint counsel appeal on the ground that the examiner's order to cease and desist is unduly narrow and insufficient to terminate respondent's conduct and restore free market conditions. Respondent appeals on the ground that the evidence does not support the charges in the complaint and urges its dismissal. The grounds for the respective appeals will be considered in detail below.

Respondent is considered the leading domestic manufacturer of fine china and related products—in terms of both annual sales and quality of the products. Respondent does not deal with wholesalers but sells exclusively to retailers. From a retailer's point of view respondent's line is highly desirable, due to its quality and customer acceptance.

Respondent requires prospective dealers to agree to its franchise provisions. The dealer application form which is completed by the

Lenox representative interviewing the prospective dealer, the sales manual,¹ and the franchise each contain at least one reference to the fact that, as a condition to obtaining a franchise, the prospective dealer must be in agreement with the requirement that Lenox products will only be sold at prices established by respondent. Thus, respondent's sales manual instructs the representative that "[i]t is equally important that you review with dealer prospect the franchise requirements to assure that they are understood and that the dealer is *in agreement* with them." (Emphasis supplied.)

Up until recently, respondent also used an advertising clipping service, permitting it to determine the prices at which its dealers advertised Lenox products. At various occasions dealers have informed respondent of another dealer's sales of Lenox china at a discount and respondent has acted on such information by terminating the discounting dealer. On at least one occasion respondent requested and received a dealer's cooperation in obtaining documentary evidence of another dealer's sales at prices below those set by respondent. The record also shows that at times respondent had threatened to terminate a discounting dealer's franchise. However, respondent alleges that since the Supreme Court's decision in *Parke, Davis*,² it instructed its representatives to refrain from making such threats.

In addition, and as a method to insure that its products would not be discounted, respondent threatens its dealers with termination for transshipping Lenox products to unauthorized dealers. This prohibition against transshipping is included in the franchise. When respondent learns that an unauthorized dealer is selling its products, a readily identifiable order is placed with the unauthorized dealer, either by respondent itself or by one of its dealers at the behest of respondent. Processing this order will inform respondent which one of its dealers is transshipping. Based on these findings the examiner concluded "that there was an understanding and implied agreement between respondent and its dealers that the dealers would maintain the retail prices set by respondent." (Initial decision, p. 591.)

Accordingly, the examiner found that respondent, by these various acts and practices, had violated Section 5 of the Federal Trade Commission Act and issued his order to cease and desist.

Respondent contends, however, that the examiner erred in finding the existence of an agreement between Lenox and its dealers. Accord-

¹ Respondent argues that the sales manual and franchise are no longer in use. They were not withdrawn from use, however, until the summer of 1966, at a time respondent was well aware of the nature of the Commission's investigation and shortly before the issuance of complaint on October 13, 1966.

² *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960).

ing to respondent, it not only did not enter into any agreements with its dealers but "took affirmative steps to avoid such agreements and relied on the dealer's self-interest as the inducement to follow [respondent's] suggested retail prices."³ Respondent argues at great length that the facts do not support the finding of an agreement. The thrust of its argument appears to be directed, however, to the absence of a finding that respondent has entered into formal contracts or express agreements with its dealers. With reference to its franchise, respondent states that "[i]t was not signed by respondent or the dealer"⁴ and "[w]e do not have here express vertical price-fixing agreements like those found unlawful in *Dr. Miles Medical Company* * * * [n]or is there in respondent's chain of distribution the web of manufacturer-wholesaler-retailer relationships which gave rise to combinations held to be unlawful."⁵ (Citations omitted.)⁵ Rather, respondent contends its "simple, direct method of distribution" falls within the type of conduct specifically sanctioned by *Colgate*.⁶ According to that decision,

In the absence of any purpose to create or maintain a monopoly, the [Sherman] act does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell.⁷

The question whether or not an agreement exists between respondent and its dealers must be answered within the context of respondent's overall business behavior. The answer does not solely hinge upon the existence of a formal contract or express agreement. As the Supreme Court stated in *Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp.*:

The crucial question is whether respondents' conduct toward petitioner stemmed from independent decision or from an agreement, tacit or express. To be sure, business behavior is admissible circumstantial evidence from which the fact finder may infer agreement. (Citations omitted.)⁸

It has long been established that a formal contract or express agreement to substantiate a finding of agreement within the meaning of the antitrust laws need not exist.

³ Brief of respondent to the Commission, p. 9.

⁴ *Id.* at 6.

⁵ *Ibid.*

⁶ *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

⁷ *Id.* at 307.

⁸ *Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540 (1954). See also *United States v. General Motors*, 384 U.S. 127 (1966); *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960).

Upon a review of the record in this matter and due consideration of respondent's business conduct, we find that the examiner concluded correctly that implied agreements to maintain suggested retail prices exist between respondent and its dealers. Respondent's sales manual, dealer application form and franchise brochure speak for themselves. Each contains a specific reference to resale price maintenance and requires a prospective dealer's agreement to respondent's resale price maintenance policy. This policy required dealers to sell Lenox products at prices established by respondent. While respondent did not execute formal contracts with its dealers, under the present circumstances no other conclusion is possible than that agreements as to resale prices between respondent and its dealers do in fact exist. Certainly a prospective dealer must at the very least be tacitly in accord with the franchise provisions to become a Lenox dealer and there can be little doubt that a prospective dealer voicing disapproval of respondent's resale price maintenance policy would not become a Lenox dealer.

Accordingly, respondent must be found to have entered into illegal price maintenance agreements with its dealers.

The record contains other evidence that respondent's conduct goes beyond the simple refusal to deal sanctioned by *Colgate*. The limits of *Colgate* are clearly transgressed by a policy that over the years has ranged from and included policing of dealers to threatening termination. The record also contains a fully documented instance in which respondent has requested and received a dealer's cooperation to obtain evidence of another dealer's price-cutting. These facts alone justify a finding of illegality in and of themselves without an attendant finding of other concerted action or agreements. As the Supreme Court stated in *Parke, Davis*:

... an unlawful combination is not just such as arises from a price maintenance agreement, express or implied; such a combination is also organized if the producer secures adherence to his suggested prices by means which go beyond his mere declaration to sell to a customer who will not observe his announced policy. (Court's emphasis.) (362 U.S. 43.)

Respondent cannot be said to have relied on a policy whereby "each customer, although induced to do so solely by a manufacturer's announced policy, independently decides to observe specified resale prices." (362 U.S. 44.)

Respondent's contention that since 1960 it took specific and affirmative steps to comply with *Parke, Davis* must be rejected. Respondent claims, without admitting, of course, that its conduct prior to 1960 was unlawful, that since the *Parke, Davis* decision it instructed its salesmen, by memorandum and at sales meetings, of the boundaries of per-

missible conduct under that decision. Since the record contains sufficient evidence to justify a conclusion that respondent's pre-1960 conduct went beyond the simple refusal to deal sanctioned by *Colgate*, this contention will be examined in the context of respondent's business behavior since 1960.

The examiner found, in effect, a "continuation of conspiracy." We concur in this finding. The only evidence in the record concerning any steps taken by respondent after 1960 is the above-referred-to memorandum to salesmen. No evidence was introduced that respondent's sales manual was altered to reflect respondent's alleged policy to stay within "the boundaries of permissible conduct under *Parke, Davis*."⁹ In fact, the sales manual was not withdrawn until shortly before the Commission issued its complaint. Respondent's application form for prospective dealers was not amended nor were the franchise provisions changed to reflect a distribution policy allegedly revised subsequent to *Parke, Davis*. Nor did respondent communicate what it considered permissible under *Parke, Davis* to its dealers, most of whom, according to the examiner, had been Lenox dealers for some years. In our opinion, respondent has not sustained the burden of proof required to show discontinuance of an illegal agreement. Not sufficient is respondent's claim that the illegal activities have been abandoned.¹⁰ As the Court observed in *United States v. Consolidated Laundries Corp.*, "it is clear that a confederate, once shown to have been such, has the burden of satisfying the trier of fact that he had withdrawn from the enterprise." (Citations omitted.)¹¹ The same rationale applies in the instant matter. Thus, respondent must introduce more convincing evidence that it has discontinued its illegal conduct.¹² This respondent has not done and a conclusion that the illegal conduct has not been discontinued after 1960 is therefore justified. In addition, the evidence in the record contradicts respondent's contention. Assuming, *arguendo*, that the evidence in this case is capable of being separated into ante- and post-1960 categories, we need only determine whether there exists a relation between respondent's past conduct and the conduct under examination. "If such a relation or connection is found it may properly be condemned as a continuance of an unlawful conspiracy."¹³ Respondent has not convinced us that it has significantly altered its

⁹ Brief of respondent to the Commission, p. 11.

¹⁰ *United States v. Fish Smokers Trade Council, Inc.*, 183 F. Supp. 227 (D.C.N.Y. 1960).

¹¹ 291 F. 2d 563, 573, *rehearing denied*, 291 F. 2d 576 (2d Cir. 1961).

¹² *Local 167 v. United States*, 291 U.S. 293 (1934); *Hyde v. United States*, 225 U.S. 347 (1912).

¹³ *American Chain & Cable, Inc. v. Federal Trade Commission*, 139 F. 2d 622, 624 (4th Cir. 1944).

method of doing business since 1960, nor do we believe that the available evidence should be thusly limited or separated. Rather, we base our finding of illegality upon the totality of the available evidence with respect to respondent's overall business behavior over a number of years.

Respondent also attacks the examiner's finding that the majority of its dealers have been Lenox dealers for some years and that, even considering a management change in 1960, respondent's policy was to continue established relationships with its dealers "with as little disruption as possible." (Initial decision, p. 584.) Lenox was established in 1889 and has almost 3000 dealers. Surely respondent is not contending that the majority of its dealers became dealers since 1960. Respondent's entire *modus operandi*—the manner in which it selects its dealers, the interview of and the detailed application form for prospective dealers—indicates that respondent very definitely is interested in the establishment of lasting business relationships with its dealers. In addition, the evidence in the record indicates that the majority of respondent's dealers have been Lenox dealers for some years. Conversely, respondent has not introduced any evidence to the effect that the majority of its dealers have not been Lenox dealers for some years. We conclude that the examiner correctly found that the majority of respondent's dealers had established relationships with respondent for some years prior to 1960.

Respondent further contends that the evidence of agreements is limited to dealers located in fair trade States and that "[a]ssuming, arguendo, that such agreements were made with certain dealers, there was no evidence that this was done except in fair trade States where such agreements were legal."¹⁴

The examiner concluded that respondent's distribution policy was nationwide and if a difference exists between its policy applicable to dealers located in fair trade States and dealers located in non-fair trade States, respondent failed to show it.¹⁵ We concur in this conclusion. The record does not contain any evidence that respondent does not adhere to a uniform nationwide distribution policy and, more significantly, respondent does not claim to employ a different policy in fair trade States as distinguished from non-fair trade States. Respondent merely contends that no evidence of its dealings in non-fair trade States was introduced. Such repetitive and redundant evidence, however, is not necessary,¹⁶ and the burden of showing that a different

¹⁴ Brief of respondent to the Commission, p. 26.

¹⁵ Initial decision, pp. 590-591.

¹⁶ *Consumer Sales Corp. v. F.T.C.*, 198 F. 2d 404 (2d Cir. 1952), *cert. denied*, 344 U.S. 912 (1953).

policy does exist rests on respondent. In the absence of any evidence to the contrary, no other conclusion is possible.

Respondent further argues that if agreements were found to have been made they were made in fair trade States and therefore legal. The examiner was of the opinion that even though respondent specifically denies having entered into resale price maintenance agreements with its dealers, that such agreements were made and "probably permissible" in fair trade jurisdictions. (Initial decision, p. 592.)

If it were necessary to decide this issue, the hearing examiner would hold that respondent's price maintenance agreements with its dealers were lawful in the "fair trade" states, although it seems clear that Congress did not intend that a manufacturer could accidentally or incidentally be afforded the protection of the McGuire Act. (Initial decision, p. 592.)

Respondent does not contend that it in fact did enter into fair trade agreements before the issuance of the complaint, and there is no question that it did not. As a matter of fact, since the issuance of the complaint respondent has entered into formal fair trade contracts.¹⁷ In addition, respondent's alleged policy, as discussed above, was not to enter into fair trade contracts but to stay within the boundaries of permissible conduct under *Parke, Davis*. What respondent endeavored to show during the course of this proceeding was that since it could have entered into fair trade contracts had it desired to do so, and that since the type of product it sold and since its distribution method qualified respondent for fair trading, its conduct was legal in fair trade States.

In effect, respondent seeks to equate price-fixing agreements with fair trade contracts, or antitrust illegality with fair trade validity, by arguing that if a price maintenance agreement is found to exist it cannot be illegal in fair trade States because fair trade statutes exempt such agreements from illegality. With respect to respondent's dealings in interstate commerce, this contention must be examined in the context of the Miller-Tydings Act¹⁸ and the McGuire Act,¹⁹ which confer immunity to otherwise illegal price maintenance agreements provided these agreements are made pursuant to and in conformity with valid fair trade statutes. Thus, the Supreme Court stated that:

A distributor of a trade-marked article may not lawfully limit by agreement, express or implied, the price at which the persons to whom its purchasers may resell, except as the seller moves along the route which is marked by the Miller-Tydings Act.²⁰

¹⁷ Answer brief of respondent to the Commission, p. 21; initial decision, p. 592.

¹⁸ 50 Stat. 693 (1937), 15 U.S.C. § 1.

¹⁹ 60 Stat. 631 (1952), 15 U.S.C. § 45.

²⁰ *United States v. Bausch & Lomb Co.*, 321 U.S. 707, 721 (1944).

This language was subsequently quoted by the Supreme Court in *United States v. McKessen & Robbins, Inc.*²¹ There the Court continued and stated that the

question before us is whether the price fixing agreements challenged herein move along that route. If they do not, they are illegal *per se*. There is no basis for supposing that Congress, in enacting the Miller-Tydings and McGuire Acts, intended any change in the traditional *per se* doctrine.²²

The Court went on to say that "since resale price maintenance is a privilege restrictive of a free economy" Congressional intent on the limitations thereto must be strictly construed.²³ This indicates to us that a manufacturer cannot "accidentally or incidentally" be afforded the protection of the McGuire Act and without having introduced some evidence that he in fact should be afforded this protection. As to this, the Commission observed in *Sandura*:

The Court's remarks underscore what was already apparent from a reading of the statute, namely, that the McGuire Act creates a limited exception to the otherwise pervasive sweep of the prohibitions against price fixing.²⁴

In that case, respondent advanced a similar argument that its price agreements between its dealers or distributors in fair trade States were *prima facie* legal. The Commission stated that "[r]espondent had the burden of proving that its resale-price-maintenance agreements were sanctioned by the statutes."²⁵

Respondent places great reliance on *United States v. Socony Mobil Oil Co.*²⁶ in an effort to show that it has met this burden of proof, namely, that its resale price maintenance agreements are valid in fair trade states. In that case Chief Judge Sweeney stated that "I can find nothing in the McGuire Act which limits its exemptions to fair trade agreements."²⁷ This argument has previously been considered and rejected by this Commission in the *Roberts Co.* case, in which we said, with specific reference to Chief Judge Sweeney's statement, that "[e]ven if this construction, for which no precedent is cited, be accepted as correct, it must still be established that the applicable state

²¹ 351 U.S. 305 (1956).

²² *Id.* at 310-311.

²³ *Id.* at 316.

²⁴ *Sandura Co.*, Docket No. 7042, 61 F.T.C. 756, 819 (1962), *modified in other respects*, *Sandura Co. v. F.T.C.*, 339 F.2d 847 (6th Cir. 1964).

²⁵ *Id.* at 819.

²⁶ "[T]he burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits. . . ." *F.T.C. v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948).

²⁷ 150 F. Supp. 202 (D. Mass. 1957), *certified*, 252 F.2d 420 (1st Cir. 1958), *dismissed*, 356 U.S. 925 (1958).

²⁸ *Id.* at 204.

laws sanction the agreement actually employed.”²⁸ We note that Massachusetts public policy and common law permits the type of agreement with which we are concerned here, even without the existence of its Fair Trade Act; its Fair Trade Act is thus not necessary to give them validity.²⁹ In other jurisdictions, however, this type of agreement—but for the existence of fair trade statutes—would be illegal, either by virtue of common law doctrine or legislative enactment. And it is our understanding that fair trade statutes in such jurisdictions are considered in derogation of the common law and accordingly must be strictly construed.³⁰ In the instant proceeding we hold that respondent has failed in its burden of proof that its conduct was permissible under the various state fair trade statutes.

Respondent itself appears to have been in doubt that its policy, without more, was protected by fair trade legislation since subsequent to the initiation of this proceeding it has entered into formal fair trade contracts in those States having valid fair trade statutes. In view of our holding that respondent failed to show that its conduct was legal in fair trade States, it is unnecessary to review other evidence, primarily circumstantial, tending to show that respondent’s policy was not, in a number of instances, in conformity with fair trade policies and precepts. It is enough to hold that public policy, as well as applicable precedents, demands that the McGuire Act exemption to the anti-trust laws be strictly construed and those seeking its protection be held to the highest accountability.

Respondent also urges dismissal of the complaint on the ground that most of the documents introduced in evidence were improperly admitted. A request for admission of genuineness was denied by respondent and respondent objected to the admission of the documents for lack of proof of genuineness or authenticity. Respondent contends, absent an admission of genuineness or waiver of objection to admission, complaint counsel has the burden of proving genuineness before the documents can be admitted and used against respondent. According to respondent, the hearing examiner’s admission of and reliance upon these documents constitute substantial error warranting dismissal of the complaint for failure of proof. We find this contention without merit.

The documents—to the admission of which respondent objects—can be briefly summarized. Most of these were submitted by counsel for respondent upon request of complaint counsel. The remaining documents

²⁸ *The Roberts Co.*, Docket No. 6943, 56 F.T.C. 1569, 1599 (1960).

²⁹ 150 F. Supp. 204.

³⁰ See, e.g., *Venable v. Engel, J., & Co., Inc.*, 1948-49 CCH Trade Cas. ¶ 62523, Md. Ct. of App. (1949).

were submitted by an official of respondent to the investigating attorney. It is not disputed that they come from respondent's files.³¹ The documents themselves consist of lists of officers and employees of respondent, franchise brochures, advertising and promotional material, price lists, interoffice memoranda and other internal records, dealer correspondence, invoices and purchase orders.

The examiner—over the objections of respondent, who did not introduce any evidence which would place the authenticity of the documents in doubt—admitted the documents, on the theory that they were records kept in the regular course of business.

In support of its position that the documents in question were improperly admitted for failure of proof of authenticity or genuineness, respondent cites and relies in part on our opinion in *Frito-Lay, Inc.*³² It appears that respondent interprets this opinion as holding that upon objection to the admission of documents for lack of proof of authenticity complaint counsel must prove their authenticity. This, however, is not the correct interpretation of that opinion.

We do not interpret this statement to mean, as respondent seems to contend, that upon the mere denial of a request for admission or waiver of objection to authenticity complaint counsel must prove authenticity. Nor do we believe that upon an objection, without more, to admission for failure to prove authenticity would complaint counsel be required to prove authenticity. Respondent is in the best position to determine the authenticity of the documents which come from its own files and the burden of proof would be on respondent to introduce some evidence tending to show that they are not authentic. Accordingly, these documents were not improperly admitted by the hearing examiner. It is not clear whether respondent also objects to the admission of these documents for failure to prove that they were kept in the regular course of business; if respondent does raise this objection, the reasoning applicable to the issue of authenticity is equally applicable to the issue whether or not the documents were kept in the regular course of business. In both instances respondent is in the best position to determine the character of the documents, and in balance-

³¹ Tr. 11, 375-376.

³² Docket No. 8606, 66 F.T.C. 1521, 1524 (1964). The pertinent paragraph reads as follows:

"Somewhat different considerations are applicable to complaint counsel's requests for the admission of authenticity of the documents. Regardless of whether a document appears on its face to be respondent's own or that of some third person, complaint counsel would be obliged, in the absence of an admission or waiver of objection to genuineness, to stand ready to prove that the document is authentic. . . . While the number of documents is very large, there is little reason to anticipate that respondent would be unable to determine readily whether each of them is in fact what it purports to be. The authenticity of most of them ought to be immediately apparent on their face."

ing the convenience of the parties we hold that it is respondent's burden to introduce some evidence tending to refute the conclusion that documents coming from its own files are authentic and kept in the regular course of business.

Moreover, it should be noted that the Commission's rules (former § 3.14(b) renumbered now as § 3.43(b)) call for the admissibility of "relevant material and reliable evidence." Clearly documents coming from a respondent's files can be regarded as reasonably reliable absent some countervailing evidence demonstrating their unreliability. It is the burden of the party challenging the reliability of a document to come forward with the evidence supporting the challenge.

Respondent also contends that the testimony of one Cheslock, a terminated dealer, should have been stricken because before he testified complaint counsel allegedly improperly influenced him.³³ The examiner denied a motion to strike Cheslock's testimony on the ground that while respondent may have succeeded in showing that Cheslock was an interested witness, Cheslock's testimony would not be affected though his credibility would be. A review of the record indicates that the examiner relied on Cheslock's testimony in support of the proposition that respondent's dealers sold several competing brands of china and thus its products were in free and open competition with similar products. Respondent itself repeatedly claimed this to be a fact and such a finding would be vital to substantiate a claim that respondent is entitled to fair trade its products, a claim respondent has repeatedly made. The examiner also cites Cheslock's testimony in support of his finding that dealers were expected to maintain suggested retail prices set by respondent and if they sold at lower prices, they would be terminated. Again, this finding is not in dispute. Accordingly, we see no reason to exclude Cheslock's testimony from the record and concur in the examiner's ruling thereon. The Commission, absent a clear abuse of discretion or unusual circumstances, will not interfere with the examiner's ruling on the issue of credibility. The examiner's proximity to the proceedings, his presiding thereover, and his ability to observe the witnesses' demeanor clearly place him in the most favored position with respect to any rulings on the credibility of a witness. Nor do we find such unusual circumstances or clear abuse of discretion in this case to warrant our interference.

Complaint counsel have appealed from the initial decision of the examiner on the ground that the order contained therein is inadequate

³³ Before Cheslock was subpoenaed to testify complaint counsel provided him with a copy of the complaint and proposed order. The proposed order contained a provision requiring Lenox to reinstate dealers terminated for price-cutting.

in that it will not effectively terminate respondent's unlawful conduct and restore free market conditions. Complaint counsel, among other arguments, contend that in order to be effective the order should contain a prohibition against respondent's limitations on dealer resales and an unlimited prohibition of suggested prices. Complaint counsel further contend that the provision requiring respondent to reinstate any dealers terminated after 1960 for price-cutting should not be limited to non-fair trade states and that respondent should be prohibited from engaging in fair trade for a period of three years.

With respect to respondent's policy of prohibiting dealers from reselling its products to unauthorized dealers, the examiner found that it constitutes an integral part of respondent's selective distribution system. He did not find, however, as urged by complaint counsel, that the transshipping prohibition was related to respondent's resale price maintenance policy.

It is not disputed that respondent strictly enforces its prohibition against transshipping, that a violation of this prohibition results in termination of the offending dealer and that respondent has, in fact, terminated transshipping dealers. In considering the totality of respondent's conduct we conclude that the prohibition of transshipping is indeed an integral part of respondent's resale price maintenance policy. Whatever reasons respondent may assign to the existence of this prohibition, it is primarily a method of insuring that Lenox products would not be resold to dealers who might sell them at prices below those established by respondent. Once the finding is made that the transshipping prohibition is a "part of a scheme involving unlawful price fixing, the result would be a *per se* violation of the Sherman Act."³⁴ Accordingly, the order to cease and desist, if it is to be effective, must include a provision prohibiting respondent from restricting its dealers to sell Lenox products to whomever they wish, including other dealers. We also reject respondent's contention that transshipping was not an issue in this proceeding and hence the order to cease and desist should not include a prohibition against the transshipping restriction. The issue in this proceeding is respondent's resale price maintenance system and the various acts and practices which are part of this system and implement it. On the basis of our conclusion that the transshipping restriction is an integral part of respondent's resale price maintenance policy, a prohibition against this restriction is not only appropriate but necessary for an effective order.

³⁴ *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 373 (1967). See also *United States v. General Motors Corp.*, 384 U.S. 127 (1966).

We also agree with complaint counsel's contention that respondent should be prohibited from engaging in fair trade for a period of three years. With reference to such a prohibition, the Supreme Court stated that it is necessary "in order that the ground may be cleansed effectually from the vice of the former illegality."³⁵ However, should respondent desire to do so, after two years from the effective date of the order and after demonstrating that competition in the resale of its products has been restored, it can apply to the Commission for repeal of this provision. Similarly, the provision requiring the reinstatement of dealers terminated for price-cutting should not be limited to non-fair trade states. Nor should it be limited to dealers terminated for price-cutting but must include dealers terminated for transshipping.

Respondent's contention that the Commission is without authority to require affirmative acts but must confine itself to requiring cessation of the conduct found unlawful is without merit. The courts have long upheld Commission orders requiring affirmative acts.³⁶ The Commission is also accorded wide discretion in determining the type of order necessary.³⁷

Respondent further contends that the prohibition against the distribution of suggested retail price lists is unnecessary and would be detrimental to respondent's business. The examiner's order prohibits respondent from using suggested retail price lists for a period of two years. Complaint counsel appealed this provision and urge that respondent be prohibited from distributing suggested retail price lists in perpetuity.

In this context, respondent, subsequent to the close of hearings in this proceeding, has moved to add to the record documentary exhibits consisting of suggested price lists issued by its competitors. This motion was denied by the Commission without prejudice.³⁸ In its present appeal respondent repeats this motion and urges the Commission to add this material to the record of this proceeding.

We have carefully considered respondent's request and have concluded that this material should not be admitted to the documentary record. It is respondent which is charged with a violation of Section 5 of the Federal Trade Commission Act and not its competitors. The price lists of respondent's competitors bear no relevance to the instant proceeding and hence should not be admitted into the record after the close of hearings.

³⁵ *United States v. Bausch & Lomb Co.*, 321 U.S. 707, 724 (1944).

³⁶ *Ward Laboratories, Inc. v. F.T.C.*, 276 F. 2d 952 (2d Cir. 1960), *cert. denied*, 364 U.S. 827.

³⁷ *F.T.C. v. National Lead Co.*, 352 U.S. 419 (1957).

³⁸ *Lenox, Incorporated*, Docket No. 8718. Order Denying Respondent's Request to Add Documentary Exhibits to Record, July 19, 1967.

We further conclude that respondent should be enjoined from the use of suggested retail price lists for a period of three years, provided that respondent may, after two years from the effective date of the order and upon a showing that competition in the resale of its products has been restored, petition the Commission for a repeal of this provision. Respondent's argument that there is nothing inherently unlawful in the use of suggested retail price lists must be examined within the framework of the use respondent has made of such lists in the past. To the extent that suggested retail price lists were used by respondent as a tool in furtherance of unlawful activities, their future use should be prohibited, at least until such time as the effect of the unlawful conduct can be expected to have disappeared. We conclude that respondent in fact used suggested retail price lists in furtherance of the unlawful conduct found herein. The Commission is accorded considerable discretion in the fashioning of orders to cease and desist, and it has the duty to fashion such an order as is necessary to effectively dissipate the effects of the unlawful conduct and prevent its recurrence. An order which would not at least temporarily prohibit the use of suggested retail price lists would not accomplish this goal.

Finally, respondent contends that the prohibition on requesting dealers to report other dealers who do not observe established resale prices and the prohibition of threatening or exerting pressure on dealers to observe established resale prices is unjustified. This form of conduct, however, is traditional as a means of securing dealer adherence to suggested resale prices and the examiner correctly included in his order a prohibition as to each of these practices. While the evidence as to these practices in the record is somewhat dated, we believe that a prohibition with respect thereto should nevertheless be included in the order. So long as these practices bear a reasonable relation to the conduct found unlawful, the Commission is not only entitled but, in accordance with its mandate from the Congress, has the duty to include a prohibition of these practices in its order to cease and desist. Repeatedly the courts have upheld the Commission's authority to prohibit practices of a similar nature as those committed in the past.

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 objective Congress envisioned, it cannot be required to confine its road block to the narrow law the transgressor has travelled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity. [Footnote omitted.]³⁹

³⁹ *F.T.C. v. Ruberoid*, 343 U.S. 470, 372 (1952).

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In the instant matter, the order, to be effective, must include a prohibition of these practices which, over the years, have become to be considered the classic tools for the establishment and perpetuation of resale price maintenance systems.

In accordance with the above, the initial decision of the examiner is adopted by the Commission, as modified by this opinion, and the appeal of complaint counsel and respondent is granted to the extent indicated and otherwise denied. An appropriate order will be entered.

Commissioner Nicholson did not participate for the reason that oral argument was heard prior to his taking the oath of office.

FINAL ORDER

This matter has been heard by the Commission on the cross-appeals of complaint counsel and respondent from the initial decision of the examiner, filed May 29, 1967. The Commission has rendered its decision denying respondent's appeal in part, granting complaint counsel's appeal in part, and adopting the initial decision of the examiner, as modified by the opinion accompanying this order. For the reasons stated herein, the Commission has determined that the order entered by the examiner should be modified and, as modified, adopted and issued by the Commission as its final order.

ORDER

It is ordered, That respondent, Lenox, Incorporated, a corporation, and its officers, agents, representatives, employees, successors, and assigns, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of fine china dinnerware, giftware, and artware, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from hindering, suppressing, or eliminating competition or from attempting to hinder, suppress, or eliminate competition between or among dealers handling respondent's products by:

1. Requiring dealers, through a franchise agreement or other means, to agree that they will resell at prices specified by respondent or that they will not resell below or above specified prices;
2. Requiring prospective dealers to agree, through direct or indirect means, that they will maintain respondent's specified resale prices as a condition of buying respondent's products;
3. Requesting dealers, either directly or indirectly, to report any person or firm who does not observe the resale prices suggested by respondent, or acting on reports so obtained by refusing or threatening to refuse sales to the dealers so reported;

4. Harassing, intimidating, coercing, threatening or otherwise exerting pressure on dealers, either directly or indirectly, to observe, maintain, or advertise established resale prices;

5. Selling to dealers at a mark down or discount from a resale or retail price;

6. Publishing, disseminating or circulating to any dealer, any price list, price book or other document indicating any resale or retail prices for a period of three years following the effective date of this order: *Provided, however,* That respondent may, two years following the effective date of this order, upon a showing that competition in the resale of its products has been restored, petition the Commission to repeal this provision;

7. Utilizing any other cooperative means of accomplishing the maintenance of resale prices fixed by respondent;

8. Requiring or inducing, by any means, dealers or prospective dealers to refrain, or to agree to refrain, from reselling respondent's products to any dealers or distributors;

9. Entering into any contract or agreement prescribing minimum or stipulated prices, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy in any state, territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, for a period of three years following the effective date of this order: *Provided, however,* That respondent may, two years following the effective date of this order, upon a showing that competition in the resale of its products has been restored, petition the Commission to repeal this provision;

10. Failing to sell or refraining from selling to any dealer who was terminated after January 1, 1960, for

(a) failing to maintain respondent's "suggested" resale prices, or

(b) selling to another dealer for resale, and who desires to purchase from respondent.

It is further ordered, That the respondent herein 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 this order.

Commissioner Nicholson not participating for the reason that oral argument was heard prior to his taking the oath of office.

Complaint

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IN THE MATTER OF

AMERICAN BRAKE SHOE COMPANY*

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

Docket 8622. Complaint, May 12, 1964—Decision, April 10, 1968

Order requiring a large manufacturer of friction materials and related products with headquarters in New York City, to divest itself of an Ohio manufacturer of sintered metal friction materials within 6 months and not to acquire any producer of such material for the next 10 years without prior Commission approval.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named above has violated and is now violating the provisions of Section 7 of the Clayton Act (U.S.C., Title 15, Section 18), as amended, through respondent's acquisition of The S. K. Wellman Company, hereby issues its complaint pursuant to Section 11 of the aforesaid Act (U.S.C., Title 15, Sec. 21) charging as follows:

I

Definitions

1. For the purposes of this complaint, the following definitions shall apply:

(a) "Friction materials" are substances used to oppose the relative motion of two bodies in contact, including but not limited to organic friction material, sintered metal friction material and paper friction material.

(b) "Organic friction materials" are those made from asbestos and other materials bonded under heat and pressure with an organic resin.

(c) "Paper friction materials" are those produced by rolling a pulp made from a blend of ingredients into a material resembling heavy cardboard.

(d) "Sintered metal friction materials" are those produced by blending various metallic and nonmetallic powders. The ingredients are then compressed and sintered to a steel or other backing under high pressure and temperature.

*Now known as Abex Corporation.

II

American Brake Shoe Company

2. Respondent, American Brake Shoe Company (Brake Shoe), is a corporation organized and existing under the laws of the State of Delaware with its office and principal place of business at 530 Fifth Avenue, New York, New York.

3. Brake Shoe is a large, diversified manufacturer, distributor and seller of friction materials, castings and forgings, and railroad and hydraulic products. In 1962 Brake Shoe had total sales of \$194,892,000 and its total assets as of December 31, 1962, were \$150,101,000.

4. Prior to and since April 16, 1963, Brake Shoe operated friction material plants at Cleveland, Ohio, and Winchester, Virginia. The Cleveland plant manufactures sintered metal friction materials and the Winchester plant manufactures organic friction materials.

5. At all times relevant herein, Brake Shoe sold its products, including friction materials, in interstate commerce throughout the United States.

III

The S. K. Wellman Company

6. Prior to its acquisition on April 16, 1963, The S. K. Wellman Company (Wellman) was a corporation organized and existing under the laws of the State of Ohio with its office and principal place of business at 200 Egbert Road, Bedford, Ohio.

7. At the time of its acquisition, Wellman was engaged principally in the manufacture, distribution and sale of sintered metal friction materials. It operated one plant at Bedford, Ohio. Its 1962 total sales were \$12,421,239, and its total assets as of December 31, 1962, were \$8,210,331.

8. Prior to, and at the time of its acquisition, Wellman sold its products, including friction materials, in interstate commerce throughout the United States.

IV

Trade and Commerce

9. The relevant product markets for the purposes of this complaint are the production, distribution and sale of friction materials in general, and sintered metal friction materials in particular, exclusive of friction materials used by the railroad industry.

10. The relevant geographical market for the purposes of this complaint is the United States as a whole.

Complaint

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11. The three major types of friction materials are organic, sintered metal, and paper. Other materials such as cork and wood are also used as friction materials, but comprise only a minor portion of the market.

12. Sintered metal friction materials are especially adapted for use under severe operating conditions, where for example, heavy loads or high temperatures are encountered. Sintered metal is one of the newest friction materials and represents a rapidly growing segment of the friction materials industry.

13. The entire friction materials industry in the United States consists of approximately thirty-two companies. In 1961 the total sales of friction materials by all companies were approximately \$159,000,000. In that year the five largest producers of friction materials accounted for 55% of total sales; the ten largest firms accounted for 84% of total sales. In 1961, Brake Shoe and Wellman ranked approximately sixth and eighth, respectively, as friction material producers.

14. Sintered metal friction materials are presently manufactured, distributed and sold by approximately six companies.

15. At the time of Brake Shoe's acquisition of Wellman, Brake Shoe and Wellman were substantial actual and potential competitors in the sale of friction materials and sintered metal friction materials.

16. As a direct result of respondent's acquisition of Wellman, respondent is now the second ranking producer of friction materials and the leading producer of sintered metal friction material in the United States.

V

Violation of Section 7 of the Clayton Act

17. On April 16, 1963, Brake Shoe acquired all of the stock of Wellman in exchange for 223,656 shares of Brake Shoe's stock having an approximate market value of \$12,468,822.

18. The effect of the acquisition of Wellman by Brake Shoe may be substantially to lessen competition or to tend to create a monopoly in the production, distribution and sale of friction materials and sintered metal friction materials throughout the United States in the following ways, among others:

(a) Actual and potential, substantial competition between Brake Shoe and Wellman in the production, distribution and sale of friction materials and sintered metal friction materials has been eliminated;

(b) Concentration in the production, distribution and sale of friction materials and sintered metal friction materials has been substantially increased;

(c) The combination of Brake Shoe and Wellman may so increase respondent's manufacturing and distribution facilities, technology, financial and market strength as to provide Brake Shoe with a decisive competitive advantage in the sintered metal friction materials industry and the friction materials industry to the detriment of actual and potential competition;

(d) New entrants into the friction materials and sintered metal friction materials industries may be inhibited or prevented;

(e) An environment has been created fostering a trend toward mergers and acquisitions on the part of other and less diversified companies in the friction materials and sintered metal friction materials industries.

19. The acquisition of Wellman by respondent, as above alleged, constitutes a violation of Section 7 of the Clayton Act (U.S.C., Title 15, Section 18), as amended.

Mr. V. Rock Grundman, Jr., and *Mr. Hugh J. Kelly* supporting the complaint.

Mr. Earl W. Kintner, *Mr. Ralph S. Cunningham, Jr.*, *Mr. Mark R. Joelson*, *Mr. Jack L. Lahr*, *Mr. George R. Kucik*, *Mr. Stanley D. Heckman*, *Arent, Fox, Kinter, Plotkin & Kahn*, Washington, D.C., and *Mr. Carson M. Glass*, *Clifford & Miller*, Washington, D.C., for the respondent.

INITIAL DECISION BY ELDON P. SCHRUP, HEARING EXAMINER

AUGUST 19, 1966

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STATEMENT OF PROCEEDINGS

The Federal Trade Commission on May 12, 1964, issued its complaint charging the respondent American Brake Shoe Company, a corporation, with violation of Section 7 of the Clayton Act as amended.¹ The complaint alleges the respondent with total sales of over \$194,000,000 in 1962 to be a large, diversified manufacturer of various products, including organic and sintered metal friction materials sold in interstate commerce throughout the United States. It is further alleged that respondent on April 16, 1963, acquired all the corporate stock of The S. K. Wellman Company, a corporation, with 1962 sales in excess of \$12,000,000 and also engaged in the manufacture of sintered metal friction materials sold in interstate commerce throughout the United States.

The complaint alleges the entire friction materials industry in the United States to consist of approximately thirty-two companies in 1961 and the total sales of all said companies to have been approximately \$159,000,000. The five largest companies are alleged to have accounted for 55% of total sales, and the ten largest companies to have accounted for 84% of total sales. The American Brake Shoe Company is alleged to have ranked sixth and The S. K. Wellman Company to have ranked eighth in sales among these thirty-two companies in 1961.

Sintered metal friction materials are alleged in the complaint to be manufactured, sold and distributed by approximately six companies. At the time of the acquisition it is further alleged that the American Brake Shoe Company and S. K. Wellman were substantial, actual and potential competitors in the sale of friction materials and of sintered metal friction materials and that as a direct result of the acquisition, respondent American Brake Shoe Company is now the second ranking producer of friction materials and the leading producer of sintered metal friction materials in the United States.

The complaint in conclusion alleges the foregoing acquisition by respondent American Brake Shoe Company may be to substantially lessen competition or tend to create a monopoly in the production, distribution and sale of friction materials in general, and sintered metal friction materials in particular, throughout the United States.

¹ "Sec. 7. That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

Respondent on August 18, 1964, filed answer to the complaint admitting some and denying other of its allegations. Respondent's answer denies the allegations of the complaint with respect to the relevant product market for friction materials and the relevant product sub-market of sintered metal friction materials therein set forth, and further states respondent to be without knowledge or information sufficient to form a belief as to the complaint's allegations relative to the number of companies, their sales and respective rank in the friction materials industry. Respondent's answer denies the effect of the acquisition as alleged in the complaint and that such acquisition constituted a violation of Section 7 of the Clayton Act as amended.

Following a series of formal and informal prehearing conferences, the hearing for the presentation of the case-in-chief commenced in Washington, D.C., on October 25, 1965, and ended November 10, 1965.² The presentation of the defense commenced in Washington, D.C., on January 4, 1966, and ended April 5, 1966. No rebuttal hearing was held and the record for the reception of evidence was closed on April 8, 1966. The transcript of record consists of 4,811 pages. Complaint counsel presented the testimony of 29 witnesses and respondent presented the testimony of 61 for a total of 90 witnesses. Received in evidence are some 123 documentary and physical exhibits submitted by complaint counsel and 165 submitted by respondent for a total of 288 exhibits.

Respective counsel were afforded full opportunity to be heard, to examine and cross-examine all witnesses and to introduce such evidence as is provided for under Section 3.14(b) of the Commission's Rules of Practice for Adjudicative Proceedings.

Proposed findings of fact, conclusions, supporting briefs, and replies thereto were filed by respective counsel, and counsel supporting the complaint submitted a proposed order to cease and desist. Oral argument thereon by respective counsel was held before the hearing examiner on July 15, 1966. Proposed findings and conclusions submitted and not adopted in substance or form as herein found and concluded are hereby rejected.

After carefully reviewing the entire record in this proceeding as hereinbefore described, and based on such record and the observation

² The lengthy and involved procedural history of this matter before the hearing examiner, the Commission and the Courts chiefly relates to respondent's requested avenues of discovery both prior to and during the course of the hearing. See, for example, *American Brake Shoe Co. v. Schrup, et al.*, Civil No. 3091 (D. Del. 1965) [7 S. & D. 1357]. All the requested discovery procedures, both as denied and as subsequently in part granted by the hearing examiner, are a matter of record herein and a detailed further recital would unnecessarily burden this statement of the proceedings.

of the witnesses testifying herein, the following Findings of Fact and Conclusions therefrom are made, and the following Order issued:

FINDINGS OF FACT

I. *American Brake Shoe Company*

1. Respondent American Brake Shoe Company³ (Brake Shoe) is a corporation organized and existing under the laws of the State of Delaware, with office and principal place of business at 530 Fifth Avenue, New York, New York. Brake Shoe is a diversified manufacturer of friction materials, hydraulic products, railroad products, castings and forgings, and at all times relevant herein, sold its products in interstate commerce throughout the United States.⁴

2. In pre-merger year 1962 Brake Shoe had total shipments of all products in the amount of \$194,892,299 and total assets of \$150,101,628 at year end.⁵ In 1963 following the acquisition of The S. K. Wellman Company total shipments of all products rose to \$214,669,000 and year end to total assets were \$160,350,613.⁶ Brake Shoe's sales of friction materials in 1963 were 15% of overall sales. Sales of friction materials in merger year 1963 were \$31,500,000 in comparison to \$17,700,000 for pre-merger year 1962.⁷

3. Brake Shoe's 1963 Annual Report with reference to the marketing of its friction products states in part as follows:

Brake Shoe's friction products have a wide variety of uses. In the automotive field they include brake lining for passenger cars, trucks and buses. Our heavy duty materials are used in clutches and transmissions for trucks and military vehicles.

For aircraft, the company supplies special braking materials to meet the requirements of almost any type of plane from small craft to large commercial and military jets.

Industrial applications include friction materials for clutches, transmissions and brakes on tractors, materials-handling trucks, mining and earth-moving equipment and numerous types of industrial machines.

Brake Shoe enjoys a sizeable volume of sales in friction products to the car and truck manufacturers and the builders of industrial equipment and farm machinery.

4. Brake Shoe's 1961 Annual Report⁸ has this to say in part about

³ American Brake Shoe Company changed its name to Abex Corporation on April 26, 1966 (Resp. proposed findings of fact No. 1).

⁴ Admitted. Resp. Answer, Pars. 2, 3, 5.

⁵ Comm. Ex. No. 7, Brake Shoe's 1962 Annual Report.

⁶ Comm. Ex. No. 8, Brake Shoe's 1963 Annual Report.

⁷ Comm. Ex. Nos. 7, 8, above.

⁸ Comm. Ex. No. 6, Brake Shoe's 1961 Annual Report.

its pre-merger market position and the composition of its friction products:

Through its American Brakeblok Division, the company is a major producer of both organic and metallic friction materials. Our principal products are brake lining for cars, trucks and buses. These are made of asbestos and other materials bonded under heat and pressure with an organic resin.

Automotive friction materials are sold to both vehicle manufacturers and the replacement market, with replacement accounting for the larger part of our business. In the United States alone there are more than 75,000,000 vehicles on the road, and approximately one-quarter of them require brake re-lining each year.

The company's replacement brake lining is sold in the United States and Canada through nation-wide distribution networks and is available to virtually every automotive serviceman. Replacement linings are also sold to other companies that market them under private brand labels.

A fully-loaded jet airliner such as the Boeing 707 weighs about 250,000 pounds and lands at speeds as high as 138 miles per hour. Ordinary materials would melt under the terrific heat generated by its brakes, so American Brakeblok makes jet plane braking materials out of sintered metals. This type of material is first formed out of powdered metals into near-finished shape, and is then fused solid under heat and pressure.

Sintered materials also have the heat and wear resistance needed to stand up under grueling use in crawler tractors and heavy earthmoving equipment. American Brakeblok provides clutch and brake parts of sintered metals for construction equipment and other types of industrial machinery.

With extensive research and production facilities in both organic and metallic materials, Brake Shoe is equipped to provide friction materials engineered for almost every use.

5. Brake Shoe's organic friction material brakelining, clutch facings and transmission parts for automotive and industrial use are produced in its Winchester, Virginia, plant. Brake Shoe's sintered metal friction material brakelining, clutch facings and transmission parts for automotive and industrial use are produced in its Cleveland, Ohio, plant⁹ and the since acquired S. K. Wellman Company plant at Bedford, Ohio.

The following tabulation¹⁰ shows the pre-merger 1961 sales of these organic friction material products by Brake Shoe's Winchester plant

⁹ Brake Shoe acquired its Cleveland, Ohio, plant in 1954 from the Metallic Friction Material Company. This company was founded by a former engineer employee of The S. K. Wellman Company and at the time of its acquisition by Brake Shoe was engaged in the production of sintered metal friction materials (Tr. 763).

¹⁰ Compiled from Comm. Ex. Nos. 79 and 86, supplied by respondent's counsel pursuant to Comm. Ex. No. 1, submitted under date of November 26, 1962, to the Federal Trade Commission for a pre-merger clearance. Export sales of \$1,350,000 are included in the Wellman grand total.

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and those products made of sintered metal friction materials by its Cleveland plant and by the then S. K. Wellman Company plant:

	Winchester plant	Cleveland plant	S. K. Wellman plant
Automotive friction materials:			
Brake lining-----	\$8, 138, 000	0	\$705, 316
Clutch facings-----	3, 000	\$6, 000	1, 156, 616
Transmission parts-----	37, 000	587, 000	432, 576
Total automotive-----	8, 178, 000	593, 000	2, 294, 508
Industrial—Nonautomotive friction materials:			
Brake lining-----	1, 044, 000	1, 081, 000	565, 200
Clutch facings-----	0	728, 000	7, 234, 006
Transmission parts-----	0	341, 000	2, 013, 000
Total industrial-----	1, 044, 000	2, 150, 000	9, 812, 206
Grand total-----	9, 222, 000	2, 743, 000	12, 106, 714

The foregoing tabulation shows that if the proposed merger between the American Brake Shoe Company and The S. K. Wellman Company had been consummated as early as 1961, that American Brake Shoe's sales share in the automotive market for organic and sintered metal brakelining, clutch facings, and transmission parts would rise from \$8,771,000 to \$11,065,508. In the industrial market, respondent's sales share for organic and sintered metal brakelining, clutch facings, and transmission parts would rise from \$3,194,000 to \$13,006,206. In the combined markets American Brake Shoe's total sales share would rise from \$11,965,000 to \$24,071,714, or a sales increase of 101% or better as a result of a merger.

6. An analysis of Brake Shoe's automotive organic and sintered metal friction material brakelining, clutch facing and transmission part sales to its ten most important customers in 1961 ¹¹ shows ten customers to account for \$7,000,045 in automotive brakelining sales,¹² ten customers to account for \$4,307 in automotive clutch facing sales¹³ and nine customers for \$626,885 in automotive transmission parts sales.¹⁴ automotive sales in these three product categories totaled \$7,631,237 to

¹¹ Comm. Ex. No. 80 submitted by respondent's counsel November 26, 1962, as per footnote 10, *supra*.

¹² Top purchasers were the Wagner Electric Corporation under a private brand, and the National Automotive Parts Association (N.A.P.A.) for after-market or replacement sale.

¹³ Top purchaser was N.A.P.A.

¹⁴ Top purchaser was Ford Motor Company; other purchasers were Balkamp, Inc., and Borg-Warner Corporation.

these groups of customers out of all customers sold in the amount of \$11,965,000 as shown on Commission Exhibit No. 79, footnote 10 and the tabulation in preceding Finding No. 5. For industrial use in 1961, Brake Shoe's brakelining sales in the amount of \$1,778,701 were accounted for by ten customers,¹⁵ clutch facings sales of \$718,937 were accounted for by ten customers¹⁶ and transmission parts sales of \$363,916 by ten customers.¹⁷ Industrial sales in these three categories totaled \$2,861,554 to these groups of customers out of all customers sold in the amount of \$3,194,000 as shown on Commission Exhibit No. 79, footnote 10 and the tabulation in preceding Finding No. 5.

In turn, Commission Exhibit No. 87 shows 1961 sales by Wellman of automotive brakelining to ten customers in the amount of \$157,753,¹⁸ automotive clutch facings in the amount of \$434,002 to ten customers¹⁹ and automotive transmission parts in the amount of \$373,930 to ten customers.²⁰ Product sales in these three categories totaled \$965,685 out of \$2,294,528 to all customers as shown on Commission Exhibit No. 86, footnote 10 and the tabulation in preceding Finding No. 5. In 1961 Wellman sold industrial brakelining in the amount of \$447,896 to ten customers,²¹ industrial clutch facings in the amount of \$2,144,185 to but ten customers²² and industrial transmission parts in the amount of \$2,013,000 to but ten customers.²³ Wellman's product sales in these three categories totaled \$4,605,081 to these groups of customers out of \$9,812,206 to all customers as shown on Commission Exhibit No. 86, footnote 10, and the tabulation in preceding Finding No. 5.

The combination of Brake Shoe's and Wellman's sales in the foregoing three categories would have resulted in sales of \$8,596,022 in the automotive field and of \$7,466,635 in the industrial field in 1961. Sales to these small groups of customers in the automotive field would account for \$8,596,922 of the total sales of brakelining, clutch facings and transmission parts to all customers amounting to \$11,065,508. In

¹⁵ Top purchasers were B. F. Goodrich, Goodyear Aircraft Corporation, Warner Electric Brake & Clutch Company, Auto Specialties Mfg. Co., Caterpillar Tractor Company, Bendix Corporation, Bucyrus-Erie Company and Clark Equipment Company.

¹⁶ Top purchasers were Caterpillar Tractor Company and Le Tourneau-Westinghouse.

¹⁷ Top purchaser was Caterpillar Tractor Company.

¹⁸ All were small purchasers in dollar amount.

¹⁹ Top purchaser was Borg-Warner Corporation; others were all small in dollar amount.

²⁰ Top purchasers were Ford Motor Company and Borg-Warner Corporation; others were small in dollar amount.

²¹ Top purchaser was Caterpillar Tractor Company; other purchasers included Borg-Warner Corporation and Curtiss-Wright Corporation.

²² Top purchaser was Goodyear Aircraft Corporation; others were small in dollar amount.

²³ Top purchaser was General Motors Corporation. Others were Caterpillar Tractor Company, U.S. Ordnance Department, Clark Equipment Company, Hyster Company, Allis-Chalmers Mfg. Company and J. I. Case Co.

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the industrial field sales to these small groups would account for \$7,466,635 out of \$13,006,206 in sales to all customers. The small groups of customers on Commission Exhibit Nos. 80 and 87²⁴ would account for \$16,063,557 of Brake Shoe's and Wellman's 1961 combined sales of \$24,071,714 in friction material brakelining, clutch facings and transmission parts. The record in this proceeding does not show this sales situation to have changed at the time of Brake Shoe's acquisition of Wellman.

7. With regard to Brake Shoe's proposed acquisition of Wellman, Commission Exhibit No. 71 dated June 13, 1962, prepared by Mr. W. T. Kelley, first vice president and a director of American Brake Shoe Company, for presentation to the board of directors,²⁵ reads as follows:

S. K. WELLMAN CO.
CLEVELAND, OHIO.

(Not to be confused with Wellman Engineering Company, also of Cleveland).

Product—Sintered metallic friction materials similar to Sintermet product line of Brakeblok—but more complete—truck blocks.

Market—About \$100 million for organic and metallic friction materials.

Shipments—About \$12 million in 1960 and 1961—both original equipment and replacement.²⁶

Facilities—Plant at Bedford 300,000 feet, lease 7 warehouses, fully integrated—own stamping department, plating, manufacture own powders. Employ 670 people. 475 shop. (Sintermet 25,000 feet, employ 160 people, 135 shop.)

Management—Good—Chairman and Founder S. K. Wellman, inactive; President Biggs. Competent Sales, Engineering and Research talent.

Earnings—1961 \$919,000 after tax, or 7.8% on sales. \$4.33 per common share. Expect to do better this year.

Method of Acquisition—Preliminary only—exchange of stock, probably share for share and hopefully "pooling of interest".

Benefits to Brake Shoe—

- 1) Secondary distribution system for our organic friction material.²⁷
- 2) More complete and advanced metallic friction line for our existing distribution system, particularly automotive.
- 3) Better and more completely integrated manufacturing facilities into which we can consolidate our own manufacturing.

²⁴ Comm. Ex. No. 87 like No. 80 was submitted by respondent's counsel November 26, 1962, as per footnote 10, *supra*.

²⁵ See Tr. 469-470.

²⁶ Comm. Ex. No. 11, prepared October 22, 1964, by the Division Comptroller, Friction Materials Group, American Brake Shoe Company, certifies that S. K. Wellman Company gross shipments, less sales returns and allowances, of sintered metallic friction materials to be as follows:

Year ended December 31, 1960, \$11,775,775;
Year ended December 31, 1961, \$12,116,319;
Year ended December 31, 1962, \$12,421,240;
Year ended December 31, 1963, \$12,790,408."

²⁷ The record does not disclose that this has happened in any substantial degree following the merger in 1963.

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4) Enhance sales and earnings. Projected return before taxes on funds invested of over 19%.
WTK-6-13-62.

8. Brake Shoe on April 16, 1963, acquired all of the corporate stock and assets of Wellman in exchange for 223,656 shares of Brake Shoe's corporate stock of the approximate market value of \$12,468,822.²⁸

II. *S. K. Wellman Company*

9. Prior to its acquisition on April 16, 1963, by Brake Shoe, The S. K. Wellman Company (Wellman) was a corporation organized and existing under the laws of the State of Ohio, with office and principal place of business at 200 Egbert Road, Bedford, Ohio. Wellman operated one plant at Bedford, Ohio, which was and since is engaged principally in the manufacture of sintered metal friction materials sold in interstate commerce throughout the United States. Wellman's total assets were \$8,434,899 as of December 1, 1962.²⁹ It was a well managed financially successful and growing company with competent sales, engineering and research talent.³⁰

10. Wellman's main products were sintered metal friction brake-lining, clutch facings, and transmission parts for automotive and industrial use.³¹ Wellman's net sales were \$11,775,775 for 1960, \$12,116,319 for 1961, \$12,421,240 for 1962, and \$12,790,408 for 1963, according to Commission Exhibit No. 11 as certified October 22, 1964, by the division comptroller, Friction Materials Group, American Brake Shoe Company.³² In 1961 Wellman sold \$1,156,616 of sintered metal automotive clutch facings in comparison with Brake Shoe's penetration of only \$6,000. In the industrial field Wellman sold \$7,234,006 of sintered metal clutch facings in comparison to Brake Shoe's sales of \$728,000 and \$2,013,000 of sintered metal transmission parts as against Brake Shoe's sales of \$341,000 of such friction parts.³³

III. *The Lines of Commerce*

11. Applicable to the instant acquisition by Brake Shoe of Wellman is the prohibition of Section 7 of the Clayton Act reading "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

²⁸ Admitted, Resp. Answer, Par. 17.

²⁹ Admitted, Resp. Answer, Pars. 6, 7, 8.

³⁰ Comm. Ex. Nos. 64 A-L, 71, 84, 85.

³¹ Comm. Ex. Nos. 86, 87.

³² Comm. Ex. No. 11.

³³ See tabulation in preceding Finding No. 5. Also see paragraph numbered "(2)" in memorandum on proposed acquisition of Wellman set forth in preceding Finding No. 7.

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create a monopoly.”³⁴ Commission and court opinions define “any line of commerce” to mean the relevant product market and/or relevant product submarket; “any section of the country” to mean the relevant geographic area; and “may be” means probable as distinguished from an actual substantial lessening of competition. Further, the instant acquisition admittedly is a “horizontal” merger between two manufacturing seller competitors.³⁵ By stipulation between the parties, the relevant geographic market for determining the effects upon competition of the acquisition by respondent of The S. K. Wellman Company is the United States as a whole.³⁶ It has also been stipulated between the parties that there are no unexpired United States patents of commercial significance in the manufacture of friction materials and sintered metal friction materials as defined in the complaint.³⁷

12. Friction materials, the subject matter of the complaint,³⁸ are mainly employed by Brake Shoe and Wellman in the manufacture of three principal categories of products. These product lines are brakelining, clutch facings and transmission parts sold for automotive and industrial use. In the automotive field these products would be sold to manufacturers of brake, clutch and transmission part assemblies, and to the original equipment manufacturer for both installation on the vehicle and after-market or replacement service for passenger cars, trucks, buses and other over-the-highway vehicles and equipment. Their after-market distribution channels would in brief be auto parts jobbers, auto and truck dealers, and passenger car and truck manufacturers’ factory service divisions. In the non-automotive or industrial field the products would also be sold to the original equipment manufacturer for both installation on the original equipment and for after-market or replacement service on aircraft, construction equipment, farm machinery, industrial machinery, materials handling equipment, oil well drilling, mining machinery and other uses. The after-market distribution channels here would in brief be industrial equipment parts jobbers, and equipment and machinery manufacturers’ factory service sales operations.³⁹

³⁴ See footnote 1, preceding, for this section in full.

³⁵ Tr. 4609.

³⁶ Ordered filed of record herein on March 18, 1965.

³⁷ Ordered filed of record herein on July 26, 1965.

³⁸ Friction materials can be broadly classified as “organic friction materials” made from asbestos and/or other materials, homogeneous metal materials, and “sintered metal friction materials” made from blended metal powders, with the addition of other materials for any particular friction characteristics needed.

³⁹ See Commission Exhibit No. 65 entitled, The United States Market For Friction Materials, American Brake Shoe Company Marketing Research Department, under date of November 10, 1962, at pages 2-3, titled “Scope of Market for Friction Materials”; Resp. Proposed Findings of Fact, Nos. 3 through 6, and 9 through 12.

13. Respondent, in its Memorandum in Support of Respondent's Proposed Findings of Fact and Conclusions of Law at page 6, would contend that the evidence establishes the proper relevant product market for evaluating this merger to be one well beyond that set forth in the complaint. At pages 14-15 of its memorandum, respondent contends that the relevant area of competition in which the producers of "friction materials" are engaged also embraces manufacturers of other systems, devices and components not employing "friction materials" but adapted to performing the same function: the transmission, conversion, and retardation of motion. These systems, devices and components according to respondent afford interchangeability of use with "friction materials" for the same end function and include hydrostatic systems which perform the function by means of hydraulic principles, hydrokinetic devices, electrical systems and others which for such reason must therefore be included in the relevant product market. This contention is rejected.⁴⁰

14. Manufacturers of non-friction systems, components and devices such as serrated tooth clutches, eddy current clutches, magnetic particle clutches, electroviscous clutches, silicone slip-clutches, hydrokinetic or hydrodynamic fluid couplings and torque converters, hydraulic, hydrostatic, and electric drives, transmissions and brakes are not manufacturers of friction materials. These systems, components and devices eliminate the need for the use of friction materials produced by friction materials manufacturers.

Friction materials, as such, are well known for what they are by all of the manufacturers of friction materials and the trade concerned. The fact that these systems, components and devices compete with and can substitute in use for friction materials does not constitute these systems, components and devices as being friction materials. It does not make the manufacturers of these systems, components and devices manufacturers of friction materials.

15. Respondent's foregoing contention for the inclusion of the above systems, components and devices in the relevant product market and submarket set forth in the complaint, runs directly *contra* to the holding of the Court in *United States v. Aluminum Co. of America, et al*, 233 F. Supp. 718 (E.D. Mo. 1964), *affirmed per curiam*, October 11, 1965, 382 U.S. 12. The district court in this case found that metal curtain wall was a line of commerce and that aluminum curtain wall was a well-defined submarket therein and as such, that it was also a line of commerce under Section 7 of the Clayton Act.

⁴⁰ Respondent's Proposed Findings of Fact, at pages 197-219.

The following appears at pages 725-726 of the Opinion:

This Court finds that metal curtain wall is a line of commerce and that aluminum curtain wall is a well-defined submarket therein and as such is also a line of commerce under Section 7.

In arriving at this conclusion, we must look to see what the Supreme Court has said in recent cases as it applies to the facts in this case.

In *Brown Shoe Co. v. United States*, 370 U.S. 294, 1. c. 324, 82 S. Ct. 1502, 1. c. 1523, 8 L. Ed. 2d 510, the Court said:

"[D]etermination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition 'within the area of effective competition.' Substantiality can be determined only in terms of the market affected."

and 1. c. 325, 82 S. Ct. 1. c. 1523, 1524:

"The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves constitute product markets for antitrust purposes. *United States v. E. I. duPont de Nemours & Co.*, 353 U.S. 586, 593-595. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. * * *

In this case the broad outer boundaries are "curtain wall" where all types of building materials compete. Within that outer market "metal curtain wall" and "aluminum curtain wall" are meaningful product markets or "lines of commerce".

The industry recognizes "metal curtain wall" as distinct and different from precast or any other type of curtain wall. The customers are the building owners as they are guided by the architects and contractors. When an aluminum curtain wall is called for, the vendors of precast concrete, brick or stone are not called in to make a sub-bid. Only those vendors of aluminum. If some other metal is an alternate, then vendors of that metal are called in to make a sub-bid.

There are specialized vendors of metal curtain wall, who deal in both steel and aluminum or in steel, bronze and aluminum. But except for one vendor, Kawneer, who also owns a concrete company which is operated as a separate unit, metal vendors do not deal in concrete and concrete vendors do not deal in metal.

Production facilities for aluminum curtain wall are unique and specialized. The extrusion presses and the hard-coat finish with color such as Duranodic or Kalcolor require special and distinct facilities to produce.

The Court pointed out in *U.S. v. E. I. Du Pont & Co.*, 353 U.S. 586, 1.c. 593, 77 S. Ct. 872, 1 L. Ed. 2d. 1057, that "automotive finishes and fabrics" have sufficient peculiar characteristics and uses to constitute a "line of commerce" separate and distinct from all other finishes and fabrics. So do metal curtain walls and aluminum curtain walls.

What we are really determining are the "trade realities". *U.S. v. Philadelphia Nat. Bank*, 374 U.S. 321, 1. c. 357, 83 S. Ct. 1715, 10 L. Ed. 2d 915. The line of commerce may be a broad line of commerce as outlined by the Court in *United States v. Continental Can Co.*, 84 S. Ct. 1738, page 1747, decided June 22, 1964.

"* * * we hold that the inter-industry competition between glass and metal containers is sufficient to warrant treating as a relevant product market the combined glass and metal container industries and all end uses for which they compete. * * *"

The line of commerce may be a narrow one. *U.S. v. Aluminum Co. of America*, 377 U.S. 271, 1. c. 277, 84 S. Ct. 1283, 1. c. 1287, 12 L. Ed. 2d 314:

"Thus, contrary to the District Court, we conclude (1) that aluminum conductor and copper conductor are separable for the purpose of analyzing the competitive effect of the merger and (2) that aluminum conductor (bare and insulated) is therefore a submarket and for purposes of § 7 a 'line of commerce.'"

What we are really finding in a line of commerce is an effective area of competition.

Preceding the above, the Opinion at page 724 states:

Once the architect has settled on a design for curtain wall, if it is determined to be in metal, the competition is between the various metal suppliers and fabricators. If cost is a dominant factor, aluminum is usually specified over other metals because it is cheaper than stainless steel, carbon steel, corten steel or bronze.

The metal fabricators who make curtain wall do not consider the precast concrete people to be their competitors. There is a separate trade association for metal. The National Association of Architectural Metal Manufacturers. The precast concrete suppliers are members of the Structural Clay Products Institute.

16. In the present proceeding the executive secretary since May 1949 of the Friction Materials Standards Institute, Inc., testified that its predecessor organization was known as the Clutch Facing and Brake-lining Institute and prior to that as the Brakelining Manufacturers Association, Inc.⁴¹ The witness testified that the Friction Materials Standards Institute, Inc. (FMSI), was primarily engaged in the standardization of sizes to facilitate any wanted interchange of the products of the various manufacturers for the same use application and further that the institute had an active membership of manufacturers of brake-lining and clutch facing friction materials. Commission Exhibit No. 101, a current membership list, was submitted by the witness in such connection. Common to the list of active members of FMSI on Commission Exhibit No. 101 and the manufacturers listed on Commission Exhibit No. 65, prepared by the Marketing Research Department of the American Brake Shoe Company and dealing with the United States Market for Friction Materials by Manufacturers are the following manufacturers, of which nine were called as witnesses in this proceeding: All-O-Matic Manufacturing Corporation;⁴² American Brake Shoe Company, American Brakeblok Division, and S. K. Wellman Division;⁴³ Bendix Corporation;⁴⁴ Borg-Warner Corp.;⁴⁵ Car-

⁴¹ Tr. 930-932.

⁴² Tr. 1125-1139.

⁴³ Tr. 375-489; 498-585; 586-598; 1449-1588; 1772-1955; 3390-3480; 4006-4055; 4061-4105 (S. K. Wellman deposition); 4415-4466.

⁴⁴ Tr. 716-739; 1071-1117.

⁴⁵ Tr. 2146-2181.

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lisle Corporation; ⁴⁶ Chrysler Corporation; ⁴⁷ Firestone Tire & Rubber Company; Gatke Corporation; General Metals Powder Company; ⁴⁸ General Motors Corporation; ⁴⁹ H. Krasne Manufacturing Company; H. K. Porter Company, Inc.; Johns-Manville Corporation; L. J. Miley Company, Inc.; Raybestos-Manhattan, Inc.; ⁵⁰ and Southern Friction Materials Company.

17. Manufacturers of friction material products, principally brakelining, clutch facings and transmission parts, advertise their products as being made from friction materials.⁵¹ Raw materials suppliers recognize the existence of a friction materials industry as distinguished from other industries.⁵² Manufacturers in the friction materials industry recognize each other as being competitors in the friction materials industry.⁵³ Manufacturers in other industries recognize the existence of a friction materials industry and that it is non-competitive with these other industries.⁵⁴ Mr. S. K. Wellman of The S. K. Wellman Company testified that the common concept of a friction material would be brakelinings, clutch facings and transmission facings, although transmission facings would not be too well known by the ordinary layman. Mr. Wellman also testified that The S. K. Wellman Company belonged to the Friction Materials Standards Institute for a long time.⁵⁵

18. American Brake Shoe Company recognizes friction materials to be a separate product line made by a specific division of the company. Commission Exhibit No. 8, its 1963 Annual Report lists under Products and Divisions: Friction Materials—American Brakeblok Products, automotive, aircraft and industrial brakelining, friction discs and laminated plastics—Velvetouch Products, clutch plates, friction discs and heavy duty industrial brakelining. American Brake Shoe Company in listing its application to the New York Stock Exchange ⁵⁶ on April 4, 1963, for the issuance of additional shares of common stock

⁴⁶ Tr. 1312-1328.

⁴⁷ Tr. 906-927; 3715-3750, 4263-4280.

⁴⁸ Tr. 743-761.

⁴⁹ Tr. 816-827; 3191-3266.

⁵⁰ Tr. 827-875; 877-905; 2976-3030.

⁵¹ Comm. Ex. Nos. 95, 97, 98, 99.

⁵² Comm. Ex. No. 111.

⁵³ Tr. 3021-3022.

⁵⁴ Tr. 3597 shows that manufacturers of automotive metal brake drums do not compete with manufacturers of automotive brakelining. Further, friction materials are considered to be a different product. At Tr. 3611-3612 the executive engineer of Budd Company, a major manufacturer of automotive metal brake drums purchasing brakelining from the American Brake Shoe Company, testified:

"Q. Now, in your industry what component is referred to as 'friction material'?"

"A. The brake lining material."

⁵⁵ Tr. 4092-4093.

⁵⁶ Comm. Ex. No. 61, p. 1.

in connection with the acquisition of the assets of The S. K. Wellman Company had this to say: "The business of Wellman should supplement that of the Company in the manufacture and sale of friction materials for various braking and clutching applications and should improve its position to supply and service the markets where such applications are utilized."

19. Commission Exhibit No. 65, The American Brake Shoe Company Marketing Research Department document, entitled, The United States Market for Friction Materials, at page 2, is titled "Scope of Market for Friction Materials" and in the context of the three basic product classifications considered in the report, namely, brakelining, transmission parts and clutch facings, the following definition is given: "*The friction materials included in the estimate of and definition of the market presented in this report are component machine parts utilized to resist motion or to modify the force and direction of motion.*" (Italic supplied.)

Respondent would ignore this definition given in the context of parts being brakelining, transmission parts and clutch facings, and seek refuge in its interpretation of a portion of the complaint's definition of friction materials which reads in full as follows: "*'Friction materials' are substances used to oppose the relative motion of two bodies in contact*, including but not limited to organic friction material, sintered metal friction material and paper friction material." (Italic supplied.)

20. Respondent would contend (Resp. Proposed Findings of Fact, pp. 194-196) that assuming the existence of a market for "friction materials" as set forth in the complaint ⁵⁷ that this market must encompass not only these materials but other substances "used to oppose the relative motion of two bodies in contact" in brakes, clutches and transmissions. Acceptance of respondent's contention, repeated during the course of the oral argument on the proposed findings of fact, would lead to an unlimited and meaningless product market not limited to "friction materials" as they are commonly known, understood and accepted by the public and the trade concerned. This is well illustrated in footnote 54 on preceding page 626.

21. The following colloquy took place at Tr. 4657-4658 during the oral argument herein on July 15, 1966:

⁵⁷ It is apparent that the friction materials definition used in the complaint was in part based on Comm. Ex. No. 65 supplied by respondent's counsel pursuant to Comm. Ex. No. 1, submitted under date of November 26, 1962, to the Federal Trade Commission for a pre-merger clearance.

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HEARING EXAMINER SCHRUP: Mr. Cunningham, I think I see what you are getting to. Are you going to the point that anything that opposes a friction material is also considered in the friction material industry?

MR. CUNNINGHAM: What I am going to say is that when these two plates, however made, come together you have to count both plates in the market.

HEARING EXAMINER SCHRUP: I see. I will ask you the same thing that I asked the Commission counsel this morning.

The brakedrum on the passenger automobile, a steel brake drum—the friction material is applied to it. Do you consider the steel brake drum to be a friction material?

MR. CUNNINGHAM: Yes, sir.

HEARING EXAMINER SCHRUP: And would that be in the friction industry?

MR. CUNNINGHAM: If there is a friction industry. I don't contend there is.

HEARING EXAMINER SCHRUP: Would you consider Budd to be a competitor of the Wellman and the American Brake Shoe Company?

MR. CUNNINGHAM: In two senses. Budd has testified they are the leading producer of paper friction materials in the—

HEARING EXAMINER SCHRUP: Let's not skip over to some other product. Let's stick with the steel drum.

MR. CUNNINGHAM: It is steel, it is in the market.

HEARING EXAMINER SCHRUP: Is Budd as the manufacturer of a steel drum a competitor of Wellman in making a brake lining?

MR. CUNNINGHAM: In the sense that Wellman makes on opposing surface, and they are included in the census prepared by Mr. Grundman on page 56 of his document.⁵⁵

HEARING EXAMINER SCHRUP: Practically everybody is in the friction material industry then?

MR. CUNNINGHAM: If you produce a substance that opposes the relative motion of two bodies in contact—that is the complaint.⁵⁶

22. The extent of respondent's attempts in support of its contention that "all substances used to oppose the relative motion of two bodies in contact" should be included in the friction materials market and submarket alleged in the complaint, is well illustrated by respondent's examination on voir dire of complaint counsel's witness,⁶⁰ the manager of the Wabash Division of Raybestos-Manhattan, Inc., the largest producer of friction materials in the industry.⁶¹

⁵⁵ This census tabulation in complaint counsel's proposed findings of fact relates to the submarket production and sales of sintered metal friction materials by Brake Shoe's Cleveland, Ohio, plant, the acquired S. K. Wellman, Bedford, Ohio, plant, and the competitor companies on said tabulation. It is to be distinguished from Comm. Ex. 65 listing the friction materials market, the manufacturers selling therein and the production figures for the said market. As previously noted Comm. Ex. No. 65 was supplied by respondent's counsel pursuant to Comm. Ex. No. 1, submitted under date of November 26, 1962, to the Federal Trade Commission for a pre-merger clearance.

⁵⁶ See preceding Finding No. 19 and No. 37, page 636 following.

⁶⁰ At Tr. 849, the following question by respondent and answer by the witness appears:

"Q. I note from glancing at your Annual Report that you produce some products of plastics. Are any of those friction materials or could they be used as thrust surfaces?

"A. Let's see, one of them is bowling balls, and that would not be a friction material by any means. No. I don't think the plastics are such materials."

⁶¹ Testified to later by the chief sales engineer of Raybestos-Manhattan, Inc., at Tr. 3011.

This witness testified in response to questions by complaint counsel, that the Wabash plant had annual sales in the vicinity of \$5,000,000 of sintered metal friction materials in the submarket of sintered metal friction materials alleged in the complaint.⁶² The witness distinguished a sintered metal structural part from a sintered metal friction material. The sintered metal structural part was stated to be merely a powdered metal pressed together without any friction modifiers in the composition, and used mainly as a bearing, pinion gear or some mechanical part. A sintered metal friction material, on the other hand, was stated as being that which was used as a brake or clutch material.⁶³

The witness recognized the competitors of the Wabash Division in the manufacture of sintered metal friction materials and enumerated them as being the respondent Brake Shoe and its S. K. Wellman Division, General Metals Powder Company, Friction Products Corporation, General Motors Moraine Division, and Bendix Corporation's Marshall-Eclipse Division. The witness stated that he knew of no other manufacturers, even by hearsay, as being producers of sintered metal friction materials as that material was distinguished by the witness from sintered metal structural parts.⁶⁴

23. Commission Exhibit No. 100 is a letter under date of April 19, 1965, from respondent's counsel replying to complaint counsel's request of respondent for all the known producers of "sintered metal friction materials." This letter lists the following twenty-two named manufacturers believed by respondent to be either engaged in current production of "sintered metallic friction products" or to have been so engaged in the recent past. Practically all of the following listed companies on this exhibit served as witnesses in this proceeding: Allied Sintering, Inc.;⁶⁵ American Brake Shoe Company;⁶⁶ American Powdered Metals, Inc.;⁶⁷ Asco Sintering Corp.;⁶⁸ Bendix Corporation,

⁶² Tr. 835-837. Raybestos-Manhattan has several plants engaged in the production of friction materials. Tr. 2993-2994.

⁶³ Tr. 858.

⁶⁴ Tr. 855.

⁶⁵ Tr. 954-956. This witness testified that Allied Sintering, Inc., produced only sintered powdered metal parts and that he did not consider his company to be competing with the sintered metal friction materials produced by Brake Shoe or Wellman.

⁶⁶ The transcript reference to the lengthy testimony of Brake Shoe officials is set forth in footnote 43, *supra*. Brake Shoe's Cleveland, Ohio, plant and its S. K. Wellman, Bedford, Ohio, plant produce sintered metal friction materials.

⁶⁷ Tr. 1169-1180. The witness from American Powdered Metals, Inc., testified his company made sintered powdered metal parts and bearings but was not in the business of making sintered metal friction materials. The witness did not consider his company to be a competitor as regards sintered metal friction materials produced by either Wellman or Raybestos-Manhattan, Inc.

⁶⁸ Tr. 1251-1252. By stipulation it was agreed that Asco Sintering Corp. was primarily a producer of structural parts from powdered metal. They produce a large number of

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Marshall-Eclipse Division;⁶⁹ Chrysler Corporation, Amplex Division;⁷⁰ Compacted Metals Corp.;⁷¹ Dixon Sintaloy, Inc., Subsidiary of Joseph Dixon Crucible Co.;⁷² Eaton Manufacturing Co., Powdered Metals Division;⁷³ Emhart Corporation, Kwikset Powdered Metal Products;⁷⁴ Friction Products Company;⁷⁵ General Metals Powder Co.;⁷⁶ General Motors Corporation, Delco Moraine Division;⁷⁷ Graphite Metalizing Corporation;⁷⁸ International Powder Metallurgy Co., Inc.;⁷⁹ Johnson Bronze Company, Ferraloy, Inc.;⁸⁰ R. G.

bearings and some thrust washers. The company had purchased the powdered metal fabricating business of Picco Industries, California. See footnote 83, *infra*.

⁶⁹ The transcript reference to the testimony of Bendix Corporation officials is set forth in footnote 44, *supra*. Its Marshall-Eclipse Division produces sintered metal friction materials.

⁷⁰ The transcript reference to the testimony of Chrysler Corporation officials is set forth in footnote 47, *supra*. Its Amplex Division produces sintered metal friction materials.

⁷¹ Tr. 969-976. The witness testified the business of Compacted Metals Corp. was in the sintered metal powder structural parts field. The witness did not consider his company to be a competitor as regards the sintered metal friction materials produced and sold by Brake Shoe and Wellman.

⁷² Tr. 940-953. The witness testified that Dixon Sintaloy, Inc., was mainly a producer of sintered powder metal parts, and that it produced a very limited amount of sintered metal friction material for use in motion picture projectors and the friction clutch in a chain saw. The witness did not consider his company a competitor of Brake Shoe or Wellman, and testified it would need larger machinery, larger presses and a different type of sintering equipment to enter into any such competition.

⁷³ Tr. 1199-1233. The witness testified the Powdered Metals Division primarily made sintered metal structural parts. The division did not consider itself a competitor as regards sintered metal friction materials made by Brake Shoe and Wellman.

⁷⁴ Tr. 1184-1199. Kwikset Powdered Metal Products manufactures a variety of sintered powder metal parts, not sintered metal friction materials as produced by Brake Shoe and Wellman. Some of the division's parts were used as clutch shoes in chain saws, the end use of other of the parts made by Kwikset were unknown to the witness.

⁷⁵ The transcript reference to the testimony from Friction Products Company is Tr. 762-818. This company produces some sintered metal friction materials.

⁷⁶ The transcript reference to the testimony from General Metals Powder Co. is Tr. 743-761. This company makes sintered metal friction materials.

⁷⁷ The transcript reference to the testimony of General Motors Corporation officials is set forth in footnote 49, *supra*. The Delco Moraine Division produces sintered metal friction materials.

⁷⁸ Tr. 858-968. The witness testified that 90% of Graphite Metalizing Corporation's products were self-lubricating bearings and that the company did not consider itself a competitor of Brake Shoe or Wellman. According to the witness, to enter into such competition would cost the company a great deal of money which it did not have.

⁷⁹ Tr. 1252-1304. The witness testified International Powder Metallurgy Co., Inc., made powdered metal parts that are considered bearings and structural parts, filters, tungsten parts, and electrodes. The company made metal pressure plates for automatic transmissions which operate against friction materials. The witness does not refer to these sintered operating parts as friction parts or friction materials (Tr. 1291). The company does not manufacture and sell sintered metal friction materials as made and sold by Brake Shoe and Wellman, but has made some in the company laboratory.

⁸⁰ Tr. 982-1012. The witness testified that Ferraloy, Inc., had not manufactured the type of sintered metal friction materials made by Brake Shoe and Wellman since late in 1940 when Ferraloy gave it up. To produce such friction material, Ferraloy would have to acquire additional equipment, and to sell in any volume, would have to make a change in its sales force. The company makes sintered metal parts for automatic transmissions, automatic washer clutches and other parts to "oppose the relative motion of two bodies in contact."

Le Tourneau & Co.; ⁸¹ National Molded Products, Inc.; ⁸² Picco Industries; ⁸³ Powdercraft Corporation; ⁸⁴ Powder Metal Products Co.; ⁸⁵ and Raybestos-Manhattan, Inc.⁸⁶

24. With regard to the above-named manufacturers, the division manager of the Wabash Division of Raybestos-Manhattan, Inc., testified that in the course of his duties he had never met in the marketplace with Allied Sintering, Inc.; American Powdered Metals, Inc.; Compacted Metals Corp.; Asco Sintering Corp.; Dixon Sintaloy, Inc.; the Emhart Corporation; International Powder Metallurgy Co.; Picco Industries Co.; Powder Metal Products Co.; National Molded Products, Inc.; Graphite Metalizing Corporation; Ferraloy, Inc.; and Powdercraft Corporation. That he did not recognize them as being producers of sintered metal friction materials, but as to some they were makers of sintered metal structural parts to the best of his knowledge. The witness stated that he had heard of the Eaton Manufacturing Co., but not in the sintered metal business, and the Amplex Division of Chrysler Corporation, but in structural parts, not in sintered metal friction materials.⁸⁷

25. The chief sales engineer of Raybestos-Manhattan, Inc., served as a witness for respondent Brake Shoe. This witness testified that the two chief competitors of his company in the sale of sintered metal friction materials were Brake Shoe and Wellman, and that he knew of no other manufacturers that he would consider to be competitors of his company in the sale of sintered metal friction materials.⁸⁸

26. The preponderance of the testimony and evidence adduced in this proceeding is directed to the complaint's allegations that in the product market for friction materials there exists a submarket of sin-

⁸¹ The transcript reference to the testimony concerning R. G. Le Tourneau & Co. is Tr. 1143-1169. This company has produced sintered metal friction materials.

⁸² Tr. 1013-1018. The witness testified National Molded Products, Inc., makes sintered powder metal parts, not friction materials. The company does not consider itself a competitor of Brake Shoe and Wellman.

⁸³ As regards Picco Industries, see footnote 68, *supra*.

⁸⁴ Tr. 1019-1068. The witness from Powdercraft Corporation testified he was formerly employed in the structural powdered metal division of S. K. Wellman Company before this division was sold by Wellman to Ferraloy, Inc., a subsidiary of Johnson Bronze Company. The witness stated his company to make sintered metal structural parts, bearings, filters, and some sintered metal friction parts. According to the witness the company does not normally manufacture sintered metal friction materials like that made by S. K. Wellman Company but has made some.

⁸⁵ Tr. 977-980. The product manager of Powder Metal Products Co. testified that they made sintered powder structural metal parts, and that he knew nothing about either Brake Shoe or Wellman as being competitors of his company's products.

⁸⁶ The lengthy transcript reference to the testimony of Raybestos-Manhattan, Inc., officials is set forth in footnote 50, *supra*. Raybestos-Manhattan, Inc., produces sintered metal friction materials.

⁸⁷ Tr. 855-857.

⁸⁸ Tr. 2976.

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tered metal friction materials. Sintered metal friction materials in the form of brakelining, clutch facings and transmission parts are the main products of Brake Shoe's Cleveland, Ohio, plant and the acquired S. K. Wellman, Bedford, Ohio, plant.⁸⁹ Organic friction materials in the form of brakelining, clutch facings and transmission parts are the main products produced at Brake Shoe's Winchester, Virginia, plant. Brake Shoe's Winchester plant did not have the facilities and was not capable of any production of sintered metal friction materials at the time of the acquisition of Wellman by Brake Shoe.⁹⁰

27. Prior to the acquisition of the Cleveland, Ohio, plant Brake Shoe had been producing sintered metal friction materials at its plant in Hillburn, New York. The capacity of this plant was considered inadequate to make a "real entry" into what it foresaw as a growing market for these materials. Brake Shoe, accordingly, in 1954 for \$742,742 cash, purchased its present Cleveland plant from the Metallic Friction Material Company, a manufacturer then engaged in the production of sintered metal friction materials.⁹¹ Brake Shoe at the time of the purchase of this plant recognized the differences existing between the production for sale of sintered metal products and the production for sale of sintered metal friction materials, and it therefore exacted from the Cleveland plant seller an agreement not to compete in the field of sintered metal friction materials for a period of four years.⁹²

28. Brake Shoe also realized this Cleveland plant acquisition to be the means of making any substantial penetration of the existing sintered metal friction materials market much earlier than the alternative posed of expanding its Hillburn, New York, plant facilities. This acquisition alternative was again seized upon by Brake Shoe in 1963 to bring about a near, if not commanding position, in the sintered metal friction materials market by the acquisition of The S. K. Wellman Company.⁹³ Growth by acquisition, rather than the expanding of its own potentialities of growth from within, was not novel to Brake

⁸⁹ See preceding Finding No. 5. *supra*.

⁹⁰ The record at Tr. 524 discloses the following testimony by Mr. M. B. Terry, president of the American Brakeblok Division of American Brake Shoe Company:

"HEARING EXAMINER SCHRUP: During the lull, I have a question that occurred to me that I would like to ask you. Prior to the merger, could the products that were made by the Wellman Company be manufactured at the Brake Shoe Winchester plant?"

"THE WITNESS: No."

⁹¹ Comm. Ex. No. 1-N (page 13); Tr. 384-386; 505; 594-596.

⁹² Tr. 763 and oral argument at Tr. 4601-4602; 4625. Witness now operates Friction Products Corp. Comm. Ex. No. 91 shows this company to be a very small seller of sintered metal friction materials.

⁹³ Tr. 475-476.

Shoe as is shown by Commission Exhibit No. 82 entitled, United States Acquisitions by Company in Fields other than Friction Materials. This document, supplied by Brake Shoe under its pre-merger clearance request to the Federal Trade Commission, shows 17 acquisitions by Brake Shoe during the time period 1943-1962.

29. Brake Shoe admittedly grew by what it terms "planned acquisition." Commission Exhibit No. 60 is a printed document of an address by the president, American Brake Shoe Company, to the New York Society of Security Analysts on November 1, 1957. This address deals with Brake Shoe's growth by planned acquisition. For example, in this document at page 3, it is stated, "[w]e established a strong position in the fast growing hydraulics field through the acquisition in 1955 of the Denison Engineering Company"—and at page 6, "Denison gave us a leading position in this field which we intend to expand."

30. In connection with the instant acquisition of The S. K. Wellman Company, the record shows Brake Shoe's market position to have been substantially augmented in several product categories. Sintered metal friction material products principally in the form of automotive transmission parts, together with some clutch facings were being produced in Brake Shoe's Cleveland, Ohio, plant. In the industrial or non-automotive field the principal product of this plant was sintered metal friction material brakelining, with clutch facings and transmission parts next in order. In Brake Shoe's acquired S. K. Wellman Bedford, Ohio, plant the principal sintered metal material products produced in the automotive field were clutch facings, with brakelining and transmission parts next in order. In the industrial or non-automotive field, sintered metal friction material clutch facings⁹⁴ were by far the most significant product, with substantial production of transmission parts and brakelining following.⁹⁵

31. Sintered metal friction materials are defined in the complaint as being those produced by blending various metal and non-metallic powders. These ingredients are stated to be then compressed and sintered to a steel or other backing under high pressure and tempera-

⁹⁴ Mr. Thomas Cox, vice president and director of Research and Development at Wellman from 1949 until 1960, testified to the following at Tr. 3419-3420:

"HEARING EXAMINER SCHRUP: Mr. Cox, when you were with the S. K. Wellman Company, did you have any so-called bread and butter friction material?"

"THE WITNESS: Yes, we had which we regarded as our bread and butter, and that was our original friction material that we made for bulldozers, earth moving machinery."

"HEARING EXAMINER SCHRUP: What would be the application in that particular machinery?"

"THE WITNESS: Well, that was a multiple disc clutch that went on the endless track on the side of the tractor. There was one clutch on either side. The tractors are steered by disengaging the clutch on either side. The operator has two handles that he pulls."

⁹⁵ See the tabulation in preceding Finding No. 5 herein.

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ture.⁹⁶ Commission Exhibit No. 17, entitled American Brakeblok - Friction Material for Industrial Equipment, at page 2, states as follows:

SINTERED METAL FRICTION MATERIAL

Metallic Friction materials are produced by blending various metallic and non-metallic powders. The ingredients are compressed and sintered to a steel backing under pressure and high temperatures.

American Brakeblok sintered metal friction materials for clutch and brake application are intended to supplement organic friction materials but not to replace them. Under severe operating conditions, metallic facings assure longer life.

The exhibit further states that this manufacturing division of Brake Shoe has for many years supplied friction materials to industrial equipment manufacturers for both original equipment and replacement use. These friction materials are stated to include products for power shovels, hoists, graders, power take-off units, dozers, farm tractors and machinery. The exhibit at page 3, entitled Description Guide for Brake and Clutch, contains a glossary of industry terms for the various applications used.

32. Various of the S. K. Wellman product catalogs are also exhibits of record in this proceeding. Commission Exhibit No. 27, for example, dealing with products for trucks, tractors, trailers, construction and off-highway industrial equipment, states:

Velvetouch Feramic Brake Blocks are made of sintered iron powders fused directly to solid steel backing plates. They were developed by The S. K. Wellman Company, pioneer of every major improvement in the highly specialized field of metallic friction materials.

33. Commission Exhibit No. 20 dealing with all-metal clutch plates, facings, matched facing sets and brakelinings for tractor and industrial equipment, represents the Wellman Velvetouch products to last longer and, further, that "unlike ordinary asbestos or semi-metallic friction products, genuine Velvetouch is made from powdered metals formed under tremendous pressures and fused with a solid steel backing." Features that Wellman stressed include "extra service life," "smooth positive performance," "uniform action" as "friction efficiency is constant month after month . . . because metal does not deteriorate like conventional materials" and . . . "low cost" for when

⁹⁶ Resp. Answer, Par. 1, admits this definition to be substantially correct but subject to clarification and refinement. During the course of the instant hearing it was developed that some manufacturers in the production of this friction material for certain applications deviate from both the complaint's definition, and the Brake Shoe and Wellman definitions set forth in Comm. Ex. Nos. 17 and 27 above and Comm. Ex. No. 20 in Finding No. 33 following.

"measured in added service and work performed all-metal construction costs less than ordinary friction material."⁹⁷

34. The sintered metal friction material of The S. K. Wellman Company was aimed at "the heavy duty, high energy field."⁹⁸ The heavy duty advantages of Wellman's sintered metallic friction material are emphasized in all Wellman catalogs. For example, in Commission Exhibit No. 20, at page 265, in the section devoted to mining, the following appears:

Wherever operating conditions are extremely severe . . . and absolute dependability essential . . . there's where you will find Velvetouch all-metal clutch plates, facings and brake linings doing a better job . . . and at a lower cost per ton mined. That's why experienced engineers and maintenance men specify genuine Velvetouch. They know, from past performance, that Velvetouch lasts longer . . . requires fewer adjustments . . . provides that extra margin of safety found only in all-metal construction.

Unlike ordinary asbestos or semi-metallic friction products Velvetouch is made from powdered metals, formed under tremendous pressures and fused with a solid steel backing.

35. The chief engineer of the Racine Works of the Twin Disc Clutch Company, a large clutch manufacturer, is a substantial purchaser of both organic and sintered metal friction materials. This witness testified in part as follows in response to a question as to the various compositions available for twin disc clutch assemblies:

THE WITNESS: In general, then, there are molded asbestos compositions, copper based sintered metal compositions, iron based sintered metal compositions, homogeneous materials such as bronze, phosphor bronze, sometimes steel upon steel—rarely so. There are cellulose fiber compounds quite often called Krayfelt by name, sometimes cork. The mating surfaces usually are then steel, iron of various grades, sometimes aluminum.⁹⁹

The witness further testified in part as follows:

Q. Isn't it true that generally speaking, you use largely the organic and sintered metal friction material for most of your friction material application?

A. Yes.

Q. Then the use of materials such as phosphor bronze and steel on steel would be a minor portion of use of friction materials?

A. Yes, and that is because the technological advances have, in the main, given us more desirable features in the asbestos and sintered metal group than in the older application group of phosphor bronze on steel.

HEARING EXAMINER SCHRUP: You were saying something about past history?

THE WITNESS: Yes, in past history, the friction materials started as wood on a ferrous surface, then leather on a ferrous surface. Then we progressed up-

⁹⁷ Comm. Ex. No. 20, p. 2.

⁹⁸ Testimony of the former president of The S. K. Williams Company at Tr. 615.

⁹⁹ Tr. 2028-2030.

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ward to the more heat and wear resistant materials of molded asbestos and the sintered metals we're talking about today.

By Mr. Grundman:

Q. Why do you use the organic or molded asbestos and the sintered metal? Why don't you specialize further and just limit yourself to either one or the other.

A. Each has its distinct advantage and in the case of the dry clutch, the molded asbestos is desired because of lower cost, equal or better wear resistance in most cases to the copper base sintered metal. It has in certain usage areas the peculiar property of giving off a foul odor when abused to warn the operator that he has gone too far in his use of it. Those are the primary advantages of the asbestos material.

Q. Now, how about the advantages of the sintered metal friction material?

A. The sintered metals can operate at temperatures well above the temperatures of asbestos, because the material used to bind the asbestos as of today generally break down around six or seven hundred degree Fahrenheit. The water of hydration is driven out of asbestos. Water hydration is the way I know it. I may not have the very correct technical term. It breaks out of asbestos and it becomes a powder instead of a structure member at around 750 degrees Fahrenheit.

So the previously mentioned flash heats tend to destroy that skin surface of asbestos and thus erode, wear away those plates quite rapidly. Yet the sintered metals do not suffer such rapid damage at those elevated temperatures.

The strength of sintered metals quite often is another advantage in that the carrying core is steel, which could easily be 30,000 psi tensile strength as compared to only 6,000 for asbestos. If the application can use such differences in strength, it is an advantage.¹⁰⁰

36. Commission Exhibit No. 59 is a Brake Shoe brochure entitled, Metal Trends, which is descriptive of its Cleveland, Ohio, plant. At page 59c, among other matters, the following appears:

American Brakblok's Cleveland plant where sintered metal friction materials are made is no mere aggregation of presses and ovens. An interesting characteristic of the manufacture of metallic friction materials is the highly individual treatment of each unit produced. This is true despite the fact that production is on a high-volume basis. Careful control over every phase from powder to packaging, stamps each unit with the imprint of unvarying high quality.

The maintenance of this reputation for quality which American Brakblok has enjoyed for over 25 years is the result of close coordination between research and operating people. In the lab and in the plant you find men who display intimate knowledge of the phenomenon of friction and a realistic consideration of the limitations of design.

Their job is to tame motion with engineered friction in a world of higher speeds, higher temperatures and heavier loads.

37. Commission Exhibit No. 9, at page 124, is entitled, Sintered-Metal Friction Materials, and is authored by the Manager, Sintermet Products Development, American Brake Shoe Company, Mahway,

¹⁰⁰ Tr. 2071-2072.

New Jersey, the home of Brake Shoe's research laboratory. This document contains a detailed technical description of the manufacturing processes and the varied powder compositions and capabilities of sintered metal friction materials, their elevated temperature properties and other qualities. Table 1 in said document shows what is stated to be the powder composition and weight by percentage of a typical sintered metal friction material. This table reads 68% copper, 8% tin, 7% lead, 6% graphite, 4% silica, and 7% iron. The manufacturing methods used in the production of sintered metal friction materials, the bonding technique, the mechanical properties, temperature resistance and operating characteristics of these friction materials are also described in the said document. "Mating surfaces" are stated to be "the type of material used in the surfaces against which friction materials operate." See preceding Finding No. 20, *supra*.

38. Dr. Benjamin T. Collins, director of Research and Product Development of the Wabash Division of Raybestos-Manhattan, Inc., described at length the many engineering, technical skills and elaborate facilities necessary to the manufacture of sintered metal friction materials in any appreciable volume. Dr. Collins also distinguished the manufacturing processes and the powder compositions of sintered metal friction materials from those employed in other sintered metal products such as, for example, sintered metal structural parts. Dr. Collins explained the necessary friction characteristics given by the powder compositions used in sintered metal friction materials and absent in other sintered metal products.¹⁰¹

39. The president of the Hoeganaes Sponge Iron Corporation testified "We are the largest suppliers of iron and alloy powders in the industry—in the world." This witness, in response to a question, further testified that his company sold certain powders to American Brake Shoe and S. K. Wellman and described the end products that would be made from these powders as follows:

THE WITNESS: From just our general knowledge of the trade, we can exclude seals and bushings and other structural parts, and we can safely conclude that the powders that we sell go into friction compositions.¹⁰²

40. The difference between the sintered metallic friction materials manufactured by S. K. Wellman and American Brake Shoe and powdered metal parts from the viewpoint of a parts manufacturer is illustrated in the testimony of the witness from American Powdered Metals Company. This witness testified that his company does not make sintered metallic friction materials but rather makes powdered

¹⁰¹ Tr. 877-905.

¹⁰² Tr. 2405, 2393.

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metal parts which are essentially 100% metallic powder. The witness was once approached by a customer to make a sintered metal friction material, but the customer was turned down and advised that the company's operation was not conducive to manufacturing this type of product. The customer was referred to Raybestos-Manhattan, Inc., a producer of sintered metal friction materials.¹⁰³

41. Powdered metal parts manufacturers manufacture pieces that sometimes are used with a friction function. Probably the most common example of this referred to in the record is the clutch shoe used in a centrifugal clutch on a chain saw. The clutch shoe is a solid one-piece construction with high tensile strength in the material itself. Its composition would be virtually all metal. A manufacturer of the centrifugal clutch shoe for chain saws stated that he considers these to be structural parts.¹⁰⁴

42. Some parts manufacturers refer to parts such as the centrifugal clutch shoe or thrust washers as "friction materials" or "friction parts" but recognize that the sintered metal friction materials manufactured by Wellman and American Brake Shoe are wholly different.¹⁰⁵ Manufacturers of centrifugal clutch shoes, thrust washers and the like do not consider themselves to be competitors of the sintered metal friction material produced by Wellman and Brake Shoe. A sintered metal friction material manufacturer would not consider an item such as a thrust washer as a "friction material."¹⁰⁶

43. A powdered metal structural parts manufacturer in order to produce sintered metal friction materials of the type manufactured by Wellman and American Brake Shoe would need larger machinery, larger presses and a different type of sintering equipment.¹⁰⁷ Respondent would appear to recognize this and impliedly admit the existence of a submarket restricted to sintered metal friction materials as alleged in the complaint when it undertook to question its witness, the president of the Hoeganaes Sponge Iron Corporation, about the "ease of entry" into such submarket by a powdered metal structural fabricator¹⁰⁸ attempting to both produce and sell in the field of sintered metal friction materials. The following is shown at Tr. 2401-2403:

Q. Mr. Gummesson, what would be your best estimate of the cost of establishing a minimum facility for the production of powdered metal friction components?

¹⁰³ Tr. 1170-1171.

¹⁰⁴ Tr. 1196-1198.

¹⁰⁵ Tr. 943, 1032, 1049, 1058, 1059.

¹⁰⁶ Tr. 882; 943; 955-956.

¹⁰⁷ Tr. 944.

¹⁰⁸ See preliminary discussion at Tr. 2400; compare S. K. Wellman Company experience at Tr. 4099-4101.

A. Well, again, on the assumption that you start from scratch, and shall we say not counting necessary working capital, which is intended to keep you alive while you install, I don't think that it is advisable to go into this business with less than \$200,000 or thereabouts, and the figure may vary very widely depending upon how willing and capable you are of building or modifying your own equipment, or whether you have enough capital to go out and buy the best.

Q. In your opinion, it would be possible to build your own presses and furnaces?

A. This is frequently done; very frequently done.

Q. Suppose, sir, that I am already engaged in the production of, let us say, sintered metal bearings. What is your best estimate of my ability to enter into the production of sintered metal friction components as to cost?

A. This again would depend on whether you are a corporate giant or whether you are a small, struggling parts fabricator. A large fabricator, a large corporation, is not very likely to start out with home-made equipment and on a small scale; he is more apt to make a large investment from the beginning, and his investment may very well start out as a quarter of a million dollars. But basically speaking, it must be easier for a parts fabricator to enter the field than a complete newcomer.

And I would think that in many cases, starting out in the friction materials field, once you are in parts making, it is more a question of devoting sums for the development work than it is to building new equipment or new plants.

It is hard to say, really. I would—I think as a fabricator, having never made structural parts, I would hate to go into it without being able to lose \$40,000 or \$50,000.

HEARING EXAMINER SCHRUP: Well, there is another intangible present there, it would seem to me, and you can't from your business experience tell us, when you talk about the production facilities, the cost of obtaining them, the other intangible is securing customers for the product once it is made.

THE WITNESS: Indeed.

HEARING EXAMINER SCHRUP: That may be a problem to a newcomer.

THE WITNESS: Right, then, on the one hand of the spectrum, all you accomplish is to duplicate what someone else is doing, which is very simple, versus coming with something entirely new that is superior to everybody else's product. My answer was not formulated considering those factors, which I want to make clear.

Appropriate here is the following from the Commission's Opinion of May 25, 1965, in the *Fruehauf Trailer Company* matter, Docket No. 6608:

While many firms may be able to enter the business on a very small scale, few indeed can attain a position substantial enough to offer a meaningful challenge to respondent.

44. American Brake Shoe Company's Service Division catalog¹⁰⁹ has this to say, among other things:

Velvetouch Metalik is the World's Best and Safest Brake Lining for Passenger Cars. It is manufactured by The S. K. Wellman Company, the world's largest producer of all-metal clutch plates, facings and brake linings.

¹⁰⁹ Comm. Ex. No. 31, published by S. K. Wellman under copyright in 1961.

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Further, the catalog states that Velvetouch Metalik:

ELIMINATES PRICE COMPETITION

Velvetouch Metalik is the only all-metal brake lining now available in the replacement market. Because it is completely different from any other lining, it has no real price competition.

You can sell Velvetouch Metalik at full list price . . . and make your full profit.

45. The technology and unique production facilities required in the manufacture of sintered metal friction materials set them apart from organic friction materials.¹¹⁰ Where the intended application dictates the need or where their use is economically more advantageous, sintered metal friction materials commonly command a premium price and are more or less insulated from price competition with organic friction materials.¹¹¹ While sintered metal friction materials and organic friction materials are interchangeable in a considerable number of applications, this does not act to bar a finding that sintered metal friction materials comprise a valid submarket as alleged in the complaint.

46. In *United States v. Bethlehem Steel Corporation*, 168 F. Supp. 577, at 593, footnote 36, the Court had this to say as to the substitute product or interchangeability test in determining a line of commerce:

It should be noted that the basic issue in the Cellophane case was that of monopoly power and the Supreme Court expressly limited the market definition there to the monopolization clause of § 2 of the Sherman Act. There is a basic distinction between § 2 of the Sherman Act and § 7 of the Clayton Act. Further, monopoly power was defined by the Supreme Court in the Cellophane case as "the power to control prices or exclude competition". Obviously, when the question is power over price, substitute products may be relevant because they can limit that power. The issue under § 7 of the Clayton Act is not whether a merger may result in a company having power over price or the power to exclude competition. The issue under § 7 is whether there is a reasonable probability of substantial lessening of competition. There can be a substantial lessening of competition with respect to a product whether or not there are reasonably interchangeable substitutes. The merger of two producers of a product may substantially lessen competition or tend to create a monopoly in the market for that product even though it does not substantially lessen competition or tend to create a monopoly in the broader market embracing all the products which are reasonably interchangeable with that product.

47. Based on the testimony and the evidence of record and the preceding findings of fact, the hearing examiner finds that the preponderance of the probative and substantial credible evidence in this

¹¹⁰ See previous Findings Nos. 26, 36, 37, 38, 43; Tr. 719; 1321; 2981.

¹¹¹ Tr. 528-529; 560-564; 642-649; 865; 895; 1136; 1321; 2061-62; 2331; 2494-2495; 2786; 2829; 3767-3769; 4096.

proceeding shows friction materials, as alleged in the complaint, to be a commercially significant line of commerce and a meaningful relevant product market, and that within such market, there is also a commercially significant line of commerce and a meaningful relevant product submarket of sintered metal friction materials.

IV. *The Competitive Effect*

48. In assessing the competitive effect of Brake Shoe's acquisition of Wellman, it becomes necessary as a starting point to observe the admonition of the United States Supreme Court in the *Brown Shoe* case:¹¹²

A company's history of expansion through mergers presents a different economic picture than a history of expansion through unilateral growth. Internal expansion is more likely to be the result of increased demand for the company's products and is more likely to provide increased investment in plants, more jobs and greater output. Conversely, expansion through merger is more likely to reduce available consumer choice while providing no increase in industry capacity, jobs or output. It was for these reasons, among others, Congress expressed its disapproval of successive acquisitions. Section 7 was enacted to prevent even small mergers that added to concentration in an industry.

49. Commission Exhibit No. 1 is a submittal under date of November 26, 1962, by respondent's counsel to the Federal Trade Commission requesting an advisory opinion as to the legality of the proposed merger of American Brake Shoe Company and The S. K. Wellman Company. The submittal consisted of the answers of each company to Commission questionnaires requiring information pertinent to the proposed merger. Question 17 of each questionnaire asked Brake Shoe and Wellman to provide for the past 5 years, the annual market universe figures (total production of all manufacturers and the dollar value thereof) for each of Brake Shoe's and Wellman's principal products or product lines and the source of the data provided. Question 18 of each questionnaire asked Brake Shoe and Wellman to list in order of their importance, the 10 principal competitors of Brake Shoe and Wellman on these principal products or product lines, and to estimate the annual share of the market universe for these products or product lines obtained by each of these 10 principal competitors of Brake Shoe and Wellman.

¹¹² *Brown Shoe Co. v. United States*, 370 U.S. 294, at 345, footnote 72. At pages 343-344 of the Opinion, the Court states that the market share which companies may control by merging is one of the most important factors to be considered when determining the probable effects of the combination on effective competition in the relevant market. The Court added in the *Brown Shoe* case, that if a merger achieving 5% were to be there approved, the Court might be required to approve future merger efforts by Brown's competitors seeking similar market shares.

50. The response by Brake Shoe to the Commission questionnaire is in evidence as Commission Exhibit No. 65. The response by Wellman to the Commission questionnaire is in evidence as Respondent's Exhibit No. 162. Neither exhibit covers the requested time period of 5 years prior to their submittal. Respondent's Exhibit No. 162 prepared by Wellman covers only the year 1961 and its answers to questions 17 and 18 state, that information for prior years is not available to the company.¹¹³ Commission Exhibit No. 65 prepared by Brake Shoe covers the years 1960, 1961 and 1962 (estimated). Brake Shoe's answer to question 17 at page 9 of the questionnaire reads as follows:

The requested information for 1960, 1961, and 1962 (estimated) is set forth on pages 4 through 8 of Exhibit 6B. The Company has been unable to assemble comparable reliable information for years prior to 1960. The reason is that surveys made in 1960 are considered reliable and in the light of subsequent experience afforded a basis for projecting forward but it would involve unwarranted speculation to attempt to reconstruct 1959 and earlier data. See page one of Exhibit 6B.¹¹⁴

Brake Shoe's answer to question 18 at page 9 of the questionnaire reads as follows:

The requested information for 1960 and 1961 is set forth on pages 5 and 6 of Exhibit 6B. The Company has been unable to assemble comparable reliable information for years prior to 1960 for the same reasons given in answer to Question 17.

51. Question 28 of the questionnaire, at page 19, asked Brake Shoe to state its reasons for wishing to effect the proposed acquisition. At page 21 of the questionnaire, Brake Shoe states, in part, as follows in response to this question:

In the field of friction materials, American Brake Shoe has been a producer in the United States since 1926. It also has facilities in Canada, Mexico and France as well as license arrangements in other countries. During the past year, and more particularly during the past two months, the Company's position in this field in the United States has been the subject of concentrated study. This study has given the Company a more accurate view of the friction materials market and has demonstrated that the Company has been unable to keep pace with the growth enjoyed by its larger competitors.

¹¹³ Neither party places any reliance on the universe figures in Resp. Ex. No. 162. Respondent introduced it to show the disparity between the universe figures in Resp. Ex. No. 162 compared to those in Comm. Ex. No. 65 submitted by complaint counsel. Respondent disavows the universe figures in both exhibits. These two exhibits cover the market production of both organic friction materials and sintered metal friction materials, and are not to be confused with the tabulation in complaint counsel's Proposed Findings of Fact relating solely to the submarket for sintered metal friction materials.

¹¹⁴ Brake Shoe Exhibit 6B is now Comm. Ex. No. 65 in this proceeding.

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52. Commission Exhibit No. 65 dated November 10, 1962, and prepared by the American Brake Shoe Company Marketing Research Department, discloses in part as follows at page 9:

*Method of Determining the Market for
Friction Materials in the United States*

The total market for friction materials in the United States for the year 1960 is estimated to aggregate \$155,473,000. This market is summarized in the following table by the principal product lines comprising the market:

	Total	Automotive	Non-Automotive
Brakelining-----	\$83, 613, 000	\$61, 510, 000	\$22, 103, 000
Transmission parts-----	33, 586, 000	29, 427, 000	4, 159, 000
Clutch facings-----	38, 274, 000	11, 543, 000	26, 731, 000
Total-----	155, 473, 000	102, 480, 000	52, 993, 000

53. Commission Exhibit No. 65 at page 5, contains an extended tabulation. This tabulation shows 32 manufacturers as being in the production of brakelining, transmission parts, and clutch facings in the friction materials market during 1960. In brakelining, according to respondent's estimate of total sales of all friction materials of \$155,473,000 for 1960, the exhibit shows 28 manufacturers to account for \$83,613,000 in brakelining sales and of this total, \$61,510,000 was in the automotive field, and \$22,103,000 in the non-automotive field. Only 10 manufacturers engaged in the sale of transmission parts in the total amount of \$33,586,000 of which \$29,427,000 was in the automotive field. In the non-automotive field, there were only 5 manufacturers who accounted for \$4,159,000. In the clutch facings, the exhibit shows a turnabout, in that 14 manufacturers account for \$38,274,000 of sales of which \$26,731,000 was in the non-automotive field compared to \$11,543,000 in the automotive field.

54. Brake Shoe's \$9,982,000 sales of brakelining and 11.9% of the market shows \$8,204,000 of this to be in the automotive field and \$1,778,000 in the non-automotive field. In transmission parts a total of \$1,040,000 in sales and 3.1% of the market shows \$830,000 of this in sales to be for the automotive field and \$210,000 for the non-automotive field. In clutch facings, out of a total of \$769,000 and 2% of the market, \$761,000 is in the non-automotive field.

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A like tabulation compiled for Wellman would further show as to brakelining sales of \$1,289,000 and 1.5% of the market, that \$730,000 was in the non-automotive field and \$559,000 in the automotive field. In transmission parts sales of \$2,143,000 and 6.4% of the market, \$1,508,000 was in the non-automotive field and \$635,000 in the automotive field. In clutch facings with \$7,034,000 of sales, Wellman soars to 18.4% of the market. This amount was divided with \$5,976,000 of it being in the non-automotive field and \$1,058,000 in the automotive field.

55. A condensation of Commission Exhibit No. 65, at page 8 for the year 1960, shows in part as follows with relation to preceding Findings Nos. 52, 53 and 54:

Summary of ABS and SKW share of the United States market for friction materials based on manufacturers' selling prices; Year 1960

	Total market	ABS share percent of market	SKW share percent of market	Combined share percent of market
Total friction materials.....	\$155, 473, 000	7. 6	6. 7	14. 3
Brakelining.....	83, 613, 000	11. 9	1. 5	13. 4
Transmission parts.....	33, 586, 000	3. 1	6. 4	9. 5
Clutch facings.....	38, 274, 000	2. 0	18. 4	20. 4

56. Respondent, following the issuance of the complaint in this proceeding, seeks to now disavow its pre-merger submittal under date of November 26, 1962, to the Federal Trade Commission as described in preceding Findings Nos. 49, 50 and 51, with respect to Commission Exhibit No. 65, and the friction materials market picture shown in preceding Findings Nos. 52, 53, 54 and 55. Respondent has taken this position prior to and during the course of the hearing and re-emphasized this position during the course of the oral argument herein on July 15, 1966.¹¹⁵

Appropriate to the situation here present is the following from the Commission's opinion of December 16, 1960, in *Pillsbury Mills, Inc.*, 57 Federal Trade Commission Decisions 1274, at 1394, with relation to a submittal of pre-merger figures to the Commission:

We recognize that the statistical data in these letters are at most estimates. But this does not mean they lack probative worth. Even though they might be comparatively rough estimates, such as a businessman might rely upon in making decisions in the usual course, they are valuable in a case of this character. In a Section 7 proceeding it is not essential that market positions be ascertained

¹¹⁵ Tr. 4612-4615, 4653-4654.

with absolute mathematical precision. Reliable, probative evidence demonstrating the unreliability of the Mintener statistics would, of course, destroy their probative value, but no evidence of record rises to that dignity.

The possibility that the Mintener letters may not have listed all important competitors is not greatly significant. Any such gaps that may have existed have been filled by other evidence. In passing upon the correctness of the examiner's conclusions on market structure it must be remembered that his findings were not premised solely upon the data in the Mintener letters. Other evidence figuring prominently in the findings includes the Commission surveys and the testimony of various competitors. In these circumstances we cannot say that the examiner gave undue weight to the Mintener letters. We sustain his assessment of their probative value.

57. The hearing examiner is placing no reliance on the accuracy of the estimated universe and the estimated sales figures of the various companies set forth as competitors of Brake Shoe and Wellman in Commission Exhibit No. 65. This exhibit, however, is not being regarded as a meaningless gesture on the part of the Marketing Research Department of the American Brake Shoe Company and respondent would be expected to put its best foot forward in applying for a pre-merger clearance.¹¹⁶

Commission Exhibit No. 65 was submitted to the Commission by Brake Shoe as being sufficiently reliable to ask that official Commission action be based upon it. The document was prepared by experienced personnel with an industry background and presents a perspective of the friction materials industry as seen through the industry-informed eyes of the respondent. Brake Shoe, as a major manufacturer in the friction materials industry, would know its principal competitors in the sale of friction materials although it might be mistaken in its estimates as to the actual dollar amounts of their sales. Respondent would further know the number and the comparative size of these competitors and whether they are substantially larger, smaller or of the approximate size of the respondent, and the extent of the sales competition which these manufacturers afforded respondent.¹¹⁷

58. The thrust of the Brake Shoe and Wellman merger is largely directed to the sintered metal friction material product sales market in

¹¹⁶ A witness from the Bendix Corporation, ranked number 2 in Comm. Ex. No. 65, stated respondent's estimate for his company's sales to be high (Tr. 1108-1109). Preceding Finding No. 7 shows that when the proposed merger was submitted to the board of directors of Brake Shoe, the friction materials market was stated as being about \$100 million.

¹¹⁷ As stated by the United States Supreme Court in the *Brown Shoe* case, 370 U.S. 294, at 342, footnote 69: "In summary, although appellant may point to technical flaws in the compilation of these statistics, we recognize that in cases of this type precision in detail is less important than the accuracy of the broad picture presented. We believe the picture as presented by the government in this case is adequate for making the determination required by Section 7: whether this merger *may* tend to lessen competition substantially in the relevant markets." (Emphasis by the Court.)

the industrial or non-automotive field, and in the heavy duty vehicle segment of the automotive field.¹¹⁸ Respondent's attack on the universe sales figures submitted in Commission Exhibit No. 65, principally centers on the alleged substantially underestimated repair or replacement needs allocated to passenger cars and light trucks in the automotive field. These are the estimated figures which according to respondent's expert witness on statistical methods¹¹⁹ are mainly responsible for the claimed distortion of the universe sales totals given in Commission Exhibit No. 65. Approximately one-third or better of respondent's Winchester, Virginia, plant organic friction materials are sold in the automotive replacement field through NAPA and a further sizeable portion finds its way there under the private brand of the Wagner Electric Corporation handled by respondent as an original equipment account. On the other hand, very few sales of the sintered metal friction materials produced by respondent's Cleveland, Ohio, plant were sold for replacement purposes, aside from those which were purchased by the original equipment manufacturers and distributed by them for after-market service.¹²⁰

59. The S. K. Wellman Company was a major manufacturer and seller of sintered metal friction material products principally in the non-automotive or industrial field, although its sales as shown in preceding Finding No. 5 for 1961 of \$2,294,508 in brakelining, clutch facings and transmission parts for heavy duty use in the automotive field could not be considered insignificant. Wellman was a well-established seller whose products had extensive trade acceptance.¹²¹ The industrial field is to be distinguished from the automotive field

¹¹⁸ The former president of Wellman, in response to a question at Tr. 615 as to what type of products might be offered for sale to truck and bus fleets, stated:

"A. Well, we had brake blocks and clutches, but it must be remembered that we were trying to service the heavy duty high energy field.

"Now, all trucks and fleets wouldn't necessarily come under that category, so that in certain areas certain particular applications would meet the pattern in which we were trying to service and others wouldn't be interested in it at all."

Also see the witness' further testimony as to sales in the industrial field at Tr. 3958-3987.

¹¹⁹ Respondent's Proposed Findings of Fact, pp. 187-193. See particularly, Chart A on brakelining repair needs as estimated for the automotive field, Chart B on automotive transmission parts, and Chart C on automotive clutch facings. Respondent failed to call as witnesses any of the officials of its Marketing Research Department responsible for the background preparation of Comm. Ex. No. 65 and relied solely on an attack on its methodology by this statistical witness.

¹²⁰ See Respondent's Proposed Finding of Fact No. 149, at page 276, of Respondent's Proposed Findings of Fact, Conclusions of Law and Order.

¹²¹ A former chief engineer of the Marshall-Eclipse Division of the Bendix Corporation testified to the following with respect to the sintered metal friction materials produced by his company in competition with those produced by Wellman:

"Q. You mentioned that your company produced smaller parts than the Wellman Company. Did you consider at any time the production of larger parts?

"A. Yes, we did, but we decided that it was not the best approach to go and compete with Wellman. Wellman had established themselves well in this area. We didn't want to take on the champion. We thought we could get around them the other way by using the buttons." (Tr. 719.)

and particularly the industrial after-market or replacement system of distribution. Members of the one field do not normally compete with members in the other field.

Two automotive jobbers serviced through NAPA with respondent's organic friction material products were called by the respondent as witnesses. One testified that sales for off-the-road equipment was but a minute part of his business and that he did not have the trained personnel or the shop facilities to handle these large units. This witness did not consider himself to compete with the type of jobber or the dealer servicing such equipment, nor that they competed with him in the servicing of the light truck and passenger car field. The witness testified that since the merger neither Brake Shoe nor NAPA had attempted to sell him metallic friction material products as distinguished from those made of organic friction materials.¹²² The other automotive jobber also testified to servicing automobiles of all types and light trucks. The witness stated on occasion he did service some heavy trucks on certain items, but that he had not the trained personnel or shop facilities to service heavy off-the-road equipment and did not compete with the dealers selling and servicing such equipment. The witness was familiar with metallic friction materials but neither Brake Shoe nor NAPA had ever attempted to sell him such products.¹²³

60. The S. K. Wellman Company, according to the testimony of its former president in this proceeding, was a substantial seller of sintered metal friction material products both to original equipment manufacturers and in competition with original equipment manufacturers in sales for the after-market servicing of such equipment. Wellman's annual sales volume was approximately 50% to the original equipment manufacturers and 50% to the after-market servicing such equipment.¹²⁴ Wellman, in addition to shipments from its main plant, leased 8 widely located storage warehouses and employed between 30 and 35 salesmen on a nationwide basis. Wellman sold some 2000 or more jobber and equipment dealer customers servicing the after-market.¹²⁵ Wellman was particularly successful in selling not only

¹²² Tr. 4474-4476.

¹²³ Tr. 4484-4490.

¹²⁴ At Tr. 3979, it was stated:

"THE WITNESS: Let me put it this way. We were after sales dollars in the aftermarket and our position and our scaling up of our aftermarket sales force was pointed towards the industrial, heavy industrial market."

¹²⁵ At Tr. 3980, in response to the question whether there were other suppliers of sintered metal friction materials to original equipment manufacturers also competing with Wellman for replacement sales, it was stated:

"THE WITNESS: Raybestos-Manhattan was the prime one. We had some static and competition from GEMPCO in the sintered metal field. We would get some competition from the abestos people, Raybestos-Manhattan, Johns Manville, Thermoid and all of these groups, trying to supply parts that would work but we didn't feel were quite equal to what we had."

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to the industrial jobber, but to the franchised dealer of the original equipment manufacturer selling and servicing the original equipment. In the last situation, Wellman was in direct competition with original equipment manufacturers in sales to their franchised dealers. It was here so successful that the witness estimated 40% of the 50% of Wellman's after-market sales went to these franchised dealers rather than industrial jobbers and in some areas a much higher percentage was sold.¹²⁶

61. The barriers which must be hurdled by a new manufacturing entrant attempting to penetrate to any appreciable extent the concentrated market of sales of sintered metal friction materials to original equipment manufacturers and in the after-market in which Wellman does business are apparent. Friction Products Corporation, operated by a thoroughly experienced engineer with the necessary technical know-how and equipment facilities, once before engaged in the production of sintered metal friction materials and attempting a re-entry in the market, made no sales in 1961 and sold but \$7,750 in 1962.¹²⁷ Compax, Inc., another attempted new entry into the sintered metal friction material production field after two and one-half years sold but \$715.¹²⁸ A large manufacturer of off-the-road machinery formerly producing sintered metal friction materials for its own requirements and the servicing of its dealers, discontinued production and obtains its present requirements from Wellman as satisfactorily and as cheaply as its own former costs of production.¹²⁹ Another large manufacturer of industrial equipment sold its sintered metal friction materials producing facilities to Wellman and since is a leading purchaser of these products from Wellman.¹³⁰ Still another large industrial equipment manufacturer and past producer of sintered metal friction materials discontinued this department and sold its facilities to Wellman and Raybestos-Manhattan, Inc.,¹³¹ Brake Shoe, a "deep purse pocket" manufacturer,¹³² with an established sintered metal friction materials plant

¹²⁶ Tr. 3958-3969; 3978-3987.

¹²⁷ Comm. Ex. No. 91 and Tr. 762-813. This witness from Friction Products Corporation formerly operated the Cleveland, Ohio, sintered metal friction materials plant acquired by Brake Shoe as shown in preceding Finding No. 27.

¹²⁸ Tr. 3364-3389. Compax, Inc., and Friction Products Corporation are contended for as examples of new entrants, at pages 286-288 of Brake Shoe's Proposed Findings of Fact.

¹²⁹ Comm. Ex. No. 107 from the president, R. G. LeTourneau Co., and Tr. 1155.

¹³⁰ The Caterpillar Tractor Company, according to the former president of Wellman, at Tr. 655-656.

¹³¹ The Clevite Corporation, at Tr. 2853.

¹³² See testimony of the chairman of the board and the chief executive officer of Brake Shoe at Tr. 475-476. Also see the testimony of the president of the Denison Division of Brake Shoe at Tr. 3671-3677. The July 1966 Fortune Magazine Directory of the 500 largest U.S. Industrial Corporations, shows Brake Shoe in 1965 to have ranked No. 263 in size among these economically powerful corporations.

and products of wide trade acceptance,¹³³ elected to acquire Wellman rather than attempt a deeper market penetration based on its own potentialities.¹³⁴

62. The submarket for the production and sale of sintered metal friction materials is highly concentrated.

(a) Raybestos-Manhattan, Inc., ranked number 1 in Commission Exhibit No. 65 with estimated sales of \$33,157,000 in all friction materials for 1960, sold \$3,649,736 of sintered metal friction materials in 1960 according to Commission Exhibit No. 90 as prepared and furnished by said company.¹³⁵ In response to the request to list the names of all competitors in the manufacture of sintered metal friction materials, the exhibit names the following 6 competitors: Brake Shoe and Wellman, General Metals Powder Company, Bendix Corporation, Friction Products Company, and Moraine Products Division of General Motors Corporation.¹³⁶

(b) The Bendix Corporation ranked number 2 in Commission Exhibit No. 65 with estimated sales of \$16,155,000 in all friction materials for 1960, produced \$2,181,300 of sintered metal friction materials in 1960 according to Commission Exhibit No. 103 as prepared and furnished by said company. The exhibit shows \$1,951,600 of this production total to be used within the company.

The balance of \$229,700 represented sales of \$173,000 for automotive and off-the-road vehicles, and \$56,700 for aircraft.¹³⁷ A former chief engineer of the Marshall-Eclipse Division testified to the following 5 companies as being competitors of his division in the sale of sintered metal friction materials: Brake Shoe, Wellman, Raybestos-Manhattan, Inc., General Metals Powder, and the Delco Moraine Division of General Motors Corporation (Tr. 733).

(c) The American Brake Shoe Company ranked number 5 in Commission Exhibit No. 65 with sales of \$11,791,000 for 1960. Brake Shoe

¹³³ Comm. Ex. No. 10, under date of October 28, 1964, is a certification of the sintered metal friction material sales of Brake Shoe (including exports) by its comptroller and shows the following:

Year ended December 31, 1960	\$2,631,344.
Year ended December 31, 1961	2,751,270.
Year ended December 31, 1962	3,566,476.
Year ended December 31, 1963	3,354,214.

¹³⁴ See Findings Nos. 3, 4, 25, 31 and 36, *supra*.

¹³⁵ Sales of sintered metal friction materials were given in the exhibit as \$4,926,030 for 1961, and \$5,306,078 for 1962.

¹³⁶ See also Tr. 855.

¹³⁷ Production of sintered metal friction materials for 1961 was given as \$1,406,400, of which \$1,268,400 was used by the company. The remaining balance of \$138,000 showed sales of \$112,500 for automotive and off-the-road vehicles, and \$25,500 for aircraft. In 1962 production figures totaled \$1,880,900 with \$1,640,900 used by the company. The balance of \$240,000 showed sales of \$209,700 for automotive and off-the-road vehicles and \$30,300 for aircraft.

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sold \$2,631,344 of sintered metal friction materials in 1960 according to Commission Exhibit No. 10 prepared by said company.¹³⁸ Brake Shoe's numerous contended for competitors in the sintered metal friction materials field are listed on Commission Exhibit No. 100.¹³⁹

(d) General Motors Corporation is ranked number 6 in Commission Exhibit No. 65 with estimated sales in all friction materials of \$10,924,000 for 1960. Commission Exhibit No. 94 as prepared and furnished by General Motors for its Delco Moraine Division shows a total production of sintered metal friction materials of only \$90,974 for 1960, \$131,931 for 1961, and \$450,662 for 1962. The exhibit states the following:

The above figures show the value, for accounting purposes, at which automotive parts containing sintered metal friction materials are transferred from Delco Moraine Division to other General Motors Divisions. No such products are sold to purchasers outside General Motors Corporation.

Other General Motors Divisions produce parts using sintered metal materials in substantial quantities. These are for other purposes than friction surfaces and, accordingly, it is our understanding that such data were not desired.

The exhibit names but 3 competitors, The S. K. Wellman Company, Raybestos-Manhattan, Inc., and the Rockford Clutch Division of Borg-Warner Corporation.¹⁴⁰

(e) The S. K. Wellman Company is ranked No. 8 in Commission Exhibit No. 65. Its total sales of sintered metal friction materials as shown in footnote 26, *supra*, were \$11,775,775 in 1960, \$12,116,319 in 1961, \$12,421,240 in 1962, and \$12,790,408 in 1963.

The former president of Wellman testified the following companies to be competitors at the time of the acquisition: Raybestos-Manhattan, Inc., Delco Moraine Division of General Motors, Marshall-Eclipse Division of Bendix Corporation, American Brake Shoe Company, Friction Products Company, General Metals Powder Company, Amplex Division of Chrysler Corporation, and R. G. LeTourneau Co.¹⁴¹

(f) General Metals Powder Company is ranked number 14 in estimated ¹⁴² friction material sales of \$2,000,000 for 1960 in Commission Exhibit No. 65. Commission Exhibit No. 89, as prepared and furnished by the said company, shows its actual sales of sintered metal friction

¹³⁸ Sales of sintered metal friction materials were \$2,751,270 for 1961, and \$3,566,476 for 1962.

¹³⁹ See preceding Finding No. 23, and in particular, footnotes 66, 69, 70, 75, 76, 77, 81 and 86 limited to those who produced sintered metal friction materials.

¹⁴⁰ Comm. Ex. No. 87 shows Borg-Warner Corporation to be the second leading customer of S. K. Wellman Company in 1960 and 1961 for sintered metal friction material industrial clutch facings.

¹⁴¹ Tr. 655-658.

¹⁴² See footnote 116, *supra*, with reference to Brake Shoe's estimation of competitors' sales in preparing the universe in Comm. Ex. No. 65.

materials to have been \$1,451,312.65 for 1960, \$1,581,440.87 for 1961, and \$1,916,921.38 for 1962. The exhibit lists but 3 companies as competitors in the sale of sintered metal friction materials: Wellman, Raybestos-Manhattan, Inc., and Friction Products Corporation.

(g) Chrysler Corporation, which is ranked number 22 in Commission Exhibit No. 65 with estimated sales of \$750,000 for 1960, had but little sales of sintered metal friction materials. As is shown on Commission Exhibit No. 93 prepared and furnished by the said company, sales were \$541 in 1960, \$2,289 in 1961, and \$1,243 in 1962. The exhibit states Chrysler to believe the following 6 companies to be manufacturers of sintered metal friction materials: Raybestos-Manhattan, Inc., Thermoid Division of H. K. Porter Company, Inc., Powdercraft Corporation, Moraine Products Division of General Motors Corporation, Marshall-Eclipse Division of Bendix Corporation, American Brakeblok Division and The S. K. Wellman Division of American Brake Shoe Company.

(h) Friction Products Corporation is not named in Commission Exhibit No. 65.¹⁴³ Commission Exhibit No. 91 as prepared and furnished by the company states it was formed in October 1961 and did not begin production shipments until near the end of 1962. Sales for 1962 were given as \$7,750. The exhibit names 6 competitors of the company in the sale of sintered metal friction materials: Raybestos-Manhattan, Inc., S. K. Wellman, American Brake Shoe Company, General Metals Powder Company, Marshall-Eclipse Division of Bendix Corporation, and the Amplex Division of Chrysler Corporation.

(i) R. G. LeTourneau & Co.¹⁴⁴ is not named on Commission Exhibit No. 65. Commission Exhibit No. 107 from its company president states: "We have manufactured some sintered lining as described but at the present are buying them from Wellman."

(j) Powdercraft Corporation is not named in Commission Exhibit No. 65.¹⁴⁵ The testimony of the witness from this company is controversial as to when and what amount of sintered metal friction materials Powdercraft may have produced.¹⁴⁶ The witness stated Powdercraft's annual sales to approximate \$1,000,000 principally in structural parts and bearings. The following appears at Tr. 1066:

Q. Mr. Robinson, you testified on direct examination that your company manufactures structural parts and bearings principally.

¹⁴³ See Finding No. 27 and footnote 92, *supra*.

¹⁴⁴ Tr. 1147.

¹⁴⁵ See footnote 84, *supra*.

¹⁴⁶ Tr. 1022-1023, 1028, 1058-1059, 1064-1066.

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Could you tell us what the percentage of your production is devoted to what you referred to as friction parts?

A. No, I can't tell you.

Q. Can you give us your best estimate, sir?

A. Oh, best estimate would be—it would be very hard to tell without looking at every piece we make, say 20 or 25 per cent.

63. Submitted with complaint counsel's Proposed Findings of Fact is a tabulation entitled, Total Shipments and Market Shares of Companies Manufacturing Sintered Metal Friction Materials.¹⁴⁷ The tabulation covers the years 1960, 1961 and 1962 with respect to the American Brake Shoe Company, S. K. Wellman Company, Raybestos-Manhattan, Inc., Bendix Corporation, General Metals Powder Company, General Motors Corporation, Friction Products Corporation, Chrysler Corporation and R. G. LeTourneau & Co.¹⁴⁸ This tabulation is incorporated in and made part of these findings of fact and is attached as an appendix to this initial decision.¹⁴⁹

The tabulation shows for each year, 1960, 1961 and 1962, a series of three columns of figures captioned, respectively, Used by the Company, All other Shipments, and Total Shipments. The first column shows for each year the amount of each company's production used internally. The second column computes the amount of shipments by each company for each year, minus the amount of production used internally. The third column computes the total shipments by each company for each year including the production amount used internally.

Under these series of three columns are another series of three columns, entitled, Market Shares (in percent) for each of the years 1960, 1961 and 1962. The first column for each year shows the percentage of total production used within each company. The second and third columns show the market share percentages of the submarket universes obtained by each company for that year computed as above described.

For example, in the year 1960, column one shows that Bendix Corporation used 91.5% of its total production internally. This reduces the submarket universe by a corresponding amount in the second column. The Bendix market share here amounts to 1.3% of the sub-

¹⁴⁷ This tabulation was the subject of considerable discussion between the hearing examiner and respective counsel during the oral argument on July 15, 1966. Tr. 4667-4669; 4671-4676; 4680-4684; 4692-4712; 4715-4731.

¹⁴⁸ The tabulation at footnote 2 therein makes an allowance for Powdercraft Corporation's estimated annual sales of friction parts as being \$250,000 or 25% of its approximately \$1,000,000 annual sales of all products. The addition or elimination of this "allowance" would make but little difference in the submarket product universes.

¹⁴⁹ See footnote 117, *supra*.

market universe. The internal amount of total production used by Bendix is not eliminated from the submarket universe in the third column. The Bendix market share here amounts to 10.6% of the submarket universe.

Brake Shoe and Wellman used none of their total production internally during the years 1960, 1961, and 1962. In 1960 Brake Shoe's shipments totaled \$2,630,356 and Wellman's \$10,393,746. The combination of these amounts for 1960 totaled \$13,024,102. Brake Shoe obtained 14.3% and Wellman 56.6% of the submarket universe in the second column. Their combined market share was 71.0% of the submarket universe. Brake Shoe obtained 12.8% and Wellman 50.7% of the submarket universe in the third column. Their combined market share was 63.6% of the submarket universe. This dominant share of the submarket of sintered metal friction materials continued in 1961 and 1962 as is shown on the tabulation.

64. Commission Exhibit No. 65, at page 5, shows Brake Shoe's Marketing Research Department to place Brake Shoe and Wellman as the 5th and 8th ranking sellers in the total friction materials market. The exhibit, at page 8, shows Brake Shoe to have a 7.6% share and Wellman a 6.7% share of this market. The combination gives Brake Shoe-Wellman a 14.3% market share and would advance it to be the 2d ranking seller in the relevant product market. The exhibit further shows this market to be highly concentrated at the top. The first 10 sellers in the market account for an 84.0% share of the entire market. The result of the Brake Shoe-Wellman combination in the relevant product submarket for sintered metal friction materials is set forth in the tabulation discussed in preceding finding No. 63, and appended to this initial decision.

In applying a more stringent Sherman Act test, the United States Supreme Court in *United States v. First National Bank & Trust Co. of Lexington*, 376 U.S. 665, at 673, held:

Where, as here, the merging companies are major competitive factors in a relevant market, the elimination of significant competition between them constitutes a violation of § 1 of the Sherman Act.

In *United States v. Philadelphia National Bank*, 374 U.S. 321, at 362, the Court stated:

We noted in *Brown Shoe Co.*, *supra*, at 315, that "[t]he dominant theme pervading congressional consideration of the 1950 amendments [to § 7] was a fear of what was considered to be a rising tide of economic concentration in the American economy." This intense congressional concern with the trend toward concentration warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects. Specifi-

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cally, 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 anticompetitive effects. See *United States v. Koppers Co.*, 202 F. Supp. 437 (D.C. W.D. Pa. 1962).

Recent Supreme Court opinions have laid down specific guidelines with relation to the market shares tests which are to be applied in the instant proceeding. In *United States v. Von's Grocery Company et al.*, 384 U.S. 270, at page 281, the concurring opinion states in short summary ". . . that where the eight leading firms have over 40% of the market, any merger between the leaders or between one of them and a lesser company is vulnerable under § 7, absent some special proof to the contrary. Here Von's acquired Shopping Bag. Both were among the eight largest companies, both had grown substantially since 1948 and they were substantial competitors. After the merger the four largest firms had 28.8%, the eight largest had 44% and the 12 largest had 50%. The merger not only disposed of a substantial competitor but increased the concentration in the leading firms. In my view the Government made out a prima facie case that the effect of this merger may be substantially to lessen competition or to tend to create a monopoly."

United States v. Pabst Brewing Company et al. (June 13, 1966)¹⁵⁰ cites *Von's Grocery* and the Opinion states in part: "* * * In 1958, the year of the merger, Pabst was the tenth largest brewer in the Nation and Blatz ranked eighteenth. The merger made Pabst the Nation's fifth largest brewer with 4.49% of the industry's total sales. By 1961, three years after the merger, Pabst had increased its share of the beer market to 5.83% and had become the third largest brewer in the country * * *." The concurring opinion of Mr. Justice White states most succinctly: "I join the Court's opinion insofar as it holds the merger of Pabst and Blatz may substantially lessen competition in the beer industry in the Nation as a whole."

In comparison with the foregoing market share pictures shown in the *Von's Grocery* and *Pabst* cases, in the instant proceeding Brake Shoe and Wellman were the fifth and eighth ranking sellers in the total national friction materials market in 1960. Brake Shoe had a 7.6% share and Wellman a 6.7% share which resulted in a combined share of 14.3% of the total relevant product market. This market share of 14.3% would advance the combination to second place in the total fric-

¹⁵⁰ CCH 1966 Trade Regulations Reports ¶ 71, 790.

tion materials market.¹⁵¹ In the relevant product submarket of sintered metal friction materials on a national basis in 1960, Wellman was the number one seller and Brake Shoe the third ranking seller. That the market is highly concentrated with but very few manufacturing sellers is evident and leaves but little doubt from a reading of the appended tabulation. The appended tabulation shows this situation continued in 1961 and 1962, and that the combination of Brake Shoe and Wellman for all three years would control from a minimum share of 60.4% to a maximum share of 71.0% of the entire submarket of sintered metal friction materials.

While the relevant product market for total friction materials is not as extremely concentrated in number of sellers as the relevant product submarket for sintered metal friction materials, it does present a highly concentrated market picture among its top sellers. Commission Exhibit No. 65, at page 5, shows that in the total friction materials market for 1960, three sellers accounted for a 40.1% market share and five sellers, of which Brake Shoe was one, accounted for a 55.7% share of the total market. Ten sellers, which included both Brake Shoe and Wellman, accounted for an 84.0% share of the entire relevant product market. The combination of Brake Shoe-Wellman with a 14.3% share would advance to second place in sales, and this would give the first three sellers a 46.0% share of the total friction materials market. The exhibit at page 7 further shows that in the total friction materials market for 1961, that the Brake Shoe-Wellman 14.3% share would give the first three sellers a 45.9% share of the total friction materials market. The top ten sellers, which include both Brake Shoe and Wellman, would account for an 83.9% share of the total friction materials market. Adopting as we must the guidelines laid down in *Von's Grocery* and *Pabst*, the merger of Wellman into Brake Shoe demonstrates the like competitive and effects found and prohibited in these recent Supreme Court cases.

65. Based on the testimony and the evidence of record and the preceding findings of fact, the hearing examiner finds that the preponderance of the probative and substantial credible evidence in this proceeding shows, that in each of the lines of commerce comprising the relevant product market of friction materials and the relevant product submarket of sintered metal friction materials, the effect of the acquisition of Wellman by Brake Shoe may be substantially to lessen competition, or tend to create a monopoly throughout the United States in each of

¹⁵¹ Comm. Ex. No. 65, page 8, shows this combination percentage of 14.3% of the relevant product market did not decline in 1961 and 1962.

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the said lines of commerce and the said relevant product market and submarket.

CONCLUSIONS

1. The acquisition of The S. K. Wellman Company by the American Brake Shoe Company, as alleged in the complaint, constitutes a violation of Section 7 of the Clayton Act (U.S.C., Title 15, Section 18), as amended.

2. An order of divestiture should be issued in the form set forth in the Notice of the complaint and therein stated as being the order which the Commission had reason to believe should issue if the facts are found to be as alleged in the complaint.

ORDER

It is ordered, That respondent, American Brake Shoe Company (now known as Abex Corporation), shall, within six (6) months from the date of service upon it of this order, divest itself absolutely and in good faith to a purchaser or purchasers approved by the Federal Trade Commission, of all stock and of all right, title and interest in all assets, properties, rights and privileges, acquired by respondent as a result of its acquisition of the stock and assets of The S. K. Wellman Company, so as to restore that which formerly made up the Wellman Company as a viable competitive entity in the friction materials and sintered metal friction materials industries in the United States.

It is further ordered, That respondent shall not sell or transfer the aforesaid stock or assets, directly or indirectly, to anyone who at the time of divestiture is a stockholder, officer, director, employee, or agent of or otherwise directly or indirectly connected with or under the control or influence of respondent.

It is further ordered, That pending divestiture, respondent shall not make any changes nor permit any deterioration in any of the plants, machinery, buildings, equipment or other property or assets of the former Wellman Company which may impair present rated capacity or their market value, unless such capacity or value is restored prior to divestiture.

It is further ordered, That for a period of ten (10) years from the date of issuance of this order, respondent shall cease and desist from acquiring, directly or indirectly, through subsidiaries or otherwise, without the prior approval of the Federal Trade Commission, the whole or any part of the stock, share capital, or assets of any corporation engaged in commerce and in the production or sale of friction material.

Initial Decision

APPENDIX

Total shipments and market shares of companies manufacturing sintered metal friction materials, 1960-62

[Dollar shipments (to b. plant)]

Company	1960			1961			1962		
	Used by the company	All other shipments	Total shipments	Used by the company	All other shipments	Total shipments	Used by the company	All other shipments	Total shipments
American Brake Shoe Co. (CX 10a, b)*	0	\$2,630,356	\$2,630,356	0	\$2,750,008	\$2,750,008	0	\$3,517,440	\$3,517,440
S. K. Wellman Co. (CX 10b, 11)*	0	10,393,746	10,393,746	0	10,676,845	10,676,845	0	11,187,086	11,187,086
Sub-total, 2 companies*	0	13,024,102	13,024,102	0	13,426,853	13,426,853	0	14,704,526	14,704,526
Raybestos-Manhattan, Inc. (CX 90d)	0	3,649,730	3,649,730	0	4,926,030	4,926,030	0	5,306,078	5,306,078
The Bendix Corp. (CX 103c)	\$1,951,000	229,700	2,180,700	\$1,268,400	138,000	1,406,400	\$1,640,900	240,000	1,880,900
General Metals Powder Co. (CX 88a)	0	1,451,313	1,451,313	0	1,581,441	1,581,441	0	1,516,921	1,516,921
General Motors Corp. (CX 94c)	90,974	0	90,974	131,931	0	131,931	450,862	0	450,862
Friction Products Corp. (CX 91d) ¹	0	541	541	0	2,289	2,289	0	1,243	1,243
Chrysler Corp. (CX 93d)	90,000	0	90,000	90,000	0	90,000	90,000	0	90,000
R. G. LeTourneau & Co. (Tr. 1147)	2,132,574	18,355,386	20,487,960	1,490,331	20,074,613	21,564,944	2,181,562	22,168,768	24,350,330
Total ²									
American Brake Shoe Co.*	0	14.3	12.8	0	13.7	12.8	0	15.9	14.4
S. K. Wellman Co.*	0	56.6	50.7	0	53.2	49.5	0	50.5	45.9
Sub-total, 2 companies*	0	71.0	63.6	0	66.9	62.3	0	66.3	60.4
Raybestos-Manhattan, Inc.	0	19.9	17.8	0	24.5	22.8	0	24.9	21.8
The Bendix Corp.	91.5	1.3	10.6	85.1	0.7	6.5	75.2	1.1	7.7
General Metals Powder Co.	0	7.9	7.1	0	7.9	7.3	0	8.6	7.9
General Motors Corp.	4.3	0	0.4	8.9	0	0.6	20.7	0	1.9
Friction Products Corp. ¹	0	(?)	(?)	0	(?)	(?)	0	(?)	(?)
Chrysler Corp.	4.2	0	0.4	6.0	0	0.4	4.1	0	0.4
R. G. LeTourneau & Co. ⁴	100.0	100.1	99.9	100.0	100.0	99.9	100.0	99.9	100.1
Total ²									

[Market shares (in percent)]

*Excludes exports.

¹ Organized in October 1961 and started production in 1962.² If Powdercraft Corp.'s estimated annual shipments of friction parts amounting to \$250,000 are included in "Total shipments," Powdercraft would account for 1.1% in 1960, 1.1% in 1961, and 1.0% in 1962. (Tr. 1066)³ Less than 0.1%.⁴ LeTourneau has ceased manufacture (CX 107).

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OPINION OF THE COMMISSION

APRIL 10, 1968

BY MACINTYRE, *Commissioner*:

I

This proceeding involves the merger on April 16, 1963, of the American Brake Shoe Company (Brake Shoe), a large diversified company engaged in the manufacture of railroad products, hydraulic products, castings, and friction materials with The S. K. Wellman Company (Wellman), a single line company engaged primarily in the production of friction materials. The acquisition was challenged under § 7 of the Clayton Act by the Commission's complaint of May 12, 1964. The proceeding is now on appeal before the Commission from the hearing examiner's initial decision sustaining the allegations of the complaint.

Brake Shoe challenges the examiner's decision principally on the ground that he failed to correctly define the relevant product market and that his conclusions as to the merger's anticompetitive effect are not supported by substantial evidence. Respondent in addition contends that the examiner violated due process by failing to make findings on material issues raised by Brake Shoe and that the order's prohibition against further acquisitions of friction material producers or sellers for a period of ten years is beyond the Commission's power to prescribe relief. In addition, Brake Shoe objects that critical findings which the examiner did make were superficial and that the rationale of the initial decision as a whole is unclear.

The threshold question facing the Commission on appeal is whether the examiner has correctly delineated the relevant product markets. That determination is of course "a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition 'within the effective area of competition.'"¹ There is no dispute on the relevant geographic market which both sides agree is the United States as a whole.

The product involved in this proceeding is friction material whose function it is to transmit, convert or retard the energy of motion, in automotive or industrial brake and clutch assemblies or transmissions as brake blocks or linings, clutch disks and transmission parts. The complaint alleges in this connection that the term "friction material" includes but is not limited to organic friction material, sintered metal friction materials and paper friction materials.

¹ *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 592 (1957).

According to the complaint:

Organic friction materials are those made from asbestos and other materials bonded under heat and pressure with an organic resin.

Paper friction materials are those produced by rolling a pulp made from a blend of ingredients into a material resembling heavy cardboard.

Sintered metal friction materials are those produced by blending various metallic and nonmetallic powders. The ingredients are then compressed and sintered to a steel or other backing under high pressure and temperature.

The complaint alleges that the relevant product markets for this proceeding are the production, distribution and sale of friction materials in general and sintered metal friction materials in particular, exclusive of friction materials used by the railroad industry. Respondent on appeal challenges the examiner's finding that the broad market of friction materials encompasses organic friction materials made from asbestos or other materials, homogeneous metal materials and sintered metal friction materials. On this issue, respondent asserts that the finding that there is a commercially significant all friction materials market is invalid because there is "pervasive interchangeability" between all friction materials and functionally equivalent non-friction systems and devices such as various hydraulic or other energy conversion systems. Brake Shoe also asserts that the examiner erred in finding that sintered metal friction materials are a significant submarket wherein the effects of the acquisition may be evaluated for the purposes of the merger act. Further, respondent assails the examiner's finding as to the competitive effects of the acquisition in both markets on the ground that they lack sufficient evidentiary foundation and clarity.

It may be noted at the outset, that the Commission has determined to confine its evaluation of the competitive impact of the merger to the sintered metal friction materials submarket. The validity of the market share statistics relating to friction materials generally is subject to some doubt. Respondent had previously submitted these figures, presumably in good faith, as justification of its request for pre-merger clearance, but in the course of the hearings presented expert testimony attacking the statistical assumptions underlying the study. This testimony went un rebutted and the examiner stated that he was "placing no reliance on the accuracy of the estimated universe and the estimated sales figures of the various companies" contained in Commission Exhibit 65.² Under the circumstances, the Commission will disregard these statistics and evaluate the competitive consequences of the acquisition solely in terms of sintered metal friction materials which in any event was the area of direct competition between Wellman and Brake

² Initial Decision p. 645.

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Shoe. The Commission's reasons for adopting, with some modification, the hearing examiner's findings on the merger and its competitive impact on the sintered metal submarket are noted below.

II

Brake Shoe through its American Brakeblok Division, is a major producer of both organic and sintered metallic friction materials sold both to vehicle manufacturers and the replacement market. Brake Shoe's organic friction materials for automotive and industrial use are produced in its Winchester, Virginia, plant. The respondent's sintered metal materials for automotive and industrial equipment³ are produced in Brake Shoe's Cleveland, Ohio, plant and since the acquisition in Wellman's plant located in Bedford, Ohio. Wellman with a much narrower product line than Brake Shoe concentrated principally on the manufacture of sintered metal friction materials in its Bedford, Ohio, plant. The examiner's finding that Wellman was a well-managed, financially successful and growing company with competent sales, engineering and research talent is not disputed.

The following sales figures set forth in the initial decision serve to outline the relative size of the two companies and their competitive relationship. Prior to the merger in 1962, Brake Shoe's total shipments for all products were approximately \$194,892,000. In 1963, the year of the acquisition, total shipments for all products rose to \$214,669,000. Respondent's overall sales of friction materials in 1963, totalled some \$31,500,000 compared to \$17,700,000 in 1962, the pre-acquisition year. Wellman's net sales in 1962, comprised primarily of sintered metal friction materials totalled approximately \$12,421,240. In 1961, the examiner's findings show that Brake Shoe's sales from the Cleveland plant which accounted for respondent's production of sintered metal friction materials totalled some \$2,743,000. The examiner's findings in the case of both companies show that an important percentage of their sales of friction materials were concentrated among a limited number of customers engaged in original equipment manufacturing in the automotive or industrial fields.

III

The initial question to be answered on this appeal is whether the examiner correctly found that sintered metal friction materials are a valid submarket for the purposes of § 7, since complaint counsel's

³ Industrial equipment includes power shovels, hoists, graders, power take-off units, farm tractors and machinery. American Brakeblok Catalog, *Friction Materials For Industrial Equipment*, CX 17, p. 1.

case in chief focused largely on the sintered metal submarket where Brake Shoe and Wellman were in direct competition in the period preceding the acquisition.

Essentially, the examiner found that sintered metal friction materials have peculiar uses and characteristics, since they differ from organic and paper friction materials in heat and wear resistance and they have greater strength because of the steel carrying core to which they are attached. He further found the sintered metal friction materials are distinguished from other friction materials by a unique technology and the fact that sintered metal friction materials in general command significantly higher prices than other friction materials.

Respondent attacks the examiner's findings on the sintered metal friction materials submarket as erroneous on the ground that he ignored evidence demonstrating the "pervasive interchangeability" between sintered metal and other friction materials on the one hand and between all friction materials and functionally equivalent devices on the other. The respondent also asserts that the examiner made incomplete findings to justify his exclusion of homogeneous metal friction materials from the submarket. The examiner's findings upon the unique technology of sintered metal friction materials the respondent would dismiss as irrelevant on the ground that there is no allegation that suppliers of production equipment had been injured by the merger. In addition, respondent alleges that the technology of producing sintered metal friction materials does not serve to distinguish the products as a valid submarket on the ground that various sintered metal friction materials differ from each other in the production process. Brake Shoe claims in this connection that there is no universal production technique for sintered metal friction materials. Respondent also challenges the finding of the examiner that price differentials differentiate sintered metal friction materials on the ground that the evidence as to interchangeability vitiates his finding on that score. Brake Shoe asserts that the examiner's industry recognition finding to support the lines of commerce set forth in the initial decision are erroneous for the reason that buyers recognize functionally equivalent products. Evidently the main thrust of respondent's attack on the initial decision's line of commerce findings is based on the contention that interchangeability precludes a valid submarket in sintered metal friction materials. In view of respondent's claim that interchangeability bars a finding that sintered metal friction materials comprise a commercially significant submarket and respondent's further assertion that the examiner has overlooked important evidence bearing on

these issues, the Commission has carefully reviewed the record on this point.

The evidence demonstrates that sintered metal friction materials possess unique performance characteristics differentiating them from other friction materials. These are described in the promotional literature and catalogs of Brake Shoe and Wellman published prior to the inception of this proceeding. Relevant to the question of whether sintered metal friction parts possess performance characteristics setting them apart from other products is Brake Shoe's statement that because of the numerous types and designs of industrial equipment "the friction materials employed must meet a wide range of operating conditions. No single material will adequately meet all needs," and the further statement that "Brakeblok's industrial friction materials [are] each specifically designed and engineered to insure the proper friction for the particular equipment under consideration."⁴

In the same catalog, Brake Shoe states "American Brakeblok sintered metal friction materials * * * are intended to supplement organic friction materials but not to replace them. Under severe operating conditions, metallic facings assure longer life."⁵

Brake Shoe in another brochure "Taming Dynamics with Engineered Friction"⁶ notes that "Higher speeds, increasing horsepower, heavier loading for vehicles and machines are creating higher operating temperatures and associated design problems for friction materials." While this statement is applicable to friction materials generally, the stress on ability to withstand high temperatures is significant. It is a feature of sintered metal friction materials to which extensive attention has been devoted in the record, since it has a strong bearing on the life and utility of friction products.

The record shows that Wellman and Brake Shoe in their promotional literature have consistently represented that sintered metals have superior qualities of heat resistance, moisture resistance, and longer life than other materials as well as superior efficacy. In Wellman's own words:

VELVETOUCH LASTS LONGER * * * BECAUSE IT IS ALL-METAL

Unlike ordinary asbestos or semi-metallic friction products, genuine Velvetouch is made from powdered metals formed under tremendous pressures and fused with a solid steel backing. No organic substances or binders of any kind are used. As a result, Velvetouch will not rot in oil * * * or burn like conventional material, and is not affected by moisture. Users the world over, who demand

⁴ CX 17, American Brakeblok Catalog, *Friction Materials for Industrial Equipment*, p. 1.

⁵ *Id.* at 2.

⁶ CX 9, pp. 149, 151.

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the utmost dependability in clutch and brake performance, rely on genuine Velvetouch for—

EXTRA SERVICE LIFE. All-Metal construction carries heat from friction surface, runs cooler, lasts longer.

* * * * *
UNIFORM ACTION. Friction efficiency is constant month after month * * *
because metal does not deteriorate like conventional materials.

* * * * *
LOW COST. Measured in added service and work performed, All-Metal construction costs less than ordinary friction material.⁷

Brake Shoe's annual reports similarly stressed the unique suitability of sintered metals for high energy heavy duty uses. For example, respondent's annual report for 1961, states:

A fully-loaded jet airliner such as the Boeing 707 weighs about 250,000 pounds and lands at speeds as high as 138 miles per hour. Ordinary materials would melt under the terrific heat generated by its brakes, so American Brakeblok makes jet plane braking materials out of sintered metals. This type of material is first formed out of powdered metals into near-finished shape, and is then fused solid under heat and pressure.

Sintered materials also have the heat and wear resistance needed to stand up under grueling use in crawler tractors and heavy earthmoving equipment * * *.⁸

The consistent promotional claims of Brake Shoe and Wellman support the conclusion that sintered metal friction materials have commercially significant performance characteristics, including longer life and heat resistance, distinguishing them from other friction materials. The question remains whether the testimony and other evidence adduced in this proceeding vitiates the finding on this point which Brake Shoe's and Wellman's promotional claims considered alone would justify.

The testimony of experts in the field of powder metallurgy and in the production of sintered metal friction materials further supports the finding that sintered metal friction materials possess peculiar characteristics and uses. According to Dr. Benjamin Tolbert Collins, director of Research and Product Development of the Wabash Division of Raybestos-Manhattan Inc., "If the energy level is high enough only sintered metals will work."⁹ Fritz V. Lenel, a professor of metal-

⁷ CX 20, p. 2.

⁸ CX 6, p. 13.

⁹ Tr. 895. Respondent on appeal also contends that the hearing examiner failed to resolve the credibility issue allegedly raised as to Dr. Collins by the testimony of his former superior at Wellman, with respect to the latter's conflict with Dr. Collins. We have reviewed this testimony and determined the examiner made no error in failing to make specific findings on this point, since on its face the testimony in question did not raise a credibility issue. Whatever the reason for Dr. Collins's departure from Wellman there

lurgical engineering at the Rensselaer Polytechnic Institute at Troy, New York, a witness of respondent, testified that the sintered metal friction materials manufactured by Wellman were more advantageous than organic asbestos based material since they are capable of absorbing higher energies for a given volume of size.¹⁰ Similarly, Raymond Moalli, the chief sales engineer of Raybestos-Manhattan, testified that his company represents to customers that sintered metals are superior to organic materials under extremely high temperatures and because they are unaffected by oil. This, he stated, eliminates normal causes of failure under heavy-duty conditions and lessens the need for costly maintenance. The record shows, therefore, that the three largest producers of sintered metal friction materials sell this product on the basis of representations that it has superior performance characteristics, including the ability to operate under higher temperatures. This witness did state that in the case of Raybestos, lower cost items were making inroads on sintered metal friction materials, but significantly explained that the most important factors in this trend were design changes in brake or clutch systems, compensating for the different performance characteristics of the products by permitting cooler operation and therefore acceptance of a lower-cost material (Tr. 2986, 2987).

Brake Shoe, in the course of its defense, presented considerable testimony from manufacturers employing friction materials in an effort to substantiate its position that there is "pervasive interchangeability" between the sintered metal products and other friction materials. That testimony, taken as a whole, however, does not negate the finding compelled by the promotional claims of Brake Shoe, Wellman and Raybestos that sintered metals have unique characteristics distinguishing them in a commercially significant way from other friction products; rather, it tends to support that finding.

Edward C. Yokel, chief engineer of the Racine Works of the Twin Disc Clutch Company, a manufacturer of industrial clutches and marine gears was called by Brake Shoe to testify with respect to the interchangeability of various friction materials. He stated that certain

is no indication that he would for that reason testify untruthfully in this proceeding. As a matter of fact, the witness upon whom respondent relies principally on this issue testified in response to the examiner's question that he would not disbelieve Dr. Collins's testimony under oath as to his professional qualifications (Tr. 3466). Another of respondent's witnesses, Kempton H. Roll, executive director of the Metal Powder Industries Federation, stated he would give respect to Dr. Collins's professional opinion (Tr. 3153).

¹⁰ Tr. 3530. At another point, the witness stated, "There are definite disadvantages in the conventional materials containing organic materials and these disadvantages can be overcome by material made by the powder metallurgy method" (Tr. 3522).

clutch plates whether made of sintered metal or of molded asbestos were interchangeable in terms of dimension but there were some differences in function (Tr. 2036). He further testified that his company uses primarily molded asbestos in its heavy duty industrial applications (Tr. 2063). This testimony as to the interchangeability factor, however, must be evaluated in the light of his assertion that different friction materials are only sometimes interchangeable in terms of performance; at others they "are dimensionally interchangeable but not performance wise" (Tr. 2040).

His explanation, noted by the examiner, of why Twin Disc does not limit itself to either asbestos or sintered metal friction materials is revealing.

Each has its distinct advantage and in the case of the dry clutch, the molded asbestos is desired because of lower cost, equal or better wear resistance in most cases to the copper base sintered metal. It has in certain usage areas the peculiar property of giving off a foul odor when abused to warn the operator that he has gone too far in his use of it. Those are the primary advantages of the asbestos material.

* * * * *

The sintered metals can operate at temperatures well above the temperatures of asbestos, because the material used to bind the asbestos as of today generally breakdown around six or seven hundred degree Fahrenheit. The water of hydration is driven out of asbestos. Water hydration is the way I know it. I may not have the very correct technical term. If [sic] breaks out of asbestos and it becomes a powder instead of a structure member at around 750 degrees Fahrenheit.

So the previously mentioned flash heats tend to destroy that skin surface of asbestos and thus erode, wear away those plates quite rapidly. Yet the sintered metals do not suffer such rapid damage at those elevated temperatures.

The strength of sintered metals quite often is another advantage in that the carrying core is steel, which could easily be 30,000 psi tensile strength as compared to only 6,000 for asbestos. If the application can use such differences in strength it is an advantage. (Tr. 2071-2072).¹¹

The executive vice president of the Lee Norse Company, a manufacturer of mining equipment, similarly testified that brakes in its equipment utilized organic and sintered friction materials interchangeably. He stated that Lee Norse uses sintered metal friction materials only as an option (Tr. 2491-2493), explaining that customers who specify sintered metal brakes do so because:

* * * The customer does not like to adjust a wearing brake. So he buys the expensive sintered product to keep from adjusting its brake very often. It is strictly a function of maintenance of brakes. *He is willing to spend the money in a more expensive low-wearing material rather than adjust his brake more frequently.* (Emphasis supplied.) (Tr. 2494, 2495-2496.)

¹¹ This witness also stated that the sintered metal friction material can withstand higher loads in heat better than the asbestos as a general rule (Tr. 2078).

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James H. Bornzin, assistant manager of engineering of the International Harvester Company, Farm Equipment, Research and Engineering Center, also called as a witness by respondent, testified along similar lines. He stated that sintered metals have not preempted the farm equipment field even in heavy duty applications. He further testified, however, that in the agricultural equipment field sintered metal friction materials and organic materials are not directly interchangeable in every application, and that this is taken into account at the design stage (Tr. 2784-85). This testimony furnishes additional support for the finding that sintered metals and other friction materials are not "pervasively interchangeable" as respondent contends. Mr. Bornzin testified that International Harvester utilizes organic friction materials in combines operated in the same horsepower range as tractors using sintered metal materials.¹² Harvester's reasons for using organic materials and sintered metal materials in the one application and not in the other are enlightening:

The combine is not used in the same way as a tractor is. A tractor is a draft instrument which requires high or almost full torque loading under the operating conditions where as a combine is not used at full peak capacity at all times. In my opinion the demand on the clutch on the combine are [sic] not as high as that on a tractor, but in addition we split our drive on the combine and it is very rarely that all the horsepower will go through the one drive whereas in a tractor it will all go through one drive. (Tr. 2800)

Another of respondent's witnesses, whose testimony is pertinent to the interchangeability issue was John McCarthy, chief engineer of Research and Development with Gar-Wood Industries, a manufacturer of various types of equipment including truck winches and an aircraft tow tractor. According to this witness, the spot brakes on Gar-Wood's aircraft tow tractor are made of sintered metals because organic material would become saturated with oil and tend to become highly glazed, thus reducing the coefficient of friction. Further, this application would be characterized by high temperatures because of the small area of the spot brake, and Gar-Wood felt that the sintered material "would stand higher temperatures better than the organic." Another consideration dictating the use of sintered metal friction materials in this application as opposed to other friction materials was that using sintered metal parts permitted Gar-Wood to use a smaller space than if it used organic materials (Tr. 2887-88).

Fred Bagniet, Jr., purchasing agent of the Manitowoc Engineering Company, Manitowoc, Wisconsin, a manufacturer of cranes,

¹² In the case of a tractor where design restrictions were limited, Harvester used sintered material in the clutch rather than organic because "we had to get a material which had a higher coefficient of friction and more durability" (Tr. 2799).

shovels and drag lines sold primarily to contractors, is another of respondent's witnesses, testifying on the interchangeability issue, who confirmed the superior durability of sintered metal friction materials (Tr. 3751). According to the witness in the case of machinery manufactured by his firm sintered metal friction materials could be used interchangeably with organic materials in any or all of the clutch and brake applications discussed in his testimony. He testified further, however, that in case of swing clutches, Manitowoc offers the widest choice of friction material options since this is the most vulnerable part of the machine, and sintered metal is one of the half dozen options which may be chosen in this instance; the others are organic. If the customer does not specify a friction material for the swing clutch and Manitowoc knows the nature of his work "we would probably lean towards putting a sintered metal at least on one side of his clutch plate" because "He will get better life out of it and he will be a happier customer if his clutch doesn't wear out too quick." Although the sintered metal friction material would be more expensive, in Manitowoc's view, because of the longer service which could be expected from sintered metals the ultimate cost to the purchaser would probably be less (Tr. 3764, 3767-68).

The fact that the unique performance characteristics of sintered metals as distinguished from other friction materials have commercial significance, is also demonstrated by evidence in the record showing that substitution of one material for the other in many, although not all, instances requires modification of the design of the brake assembly or transmission in which the friction product is to be utilized, before one material can be replaced by the other.

For example, Emil J. Hlinsky, manager of Mining Products Development for the Goodman Division of the Westinghouse Air Brake Company, testified that in the case of mining machinery manufactured by his company there are no applications in which sintered metal friction materials are now being used in which other friction materials could not be substituted (Tr. 2314). In Goodman's case, however, the substitution of one friction material for another pre-supposes changes in the design of the application such as the clutch which is to use the friction material.¹³ As a result, given a specific clutch the materials would not be interchangeable without design changes taking into

¹³ Tr. 2331. " * * * in a particular design of given dimensions, you can't lift sintered material out and put, say, organic in, because of the design considerations. But in any one clutch application, you could design a clutch that would take organic materials, a clutch that would take brass, or a clutch that could take sintered for the same use" (Tr. 2331).

consideration differing performance characteristics, such as the heat resistance of the particular friction material (Tr. 2328, 2330).

Paul G. Hykes, assistant engineer of the Budd Company's Automotive Division, who testified that the advantage of a brake designed for use with sintered metal friction materials is that it is possible to dissipate the same amount of heat as with a larger brake, further stated, that "it would be a very fortunate coincidence" if a brake designed for organic linings would work satisfactorily with sintered metal linings (Tr. 3601, 3615-16).

The Armstrong Cork Company which hopes to compete with its paper asbestos friction materials in the automobile transmission field cannot directly substitute its materials for sintered metal materials. In view of the design considerations, "you just can't make direct substitutions."¹⁴

If sintered metals are to be displaced by lower cost paper or organic friction materials, this must be accomplished by designs which will permit the substitute material to operate at a lower temperature. One technique which may be employed is switching from a dry application to a wet application utilizing oil, since the use of oil in an application may compensate for the sintered metal friction materials' heat advantage.¹⁵ Redesign, however, may involve considerable expense because of the necessity for retooling (Bornzin, Tr. 2786).

Brake Shoe also introduced evidence with respect to non-friction energy conversion devices to demonstrate that devices of this nature by lessening the demands on friction materials increase the likelihood that vehicle manufacturers would convert from the more expensive sintered metal friction materials to cheaper organic products. One device relied upon by respondent to illustrate this point is the engine brake of the Jacobs Manufacturing Company, a device designed to slow down vehicles by dissipating the energy from engines, the friction brake being utilized only to bring the vehicle to a complete stop.¹⁶ Jacob's sales manager testified on this point that these devices averaging \$400 did permit vehicle operators to use less expensive materials than sintered metals in the friction brake (Tr. 2111-12). Such evidence of "interchangeability," however, far from demonstrating that there are no significant differences between sintered metal and other friction materials, demonstrates to the contrary that sintered metals' performance characteristics setting them apart from

¹⁴ Testimony of R. L. Collister, marketing manager for Armstrong Cork Company (Tr. 1743-45).

¹⁵ Raymond Moalli, Raybestos-Manhattan (Tr. 2987-88); Wellman Deposition (Tr. 4103).

¹⁶ Statement of Brake Shoe's counsel (Tr. 2090).

other friction products are in fact commercially significant. Otherwise, the contention that it is worthwhile to install a non-friction device, costing \$400, for, among other reasons, the purpose of facilitating the substitution of cheaper materials for sintered metals would be completely unrealistic.

To summarize, the evidence in this proceeding that under certain circumstances one friction material may be substituted for another does not vitiate the fact that because of superior heat resistance, durability, and other qualities that sintered metal friction materials possess peculiar uses and characteristics which are commercially significant. Whatever the degree of substitutability shown here the products are not so identical as to justify ignoring the differences between them plain on the face of this record.

Price differences between products may be "the single, most important practical factor of the business" in determining the relevant market.¹⁷ The testimony as a whole shows that as a general rule sintered metals command a significantly higher price than other friction products. For example, the record shows that sintered metals sell at a premium over organic materials¹⁸ and that both are more expensive than homogeneous steel friction materials.¹⁹ These differences are substantial. Truck blocks made of Wellman's sintered metal friction materials, the former President of Brake Shoe's Wellman Division conceded, could have been 5 to 10% higher than the very "top grade" organic blocks and 30 to 40% higher than the "average" organic block (Tr. 644, 649). A salesman for a distributor of automotive parts corroborated the testimony of the Wellman official on this point stating that Wellman's Velvetouch blocks sell for approximately a 25% premium over organic brake blocks (Tr. 2221). Similarly, the purchasing agent of the Manitowoc Engineering Company testified with respect to price differences that it would be roughly two to three times more expensive in the case of a particular application to install sintered metal rather than organic friction materials (Tr. 3768).

Despite the price disadvantage under which sintered metals suffer in comparison to other friction materials, the available data evidences an increase in the sale of this product in the relevant period.

¹⁷ See *United States v. Aluminum Co. of America*, 377 U.S. 271, 276 (1964).

¹⁸ Jack D. Hinton, vice president for Original Equipment Sales, American Brakeblok Division of Brake Shoe (Tr. 1541). In the words of Benno Bordiga of the Allomatic Manufacturing Company:

"I would say that the paper based material is the cheapest, the organic or semiorganic is next, and then way, way above that is the sintered material" (Tr. 1136).

¹⁹ Hugh S. Kays, manager of purchasing, Warner Electric Brake and Clutch Company (Tr. 2913-14).

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The total shipments of the three largest producers rose from \$16,673,832 to \$20,010,604 in the period 1960-62, immediately preceding the acquisition, a substantial increase.²⁰ The record indicates that price will govern the selection of the friction material provided the less expensive product meets all the specifications of the user.²¹ The increase accordingly suggests that there are commercially significant differences distinguishing sintered metals from other friction materials. Were it otherwise, the sales of sintered metals should in view of their price disadvantage have declined.

On the basis of technology as well, sintered metal friction materials are differentiated from other friction products. Their manufacture unlike organic and homogeneous metal friction materials, is basically dependent on powder metallurgy which involves unique production problems.²² Brake Shoe's description of the blending process for sintered metal friction materials indicates a recognition of this fact by respondent:

Making sintered metal friction materials is very much like the work of the pharmacist at the corner drugstore. Sintered metals are compounded of fine powders in delicate proportions and exact weights * * *.

* * * Each metal powder is there for a purpose and how it behaves on the job is influenced by every other ingredient in the formula.²³

Similarly, Wellman's description of itself as the "pioneer of every major improvement in the highly specialized field of metallic friction materials" (CX 20, p. 271) also furnishes support for the finding that the technology of sintered metal friction materials is significantly different from the manufacturing process involved in other friction products. As an expert in the field of powder metallurgy testified there is "art" as well as science involved in the powder metal technology of sintered metal friction materials, since it is based on empirical know how as well as on scientific principle.²⁴

²⁰ CX 10 a, b, CX 10(b), 11, CX 90(d).

²¹ *E.g.*, testimony of John McCarthy (Tr. 2897).

²² " * * * At about the same time that molded organic lining appeared, advances were being made in powder metallurgy, employing techniques that necessitated an extended development period. * * * " (Howard B. Huntress, manager, Sintermet Products Development, American Brake Shoe Company, "Friction Elements in the design of Brakes & Clutches," CX 9, p. 124).

²³ *Metal Trends*, 1957, CX 59b.

²⁴ Fritz V. Lenel (Tr. 3587-88); John Francis Lowey, president of Friction Products Company, testified:

"Q. Would you say that the formulation of powdered metal compositions is a trial and error art or an exact science?

"A. I would say today it is, and this would be emphatic it is an art" (Tr. 798).

Industry recognition of the fact that sintered metal friction material production involves a specialized technology is evidenced by the fact that a section of the Committee on Metal Powders and Metal Powder Products of the American Society for Testing and Materials was constituted specifically to study problems involved in sintered metal friction materials. A principal function of this section was to establish standard methods of testing for sintered metal friction materials, and the record shows that the section approved three standard tests adopted by the parent committee of the American Society for Testing Materials.²⁵

The testimony in this proceeding demonstrates that the production processes for sintered metal friction materials and other friction products are not interchangeable. For example, the sintered metal friction materials manufactured by Wellman could not be manufactured at Brake Shoe's plant making organic friction materials.²⁶ Similarly, Bendix produced sintered metal friction materials in areas separate from that used for the production of organic materials and utilized different personnel in this process²⁷ and the Carlisle Corporation, a manufacturer of an organic brake-lining, has determined not to go into the manufacture of sintered metal friction materials because "it is an entirely different concept of manufacture as far as the organic brake-lining that we are in."²⁸

The respondent objects that the hearing examiner failed to make adequate findings on the question of whether homogeneous metals should be included in the line of commerce and that he ignored evidence demonstrating their interchangeability with other friction materials. The argument is rejected for the reasons already outlined as supporting the examiner's findings on the applicable product market. The record indicates that like organic friction materials, homogeneous metal friction materials may in certain applications be substituted for the sintered metal product. The evidence however further demonstrates sufficient differences between these materials on the basis of their characteristics, technology and prevailing price levels to support the finding that the production and distribution of sintered metal friction materials constitutes a distinct product line. On this point the examiner cited the following testimony of Edward C. Yokel:

²⁵ CX 112; "Standard Method of Test for Hardness of Sintered Metal Friction Materials" (CX 113) adopted 1964; "Standard Method of Test for Density of Sintered Metal Friction Materials," adopted 1965 (CX 114); and "Standard Method of Test for Transverse Rupture Strength of Sintered Metal Friction Materials," also adopted in 1965 (CX 115).

²⁶ Testimony of Maynard Terry (Tr. 524).

²⁷ Testimony of Edward W. Drislane (Tr. 719).

²⁸ Testimony of William J. Vachout, vice president and general manager, Carlisle Corporation (Tr. 1321).

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Q. Isn't it true that generally speaking, you use largely the organic and sintered metal friction material for most of your friction material application?

A. Yes.

Q. Then the use of materials such as phosphor bronze and steel on steel would be a minor portion of use of friction materials?

A. Yes, and that is because *the technological advances have, in the main, given us more desirable features in the asbestos and sintered metal group than in the older application group of phosphor bronze on steel* (Tr. 2071, emphasis supplied).

This view is corroborated by the division manager of the Wabash Division of Raybestos-Manhattan Company, who stated that steel is not a commonly used friction material but rather a minute factor in comparison to the amount of organic, paper and sintered metal friction materials utilized (Tr. 873). That testimony coming from an official of the largest friction material manufacturer is entitled to considerable weight on this point.

Further, the homogeneous metal material is differentiated from other friction products by virtue of its price which as previously noted is considerably lower than that for other friction materials. Finally, the powder metallurgy technology of the production process for sintered metal friction materials differs fundamentally from that underlying the manufacture of the homogeneous metal friction materials. On that basis the evidence of interchangeability between homogeneous metal friction materials and other friction materials does not preclude the finding of a submarket confined to the sintered metal product alone.

Respondent contends in any event that the definition of sintered metal friction materials advocated by complaint counsel is too narrow since it excludes certain sintered metal materials which serve a friction function. Specifically, Brake Shoe charges that the complaint definition of sintered metal friction materials as "compressed and sintered to a steel or other backing under high pressure and temperature" is too narrow since it excludes sintered metal friction materials not sintered to a steel or other backing under high pressure and temperature as well as those sintered metal friction materials which have no backing at all but which do perform a friction function. We turn first to the question of whether sintered metal friction material with a steel or other backing possesses features which meaningfully distinguish it from other sintered metal parts which may perform a friction function. The record as a whole indicates that the presence or absence of backing to the material significantly affects its utility.

Sintered metal friction materials are designed for friction properties and generally are not structurally strong. The material therefore

requires a strong structural part, frequently of steel²⁹ as backing to lend the strength and toughness necessary for the proper functioning of the friction element.³⁰ In addition to furnishing tensile strength, the backing performs the function of absorbing heat or acting as a heat sink.³¹ There is also testimony that the use of sintered metal friction materials without a backing or steel core in some applications would require twice as many parts.³² On the basis of the evidence as a whole it is clear that the superior strength and heat absorbing characteristics of the sintered metal friction material with a backing distinguishes it significantly from sintered metal friction parts lacking that element.

Respondent argues further that complaint counsel have abandoned the definition of the complaint defining sintered metal friction materials as bonded or sintered under high temperature and pressure to a steel or other backing, by including in their market share statistics for sintered metal friction materials parts bonded to a backing without the use of high pressure and temperature. On this point complaint counsel contends that the record developed in the hearing demonstrates that heat, pressure and time are dependent variables which can be varied or substituted for each other with engineering know-how. The record supports this position and justifies inclusion in the product market of those sintered metal friction materials bonded or sintered to a backing without resort to high temperature or pressure.

Respondent also apparently asserts that certain sintered metal structural parts may perform a friction function and therefore should be included within the line of commerce. There is, however, a fundamental difference between sintered metal structural parts and sintered metal friction products. The former are simply powdered metal pressed together without any friction modifiers in their composition and they are used mainly as bearings, pinion gears, or mechanical parts, whereas the sintered metal friction material is used either as a brake or a clutch material.³³ Structural sintered metal parts also differ from sintered metal friction parts in that the inclusion of non-metallic elements in the latter reduces the amount of metallics contained therein which lend strength to structural parts.³⁴ While there is some relationship

²⁹ Testimony of John Francis Lowey (Tr. 788).

³⁰ Howard B. Huntress, Manager, Sintermet Products Development, American Brake Shoe Company, "Friction Elements in the design of Brakes & Clutches," CX 9, p. 125.

³¹ Testimony of Robert Biggs (Tr. 624, 628-29).

³² Testimony of Benjamin Tolbert Collins (Tr. 836).

³³ Testimony of Clarence Paul Schneider (Tr. 858).

³⁴ Testimony of Francis John Lowey (Tr. 807-08).

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between the technology involved in sintered metal structural parts and sintered metal friction materials since both depend on powder metallurgy the record demonstrates significant differences in the production process involved in each because of the different objective of the two manufacturing processes.³⁵ Further, while certain structural parts may have a friction function, in many instances this appears to be fortuitous.³⁶ Clearly, sintered metal friction material producers and structural parts manufacturers are not in the area of effective competition.

Finally, Brake Shoe's challenge to the examiner's line of commerce finding on the sintered metal submarket, grounded on the contention that it is barred by evidence of interchangeability, cannot be reconciled with the applicable precedents for:

* * * The issue under § 7 is whether there is a reasonable probability of substantial lessening of competition. There can be a substantial lessening of competition with respect to a product whether or not there are reasonably interchangeable substitutes.³⁷

As the Third Circuit recently noted:

* * * The fact that different products may in some sense be competitive with each other is not sufficient to place them in the same market if by themselves they constitute distinct product lines. *United States v. Aluminum Co. of America* (Alcoa-Rome Cable) 377 U.S. 271 * * * (1964). Nor does the availability of substitute products compel the conclusion that they belong in the same relevant market. *United States v. E. I. DuPont De Nemours & Co.*, 353 U.S. 586 * * * (1957). *Reynolds Metals Co. v. Federal Trade Commission*. * * *³⁸

The market for § 7 purposes consists of "the product and probably its close substitutes, but does not embrace all products as to which there

³⁵ Testimony of Dr. Collins (Tr. 891-94).

³⁶ E.g., John Smith, plant manager of powdered metals with the Kwikset Division of the Emhart Corporation, testified in connection with a part used as a centrifugal clutch shoe for chain saws that "The parts we make at the moment are in my opinion structural parts that we have made before they were ever used as a clutch shoe, and they sufficed" (Tr. 1196). He stated further, while some of the parts produced by this company are used in friction applications the end use of many is unknown to the manufacturer (Tr. 1191).

³⁷ *Crown Zellerbach Corporation v. Federal Trade Commission*, 296 F. 2d 800, 814 (9th Cir. 1961), cert. denied, 370 U.S. 937 (1962); *General Foods Corporation v. Federal Trade Commission*, 386 F. 2d 936 (3d Cir. 1967).

³⁸ *General Foods Corporation v. Federal Trade Commission*, supra note 37 at 940.

is a significant cross-elasticity of demand, or which are in a sense broad substitutes even though the existence of substitutes is among the factors which determine the extent of a firm's market power."³⁹ The Supreme Court has established that although the outer boundaries of a product market may be determined by reasonable interchangeability between substitute products, this does not preclude the existence of well defined submarkets valid for antitrust purposes within the confines of the broader market.⁴⁰

The boundaries of the submarket may be determined by reference to a number of practical indicia, including industry and public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes and specialized vendors.⁴¹ Such a submarket may exist though only some of these criteria enumerated by the Supreme Court are applicable in the particular case.⁴² The sintered metal friction materials market by virtue of its unique technology and production facilities, a distinct price structure, and the products' peculiar uses and characteristics constitute a market economically significant and meaningful in terms of trade reality.⁴³ The effect of the acquisition may properly be assessed within its confines.

IV

The hearing examiner in appraising the competitive effect of the merger relied on a survey of sintered metal friction material producers covering the period 1960 through 1962, which delineated the market structure of the industry as follows:

³⁹ *Ekco Products Company*, 65 F.T.C. 1163, 1208, *aff'd* 347 F. 2d 745 (7th Cir. 1965).

⁴⁰ *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962); *United States v. Continental Can Co.*, 378 U.S. 441, 457-8 (1964); *United States v. Aluminum Co. of America*, *supra* note 17 at 271.

⁴¹ *Brown Shoe Co. v. United States*, *supra* note 40 at 325.

⁴² *General Foods Corporation v. Federal Trade Commission*, *supra* note 37; *Reynolds Metals Company v. Federal Trade Commission*, 309 F. 2d 223, 228 (D.C. Cir. 1962).

⁴³ *Crown Zellerbach Corporation v. Federal Trade Commission*, *supra* note 37 at 811; *General Foods Corporation v. Federal Trade Commission*, *supra* note 37 at 943.

Total shipments and market shares of companies manufacturing sinteral materials, 1960-62
[Dollar shipments (f.o.b. plant)]

Company	1960			1961			1962		
	Used by the company	All other shipments	Total shipments	Used by the company	All other shipments	Total shipments	Used by the company	All other shipments	Total shipments
American Brake Shoe Co. (CX-10a, b)* S. K. Wellman Co. (CX-10b, 11)*	0 0	\$2,630,356 10,393,746	\$2,630,356 10,393,746	0 0	\$2,750,008 10,676,845	\$2,750,008 10,676,845	0 0	\$3,517,440 11,187,086	\$3,517,440 11,187,086
Sub-total, 2 companies*	0	13,024,102	13,024,102	0	13,426,853	13,426,853	0	14,704,526	14,704,526
Raybestos-Manhattan, Inc. (CX-90d) The Bendix Corp. (CX-103c) General Metals Powder Co. (CX-88c) General Motors Corp. (CX-90e) Friedrich Products Corp. (CX-91d) Chrysler Corp. (CX-93d) R. G. LeTourneau & Co. (Tr. 1147)	0 \$1,951,600 0 90,974 0 90,000	3,640,730 2,939,700 1,451,313 0 0 541	3,640,730 2,939,700 1,451,313 90,974 0 541	0 \$1,208,400 0 131,931 0 90,000	4,925,030 138,000 1,581,441 0 0 2,280	4,925,030 1,406,400 1,681,441 131,931 0 90,000	0 \$1,610,900 450,662 0 0 90,000	5,306,078 1,880,990 1,916,921 450,662 7,750 1,243	5,306,078 1,880,990 1,916,921 450,662 7,750 1,243
Total 2	2,132,574	18,355,386	20,487,960	1,490,331	20,074,613	21,564,944	2,181,662	22,168,768	24,358,170
[Market shares (in percent)]									
American Brake Shoe Co.* S. K. Wellman Co.*	0 0	14.3 56.6	12.8 50.7	0 0	13.7 53.2	12.8 49.5	0 0	15.9 50.5	14.4 45.9
Sub-total, 2 companies*	0	71.0	63.6	0	66.9	62.3	0	66.3	60.4
Raybestos-Manhattan, Inc. The Bendix Corp. General Metals Powder Co. General Motors Corp. Friedrich Products Corp. Chrysler Corp. R. G. LeTourneau & Co.*	0 91.5 4.3 0 4.2	19.9 1.3 7.9 0 (3)	17.8 10.6 7.1 0.4 (3)	0 85.1 8.9 6.0	24.5 0.7 7.5 (3)	22.8 4.5 7.3 0.6 (3)	0 75.2 20.7 4.1	23.9 1.1 8.6 0 (3)	21.8 7.7 7.9 1.9 (3)
Total 2	100.0	100.1	99.9	100.0	100.0	99.9	100.0	99.9	100.1

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* Organized in October 1961 and started production in 1962.

² If Powdercraft Corp.'s estimated annual shipments of friction parts amounting

⁴ LeTourneau has ceased manufacture (CX 107).

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We are satisfied that appropriate measures were taken to insure that the significant producers of the product relevant to this proceeding would be included in the survey and that the omissions, if any, are not substantial. There is no indication that the replies in the survey and the testimony of the businessmen in this proceeding relating to the identity of the industry's members, on the basis of their experience, made omissions of consequence to the survey's results.⁴⁴

The survey adequately reflects the reporting companies' production of the relevant product—sintered metal friction parts with a backing. Contrary to respondent's assertion, the fact that some companies reported materials not relevant to the proceeding such as unbacked materials while others failed to do so does not detract from the significance of the data. If anything, the report by firms, other than Wellman and Brake Shoe, of sales figures not properly within the line of commerce by inflating the universe favors respondent.⁴⁵

In addition, Brake Shoe contends that the survey's universe rests on inconsistent sales figures since the reporting firms included products sold at different price levels. Brake Shoe objects that sales in the after market were generally at a price $2\frac{1}{2}$ times that charged for the similar unit to an original equipment manufacturer and should not, therefore, be compared with such transactions. Respondent also argues that neither sales reported at the after market level or at original equipment manufacturer prices should be compared with the values reported for intracorporate transfers by sintered metal friction producers engaged in captive production. Such prices would be at a lower level than those charged original equipment manufacturers.

Respondent insists that absent a showing that all the reporting companies made sales at the various price levels in approximately the same proportion, no meaningful conclusions can be drawn from the

⁴⁴To insure that the survey would include the manufacturers of the sintered metal friction materials relevant to this proceeding the survey questionnaire requested the firms contacted to list their competitors in the production and sale of this material. The testimony of representatives of the friction material producers appearing in this proceeding confirmed these responses. Furthermore, pursuant to complaint counsel's request, Brake Shoe by letter of April 19, 1965 (CX 100), listed therein 22 firms "which to the best of our present knowledge and information are manufacturers of sintered metallic friction products." This listing included the companies reporting in the survey introduced by complaint counsel. Representatives of those concerns listed by respondent but not included in the survey testified generally that they were primarily structural parts manufacturers rather than sintered metal friction materials producers or, if the concern did produce sintered metal parts which might have a friction function they were not of the kind manufactured by Brake Shoe or Wellman. In addition, many of these witnesses testified expressly that their firm did not compete with either Wellman or Brake Shoe in the sale of sintered metal friction materials (see Initial Decision pp. 629-631, 649-653).

⁴⁵Insofar as Wellman's figures are concerned to the extent that they contain data which is not relevant, there is no evidence that this significantly affects the survey's results. Respondent, although in the best position to do so, has failed to make such a showing.

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survey. The fact that the survey figures may not reflect with precision the unit sales by the reporting companies is immaterial. In view of the variety of parts made of sintered metal friction materials (ranging from components of airplane brakes to tractor transmissions), it is unlikely that a comparison of sales on a unit basis would either be practical or informative. The only realistic measure under the circumstances is the sales volume of the reporting companies in terms of price. The fact that certain of the reported sales were made at different price levels does not vitiate the significance of the survey, which reflects the value placed on these transactions by the reporting companies in the regular course of business. This data may, therefore, be regarded as giving a reasonable indication of the market significance of the transactions reported. Despite a possible margin of error in statistics combining sales at different levels of distribution, it nevertheless provides an adequate basis to gauge the significance of this acquisition, for whatever the technical flaws in the compilation of the survey. "precision in detail is less important than the accuracy of the broad picture presented."⁴⁶

The record as a whole corroborates the inferences which may be drawn from the survey data, namely, that the sintered metal friction materials market is highly concentrated and that Wellman and Brake Shoe, along with Raybestos, were the leading suppliers of this product. This is evidenced by the testimony of representatives of the companies themselves and by their responses to the Commission questionnaires initiating the survey.⁴⁷ Evidence of this nature emanating from firms actually engaged in the market is entitled to considerable weight as corroboration of the survey data. Accordingly, the figures—despite certain underlying price differences—afford a rough but serviceable guide for evaluating the structure of this industry and the competitive impact thereon of the Wellman-Brake Shoe merger.

The record shows that the number of significant producers of sintered metal friction materials within the line of commerce relevant to this proceeding is extremely limited. In 1962, there were at most seven companies with an annual volume exceeding \$250,000 in the case of this product.⁴⁸ The substantial production of this friction

⁴⁶ See *Brown Shoe Co. v. United States*, *supra* note 40 at 342 n. 69 (1962).

⁴⁷ *E.g.*, Ronald Moalli, Chief Sales Engineer of Raybestos, testified Wellman and Brake Shoe are his company's chief competitors in the sintered metal friction material field and he did not know of others that he could consider as competitors (Tr. 3022).

⁴⁸ Brake Shoe, Wellman, Raybestos, Bendix, General Motors, General Metals Powder Co., and possibly Powdercraft. As the examiner noted, the testimony indicating that Powdercraft, principally a manufacturer of structural parts and bearings, was responsible for

material was concentrated among these firms and among them the Wellman-Brake Shoe combination held by far the predominant share. The competitive significance of the merger is even more readily apparent when viewed in the context of sales of the material in commercial channels as opposed to captive production or intracorporate transfers. There were at best five independent firms with substantial sales in commercial channels and, in fact, the lion's share of such transactions was concentrated among the three leading firms—Wellman, Brake Shoe and Raybestos. Here “[t]he concentration ratio, in other words, is that characteristic of oligopoly.”⁴⁹ The sintered metal friction material market by virtue of the limited number of substantial competitors participating therein clearly falls in that category of industry structure recognized by the commentators as having the potential for anticompetitive performance because of the concentration of sales among a few.⁵⁰ This merger accentuates that condition, of which the Supreme Court stated, “As [it] develops, the greater is the likelihood that parallel policies of mutual advantage, not competition, will emerge.”⁵¹ The survey in this record established one thing beyond question—that the industry is highly concentrated and as a result, even without reference to the individual market percentages, it is obvious that the elimination of Wellman as a substantial competitor from the already limited number of producers necessarily leads to the results proscribed by the statute. The margin of error, if any, residing in the market share percentages computed from the survey is therefore of little significance. Our examination of the record accordingly constrains us to affirm the finding of the examiner that the effect of the merger may be to substantially lessen competition in the production and sale of sintered metal friction materials.

sintered metal friction material production in that amount is subject to controversy (Initial Decision p. 652).

⁴⁹ See *The Proctor & Gamble Co.*, F.T.C. Docket 6901, 63 F.T.C. 1465, 1561-1562, *rev'd* 358 F.2d 74 (6th Cir. 1966), *rev'd* 386 U.S. 568 (1967).

⁵⁰ The sintered metal friction materials market, as the bleach market in *P&G*, would be characterized by Professors Kaysen and Turner as a “Type One structural oligopoly” wherein “the first eight firms have at least 50 percent of total market sales and the first twenty firms have at least 75 percent of total market sales.” *The Proctor & Gamble Co.*, *supra* note 49 at 1562, n. 40 citing Kaysen and Turner *Antitrust Policy* 27 (1959).

⁵¹ *United States v. Aluminum Company of America*, *supra* note 17 at 280. According to Professors Kaysen and Turner, “In Type One oligopoly recognition of interdependence by the leading firms is extremely likely . . . [and it is unlikely] that the response of the small sellers will . . . limit the behavior of the larger firms.” *Antitrust Policy* 27, *supra* note 50. In more loosely structured markets the existence of an unconcentrated sector may constitute a competitive restraint of varying significance on the concentrated firms. *Ibid.*

That finding is compelled by the standards enunciated by the Supreme Court in its decisions under the merger statute. The Court has held "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."⁵² In this case, concentration was already extremely high and the increase thereof resulting from the Wellman-Brake Shoe amalgamation can be considered anything but slight. The market share of the combined concerns meets the standard of presumptive illegality promulgated by the Court in *United States v. Philadelphia National Bank*.⁵³ That presumption has not been rebutted here. Further, the acquisition is clearly within the Court's ruling that where the merging companies are major competitive factors in a relevant market, the elimination of substantial competition between them by merger or consolidation constitutes a violation of § 1 of the Sherman Act.⁵⁴ Under the circumstances, the instant case *a fortiori* presents a violation of § 7 of the amended Clayton Act.⁵⁵ Contrary to respondent's position, in a case of this nature "Where a merger is of such a size as to be inherently suspect, elaborate proof of market structure, market behavior and probable anticompetitive effects may be dispensed with in view of § 7's design to prevent undue concentration."⁵⁶

Moreover, the finding that the merger has the tendency to lessen competition is also supported by Wellman's record as a pioneer and innovator of new techniques in the sintered metal friction material market. Brake Shoe by virtue of its resources should similarly possess the potential for innovation. The merger of the engineering and research efforts of the technical staffs of the two corporations, however, poses the danger that in order to avoid duplication some new ideas may never be developed or at least that they will not be subjected to the test of the marketplace. That is a significant consideration in assessing the impact of the merger since engineering and scientific know-how play an extremely important, if not controlling, role in the competitive struggle in this industry.

V

While the primary issue on appeal is the question of whether the impact of the merger may be evaluated within the confines of the

⁵² *United States v. Philadelphia National Bank*, 374 U.S. 321, 365 n. 42 (1963).

⁵³ *Id.* at 364. See *United States v. Continental Can Co.*, *supra* note 40 at 461.

⁵⁴ *United States v. First National Bank of Lexington*, 376 U.S. 665, 672-73 (1964).

⁵⁵ *Fruehauf Trailer Company*, Docket No. 6608, 67 F.T.C. 929, 932.

⁵⁶ *United States v. Continental Can Co.*, *supra* note 40 at 458.

sintered metal friction materials submarket, respondent has raised a number of subsidiary issues. These include Brake Shoe's contention that friction materials generally are not an appropriate market for the purposes of this proceeding and the further argument that the examiner ignored evidence indicating that irrespective of the market definition applied, the merger could not have been anticompetitive because of the "pro-competitive" influence of a number of factors operating on the industry. In this connection, respondent urges whatever adverse effect there might otherwise flow from the acquisition it is neutralized by the economic power and technological ability of the large friction material buyers, the ability of such customers to themselves make the product, and the potential competition of other firms in the powder metallurgy field, as well as of non-friction energy conversion systems.

Respondent asserts the appropriate line of commerce is the overall market for friction energy conversion devices, whether utilizing friction materials or non-friction systems such as hydraulic, hydrostatic and electric drives, transmissions or brakes, etc.,⁵⁷ and that the friction materials industry alone is an unrealistic market in the context of this proceeding. In essence, Brake Shoe argues that evidence of interchangeability dictates the placing of friction and non-friction energy conversion devices in the same market. Failing a finding that the proper line of commerce in this case is an overall market for energy conversion devices comprised of both friction and non-friction systems, Brake Shoe insists that the hearing examiner should have taken into consideration the "procompetitive influence of the competition from non-friction functionally equivalent systems and devices."⁵⁸

The finding that friction materials generally are a relevant product market is supported by the evidence. The record as a whole clearly establishes, that manufacturers of friction materials consider production of friction materials to be a distinct industry, that the technology involved in friction and non-friction energy conversion devices is on its face completely different, and that non-friction energy conversion systems are distinguished from applications using friction materials by substantial price differences.⁵⁹

⁵⁷ See Initial Decision p. 623.

⁵⁸ Respondent's appeal brief p. 20.

⁵⁹ The manager of Industry Systems of the Oilgear Company, a manufacturer of hydrostatic transmissions, stated that hydrostatic transmissions are at a cost disadvantage with respect to mechanical transmissions (Tr. 2532). The executive vice president of the Sundstrand Corporation testified that hydrostatic transmissions cost approximately 75% more than the parts they displace (Tr. 2743-44), and the manager of engineering for the Transportation equipment products operation of the General Electric Company testi-

There are areas where non-friction systems can be substituted for friction brakes or transmission. Nevertheless, the evidence indicates that the competition between devices utilizing friction materials and non-friction systems on an overall basis at the time of the hearings was marginal.⁶⁰ There is testimony that hydraulic and other non-friction systems may be "a threat" to friction materials.⁶¹ At the time of the hearings, however, non-friction and friction devices were not close substitutes and the "threat" conjectural. At best the record indicates such devices may constitute potential rather than effective competition to the friction materials industry.

Similarly, respondent argues that the examiner failed to take into account evidence demonstrating the "procompetitive influence" exerted by the large original equipment manufacturer (OEM) buyers of friction materials which "alone is sufficient to negate any possible inference of anticompetitive effects arising from the merger."⁶² Brake Shoe argues that by virtue of their economic power and technological competence the principal buyers of friction materials have been able to substantially shape the nature of competition among suppliers of these products thus vitiating any anticompetitive effect which might otherwise flow from the merger. In essence, Brake Shoe makes two contentions, first, that the OEM's economic power and technological prowess enables them to extract the lowest possible prices from their suppliers and, second, that the threat of integration into the production of friction materials by certain customers similarly forces independent suppliers of friction materials to remain competitive in terms of prices and services. Essentially, therefore, it is respondent's argument that non-friction devices and large buyers are a "procompetitive force" because they constitute potential competition to sellers already in the market. Related to the argument that OEM customers constitute

fied mechanical systems would be cheaper than electric drives for off-highway vehicles (Tr. 3183). The conventional mechanical drive using friction materials since it is made in very high volume has an initial cost advantage over other systems (Ferris T. Harrington, Tr. 3332-33).

⁶⁰ For example, the Oilgear Company, as a matter of choice, does not generally sell hydrostatic transmissions for mobile applications such as tractors, because it is a high volume, low cost industry. Oilgear prides itself on selling its engineering talents with its products, a factor which is not as important in the mobile industry where there is the danger that the supplier will simply teach the customer how to make his own product (Tr. 2515-16). In the case of International Harvester, at the time of the hearings, 50 out of approximately 10,000 combines made by this manufacturer were equipped with hydrostatic drives (Tr. 2796) and the hydrostatic transmission cost approximately \$500 more than the mechanical transmission (Tr. 2800). While there may be future increases in such pilot projects (Tr. 2804) the extent thereof is not clear. Similarly, while Harvester has some plans for utilizing hydrostatic drives in certain of its tractors, at the time of the hearings, all the tractors then in production had mechanical transmissions (Tr. 2797).

⁶¹ Testimony of Brake Shoe officials Francis B. Herlihy (Tr. 4027) and M. B. Terry (Tr. 568-9).

⁶² Respondent's appeal brief pp. 19, 20.

potential competition is Brake Shoe's further contention that they have "shaped competition" by virtue of their power to extract the lowest possible prices from suppliers in the independent segment of the market. Here, Brake Shoe in essence resorts to the concept of countervailing power.

Brake Shoe similarly insists that in evaluating the commercial setting in which friction materials are marketed, the hearing examiner and the Commission should take into account the potential competition with respect to sintered metal friction materials represented by manufacturers primarily engaged in the production of structural parts and bearings. Passing over for the moment, the question of whether potential competition is relevant in the case of a horizontal merger, the few entrants into sintered metal friction materials production and their subsequent experience indicate that entry is not necessarily easy.⁶³

The record suggests that while it may not be overly difficult to secure the physical facilities for making the product, this is not the only problem facing a prospective entrant. It may take considerable time for a would be supplier of friction materials, whether organic or sintered metal, to qualify for the business of certain customers.⁶⁴ Further, as already noted, powdered metal technology does not depend on scientific principle alone, but it is also an art based on empirical know-how⁶⁵ and the development of new products may take several years.⁶⁶ Another and inescapably important consideration in an assessment of entry barriers is the difficulty of securing technically qualified people.⁶⁷ No categorical answer as to whether it is easy to expand from structural parts manufacturing to sintered metal friction parts is justified on the basis of this record.⁶⁸

Essentially, therefore, it is respondent's argument first, that low entry barriers and the potential competition of original equipment manufacturers, structural parts manufacturers, and non-friction energy conversion devices by restraining the market power of existing sintered metal friction materials producers nullify the effects of the ac-

⁶³ *E.g.*, the president of Friction Products Company, whose first year sales in 1962, totalled \$7,750, admitted that at the time of the hearings in 1965, his current sales figures were not substantial, although he was more hopeful of the future, and that this firm was still operating at a loss (Tr. 785). In the case of Compax Inc., another firm cited by Brake Shoe in its argument on this point, the evidence indicates no more than that this concern delivered approximately 715 parts similar to those made by Wellman to Douglas Aircraft in 1965. The performance of the product at the time of the hearings had not yet been determined (Tr. 3366, 3382).

⁶⁴ Edward C. Yokel (Tr. 2076-77); Archer W. Brown, American Hoist and Derrick Company (Tr. 3844).

⁶⁵ Fritz V. Lenel (Tr. 3538).

⁶⁶ Wellman Deposition (Tr. 4087).

⁶⁷ Earle Lowe (Tr. 1695-96).

⁶⁸ *Id.* (Tr. 1667-68).

quisition, and secondly, that the countervailing power of large buyers to force prices down to the lowest possible levels achieves the same result. Were this a conglomerate or a market extension merger respondent's argument with respect to the ameliorating effects of potential competition and low entry barriers might have some relevance. The Brake Shoe-Wellman merger is, however, a horizontal acquisition involving the elimination of substantial actual competition, and respondent's argument is in direct conflict with the previous Commission decisions on this issue.

Actual and potential competition are not completely interchangeable concepts,⁶⁹ since the effects arising from the absence of actual competition are rarely, if ever, cancelled out completely by the presence of even substantial potential competition.⁷⁰ Although potential competition in a concentrated market may keep prices down to entry discouraging levels, such levels may be, and are likely to be, substantially higher than the prices which would be set by vigorous competition among the sellers already in the market.⁷¹ As we previously noted:

* * * [the restraint of potential competition] 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. * * *⁷²

Similarly with respect to the ease of entry factor, the finding that entry into a market is difficult is not indispensable to the finding of illegality under § 7, since potential competition does not excuse the elimination of actual competition.⁷³

* * * 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. * * * 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. * * *⁷⁴

In sum, substitute competition is not a proper defense here, since it does not limit market power sufficiently.⁷⁵ Further:

"The loss of a substantial firm, however, may of itself induce a reduction in the vigor of competition. For even if new entrants are coming into the market or concentration is for some other reason declining, there will be one less substantial firm than would have existed but for the merger, and an adverse finding

⁶⁹ *Beatrice Foods Company*, F.T.C. Docket No. 6652, 67 F.T.C. 697, 716.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² *Ekco Products Company*, *supra* note 39 at 1209.

⁷³ *Id.* at 1208.

⁷⁴ *Ibid.*

⁷⁵ *Id.* at 1209.

under § 7 is predicated on the presumption that competition would have benefited had that firm remained independent."⁷⁶

Under the circumstances, the examiner clearly did not err in failing to give weight to the factors which Brake Shoe contends operate as a "pro-competitive" influence and on which it relies as negating the effects of the merger. To have done so, would have resulted in findings on issues which are essentially irrelevant. In administering § 7 of the Clayton Act, the Commission as the Courts:

"* * * must be alert to the danger of subverting congressional intent by permitting a too broad economic investigation * * * And so in any case in which it is possible without doing violence to the congressional objective, embodied in § 7, to simplify the test of illegality, the courts ought to do so in the interest of sound and practical judicial administration. * * *"

Applying the tests advocated by respondent would on its face violate that injunction.

The argument that the countervailing power of large buyers negates the competitive impact of the acquisition is similarly out of place. That concept is antithetical to antitrust policy which depends on the free play of competitive forces to regulate the market. As a practical matter, a policy devoted to dividing market power between large sellers and buyers is more likely to restrain than to promote competition.⁷⁸

The final issue presented by Brake Shoe's appeal is the proper scope of the order. The respondent does not challenge the Commission's power to order divestiture assuming a violation of § 7 has been documented. On the contrary, it insists this is the only remedy available. Brake Shoe does challenge the Commission's power, under the statute, to order a ban on future acquisitions. The appeal on that ground is denied. The Commission's powers under § 11(b) of the Clayton Act encompass broad equitable relief beyond simply divestiture. See *Ecko Products Company*, Docket No. 8122,⁷⁹ which anticipated the arguments on this issue advanced by Brake Shoe. Wellman to be sure must be restored to its preacquisition posture as a viable competitor in the sintered metals friction materials market. Divestiture, alone, however, is not sufficient in this case to safeguard competition over the long run. Brake Shoe's tendency to expand by acquisition rather than internal expansion coupled with the high degree of concentration in the market dictate a ban for ten years on future acquisitions of other

⁷⁶ *Crown Zellerbach Corporation v. Federal Trade Commission*, *supra* note 37 at §80 n. 39 citing Bok "Section 7 of the Clayton Act and the Merging of Law and Economics," 74 Harv. L. Rev. 226 (1960).

⁷⁷ *United States v. Philadelphia National Bank*, *supra* note 32 at 362.

⁷⁸ Compare *id.* at 370.

⁷⁹ *Supra* note 39.

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sintered metal friction material producers unless such mergers are approved by the Commission. "Prophylactic relief, not merely the after-the-fact remedy of divestiture, is essential"⁸⁰ to effectively carry out the Congressional policy expressed by § 7 of the Clayton Act in this industry. Since we have evaluated the competitive impact of the merger on the sintered metal friction material submarket rather than in the market for friction materials generally, the provision in the examiner's order on this point will be modified to limit its application to sintered metal friction materials alone. This provision of course "is in no sense an absolute ban on such acquisitions. In deciding whether or not to approve a proposed acquisition submitted under such an order, the Commission is not free to act capriciously or unreasonably. It may deny approval only where the acquisition, if consummated, would conflict with the remedial objectives of the order."⁸¹

For the foregoing reasons respondent's appeal, except to the extent noted, is denied and the hearing examiner's decision as modified and supplemented by this opinion and the findings contained therein is adopted as the decision of the Commission.

Commissioner Nicholson did not participate for the reason oral argument was heard prior to his appointment to the Commission.

FINAL ORDER

The Commission has determined, for the reasons stated in the accompanying opinion, that respondent's appeal, except to the extent noted, should be denied and that the hearing examiner's initial decision and order as modified and supplemented by the accompanying opinion should be adopted as the decision of the Commission. Accordingly,

It is ordered, That the order contained in the initial decision be, and it hereby is, modified to read as follows:

ORDER

It is ordered, That respondent, American Brake Shoe Company (now known as Abex Corporation), shall, within six (6) months from the date of service upon it of this order, divest itself absolutely and in good faith to a purchaser or purchasers approved by the Federal Trade Commission, of all stock and of all right, title and interest in all assets, properties, rights and privileges, acquired by respondent as a result of its acquisition of the stock and assets of The S. K. Wellman Company, so as to restore that which for-

⁸⁰ See *Beatrice Foods Company*, F.T.C. Docket No. 6653, 68 F.T.C. 1003, 1006.

⁸¹ *Beatrice Foods Company*, *supra* note 69 at 731 n. 48.

merly made up the Wellman Company as a viable competitive entity in the friction materials and sintered metal friction materials industries in the United States.

It is further ordered, That respondent shall not sell or transfer the aforesaid stock or assets, directly or indirectly, to anyone who at the time of divestiture is a stockholder, officer, director, employee, or agent of or otherwise directly or indirectly connected with or under the control or influence of respondent.

It is further ordered, That pending divestiture, respondent shall not make any changes nor permit any deterioration in any of the plants, machinery, buildings, equipment or other property or assets of the former Wellman Company which may impair present rated capacity or their market value, unless such capacity or value is restored prior to divestiture.

It is further ordered, That for a period of ten (10) years from the date of issuance of this order, respondent shall cease and desist from acquiring, directly or indirectly, through subsidiaries or otherwise, without the prior approval of the Federal Trade Commission, the whole or any part of the stock, share capital, or assets of any corporation engaged in commerce and in the production or sale of sintered metal friction material.

It is further ordered, That the hearing examiner's initial decision, as modified and supplemented by the findings and conclusions embodied in the accompanying opinion, 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 provisions in the order set forth herein.

Commissioner Nicholson did not participate for the reason oral argument was heard prior to his appointment to the Commission.

IN THE MATTER OF

LAWRENCE TV CORPORATION ET AL.