

the findings and conclusions with the court. The Commission ruled that a

*See joint Initial Decision *In the Matter of National Portland Cement Company*, Docket No. 8654, 71 F.T.C. 399.

pre-acquisition loan arrangement had substantially the same anticompetitive effect as the acquisition itself.

Mr. Joseph J. O'Malley, Mr. Wilbur W. Sacra, Jr., and Mr. Larry D. Sharp supporting the complaint.

Mr. Macdonald Flinn, Mr. Thomas B. Leary, Mr. Benjamin M. Vandergrift and Mr. Mario Diaz-Cruz, III, of White & Case for the respondent.

INITIAL DECISION ON REMANDED ISSUES BY JOHN LEWIS,
HEARING EXAMINER

JANUARY 14, 1972

STATEMENT OF PROCEEDINGS

This proceeding is now before the undersigned hearing examiner pursuant to the Commission's order of September 25, 1970 [77 F.T.C. 1646], reopening the proceeding and remanding it to him for the purpose of receiving evidence on certain specific issues. Such remand was the result of a decision of the Court of Appeals for the Sixth Circuit, filed May 6, 1970 [426 F. 2d 592, 6th Cir. 1970], which remanded this matter to the Commission for further findings of fact. The complaint herein, which was issued January 22, 1965 [74 F.T.C. 1270], charged respondent with having violated Section 7 of the Clayton Act, as amended, by acquiring the stock and assets of Certified Industries, Inc. (Certified), a ready-mixed concrete producer in the New York City metropolitan area, such company being a customer of respondent's Universal Atlas Cement Division (UAC) at the time of the acquisition. Following hearings between October 11 and November 22, 1965, the undersigned hearing examiner issued his initial decision on May 20, 1966 [71 F.T.C. 399], dismissing the complaint herein on the ground, essentially, that the evidence established Certified was a failing company within the meaning of the so-called "failing company" doctrine, which had been pleaded as a defense by respondent.

Complaint counsel had urged before the examiner after the original hearings that, (a) respondent had failed to establish Certified was a "failing company" within the meaning of the defense as initially enunciated in *International Shoe Co. v. Federal Trade Commission*, 280 U.S. 291 (1930) and (b), in any event, the defense is not an "absolute," but a "relative," defense and does not confer complete immunity on an acquisition which will have the adverse effect on competition proscribed by the statute. In his initial decision, issued May 20, 1966 [71 F.T.C. 399], the undersigned held that respondent had established the requisite elements of the failing company defense since it had shown that,

(1) Certified was in failing circumstances at the time of the acquisition and (2) there was no other prospective purchaser then available for Certified's stock or assets. He further held that the failing company doctrine provided a complete defense to the acquisition, but that to the extent it provided merely a "relative" defense, as complaint counsel had urged, the latter had failed to establish that the acquisition would be likely to have the effect on competition required to be shown under the statute. After extended consideration of the matter the Commission, in its decision issued December 2, 1968 (with two Commissioners not participating and one dissenting), reversed the examiner's decision. While agreeing that "the examiner was correct in finding that Certified was failing," it held that the failing company doctrine did not provide a complete defense to the acquisition. Since, in its view, the evidence established that in spite of Certified's failing condition the acquisition would have the detrimental effect proscribed by the statute, the Commission held that a violation of Section 7 had been proven.

The court of appeals held that there was substantial evidence to support the Commission's finding that Certified's acquisition would have an adverse competitive effect in spite of its failing condition. However, the court found it unnecessary to determine "whether [the effect of] 'failing company' status is to immunize an acquisition or is merely a factor to be weighed in determining whether the acquisition is in the 'public interest' " since, in the court's view, respondent had failed to establish it had met all of the requirements of the failing company defense, as amplified by the Supreme Court's most recent holding in *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969). As noted by the court of appeals, prior to the *Citizen Publishing Co.* decision the requirements of the failing company defense were considered to be met by a showing (1) "that the financial condition and resources of the company are so dire that 'it faced the grave probability of a business failure' " and (2) that there was "no other prospective purchaser" of the acquired company. However, the Supreme Court's decision in *Citizen Publishing Co.* had added a third requirement to the defense, *viz.*, that "the prospects of the acquired company emerging from reorganization as a competitive unit must be 'dim or non-existent.' " Since the *Citizen Publishing* case had been decided subsequent to the examiner's and the Commission's decisions herein, the circuit court considered it "appropriate to remand this case [to the Commission] to give U.S. Steel an opportunity to bring forth evidence that the prospects of Certified passing through bankruptcy or similar proceeding were 'dim or nonexistent' [following which] the Commission will be in a position * * * make a finding of fact as to this crucial element in the failing company defense."

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In remanding the case, the court also charged the Commission with the responsibility of resolving a further issue, relative to the date to be used for evaluating Certified's failing condition. The date used by the hearing examiner in determining whether Certified was in a failing condition was the date of Certified's acquisition, *viz.*, on or about April 30, 1964. In so doing, the examiner had overruled the argument of counsel supporting the complaint that the appropriate date to use was January 1963, which was the date when Certified had obtained a long-term bank loan guaranteed by respondent. After reviewing the examiner's holding in this regard, the Commission concluded:

We agree with this [the hearing examiner's] conclusion. Complaint counsel's argument is therefore rejected.

The court of appeals suggested that the cement-purchasing arrangement between Certified and U.S. Steel's cement subsidiary UAC, following the loan agreement, might be illegal and directed the Commission to "reassess the standards by which the actions and defenses of United States Steel Company are to be judged." It stated, in this regard, that:

[T]he record reveals that U.S. Steel-Certified vertical ties may have taken an unlawful cast as early as January 1963. If such vertical ties were unlawful, then the failing character of Certified must be shown to have existed at that time. * * * To the extent that unreasonable foreclosure of Certified's cement demands occurred as a result of the financial arrangement in January 1963, we believe that the failing company defense must be measured from the inception of these unreasonable vertical arrangements, not from the point of their final consummation.

Following the court of appeals decision of May 6, 1970, remanding this matter to the Commission for further consideration in the light of the Supreme Court's holding in the *Citizen Publishing Co.* case, the Commission, by order issued September 25, 1970, remanded the proceeding to the undersigned hearing examiner. The examiner was directed to conduct hearings

for the purpose of receiving evidence * * * with respect to the issues of whether:

- (a) as of January 1963 the financial condition and resources of Certified Industries were so dire that it faced the grave probability of a business failure,
- (b) between January 1963 and April 1964 no prospective purchaser other than United States Steel Corporation was interested in acquiring Certified,
- (c) "Certified's opportunity for some form of continued competitive vitality through bankruptcy or similar proceedings" was "dim or nonexistent" either in January 1963 or in April 1964, and
- (d) the U.S. Steel-Certified vertical ties did in fact take an unlawful cast as of January 1963.

The Commission's order further directed the hearing examiner, upon termination of the hearings, to prepare an initial decision "confined to the issues hereinabove specified."

Following the Commission's remand order of September 25, 1970 [77 F.T.C. 1646], the examiner convened a prehearing conference on October 29, 1970, for the purpose of delineating the issues remanded to him for consideration and the setting up of a procedural schedule, the results of said conference being embodied in the examiner's Prehearing Order No. 1 (PHO 1). At such conference the examiner overruled the position of complaint counsel, who had argued that the burden of proof under subparagraph (d) of the Commission's order (*viz.*, whether the "vertical ties" between respondent and Certified had taken on "an unlawful cast" as early as January 1963), was upon respondent and not upon the government. Complaint counsel indicated that they might decide to rest upon the existing record on this issue, but reserved a decision in this regard to a later date. They thereafter elected not to offer any further evidence on this issue. Respondent took the position that unless complaint counsel offered further evidence to establish the illegality of the vertical arrangement in January 1963, it would restrict its evidence to the period of the acquisition in April 1964, and would limit it to the issue remanded under subparagraph (c) of the Commission's order (*viz.*, whether as of April 1964 Certified's opportunity for continued competitive vitality through bankruptcy or similar proceedings was "dim or non-existent"). Respondent also raised the question whether subparagraph (b) of the remand order was intended to reopen the question of the availability of other purchasers in April 1964, and indicated that it intended to file a motion requesting certification of this question to the Commission. The examiner stated that he did not interpret the Commission's order as reopening this issue, and that further evidence by respondent under subparagraph (b) would be required only if complaint counsel were to establish that the vertical ties became unlawful in January 1963 or at some period prior to the acquisition. However, respondent was given an opportunity to file a formal motion requesting certification of this issue to the Commission, which motion was thereafter filed by respondent and was denied by the examiner's order of November 19, 1970.

Pursuant to discussions had at the prehearing conference, respondent filed a motion for the issuance of a number of subpoenas *duces tecum*, for discovery purposes, to various cement manufacturers and ready-mixed concrete firms to produce sales and financial data for the period 1964-69. Said motion was opposed by complaint counsel on the ground that the post-acquisition data sought to be obtained were irrelevant to the issues remanded in this proceeding. By order dated November 20,

1970, the examiner granted respondent's motion and issued the requested subpoenas *duces tecum*. Although most of the third parties produced the data requested, motions to quash said subpoenas *duces tecum* were filed on behalf of several of them on the ground that the information sought was irrelevant and confidential, and would be burdensome to produce. Said motions were denied by separate orders of the examiner issued in December 1970 and January 1971. Following appeals from said orders by the third parties, with complaint counsel having been granted leave to intervene, the Commission issued its order on March 4, 1971 [78 F.T.C. 1569], granting the appeals and directing the quashing of the subpoenas *duces tecum* theretofore issued by the hearing examiner.

Thereafter, a second prehearing conference was held on April 7, 1971, at which respondent indicated that as a result of the Commission's order quashing the subpoenas *duces tecum*, it would have to revise its defense strategy, insofar as it involved the use of post-acquisition data obtained from third parties, and that it would return the data submitted by a number of the third parties who had not filed motions to quash. A revised procedural schedule was agreed upon, which is embodied in the undersigned's Prehearing Order No. 2.

Hearings for the reception of evidence were thereafter convened on July 13, 14, and 15, 1971, in New York, New York. Evidence was offered at said hearings by respondent in support of the issue as to which the examiner had ruled it had the burden of proof, *viz.*, whether Certified's opportunity for some form of continued competitive vitality through bankruptcy or similar proceedings was "dim or non-existent" as of the time of the acquisition by respondent in April 1964. No evidence was offered by respondent with respect to the period January 1963, inasmuch as it made no contention that Certified was a failing company as of that time, and further contended that it was under no obligation to offer any evidence concerning this period unless complaint counsel first established that the arrangement with Certified had become illegal as of January 1963. The only evidence offered by counsel supporting the complaint was with respect to the same issue as to which evidence had been offered by respondent. Pursuant to leave granted by the undersigned, proposed findings of fact and conclusions of law were filed by the parties on September 1, 1971, and replies thereto were filed on September 15, 1971.¹

¹ The proposed findings filed by each of the parties were with respect to the issues as to which the examiner had ruled they had the burden of proof. Respondent's proposed findings were directed to subparagraph (c) of the Commission's remand order, and complaint counsel's proposed findings were directed to the remaining subparagraphs. The replies contain each party's position with respect to the opposing party's proposed findings on the issue or issues as to which the opposing party had the burden of proof.

After having carefully reviewed the evidence in this proceeding, the proposed findings of fact and conclusions of law and the replies there,² and based on his observation of the witnesses, the undersigned makes the following findings and conclusions as to the remanded issues:

A. The Prospects of Certified's Surviving Through Bankruptcy or Similar Proceedings in April 1964

1. The evidence offered by respondent consisted essentially of, (a) testimony and documentary evidence by officials of respondent and Certified, purporting to show that the state of Certified's equipment and business at the time of the acquisition was such that there was no likelihood of Certified's survival without the infusion of substantial amounts of new capital, and that despite the infusion of substantial amounts of capital by respondent, Certified's operation continued to lose substantial amounts of money in the years succeeding the acquisition, at least through 1967; (b) the testimony of witnesses from the ready-mixed concrete industry purporting to show that a substantial number of ready-mix operators in the New York City metropolitan area (NYMA) went out of business both prior to and after Certified's acquisition, and that not a single company had been able to successfully reorganize through bankruptcy or similar proceedings; and (c) the testimony of two experts in the field of bankruptcy and reorganization to the effect that the prospects of Certified's being reorganized in April 1964 were dim or nonexistent.

2. Before discussing such evidence it should be noted that the financial data offered by respondent concerning Certified's financial condition in the post-acquisition period and as to the infusion of additional capital by respondent, were received in evidence over the objection of complaint counsel. The basis of counsel's objection was that the Commission's order of March 4, 1971, quashing the subpoenas *duces tecum* issued at the instance of respondent for the production of post-acquisition financial data by third parties, precluded the receipt into evidence of respondent's own post-acquisition data. Such objection was overruled by the examiner. While the undersigned's conclusions here would be the same irrespective of whether the post-acquisition data are con-

² Proposed findings not herein adopted, either in the form proposed or in substance, are rejected as not supported by the evidence or as involving immaterial matters. References to proposed findings are made with the following abbreviations: "RPF" (for respondent's proposed findings); "CPF" (for complaint counsel's proposed findings); "RR" (for respondent's reply); "CR" (for complaint counsel's reply). Other abbreviations used herein are: "Tr." (for transcript of testimony); "CX" (for complaint counsel's exhibits); "RX" (for respondent's exhibits); "I.D." (for examiner's original Initial Decision).

sidered or not, in his view such evidence is unquestionably relevant. The Commission's order holding such evidence not to be relevant, insofar as the third party subpoenas *duces tecum* were concerned, was based principally on the holding of the Supreme Court in *Federal Trade Commission v. Procter & Gamble Co.*, 386 U.S. 568. The holding of that case, that a showing of *actual* anti-competitive effect is not a "requirement" for establishing the "probability" of competitive injury under Section 7 of the Clayton Act is not, in the opinion of the undersigned, tantamount to a holding that post-acquisition evidence has no logical probativeness.³ Moreover, where the issue is one of the prospect of a company's being successfully reorganized, evidence as to actual financial developments in the affairs of the company and in the industry during the post-acquisition period, while not a *requisite* element of proof, cannot be said to be without logical probativeness as providing a backdrop against which to compare a forecast as to what a company's prospect for reorganization would have been if it had not been acquired.

3. The evidence establishes that the nature of the ready-mixed concrete industry, as an industry, is such that it does not readily lend itself to reorganization once a company experiences serious financial difficulties. This is particularly true of the industry in the NYMA. The product, ready-mixed concrete, is a homogeneous product which is sold primarily on a price basis. There is little or no customer loyalty in the industry, and continuing customer relationships characteristic of other industries are lacking. There is no such thing as goodwill or going concern value, as an asset against which funds can be raised when a company is experiencing financial difficulty (Tr. 1381, 1384, 1403, 1407-09, 1433-34, 1498, 1520-21). The business involves substantial fixed costs, and volume is essential to spread these costs. There is, therefore, a tendency to bid low on jobs in order to maintain volume, despite the fact that the price will result in little or no profit (Tr. 1375-78, 1386-87, 1432, 1434, 1437, 1464-66). Maintenance of an efficient truck fleet is essential to a company's successful operation since, in addition to price, dependable and fast delivery is essential to obtaining business and continuing customer relationships. However, once a company experiences financial difficulty, there is a tendency to reduce

³ In *United States v. Falstaff Brewing Corp.*, 333 F. Supp. 970, 972 (D.C. R.I., 1971), the court held that post-acquisition evidence showing a decline in market share was admissible, stating:

"It is well established that post-acquisition evidence is admissible in an action such as this and may properly be considered in determining whether the probable effect of said merger will be a substantial lessening of competition * * *. [T]here is no evidence that [the acquiring corporation] during said period did not make every effort to realize the benefits it hoped to obtain by its acquisition."

costs by avoiding replacement of obsolete trucks and by reducing maintenance on the existing fleet. This results in more frequent truck breakdowns and the need to cannibalize parts from other trucks, thus compounding the problem (Tr. 1439, 1441, 1448-50, 1513-14, 1526-27). The ability of a company in financial difficulty to raise additional capital against its assets is minimal. Generally, its trucks are encumbered by mortgages, and even where not encumbered they generally bring only a fraction of their cost in a sale. In the case of multi-plant companies, the prospect of selling off one or more plants is remote where the industry as a whole is suffering from overproduction and a declining demand. The cost of borrowing against accounts receivable is high and once this avenue has been pursued, it is no longer available if additional funds are required. The problems of a company in financial difficulty are compounded by the traditional slowness in payment of accounts receivable by ready-mixed concrete customers, by the practice of asserting "back charges" for alleged late or defective delivery, and by the tendency to cancel orders because of concern that the supplier will be unable to deliver (Tr. 1382-83, 1388-92, 1402, 1409-10, 1431, 1434, 1437-39, 1443, 1469-70, 1504, 1521).

4. All of the problems of the ready-mixed concrete industry in the NYMA were reflected and intensified in the case of the acquired company here involved, Certified Industries. Its financial losses had increased in the latter part of 1963 and early 1964. It was being pressed for payment by its creditors. The condition of its truck fleet was poor, with about 40 percent of its trucks being overage. Without the infusion of additional capital to repair, remodel and replace trucks, Certified was at the point where it could not have maintained enough efficiency to continue in operation. Plants and other equipment were in a bad state of repair. Despite economy measures, including reductions of salaries and the closing of some plants, it was unable to stem the tide of loss. Its need for working capital was such that within one week after the acquisition, it would have been unable to meet its payroll, to say nothing of paying for rent, utilities and material charges. The only thing that could have kept it alive was the infusion of new capital. Other than respondent, which had become involved in Certified's affairs through its guarantee of the loan from Bankers Trust Company, there was no one else on the horizon who would have been willing to provide such funds. In the case of respondent, its willingness to make further financial commitments was conditioned on its ability to have a controlling voice in trying to turn Certified around, *viz.*, by acquisition of the company (Tr. 1372 X-Y, 1448-53, 1464-65, 1467-72, 1522, 1531, 1535-36; CX 62).

5. The prospect that Certified could have been successfully reorganized must be viewed against the background of the financial travail of ready-mixed concrete companies in the NYMA during this period, and the fact that not a single one was successfully reorganized through bankruptcy or other proceedings.⁴ The record establishes that a substantial number of companies left the market during this period because of their financial inability to withstand the onslaughts of the intense, dog-eat-dog competition of a declining market. This process, which started several years prior to the acquisition of Certified, continued thereafter and included several of the firms listed in the original initial decision herein as being among the top companies in the industry (Tr. 1379-82, 1392-93, 1408-14, 1428, 1472-74, 1493; I.D. par. 102-07, at 39-41 [71 F.T.C. 436-8]).⁵ While, as complaint counsel sought to show, new companies in some instances took over or bought out the assets of departing companies, the rapid and widespread turnover of companies is itself a reflection of the depressed financial condition of the industry.⁶

6. Although, as above noted, Certified's ability to survive was dependent on the infusion of outside capital, which only respondent was willing to provide, even this was not sufficient to stem the adverse tide of its business. During the period from April 1964 (when the acquisition took place) to December 31, 1967, respondent invested \$14,320,277 in the Certified operation to cover the need for new or improved equipment and to provide for payment on bills that were due and various obligations that were owing (RX 70, 71, 76-81; Tr. 1372 L). Various economies were effected by more efficient management, including reduction of management salaries, clerical costs, interest, and insurance costs, the providing of various free services through the personnel of respondent's UAC Division, and the reducing of operating costs by closing various plants (Tr. 1372 S-W, 1534-40). Despite these efforts, Certified's losses continued and its volume remained static or declined,

⁴ Several of the companies made assignments for the benefit of creditors, but this was merely a vehicle for their dissolution or liquidation (Tr. 1411-13, 1428-33, 1393).

⁵ M. F. Hickey, which was the fifth ranking ready-mix producer in the NYMA in 1964, went out of business in 1967 because it could no longer meet its financial obligations (Tr. 1493). Some of its trucks were sold at distressed prices, as were two of its plants which were dismantled by the purchasers. Its other two plants could not be sold (Tr. 1496). Century Transit Mix, the sixth ranking producer, went out of business in 1965 (Tr. 1474, 1610). Cooney, the seventh ranking producer, after combining with another producer, discontinued operation of a number of its plants in 1966 (Tr. 1519-20).

⁶ The only evidence offered by complaint counsel on the remand of the proceeding was a single witness from the industry, through whom they sought to show that a number of companies had entered the ready-mix business in the eastern portion of the NYMA in recent years. The testimony of the witness corroborates the evidence offered by respondent as to the number of companies leaving the market because "they went broke" (Tr. 1611), and indicates that most so-called new entrants merely took over the facilities of defunct companies.

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as the following table reflects (RX 67-69; I.D. par. 22 at 12 [71 F.T.C. 410]):

Year	Sales	Income—Loss
1964 (last 8 months)		\$1,204,210
1965	\$6,983,555	1,936,839
1966	7,616,024	1,596,777
1967	7,793,061	2,041,397
	7,241,021	

7. The uncontradicted and credited testimony of two experts in the field of creditors' rights, bankruptcy and reorganization, who were called to testify by respondent, establishes that the prospects for Certified's continued competitive vitality in April 1964, through bankruptcy or similar proceedings, were dim or nonexistent. The opinions of these experts were based on Certified's financial data as of the time of the acquisition, and certain factual assumptions posited by counsel for respondent relative to the nature of the industry and Certified's particular situation at the time of the acquisition, all of which factual assumptions are supported by the record. The opinion of each witness was based on the preacquisition situation, and without his having had access to Certified's postacquisition history. However, after having given his original opinion, each witness was given access to the post-acquisition financial data and each stated that such evidence merely confirmed his original opinion as to the lack of any favorable prospect for Certified's being reorganized.

8. The opinion of the first of the expert witnesses, that Certified's prospects for being successfully reorganized in April 1964 were "negligible, dim," was based on the following rationale:

* * * [T]he essential ingredient in any successful reorganization, whether it be under Chapter 10, Chapter 11, or even out of court, is the presence of a potential for profit. As I read the finances here, it seemed clear to me that by April of '64, Certified had a minus net worth. It had no working capital, its losses were averaging over \$200,000 a month, there was no indication of any change in this trend whatsoever and under those circumstances and with the other factors that you have mentioned in your hypothetical question, I don't see how Certified could have been successfully reorganized. (Tr. 1576)

Respondent called as expert witnesses two lawyers specializing in the field of creditors' rights. One of these, had represented trustees and receivers in bankruptcy, assignees for the benefit of creditors, creditors' committees and hundreds of companies in bankruptcy matters over a period of almost 50 years. He had also lectured on the subject before the Practising Law Institute and similar groups. The other, in addition to representing clients in bankruptcy matters, was a professor of law at New York University and a member of the Advisory Committee of the United States Judicial Conference on bankruptcy matters. He had also been retained by the Secretary of the Treasury as a special consultant on the Lockheed Aircraft reorganization. He was also coauthor of Collier on Bankruptcy, a standard text in the field of bankruptcy.

The witness further testified that while a multi-division company, some of whose divisions were losing money while others were making a profit could be successfully reorganized by selling off the unprofitable divisions and reorganizing around the profitable portion of the business, he had never seen a successful reorganization involving an essentially one-product company which had been losing money at the rate, and over the period of time, as had Certified (Tr. 1581).

9. The other witness summarized his views as follows:

I came to the conclusion that I did based upon an analysis of operating statements and all the information contained in these various reports which were submitted to me and which * * * were introduced into evidence in this proceeding, the earnings record of this company was so poor and the prospects for the future were so uncertain, so dim, I should say, and bearing in mind the amount of money that had been put into this company in the way of new capital, starting a couple of years before when they were able to arrange that loan from the bank, all of which was dissipated quite quickly, that this is not a viable enterprise and it's one that just could not have been reorganized. * * * Now, it's true that any corporation can be reorganized. If you examine it abstractly, if someone is willing to bear the burden of losses, any corporation can be reorganized, but I can't look at it on the basis of whether it has an earning potential, if some-what that earning potential is, and this to me, this case, it has no earning potential and it was ripe for liquidation in 1964 * * *. (Tr. 1648)

10. Counsel supporting the complaint offered no countervailing expert testimony as to Certified's prospects of survival through reorganization in bankruptcy or otherwise. However, they question two of the eleven factual assumptions on which the testimony of respondent's witnesses was based, viz.:

- (a) There were no prospects for marked improvement in the future demand for ready-mix concrete in general, or in the sales of Certified in particular.
- (b) There was no prospect of a purchase by a company other than U.S. Steel. (Tr. 1575)

In the opinion of the examiner, these assumptions are amply supported by the record even if the postacquisition financial evidence is ignored. The validity of the second assumption is dealt with elsewhere. Suffice it to say at this point that the examiner has previously found, and the Commission has sustained such finding, that respondent was the only purchaser available for Certified's business as of April 1964.

11. In support of their contention that the record does not support the first assumption quoted above, complaint counsel cite the testimony of a witness at the earlier hearings that he regarded the market to be in "a lull before it picks up again," and the testimony of a witness at the more recent hearings that he entered the ready-mix business in 1964 in the expectation of an increase in demand (CR at 3). The

evidence cited by complaint counsel hardly supports their position of prospect for a marked increase in the demand for ready-mixed concrete. The first witness referred to by counsel was a manufacturer of cement rather than ready-mixed concrete, and he was testifying about the situation in the cement market in October 1965 when he was in April 1964 (Tr. 344-45). The testimony of the second witness, who had sold out his family's ready-mix business to a large cement company for over \$3.5 million in 1960 and remained on as president of the ready-mix operation until April 1964 during which time the operation continued to decline until it was sold to a third party, and who had leased the plant of a small bankrupt company in the eastern portion of New York City in August 1964 with the hope that "maybe '64 would be the last year of the slide" (Tr. 1526), is hardly a paean of hope and confidence in the revival of the ready-mix market in the NYMA in or about April 1964.

12. The fragmentary evidence cited by complaint counsel hardly overcomes the overwhelming evidence adduced at the earlier hearings concerning the depressed state of the ready-mix market in or about April 1964 and the lack of prospect for any marked improvement in the market in the foreseeable future, and particularly for any improvement in Certified's condition. At the time of the acquisition the depressed condition of the ready-mix market in the NYMA had been in process for at least a year and a half. Purchases of cement by ready-mix companies had declined by 18 percent. Ready-mixed concrete prices had dropped sharply. There had been a substantial shake-out of companies in the industry, with a number of companies turning to a cement company merger as a means of surviving and others simply going out of business (I.D. par. 102-07, at 39-41 [71 F.T.C. 436-8]). Whatever may be said of the prospects for an eventual improvement in the market as a whole, there certainly was no prospect for any improvement in Certified's business situation within a time frame required to prevent its financial debacle.

13. Complaint counsel also suggest that the testimony of the bankruptcy experts is a variance with the opinions expressed by respondent's own officials, at or about the time of the acquisition, that Certified's financial reverses could be halted "with new management" (CR at 4). However, it is clear from the context of the opinions expressed by respondent's officials that, left to its own devices, Certified's future lay only in business failure and that the "new management" referred to by them was that in which respondent's own officials would assume

direction of the company after acquisition. Even this course did not presage successful operation for Certified, but was looked upon as a desperate effort by respondent to salvage whatever it could of its investment in Certified. Thus, in January 1964 respondent's executive vice-president expressed the opinion to its board of directors that: "Certified's financial position probably will cause bankruptcy unless it can find a purchaser willing to invest additional funds in the business," and its treasurer advised operating officials at the end of 1963 that: "[W]e must say to you that there is no financial basis for lending additional funds [to Certified] at this time. * * * From the viewpoint of a businessman and in the light of the financial position summarized above, we cannot consider this a good business risk" (I.D. par. 51-2, at 23-4 [71 F.T.C. 420-1]). Respondent ultimately made the acquisition not because Certified represented a good financial risk, but because it was already heavily involved in Certified's financial situation, and because acquisition offered respondent the only hope of salvaging any of its investment. It is clear that the hope expressed at the time that new management and the infusion of new funds might revive Certified is not tantamount to the existence of any expectation by respondent that Certified by itself, and through its own internal resources, had any future in the ready-mix business.

14. Although not referred to by complaint counsel in their proposed findings or reply, the examiner notes that the court of appeals' reference to the "prospects of reorganizing Certified into a vital, competitive company" stems principally from two facts, (a) that "United States Steel paid over a million dollars to the equity interests of Certified, after assuming all liabilities" and (b) that "Certified was created by the tying together of a number of ready-mix concrete and building aggregate companies serving the NYMA, each of which had created a certain amount of goodwill [thus suggesting] the possibility that Certified may have been split into several going concern packages in a receivership proceeding." Respondent's willingness to pay \$1 million to the equity interests of Certified was due, in part, to its desire to take over a going company with its organization intact, rather than of which as an operating entity might be problematical. In addition, the decision to pay something of a premium for the equity in Certified was influenced by the opinion of respondent's officials that there were sand and gravel deposits on one of Certified's properties which might have a value of \$2½ million if they could be mined. However, subsequent to the acquisition it was ascertained that due to zoning restrictions the property could not be developed for sand and gravel pur-

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poses. As a result, respondent refused to pay Certified's stockholders the final payment of \$250,000 which still remained owing on the \$1 million originally agreed to be paid (Tr. 1558-62, 1541-48). In the opinion of the examiner respondent's willingness to pay a so-called premium of \$1 million under the circumstances above outlined, is hardly indicative of the existence of any real prospect for Certified's successful reorganization in bankruptcy.

15. With respect to the matter of the possibility of splitting Certified into the constituent elements from which it had been formed, the evidence offered at the earlier hearings establishes that this would not have been a feasible solution. The principal ready-mix company which it had acquired and which enabled it to more than double in size was itself a company in financial difficulty, and its acquisition merely aggravated Certified's thin financial structure. Both companies operated in substantially the same trade area and there is not the slightest evidence that the splitting up of the companies would have enabled one of them to operate any more successfully than the current hearings disclosed. Moreover, as the evidence adduced at the current hearings disclosed, there is no such thing as goodwill that can be transferred from a moribund ready-mix company. The other acquired company, Northern Lightweight Aggregate Company, was also in financial difficulty when acquired and had not operated at a profit for most of the period it was in business. There is not the slightest evidence in the record that Certified could have realized sufficient capital from a sell-off of Northern Lightweight to enable it to remain in business (I.D. par. 26-28 at 13-14 [71 F. T. C. 412]).

B. Whether the Vertical Ties Between Respondent and Certified Took on an "Unlawful Cast" as of January 1963

16. Complaint counsel introduced no additional evidence in support of their position that the so-called vertical arrangement between respondent and Certified "took on an illegal cast" in January 1963, when Certified obtained the loan from Bankers Trust Company as a result of respondent's intercession with the bank and its signing of a "Note Purchases Agreement" under which it, in effect, guaranteed repayments of the loan. Following the loan from the bank, Certified's purchases of cement from respondent's UAC Division increased sharply, from approximately 15 percent of its total cement purchases in 1962 to 54 percent in 1963 and then to 88 percent in 1964 (the latter year covering the period both before and after the acquisition). Although there was no written agreement between respondent and Certified, complaint counsel argue that in practical operation there existed "a

tying arrangement" between respondent and Certified under which the latter had undertaken to purchase the bulk of its cement requirements from respondent's UAC Division. Since the amount of cement involved in this arrangement was "not insubstantial," complaint counsel contend that the arrangement was illegal under *International Salt Co. v. United States*, 332 U.S. 392, and other cases involving tying contracts (CPF at 15-19).

17. Complaint counsel's position at this juncture of the proceeding is no different from that which it urged at the original hearing phase. At that time it urged that both the question of Certified's failing condition and the availability of other purchasers must be determined as of January 1963, when the loan arrangement was made, rather than as of April 1964 when the acquisition took place. The undersigned overruled complaint counsel's position in both respects on the ground that the complaint did not charge a violation of Section 3 of the Clayton Act and, furthermore, that there was no causal connection between the loan arrangement and Certified's subsequent acquisition. On the contrary, the examiner held that the evidence disclosed Certified had entered into the loan arrangement not as a precursor to eventual acquisition, but as part of a desperate effort to try to maintain its independent existence (I.D. par. 55-56, at 79-80 [71 F.T.C. 422-3]). The Commission, finding "no evidence that in obtaining the Bankers Trust loan Certified was not making a good faith effort to rehabilitate itself," agreed with the examiner's conclusion that the controlling date was April 1964 and not January 1963.

18. The principal ground for complaint counsel's now urging a different result is not the disclosure of any evidence not previously considered, but the opinion expressed by the court of appeals herein that:

To the extent that unreasonable foreclosure of Certified's cement demands occurred as a result of the financial arrangement in January, 1963, we believe that the failing company defense must be measured from the inception of these unreasonable vertical arrangements, not from the point of their final consummation.

Since, as the examiner originally found herein, there is no evidence that the loan arrangement led to, or was calculated to lead to, Certified's eventual acquisition, the undersigned is at a loss to understand how the putative illegality of the loan arrangement and the cement-purchasing practices resulting therefrom can affect the operative date for determining Certified's failing condition and the availability of other purchasers of its business. The effort to fuse the two issues is somewhat analogous to the "felony-murder" principle applicable in

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the field of criminal law, under which the element of intent or pre-meditation which is required to be shown in order to establish a case of first degree murder is presumed to exist, or need not be shown, if the homicide occurred in the course of committing another felony. The latter principle has a statutory, rather than a logical basis, and is not applicable to the issues in this case. The illegality of a Section 3-type of conduct cannot, in the examiner's opinion, supply the missing element to a Section 7 charge, absent a causal relationship between the two types of conduct.

19. The examiner notes that the court of appeals, in suggesting that if the vertical ties between Certified and respondent became unlawful as early as January 1963 "then the failing character of Certified must be shown to have existed at that time," cited as authority for its view the *Citizen Publishing Co.* case, noting that there:

The failing character of the [acquired] Company was measured from 1940 at which time the first joint operating agreement was effected, rather than from 1953 at which time the challenged agreement was effected.

However, the situation in *Citizen Publishing Co.* is wholly dissimilar to that existing here. In that case the two companies had entered into an agreement in 1940 under which the entire business operations of the two companies were integrated into a single joint operation. The formal merger of the two companies did not take place until 15 years later. The Supreme Court correctly held that the failing condition of the acquired company should be determined as of 1940, when the legal merger was consummated. In the instant case not only was there no informal acquisition in January 1963 when the loan arrangement was entered into but, so far as the evidence discloses, the arrangement was entered into with the expectation of Certified's being able to maintain its independent existence.

C. The Remaining Remanded Issues

20. The remaining issues remanded by the Commission are, in substance, (a) whether Certified was in a failing condition as of January 1963, and (b) whether any purchaser other than respondent was interested in acquiring Certified between January 1963 and April 1964. Since, as found above, the record fails to establish that, prior to the acquisition, the U.S. Steel-Certified arrangement took on an unlawful cast of such a nature as to justify advancing the date for determining compliance with the requirements of the failing company defense, it is unnecessary, in the opinion of the examiner, to make any findings or conclusions with respect to the above two issues. However, complaint

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counsel contend that under the Commission's remand order a determination as to Certified's financial condition in January 1963 and as to the availability of other purchasers between January 1963 and April 1964 is not conditioned on a prior determination that the vertical arrangement between the two companies took on an unlawful cast as early as January 1963. Indeed, complaint counsel argue in their proposed findings, as they did at the initial prehearing conference herein, that the remand order was intended to reopen the entire failing company defense, including the question of whether any other purchaser was available during the period from January 1963 to April 1964 and whether Certified's financial debacle was caused by management deficiencies in Certified's operations which could have been prevented or arrested by the taking of appropriate corrective action on the part of Certified or respondent.

21. Complaint counsel's position as to the nondependence of the first two remanded issues on a prior determination that the Certified-U.S. Steel vertical arrangement took on an unlawful cast as early as January 1963, is based on the fact that the remand order "placed the question of 'unlawful cast' fourth in the series of issues which must be decided by the examiner," and they argue that:

There is no indication in the remand order that the financial condition of Certified in January 1963, or that company's outlook for continued viability or competitive vitality in January 1963, is relevant to all of the other remand issues only if some unlawful vertical ties are first demonstrated. (CPF at 5)

While the remand order itself does not spell out the conditional nature of certain of the issues, it is clear from the court of appeals decision which prompted the present remand that the Commission did not intend a broad reopening of the failing company defense such as that which complaint counsel suggest.

22. The basic reason for the remand to the Commission by the court of appeals was, as previously noted, "to give U.S. Steel an opportunity to bring forth evidence that the prospects of Certified passing through bankruptcy or similar proceedings were 'dim or nonexistent'; and so that the Commission would then 'be in a position on remand to make a finding of fact as to this crucial element in the failing company defense.'" The Commission had not previously considered this question and respondent had not offered any evidence regarding it because the need for such a showing (in order to meet the requirements of the failing company defense) had not been made explicit until the Supreme Court's decision in *Citizen Publishing Co.*, following the Commission's decision herein. It is clear, therefore, that the basic purpose of the remand was to permit the reception of additional evidence

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on a specific element of the failing company defense, *viz*, the prospects for Certified being reorganized in bankruptcy or otherwise, and not to reopen the entire failing company defense.

23. The matter of Certified's financial condition as of January 1963, and the availability of other purchasers at that time, entered into the picture as a result of the court's observation that the arrangement between respondent and Certified might have taken on an "unlawful cast" as early as January 1963. If such were the case, then a determination as to whether respondent had met the requirements of the failing company defense would have to be made as of the earlier date rather than as of the date of the acquisition, which is normally considered to be the operative date for determining the applicability of the failing company defense, and was so considered by both the Commission and the examiner here. Only if it were determined that the arrangement between respondent and Certified had become illegal prior to the date of the acquisition would Certified's financial condition and the availability of other purchasers prior to April 1964 become relevant considerations under the remand was being made "in accordance with the opinion of the Court of Appeals," it must be assumed that the Commission states that the remand was being made "in accordance with the opinion of the Court of Appeals," it must be assumed that the Commission intended to reopen only the questions which were required to be reopened by the court, and that it did not intend to reopen the entire failing company defense as of April 1964, or as of some earlier date which has no pertinence unless the Certified-U.S. Steel arrangement became unlawful prior to the date of actual acquisition.

24. In connection with the issue of the availability of other purchasers between January 1963 and April 1964, it may be noted that the initial prehearing conference following the remand, respondent suggested that the Commission's remand order was ambiguous and might be interpreted as reopening the question of the availability of other purchasers as of the date of acquisition in April 1964, which issue had already been considered and disposed of favorably to respondent in the initial decision of the hearing examiner and in the Commission's decision on appeal. Respondent expressed a desire to have the matter certified to the Commission, so that this question could be clarified. The examiner stated at that time that he did not interpret the Commission's order as intending to relitigate this issue as of the period of the acquisition, but nevertheless granted respondent leave to file an appropriate motion (PHO 1, par. 3). Such motion was there- after filed and was denied by the examiner's order of November 19, 1970, on the ground that he did not interpret the remand order as in- tending to reopen the question of the availability of other purchasers

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at or about the time of the acquisition, but as intending to require a showing of nonavailability of other purchasers only if it were first established that the ties between Certified and respondent had become illegal in January 1963 or at some date prior to April 1964.

25. In connection with complaint counsel's position that the remand order was intended to reopen the entire failing company defense, including the question of whether there were other less anticompetitive ways of correcting Certified's financial difficulties (CPF at 5-6), it should be noted that this position was first asserted at the initial prehearing conference herein. At that time the examiner ruled contrary to the position of complaint counsel, and suggested that any broadening of the issues beyond those specifically set forth in the Commission's remand order would require a modification of the Commission's order. Complaint counsel reserved the right to seek a modification of the Commission's order (PHO 1, par. 4). However, no such motion was made by complaint counsel.

26. Complaint counsel are nevertheless asserting essentially the same position in their proposed findings herein. They refer, for example, to Certified's failure to avail itself of other offers for purchase during the 1963-64 time-period, suggesting that the loan commitment obtained through the assistance of respondents was responsible for Certified's lack of interest in such offers and, further, that neither Certified nor respondent made any effort to correct Certified's fiscal deficiencies (CPF at 24-30). All of these matters were considered in the original initial decision herein. Thus, the examiner held that the declination of an offer for acquisition from another company at or about the time of the U.S. Steel-sponsored loan (which offer would also have involved vertical integration) did not establish the availability of other purchasers (I.D. par. 58, at 81 [71 F.T.C. 423]). This holding was specifically quoted and upheld in the Commission's decision. The examiner also specifically found that at the time of the inception of negotiations for the acquisition of respondent in November 1963 no other purchaser was available, all negotiations having ceased for at least several months prior thereto (I.D. par. 61, at 82 [71 F.T.C. 424]). This holding was not disturbed by the Commission. The matter of Certified's alleged failure to take appropriate steps to meet its financial problems was also considered in the initial decision, as was respondent's alleged responsibility for not stemming the decline (I.D. par. 37 at 17 [71 F.T.C. 415]; par. 62-64 at 82-84 [71 F.T.C. 425]). Lacking a clear mandate from the Commission that it desires to have these issues relitigated, it is inappropriate to consider complaint counsel's proposed findings concerning matters not included in the remand order.

CONCLUSIONS

1. The record fails to establish that the U.S. Steel-Certified ties or business arrangements in January 1963, or at any period prior to the acquisition in April 1964, took on an unlawful cast of such a nature as to require a showing by respondent that the elements of the failing company defense were met as of such earlier date.

2. It is unnecessary to consider whether Certified faced a grave probability of business failure as of January 1963, in view of the conclusion reached in Paragraph 1 above.

3. It is unnecessary to consider whether any other prospective purchaser was interested in acquiring Certified in January 1963 or at any time prior to the period of the acquisition in view of the conclusion in Paragraph 1 above, and in view of the fact that the matter of the availability of other purchasers in April 1964 and for a reasonable period prior thereto has already been considered in the examiner's original initial decision herein.

4. The record establishes that Certified's opportunity for some form of continued competitive vitality through bankruptcy or similar proceedings was dim or nonexistent in April 1964. In view of the conclusion reached in Paragraph 1 above, it is unnecessary to determine what the prospects for such continued competitive vitality were as of January 1963.

CONCURRING OPINION OF CHAIRMAN KIRKPATRICK

I concur in the order herein and join in the opinion to the extent that it holds that the loan arrangement between U.S. Steel and Certified was unlawful under Section 5 of the Federal Trade Commission Act and that Certified was not in a failing condition in January 1963, for the purposes of the failing company defense. Also, to the extent that the opinion and mandate of the Court of Appeals require our disposition of this matter to rest upon a January 1963 application of that defense, this Commission is, of course, not free to hold otherwise. However, my view would be that the failing company defense should be evaluated as of the date of the acquisition of "share capital" or of "any part of the assets of another corporation." That date could be the date of the acquisition or merger or it could also be an earlier date upon which the two companies may have entered into a transaction or arrangement tantamount to such an acquisition but not such in the strict legal sense. In the latter event, as in *Citizen Publishing*, the failing company defense should be considered as of the date of that transaction or arrangement. But that would not appear to be

the case here. I would not conclude that the loan arrangement between Certified and U.S. Steel constituted the equivalent or an acquisition or was such as to lead inevitably thereto. The fact that such January 1963 transaction may have violated Section 1 of the Sherman Act, Section 5 of the FTC Act, or Section 3 of the Clayton Act would not, in my view, give rise to the application of Section 7 of the Clayton Act as of that date.

I would also like to note that I concur in the Commission opinion of December 2, 1968, with respect to the scope of the failing company defense.

DISSENTING OPINION BY COMMISSIONER DENNISON

Being unable to subscribe to the majority's view that there existed a vertical "tying" arrangement which had taken an unlawful cast at the time of the loan agreement in January 1963, nor with the view that the "failing company" defense is not an absolute defense, I am compelled to dissent. I do not find the loan guarantee agreement of such a nature as to create an actionable restraint of trade. Furthermore, even if an unlawful restraint did exist, I do not find any causal relation between such restraints and Certified's failing condition in April 1964.

As to the first question, the law is clear that not every conceivable "tie-in" arrangement falls within the rigid *per se* category of illegality. The very same Court of Appeals which reviewed this proceeding has construed the Supreme Court's *Fortner* decision as requiring an affirmative showing that the seller possessed "economic advantage" or "power" in the market of the tying product before the *per se* doctrine attaches. *Fortner Enterprises, Inc. v. United States Steel Corp.*, 452 F.2d 1095, 1101 (6th Cir. 1971). Without this qualification, perfectly harmless, or even beneficial arrangements reasonably sought by the customer, would be needlessly barred. No attempt has been made by complaint counsel to show that U.S. Steel had financial or other advantages over other lenders in the New York area that gave it any such market power. The only thing unique about U.S. Steel in this regard was its willingness to guarantee the bank loan to Certified. But such willingness in and of itself does not establish market power or advantage in the lending market. See *Fortner Enterprises, Inc. v. United States Steel*, 394 U.S. 495, 505 (1969). The fact that Certified was willing to buy cement from respondent at a price that was sometimes in excess of a competitor's price does not demonstrate leverage in the credit market since the price of the total package (*i.e.* the price of credit included, considering the risks involved) may have

been a competitive price to Certified, not a monopolistic price. See "Credit as a Tying Product," 69 Col. L. Rev. 1435, 1443 (1969).

Nor do I see any justification for concluding that the financial arrangement here was an actionable restraint of trade under a "rule of reason" or other test applicable to requirement contracts. As the Commission noted in its original decision in this matter, the January 1963 loan enabled Certified to retain its independent status rather than become permanently integrated into a cement company, which appeared the likely alternative at that point in time. It is true that during the ensuing calendar year Certified in return purchased somewhat more than half its cement requirements from U.S. Steel thus foreclosing some part of the market. But this does not amount to the type of total and permanent foreclosure that results from an acquisition. It is not enough in my view to point to the fact that the Commission found (and the Court affirmed) that the later vertical acquisition was actionable under Section 7 of the Clayton Act. As the Court of Appeals itself noted, the standard for adjudging the legality of requirements contracts is more tolerant with respect to requirements contracts than vertical integration by acquisition. *U.S. Steel Corp. v. Federal Trade Commission*, 426 F. 2d 592, 601 (6th Cir. 1970). See also *Brown Shoe Co. v. United States*, 370 U.S. 294, 330-332 and n. 55 (1961) ("ownership integration is a more permanent and irreversible tie than is contract integration"). If the test for measuring the market for foreclosure effect announced in *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961), is used (in this case, the area in which competing cement sellers could practically turn for customers), the amount of foreclosure occasioned during 1963 does not on its face appear substantial. Certified's purchases of cement from U.S. Steel's division constituted about 1.2 percent of total shipments by cement plants that served the New York area. In view of the fact that the loan arrangement had the salutary possibility of keeping Certified intact as an independent non-integrated competitor in the highly concentrated ready-mix market (a market much more concentrated than the cement market and one which was dominated by one company, Colonial Sand and Stone, possessing 50 percent of sales), I think the financial arrangement should not be condemned on some mechanical test of "foreclosure" to cement suppliers.

Furthermore, I agree with Chairman Kirkpatrick that the vertical arrangement in January 1963 did not amount to, or lead ineluctably to, a more permanent form of integration attackable under Section 7. Nor do I find any persuasive evidence that the arrangement caused

Certified's "failing condition" in April 1964 or contributed to the fact that there were no other available purchasers at that time. It seems clear to me that Certified failed not because of the loan arrangement but in spite of it.

Regarding the legal relevance of the failing company doctrine, I would associate myself with former Commissioner Elman's dissent in this matter [74 F.T.C. 1305].

OPINION OF THE COMMISSION

By DIXON, *Commissioner*:

An order to cease and desist was issued by the Commission in this matter on December 2, 1968 [74 F.T.C. 1270]. Thereafter the order was reviewed by the United States Court of Appeals for the Sixth Circuit, and in an opinion issued May 6, 1970 [426 F. 2d 592, 6th Cir. 1970], the court remanded the case to the Commission for further findings of fact and further proceedings in light of the Supreme Court's holding in *Citizen Publishing Company v. United States*, 394 U.S. 131 (1969), as well as the views of the Court of Appeals set forth in its opinion.

The complaint herein, filed January 22, 1965, charged that United States Steel Corporation, a large producer of portland cement through its Universal Atlas Cement Division, had violated Section 7 of the Clayton Act by acquiring Certified Industries, Inc., one of the four largest ready-mixed concrete producers in the New York City metropolitan area.

On May 20, 1966 [71 F.T.C. 399], Hearing Examiner John Lewis filed an initial decision dismissing the complaint. The primary basis for this dismissal was that the acquired company's failing condition at the time of its acquisition immunized the transaction from Section 7 challenge. The examiner also held, in the alternative, that the acquisition did not have the tendency to substantially lessen competition or to create a monopoly in any line of commerce in any section of the country. On appeal, the Commission reversed these rulings by the examiner, holding (1) that the challenged acquisition was anticompetitive within the test of Section 7, and (2) that the failing condition of the acquired company did not exempt the acquisition. In its final order, entered December 2, 1968, the Commission directed U.S. Steel to divest itself of the acquired corporation and also enjoined it for a period of ten years from acquiring any ready-mix company without prior approval of the Commission.

Thereafter U.S. Steel filed a petition with the Court of Appeals for the Sixth Circuit to review and set aside this order. The court ruled

that the Commission's findings of fact with respect to the effect of the acquisition on competition we supported by substantial evidence and upheld that portion of the Commission's decision. The court did not resolve the issue raised by the Commission's ruling with respect to the scope of the failing company defense. It did, however, specifically reject respondent's contention that its acquisition of Certified was completely immunized by the "failing company doctrine." It held, in this connection, that respondent had failed to prove the "ultimate facts material to the rule of *International Shoe Co. v. FTC*, 280 U.S. 291 (1930) * * *" as clarified by more recent Supreme Court decisions culminating in *Citizen Publishing Company v. United States*, *supra*. The Court of Appeals pointed out that the *Citizen Publishing Company* decision had held that a company claiming the failing company defense must show not only (1) "that the financial condition and resources of the [acquired] company are so dire that 'it faced the grave probability of a business failure'" and (2) that there was "no other prospective purchaser" but also that the prospects of the acquired company emerging from reorganization as a competitive unit were "dim or non-existent." The court further observed that U.S. Steel had failed to sustain its burden with respect to the third requirement. Since *Citizen Publishing* had been decided subsequent to the Commission's disposition of the instant case, however, the court considered it appropriate "to remand this case to give U.S. Steel an opportunity to bring forth evidence that the prospects of Certified passing through bankruptcy or similar proceedings were 'dim or non-existent.'"

The court also expressed the view that upon remand "the Commission should reassess the standards by which the actions and defenses of United States Steel Company are to be judged." In this connection, the court referred to a "notes purchase agreement" between U.S. Steel and Bankers Trust Company which enabled Certified to obtain a long-term loan commitment from the latter. This agreement was entered into in January 1963, approximately 15 months before the acquisition was consummated. Relying upon the Supreme Court's decision in *Citizen Publishing Company v. United States*, *supra*, the court held that if "vertical ties" in the form of increased cement purchases by Certified from respondent had taken an unlawful cast as of the time of the loan agreement then the failing character of Certified must be shown to have existed at that time.

After remand from the court, the Commission, by order of September 25, 1970 [77 F.T.C. 1646], reopened the proceeding and remanded it to Hearing Examiner Lewis to begin hearings, in accordance with the opinion of the Court of Appeals, for the purpose of receiving evidence with respect to the issues of whether:

(a) as of January 1963 the financial condition and resources of Certified Industries were so dire that it faced the grave probability of a business failure.

(b) between January 1963 and April 1964 no prospective purchaser other than United States Steel Corporation was interested in acquiring Certified.

(c) "Certified's opportunity for some form of continued competitive vitality through bankruptcy or similar proceedings" was "dim or non-existent" either in January 1963 or in April 1964, and

(d) the U.S. Steel-Certified vertical ties did in fact take an unlawful cast as early as January 1963.

In an initial decision filed January 14, 1972, Mr. Lewis made findings of fact with respect to only one of the above issues. He found on the basis of testimony and documentary evidence adduced by respondent, including the testimony of two experts in the field of bankruptcy and reorganization, that the prospects of Certified's surviving through bankruptcy or similar proceedings in April 1964 were dim or non-existent. The examiner did not decide the question whether "the U.S. Steel-Certified vertical ties did in fact take an unlawful cast as early as January 1963," apparently because he did not believe the court's remand instructions on this point were correct as a matter of law. He found instead that "the record fails to establish that, prior to the acquisition, the U.S. Steel-Certified arrangement took on an unlawful cast of such a nature as to justify advancing the date for determining compliance with the requirements of the failing company defense" (emphasis added). Having so found, he deemed it unnecessary to make any findings or conclusions with respect to the two remaining issues, (a) and (b) above.

In their appeal from the examiner's decision counsel supporting the complaint do not contest the conclusion that Certified's opportunity for some form of continued competitive vitality through bankruptcy or similar proceedings were dim or non-existent in April 1964. They concede that Certified was in a failing condition when it was acquired. Their principal argument concerns the examiner's failure to find that the relationship between U.S. Steel and Certified was unlawful in January 1963 when U.S. Steel arranged the Bankers Trust loan for Certified.

The following facts necessary to an understanding of this aspect of the case and of the court's ruling with respect thereto are not in dispute: By the end of 1962 Certified was in a very tight financial position. It was still earning a profit but because of its growth and the

high volume it was generating, it had insufficient working capital for its needs. In December 1962 Certified's management informed representatives of U.S. Steel that Certified would have difficulty in paying a \$150,000 note which was due to mature on February 15, 1963. As a consequence, U.S. Steel arranged a meeting between Certified and Bankers Trust Company of New York, where U.S. Steel was a depositor. After investigating Certified representatives of the Bankers Trust Company reached the conclusion that the ready-mix company had young, aggressive management with good ideas as to how to run the company properly but that it was in need of approximately \$3 million on a long term basis to refinance existing debt, provide for new equipment and furnish much needed working capital. The Bankers Trust representatives were "somewhat enthusiastic" about the possibilities and prospects in the Certified situation, but in early January 1963 they advised officials of U.S. Steel that the necessary term loan would not be "bankable" without some sort of credit support or guarantee by U.S. Steel. Realizing that the furnishing of such a guarantee would afford it the opportunity to increase sales of cement to Certified, U.S. Steel entered into an agreement with the bank under which it agreed to purchase notes given to the bank by Certified, up to a maximum of \$3.5 million in the event such notes were not paid when due. The bank then loaned Certified \$3.3 million for a period of ten years, at a rate of interest of $\frac{7}{8}$ percent above the bank's prime commercial loan rate. After the loan had been approved U.S. Steel submitted to Certified a proposed supply agreement under which Certified would agree to buy not less than 65 percent of its cement requirements from respondent for a period of ten years. This agreement was not executed, but Certified increased its cement purchases from respondent from approximately 15 percent in 1962 to 53.6 percent in calendar year 1963. By November of 1963 Certified was purchasing cement from U.S. Steel at a rate that would amount to 700,000 barrels a year, equaling slightly over 65 percent of its requirements.

When this matter was first before the Commission argument was made by complaint counsel that the above-mentioned loan was instrumental in inducing Certified to reject purchase offers from cement manufacturers that were attempting to acquire it. Hence, they contended that since respondent's financial involvement with Certified prevented the latter from being acquired, the operative date for determining whether Certified was in a failing condition should be January 1963. In rejecting this argument the Commission held that there was no evidence that Certified was not making a good faith effort to rehabilitate itself and that it was preferable for it to secure

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financing to retain its independence than to be acquired by a cement company. Contrary to the suggestion made by respondent's counsel during oral argument on appeal from the initial decision on remand, the Commission did not rule on, or even consider, the question of whether Certified's increased purchases of cement from respondent were illegally tied to respondent's guarantee of the January 1963 Bankers Trust loan or whether there was an exclusive dealing arrangement in violation of Section 3 of the Clayton Act.¹

The question of whether there were illegal vertical ties between U.S. Steel and Certified in the form of increased cement purchases by Certified was placed in issue by the court's remand to the Commission and by the Commission's instructions on remand to the Commission. As stated above, the examiner failed to make a finding on this issue, apparently having been persuaded by respondent that the court had misread the *Citizen Publishing* case. Respondent had argued in this connection "Clearly the *Citizen* decision in no way supports the conclusion that any and all 'vertical ties [which] may have taken an unlawful cast' at some time prior to the challenged acquisition require that 'the failing character of [the acquired company] must be shown to have existed at that time.'"²

This argument, however, misstates the holding of the Court of Appeals. The court did not indicate that it was interested in "any and all" unlawful vertical ties between respondent and Certified. It specifically stated: "Apparently, U.S. Steel and Certified participated in [the January 1963 'notes purchase agreement'] with the tacit understanding and expectation that Certified would receive a large loan at exceptionally favorable interest rates in return for which Certified would purchase a very substantial portion of its future cement supplies from U.S. Steel. The effect of such an agreement may very well have been the use of credit, as a lever, to unreasonably restrain or induce Certified from purchasing its cement needs for a sufficient period of time on the open market. Such an arrangement, and its accompany-

¹ Complaint counsel argued before the hearing examiner in the first proceeding "[g]iven the substantiality of this foreclosure of [the increased cement purchases by Certified from respondent subsequent to the Bankers Trust loan] and the accompanying trend in the New York market, there is little question that if challenged separately, U.S. Steel's 'deal with Certified' . . . could have been held violative of Section 3 of the Clayton Act." The hearing examiner refused to consider this argument, holding "[w]hether the U.S. Steel-guaranteed loan and the resultant increase in Certified's purchases of U.A.C. cement are violative of Section 3 of the Clayton Act is something the examiner need not determine, since the complaint does not charge such a violation nor was the matter litigated." This ruling was not challenged on appeal to the Commission.

² As an example of a pre-acquisition unlawful vertical tie which should not logically have any bearing on the time for determining whether a company is failing, respondent referred to a situation where a dealer acquiesces in a manufacturer's network of territorial resale limitations isolating its dealer organization from intra-brand competition.

ing effects, may well be unlawful under Section 1 of the Sherman Act. * * * To the extent that unreasonable foreclosure of Certified's cement demands occurred as a result of the financial arrangement in January, 1963, we believe that the failing company defense must be measured from the inception of these unreasonable vertical arrangements, not from the point of their final consummation." This position seems to us to be consistent with the rationale of *Citizen Publishing* in which the earlier date (of an unlawful agreement) was applied with respect to a merger which "had the effect of continuing in a more permanent form a substantial lessening of competition. * * *" In this case the court is interested in ascertaining whether there was an unlawful agreement between respondent and Certified having substantially the same anticompetitive effect as the subsequent acquisition.

We have no doubt from our review of the record that respondent's increased sales of cement to Certified were tied to respondent's guarantee of the Bankers Trust loan. First of all, we find that the arrangement here, like that in *Fortner Enterprises, Inc. v. U.S. Steel Corp.*, 394 U.S. 495 (1969), was not the mere sale of merchandise on credit, but instead involved two separate products. Here, as in *Fortner*, Certified contracted "to obtain a large sum of money over and above that needed to pay the seller for the physical products purchased." The guarantee of the loan was not inseparable from the sale of cement to Certified. Secondly, the record establishes that Certified did not wish to be acquired by another company at that time and that it had reason to believe that it could preserve its existence as an independent entity only if it could obtain long term financing in the amount of at least \$3 million. It is also clear from the record that prior to receiving the Bankers Trust loan, Certified had exhausted its efforts to obtain the type of long term financing it desired and knew that it had no one to turn to except respondent. The record further shows that even under the most optimistic view Certified could not have expected to extricate itself from its financial problems for at least three to five years. It also establishes that Certified's financial condition continued to deteriorate even after it received the Bankers Trust loan and that it could look only to U.S. Steel for further assistance. Respondent, on the other hand, assisted Certified in obtaining the loan with the purpose of obtaining a substantial increase in its share of Certified's cement purchases. In 1962 respondent supplied only about 15 percent of Certified's cement requirements. It requested that its share be increased to at least 65 percent of Certified's requirements and, by the end of 1963, Certified was purchasing respondent's cement at that rate. These facts are by themselves persuasive evidence that Certified had obligated itself to

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purchase most of its cement requirements from respondent in return for the latter's assistance in obtaining financing.

There is, moreover, other evidence of record manifesting the existence of such a relationship between respondent's guarantee of Certified's loans and the increased purchases of respondent's cement by Certified. During 1963 Certified bought most of its cement requirements from respondent even though respondent was selling at the going market price, less a cash discount, and other cement companies were offering allowances over and above the cash discount.³ One of the most attractive prices was offered by Triangle Cement Company in the form of a volume discount and the record discloses that Certified asked respondent to meet this price and that respondent refused to do so.⁴ Nevertheless Certified continued to purchase most of its requirements from respondent at the higher price.

We believe that these facts not only evidence the existence of a tying arrangement but also demonstrate that the restraint imposed on Certified was even more onerous than the restrictions in *International Salt Co. v. United States*, 332 U.S. 392 and *Northern Pacific R. Co. v. United States*, 356 U.S. 1, which gave the vendors in those matters a priority on the business of their vendees only when their prices were no higher than the prices of their competitors.⁵

³ Mr. E. L. Litman, vice president and general manager of Certified Industries, testified as follows with respect to cement prices:

Q. You speak of allowances. Could you go into this in a little more detail and explain that situation?

A. Cement companies, some cement companies—I don't know which exactly—were offering allowances over and above the cash discount for the purchase of their product.

Q. And this would have brought their price down lower than that that Universal Atlas would supply cement to you for?

A. Yes, Sir. (Tr. 849)

⁴ Mr. Litman testified as follows with respect to a conversation with one of respondent's officials, Mr. Raggio, in which he requested respondent to meet Triangle's price:

Q. What was your main purpose in discussing this issue with Mr. Raggio? Were you hoping he would match this discount?

A. I think so.

* * * * *

Q. What did Mr. Raggio tell you about meeting this discount?

A. I don't recall exactly what he told me, but I believe he would have taken it under consideration.

Q. Well, did he? Did you get a reduction in price?

A. No, Sir.

Q. Did you make any change in your buying policy after Mr. Raggio refused you this discount?

A. No, Sir. At least not as I recall and not related to this conversation. (Tr. 856-857)

⁵ This type of evidence would have satisfied even the dissenting justice in *Northern Pacific R. Co. v. United States*, *supra*, at 16-17: "I do not deny that there may be instances where economic coercion by a vendor may be inferred, without any direct showing of market dominance, from the mere existence of tying arrangements themselves, as where the vendee is apt to suffer economic detriment from a tying clause because precluded from purchasing a tied product at better terms or of a better quality elsewhere."

We further find that the foregoing vertical arrangement between respondent and Certified, foreclosing as it did a substantial share of the New York market for portland cement, had an adverse effect on competition in this market comparable to that which we have already found resulted from the eventual acquisition of Certified. It is unnecessary, however, to again analyze the competitive effects of the foreclosure. Since we find that respondent compelled Certified to buy respondent's cement in order to obtain respondent's financial assistance and that the arrangement was therefore in the nature of a tie-in, it is enough to find that a not insubstantial portion of commerce was affected. *Atlantic Refining Co. v. Federal Trade Commission*, 381 U.S. 357 (1965), *Federal Trade Commission v. Brown Shoe Company, Inc.*, 384 U.S. 316 (1966). The vertical foreclosure resulting from the arrangement amounted to \$1,675,000 in 1963 alone which far exceeds the amounts deemed "not insubstantial" by the Court in *International Salt and Fortner*.

As stated above, the hearing examiner did not make any finding on issue (a) of the remand order, *i.e.*, whether as of January 1963 the financial condition and resources of Certified Industries were so dire that it faced the grave probability of a business failure.⁶ Respondent does not claim, however, that Certified was in a failing condition as of this earlier date. It made no attempt to introduce evidence on this issue nor did it take exception to the examiner's ruling that it was not required to do so unless it were established that the January 1963 arrangement was illegal. Respondent specifically states in its proposed findings that "Respondent does not claim that Certified was a failing company as of January 1963 (R. 1282, 1643). Accordingly, the evidence it offered on remand was addressed solely to issue (c) and only to Certified's opportunity for survival through bankruptcy or similar proceedings from the date of its acquisition on April 30, 1964. * * *" (Findings of Fact and Conclusions of Law on Remand Proposed by Respondent, page 3) Accordingly, we find that the record does not establish that as of January 1963 the financial

⁶ The examiner reasoned that he was required to receive evidence on Certified's financial condition in January 1963 and to make findings with respect thereto only if he first found that the arrangement between respondent and Certified had taken an unlawful cast as early as January 1963. This reasoning, however, leaves much to be desired. It should have occurred to him that even if he had found no illegality in the January 1963 arrangement, this finding could have been set aside by the Commission on review or appeal of the initial decision. Certainly, it should be unnecessary to include in a remand order a specific reminder to the examiner that he is merely rendering an initial decision, not a final one.

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condition and resources of Certified Industries were so dire that it faced the grave probability of a business failure.⁷

To the extent indicated herein, the appeal of complaint counsel is granted. The initial decision following remand will be modified to conform with this opinion and, as so modified, will be adopted as the decision of the Commission. The Commission's findings and conclusions will be filed with the Court of Appeals for the Sixth Circuit.

ORDER ON REMAND

This matter having been heard by the Commission upon the appeal of counsel supporting the complaint from the hearing examiner's initial decision following the remand of the case by the United States Court of Appeals for the Sixth Circuit; and

The Commission having determined for the reasons set forth in the accompanying opinion that the appeal of counsel supporting the complaint should be granted in part and that the initial decision following remand should be modified to conform with the views set forth in the opinion:

It is ordered, That the initial decision following remand be modified by striking therefrom findings 16 through 26, beginning on page 17 and ending on page 22, and conclusions 1 through 3 on page 23, and substituting therefor the findings and conclusions contained in the accompanying opinion.

It is further ordered, That the findings and conclusions contained in the initial decision following remand, as so modified, be, and they hereby are, adopted as the decision of the Commission.

It is further ordered, That the General Counsel be, and he hereby is, directed to file said findings and conclusions with the United States Court of Appeals for the Sixth Circuit.

Commissioner Kirkpatrick filed a concurring opinion. Commissioner Dennison dissented and filed an opinion. Commissioner MacIntyre did not participate.

⁷ The record shows that Certified had earned a profit in each year of its existence. In the fiscal year ending June 30, 1972, and for the six-month period ending December 31, 1962, Certified's financial condition was as follows:

	Total assets	Net sales	Net income	Retained earnings
June 30, 1972.....	\$9,322,225	\$9,753,178	\$321,910	\$717,865
6-month period ending December 31, 1962...	9,204,364	7,140,043	57,521	1,775,386

¹ (CX 23: CX 26 A-M)

A thorough investigation of Certified was made by representatives of Bankers Trust Company in December 1962 and January 1963. Although "pressures were mounting," Certified's situation "was not considered critical" by these financial experts at that time. (CX 52(a)) The firm still had retained earnings, a substantial net worth, expanding sales and the expectation of a profitable year.

Complaint

IN THE MATTER OF

GREAT WESTERN UNITED CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND THE TRUTH IN LENDING ACTS*Docket C-2306. Complaint, Oct. 20, 1972—Decision, Oct. 20, 1972.*

Consent order requiring a developer of real estate projects based in Denver, Colorado, and its subsidiaries, among other things to cease misrepresenting the purposes of and the benefits to be derived from its real estate training course; misrepresenting the conditions of and proposed additions to certain real estate projects presently under development; failing to maintain adequate records upon which certain representations are based; and inaccurately disclosing information required by Regulation Z of the Truth in Lending Act.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and the Truth in Lending Act and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Great Western United Corporation, a corporation, and its subsidiaries, Great Western Cities, Inc., California City Realty Company, California City Development Company, Great Western Cities Realty, Colorado City Realty Company, Colorado City Development Company and GWU Properties, Inc., corporations, hereinafter referred to as respondents, have violated the provisions of said Acts, 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 that respect as follows:

COUNT I

Charging a violation of Section 5 of the aforesaid Federal Trade Commission Act, the Commission alleges:

PARAGRAPH 1. Respondent Great Western United Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business located at the Equitable Building, Denver, Colorado. Respondent Great Western United Corporation from its aforementioned principal place of business is responsible for all the acts and practices of the aforementioned subsidiary corporations hereinbefore referred to as respondents in this complaint.

Respondents Great Western Cities, Inc., California City Realty Company, California City Development Company, Colorado City