

FEDERAL TRADE COMMISSION DECISIONS

Findings, Opinions and Orders IN THE MATTER OF

BEATRICE FOODS CO.

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

Docket 8864. Complaint, Oct. 1, 1971—Decision, July 1, 1975

Order requiring a multinational, multiproduct company, located in Chicago, Ill., among other things to divest itself of a competing manufacturer of paint rollers which it acquired in 1970, and to not make any acquisitions for 10 years, in the paint brush-and-roller industry, without prior Federal Trade Commission approval. Further, the order dismissed, for failure of proof, allegations in the complaint that the acquisition of Tip Top Brush Co., through which the respondent entered the industry, violated Sec. 7 of the Clayton Act.

Appearances

For the Commission: *Murray L. Lyon, William M. Sexton, and Randolph B. Sim.*

For the Respondent: *Edward L. Foote, John W. Stack, and Terry M. Grimm, Winston & Strawn, Wash., D.C., John P. Fox, Jr., General Counsel, Beatrice Foods Co.*

COMPLAINT

The Federal Trade Commission, having reason to believe that respondent Beatrice Foods Co., a corporation, has violated and is now violating the provisions of Section 7 of the Clayton Act, as amended (15 U.S.C. §18) through the acquisition of the stock and assets of various corporations, as hereinafter more particularly designated and described, and it appearing to the Commission that a proceeding by it with reference thereto would be in the public interest, hereby issues its complaint pursuant to the provisions of Section 11 of the aforesaid Clayton Act (15 U.S.C. §21) stating its charges as follows:

I. DEFINITIONS

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

(a) *Manually powered paint applicators*: Paint and varnish brushes; paint rollers including pans, covers, handles, and other accessories sold separately, or as part of a paint roller kit; and miscellaneous paint applicators other than spray equipment and aerosol cans.

(b) *Manually powered paint application industry*: Persons, partnerships, joint ventures, and corporations engaging in the manufacture and sale of manually powered paint applicators, as defined in (a), immediately above.

(c) *Paint rollers*: As used separately, includes, in addition to the complete paint roller, pans, covers, handles, and other accessories sold separately, or as part of a paint roller kit.

II. RESPONDENT

2. Respondent, Beatrice Foods Co., sometimes hereinafter referred to as "Beatrice," is, and has been, at all times relevant herein, a corporation organized, existing, and doing business under the laws of the State of Delaware, with its present executive office and principal place of business located at 120 S. LaSalle St., Chicago, Ill.

3. Beatrice is today a multinational, multiproduct company with its primary emphasis on foods and related services. Following extensive research by management and market specialists, Beatrice began diversifying six years ago into a limited number of non-food fields appraised as having exceptional potential for growth of sales and profits. These fields, grouped together as the Chemical & Manufactured Products Division, represented approximately 20 percent of Beatrice's dollar sales in fiscal year ended Feb. 28, 1970. Many of the products in the Chemical & Manufactured Products Division are similar in that these products are sold by Beatrice to common customers or are distributed to similar outlets, such as variety, hardware, grocery and mass merchandise stores. One field within this division is paint brushes and paint rollers. Many retailers and distributors of paint brushes and paint rollers are purchasers or potential purchasers of a variety of other products manufactured and distributed by Beatrice.

Beatrice, in the sale of its products, relies heavily on advertising, especially advertising designed to promote consumer brand identification. For fiscal year ended Feb. 29, 1968, Beatrice spent approximately \$27 million for advertising of its products, utilizing all major media and means of reaching the consumer public. Respondent has continued to expand its advertising expenditure since that time.

In conjunction with its advertising, Beatrice has been successful in promoting its household products through new packages, display materials, coupons, and special promotions. Major promotional programs have centered on products within the Chemical & Manufactured Products Division, including Melnor sprinklers, Stiffel lamps, and Airstream trailers.

4. In the course and conduct of its business, Beatrice is, and has been, at all times relevant herein, engaged in selling its products to

purchasers located in various States of the United States, and caused such products, when sold, to be transported from its facilities in various States of the United States to such purchasers located in various States of the United States. In so doing, Beatrice is engaged in "commerce," as "commerce" is defined in the Clayton Act, as amended, and has been continuously so engaged at all times relevant herein.

5. Beatrice's development has been characterized through the years by continuous growth. During the past decade, sales increased by \$1.1 billion, or 256 percent. For fiscal year ended Feb. 28, 1970, net sales were approximately \$1,576,000,000, and total assets approximated \$504 million. Acquisitions accounted for a significant portion of this growth.

III. ACQUIRED COMPANIES

Tip Top Brush Co., Inc. and Affiliated Companies

6. Prior to and until July 31, 1969, Tip Top Brush Co., Inc. and its affiliated companies Banner Brush Co., Inc.; Best-Set Brush Co., Inc.; United Brush Manufacturing Co., Inc.; First Synthetic Fibre & Brush Co., Inc.; West Side Leasing Corp.; Excello Roller Co., Inc.; and Star Brush Manufacturing Co., Inc., sometimes hereinafter referred to collectively as "Tip Top," were corporations organized, existing, and doing business under the laws of the State of New Jersey, with their offices and principal places of business located at 151 W. Side Ave., Jersey City, N.J., except with respect to Star Brush Manufacturing Co., Inc., which was organized, existing, and doing business under the laws of the State of New York, with its office and principal place of business located at 690 Harrison Ave., Boston, Mass.

7. All of the issued and outstanding capital stock of each of the corporations listed in Paragraph 6, above, were owned by Miklos Felkay and Madelaine Felkay. These corporations were closely held and operated so as to mutually benefit each other.

8. Tip Top was engaged in the manufacture, sale, and distribution of manually powered paint applicators. For fiscal year ended Sept. 30, 1968, the year preceding its acquisition by Beatrice, it had net sales of approximately \$5,425,000, and it had total assets approximating \$2,641,000. By fiscal year ended Sept. 30, 1969, these sales had increased to approximately \$7,126,000.

9. In the course and conduct of its business prior to July 31, 1969, as aforesaid, Tip Top sold its products to purchasers located in various States of the United States and caused such products, when sold, to be transported from its facilities in various States of the United States to such purchasers located in various other States of the United States. In

so doing, Tip Top was engaged in "commerce," as "commerce" is defined in the Clayton Act, as amended.

10. Pursuant to an agreement adopted June 25, 1969, Beatrice, on July 31, 1969, acquired all of the issued and outstanding capital stock of Tip Top in exchange for up to 85,000 shares of Beatrice's common stock.

Essex Graham Company

11. Prior to and until July 1, 1970, Essex Graham Company, sometimes hereinafter referred to as "Essex," was a corporation organized, existing, and doing business under the laws of the State of Illinois, with its office and principal place of business located at 1700 W. Pershing Rd., Chicago, Ill.

12. Essex was engaged in the manufacture, sale, and distribution of manually powered paint applicators. In 1969, the year preceding its acquisition by Beatrice, Essex had net sales of approximately \$2,216,000 and its total assets approximated \$2,322,000.

13. In the course and conduct of its business prior to July 1, 1970, as aforesaid, Essex sold its products to purchasers located in various States of the United States and caused such products, when sold, to be transported from its facilities in Illinois to such purchasers located in various other States of the United States. In so doing, Essex was engaged in "commerce," as "commerce" is defined in the Clayton Act, as amended.

14. Pursuant to an agreement and plan of reorganization adopted July 1, 1970, Beatrice, on July 1, 1970, acquired substantially all of the assets of Essex in exchange for shares of Beatrice's common stock.

IV. NATURE OF TRADE AND COMMERCE

15. Manually powered paint applicators are a separate and distinct product which is distinguished from all other paint applicators and all other products in a number of ways, including, but not restricted to, method of use, cost of production, marketing, and consumer acceptance.

16. In the United States prior to World War II, paint was principally applied by brush. During World War II the paint roller was developed, offering a new method by which to apply paint. Initially paint rollers were produced principally by firms not engaged in the manufacture of paint brushes. During the past decade, however, substantial market pressure has resulted in a significant number of companies originally engaged in the manufacture of either paint brushes or paint rollers entering into the manufacture and sale of both. Currently, of the top twelve concerns in the manually powered paint application industry, ten manufacture and sell both paint brushes and

paint rollers. Of the remaining companies within this industry, most if not all, manufacture and/or distribute both paint brushes and paint rollers.

17. Approximately three years ago miscellaneous flat paint applicators other than brushes and rollers were introduced. In 1969, such miscellaneous flat paint applicators constituted an insignificant portion of the total sales of manually powered paint applicators.

18. The manufacture and sale of manually powered paint applicators is a significant industry in the United States. In 1969, value of shipments was approximately \$99.3 million, up from 1967 value of shipments of \$88.6 million. There has been a significant increase in the level of concentration in the manually powered paint application industry. In 1967, the top four and top eight manufacturers had approximately 34.6 percent and 51.3 percent of domestic plant shipments, respectively. By 1969, these shares had increased to approximately 40.4 percent and 58.6 percent, respectively. By attributing to the acquiring company the 1969 plant shipments of those companies acquired in 1970, the market shares of the top four and top eight in 1969 increase to 46.7 percent and 66.1 percent, respectively.

19. The aforesaid increase in concentration has been paralleled by a number of independent manually powered paint applicator concerns leaving the industry, either by virtue of merger or by voluntarily ceasing operations. Additionally, there has not been a significant new entrant into this industry within the past two decades.

20. In 1969, Tip Top was the third largest manufacturer of manually powered paint applicators, accounting for approximately 6.9 percent of plant shipments in the United States. In that year, Essex had approximately 2.3 percent of domestic plant shipments. The combined production of these acquired concerns would have made Beatrice the third largest domestic manufacturer of manually powered paint applicators in 1969.

21. Paint rollers constitute a significant segment of manually powered paint applicator sales, representing approximately \$26.5 million in 1967, and increasing to approximately \$31.2 million in 1969. Concentration in this segment is high. In 1969, the top four and top eight manufacturers had in excess of 59.2 percent and 76.7 percent of domestic plant shipments of paint rollers, respectively.

22. In 1969, Tip Top accounted for approximately 3.8 percent of paint roller plant shipments in the United States. In that year, Essex represented approximately 7.2 percent of domestic plant shipments. On the basis of the combined production of these acquired concerns, as aforesaid, Beatrice would become the third largest domestic manufacturer of paint rollers in 1969.

23. The largest segment of manually powered paint applicator sales is in paint and varnish brushes, representing approximately \$62.1 million in 1967, and increasing to approximately \$68.1 million in 1969. Concentration in this segment is significant. In 1969, the top four and top eight manufacturers accounted for approximately 40.1 percent and 61.7 percent of domestic plant shipments, respectively. In that year, Tip Top was the second largest manufacturer of paint and varnish brushes, with 8.3 percent of domestic plant shipments.

24. Manually powered paint applicators of all types are distributed to hardware, variety, paint and wallpaper, and mass merchandise stores, among others. Recently, these products have been sold in grocery stores, with this latter market expected to be of major significance in the future.

V. EFFECTS OF THE ACQUISITIONS

25. The effect, cumulatively and individually, of the aforesaid acquisition by Beatrice of the stock and assets of Tip Top and Essex may be substantially to lessen competition or to tend to create a monopoly in the manufacture and sale of manually powered paint applicators in the United States as a whole in the following ways, among others:

(a) Potential competition between Beatrice and each of the aforesaid corporations acquired by it and between Beatrice and all others has been eliminated;

(b) Actual competition between and among the aforesaid corporations acquired by Beatrice has been eliminated;

(c) Producers of manually powered paint applicators may be unable to compete, or will be at a competitive disadvantage in competing, with respondent due to any one, any combination of, or all of the following factors:

(1) Respondent's financial and economic strength;

(2) Respondent's advertising, merchandising, and promotional ability and experience;

(3) Respondent's ability to command acceptance of its products and of valuable store shelf space;

(4) Respondent's ability to offer preferential prices on manually powered paint applicators;

(5) Respondent's ability to offer preferential prices on other products it sells as a condition, implied or explicit, to the purchase of respondent's manually powered paint applicators;

(6) Respondent's ability to combine product distribution;

(d) The leading position of Beatrice has been enhanced and may be further enhanced;

(e) An industry trend toward concentration has been accelerated and further acquisitions may be induced;

(f) The degree of concentration has been increased and may be further increased; and

(g) The entry of new competitive entities has been and may continue to be made more difficult.

26. The effect, cumulatively and individually, of the aforesaid acquisition by Beatrice of the stock and assets of Tip Top and Essex may be substantially to lessen competition or to tend to create a monopoly in the manufacture and sale of paint rollers in the United States as a whole in the following ways, among others:

(a) Potential competition between Beatrice and each of the aforesaid corporations acquired by it and between Beatrice and all others has been eliminated;

(b) Actual competition between and among the aforesaid corporations acquired by Beatrice has been eliminated;

(c) Producers of paint rollers may be unable to compete, or will be at a competitive disadvantage in competing, with respondent due to any one, any combination of, or all of the following factors:

(1) Respondent's financial and economic strength;

(2) Respondent's advertising, merchandising, and promotional ability and experience;

(3) Respondent's ability to command acceptance of its products and of valuable store shelf space;

(4) Respondent's ability to offer preferential prices on paint rollers;

(5) Respondent's ability to offer preferential prices on other products it sells as a condition, implied or explicit, to the purchase of respondent's paint rollers;

(6) Respondent's ability to combine product distribution;

(d) The leading position of Beatrice has been enhanced and may be further enhanced;

(e) An industry trend toward concentration has been accelerated and further acquisitions may be induced;

(f) The degree of concentration has been increased and may be further increased; and

(g) The entry of new competitive entities has been and may continue to be made more difficult.

27. The effect, cumulatively and individually, of the aforesaid acquisition by Beatrice of the stock and assets of Tip Top and Essex may be substantially to lessen competition or to tend to create a monopoly in the manufacture and sale of paint and varnish brushes in the United States as a whole in the following ways, among others:

(a) Potential competition between Beatrice and each of the aforesaid

corporations acquired by it and between Beatrice and all others has been eliminated;

(b) Potential competition between and among the aforesaid corporations acquired by Beatrice has been eliminated;

(c) Producers of paint and varnish brushes may be unable to compete, or will be at a competitive disadvantage in competing, with respondent due to any one, any combination of, or all of the following factors:

(1) Respondent's financial and economic strength;

(2) Respondent's advertising, merchandising, and promotional ability and experience;

(3) Respondent's ability to command acceptance of its products and of valuable store shelf space;

(4) Respondent's ability to offer preferential prices on paint and varnish brushes;

(5) Respondent's ability to offer preferential prices on other products it sells as a condition, implied or explicit, to the purchase of respondent's paint and varnish brushes;

(6) Respondent's ability to combine product distribution;

(d) The leading position of Beatrice has been enhanced and may be further enhanced;

(e) An industry trend toward concentration has been accelerated and further acquisitions may be induced;

(f) The degree of concentration has been increased and may be further increased; and

(g) The entry of new competitive entities has been and may continue to be made more difficult.

VI. NATURE OF THE VIOLATION

28. The acquisition by Beatrice of the stock and assets of the aforesaid corporations, individually, and/or together with the cumulative effect thereof, constitutes a violation of Section 7 of the Clayton Act (15 U.S.C. §18), as amended.

INITIAL DECISION BY WILLIAM K. JACKSON, ADMINISTRATIVE
LAW JUDGE

OCTOBER 25, 1973

PRELIMINARY STATEMENT

The Federal Trade Commission, on Oct. 1, 1971, issued its complaint in this proceeding charging Beatrice Foods Co., a corporation, by its acquisitions of the stock and assets of Tip Top Brush Co., Inc. and Essex Graham Company, violated Section 7 of the Clayton Act, as

amended (15 U.S.C. § 18). The complaint alleges that the effect, cumulatively and individually, of the acquisitions may be substantially to lessen competition or tend to create a monopoly in the manufacture and sale in the United States as a whole of (1) manually powered paint applicators, (2) paint rollers, and (3) paint and varnish brushes, in the following ways, among others:

(a) Potential competition between Beatrice and each of the aforesaid corporations acquired by it and between Beatrice and all others has been eliminated;

(b) Actual competition between and among the aforesaid corporations acquired by Beatrice has been eliminated;

(c) Producers of (1) manually powered paint applicators (paint rollers/paint and varnish brushes), may be unable to compete, or will be at a competitive disadvantage in competing, with respondent due to any one, any combination of, or all of the following factors:

(1) Respondent's financial and economic strength;

(2) Respondent's advertising, merchandising, and promotional ability and experience;

(3) Respondent's ability to command acceptance of its products and of valuable store shelf space;

(4) Respondent's ability to offer preferential prices on manually powered paint applicators (paint rollers/paint and varnish brushes);

(5) Respondent's ability to offer preferential prices on other products it sells as a condition, implied or explicit, to the purchase of respondent's manually powered paint applicators (paint rollers/paint and varnish brushes);

(6) Respondent's ability to combine product distribution;

(d) The leading position of Beatrice has been enhanced and may be further enhanced;

(e) An industry trend toward concentration has been accelerated and further acquisitions may be induced;

(f) The degree of concentration has been increased and may be further increased; and

(g) The entry of new competitive entities has been and may continue to be made more difficult.

After being served with the complaint, respondent appeared by counsel, and on Nov. 11, 1971, filed its answer to the complaint denying, in substance, that the mergers were illegal. Thereafter, on Jan. 13, 1972 and Feb. 25, 1972, prehearing conferences were held pursuant to pretrial orders of the undersigned for the purposes of simplification of the issues, obtaining admissions of fact and authentication of documents, discovery of relevant material, exchanging lists of exhibits and names of witnesses, together with a summary of their proposed

testimony, to be used at the trial, and the preparation of a concise statement of the contested issues of law and fact. In accordance with the undersigned's pretrial order, both parties prepared and submitted a pretrial memorandum.

Hearings for the presentation of testimony and other evidence by complaint counsel began in Washington, D.C., on Dec. 6, 1972, and concluded on Dec. 18, 1972, with the exception of one witness, Mr. Brown W. Cannon, senior vice president of respondent, whose testimony was deferred until Apr. 24, 1973, in order to accommodate respondent until the commencement of respondent's defense. Pursuant to a request by respondent for further discovery, a 2-month adjournment¹ was granted prior to the presentation of respondent's defense. During this period, respondent presented to the undersigned approximately nine subpoenas duces tecum, all of which were issued. Respondent's defense commenced on Apr. 25, 1973, and was completed on May 21, 1973. Thereafter, on July 9, 1973, complaint counsel commenced rebuttal hearings which were concluded on July 16, 1973. On July 27, 1973, respondent had surrebuttal hearings and the record was closed on July 27, 1973.

The record in this matter consists of 3,553 pages and there were 35 days of hearing. Complaint counsel, for their case-in-chief, noticed 26 witnesses and 19 testified. Complaint counsel originally noticed 101 exhibits, of which 83 were received, one was withdrawn and 17 were omitted. Complaint counsel offered 12 additional exhibits, of which 10 were received. On rebuttal, complaint counsel called 20 witnesses and offered five exhibits, of which four were received and one was rejected.

Respondent's first pretrial submissions were submitted on Nov. 15, 1972, but were rejected as inadequate. Respondent resubmitted its lists of witnesses and documents on Nov. 29, 1972. On Jan. 10, 1973, respondent filed a third submission entitled "Second Revision of List of Witnesses and Documents." On Jan. 31, 1973, respondent filed a final list of documents, and on Apr. 5, 1973, filed a final schedule of witnesses.

Respondent, for its defense, originally noticed 232 exhibits, of which 69 were either offered or identified and 51 were received, 13 rejected, and five withdrawn. Respondent also identified or offered 20 additional exhibits that were not noticed, of which 15 were received, three were rejected, and two were identified but not offered. Approximately 163 of respondent's noticed exhibits were not identified or offered at the hearing. Respondent originally noticed approximately 90 witnesses, which on Apr. 5, 1973, was reduced to approximately 58 named individuals, together with numerous unnamed officials of respondent,

¹ Due to the illness of the undersigned during this adjournment, respondent's defense was further postponed.

of which 34 were actually called to testify in its defense. On surrebuttal, respondent called one witness and offered one exhibit which was rejected.

Pursuant to order of the undersigned, complaint counsel filed their proposed findings, conclusions of law, and brief in support thereof on Oct. 16, 1973. On Oct. 31, 1973, respondent filed its proposed findings and conclusions and brief in support thereof. Thereafter, on Sept. 10, 1973, complaint counsel filed their reply brief.

Any motions not heretofore or herein specifically ruled upon, either directly or by the necessary effect of the conclusions in this Initial Decision, are hereby denied.

This proceeding is before the undersigned upon the complaint, answer, testimony and other evidence, proposed findings of fact and conclusions and briefs filed by counsel supporting the complaint and by counsel for respondent. The proposed findings of fact, conclusions and briefs in support thereof submitted by the parties have been carefully considered by the undersigned, and those findings not adopted either in the form proposed or in substance are rejected as not supported by the evidence or as involving immaterial matter.

For the convenience of the Commission and the parties, the findings of fact include references to the principal supporting items in the record. Such references are intended to serve as convenient guides to the testimony and exhibits supporting the recommended findings of fact, but do not necessarily represent complete summaries of the evidence considered in arriving at such findings.

References to the record are made in parentheses, and certain abbreviations, as hereinafter set forth, are used:

CX - Commission's Exhibits

RX - Respondent's Exhibits

CPF - Complaint Counsel's Proposed Findings and Conclusions

RPF - Respondent's Proposed Findings and Conclusions

CB - Complaint Counsel's Brief

RB - Respondent's Brief

CRB - Complaint Counsel's Reply Brief

The transcript of the testimony is referred to with either the last name of the witness and the page number or numbers upon which the testimony appears or with the abbreviation Tr. and the page.

Having heard and observed the witnesses and after having carefully reviewed the entire record in this proceeding, together with the proposed findings, conclusions and briefs submitted by the parties, as well as replies, the administrative law judge makes the following:

FINDINGS OF FACT

I. IDENTITY AND BUSINESS OF RESPONDENT AND ACQUIRED COMPANIES

A. *Beatrice Foods Company (respondent)*

Introduction

1. Respondent Beatrice is and has been, at all times relevant herein, a corporation organized, existing, and doing business under the laws of the State of Delaware, with its executive office and principal place of business located at 120 S. LaSalle St., Chicago, Ill. (complaint and answer, Par. 2).

2. Beatrice is today a multinational, multiproduct company, with traditional emphasis on foods and related services (complaint and answer, Par. 3). In this regard, respondent has for many years been a leading producer of consumer food products, generally preselling consumers through intensive advertising, packaging, and promotional efforts (findings 5-15). Included within these products are fluid milk and cream, of which Beatrice is the third largest processor in the United States (CX 50 a); butter, yogurt, and other dairy products; grocery and confectionery items; and consumer convenience and specialty foods (CX 9-15). Some of the better known trade names of respondent's consumer food products are the following: Meadow Gold, Dannon, Louis Sherry, LaChoy, Aunt Nellie's, Ma Brown, Clark, and Holloway (CX 50 b).

It also engages in the agri-products business and has chemical, manufacturing, and international divisions which by 1970 accounted for over 30 percent of its sales. Nonfood products now sold by Beatrice range from house trailers to skis (*Beatrice Foods Co.*, F.T.C. Docket 8814, Sept. 28, 1972)[81 F.T.C. 481].

Growth Through Acquisition

3. Beatrice has become, through acquisition, a manufacturer of a number of consumer nonfood products, including lawn sprinklers, closet accessories, draperies, picture frames, housewares, paint brushes and rollers, travel trailers, and plumbing specialties (CX 2 a-h; CX 13, p. 15). Many of these acquired nonfood manufacturers are leading factors in their respective industries (CX 11, p. 9; CX 19 c).

4. Beatrice has made remarkable progress since its inception; its development has been characterized through the years by substantial and continuous growth. Between 1960 and 1970, all divisions reported record results. Total sales increased by \$1.1 billion, or 256 percent; net earnings increased by \$43 million, or 413 percent; working capital increased to \$218 million from \$52 million; and earnings per share of common stock increased 139 percent to \$2.03 from 85 cents. By fiscal

year ended Feb. 28, 1970, net sales reached approximately \$1,576,000,000 and total assets approximated \$504,000,000 (complaint and answer, Par. 5; CX 13, pp. 2-3).

5. Acquisitions accounted for a significant portion of Beatrice's growth (complaint and answer, Par. 5). Of the approximate \$1.5 billion in sales for fiscal year 1970, slightly under \$750 million can be directly attributed to the sales of those companies acquired by respondent during its previous five fiscal periods (CX 9, p. 17).

Marketing and Advertising

6. The success of the Beatrice companies, by its own admission, is largely the result of marketing skill and knowhow (CX 15 1). This is manifested in its advertising, upon which Beatrice relies heavily to promote consumer brand identification in the sale of its products (findings 7-14). Beatrice has won awards for its advertising and promotion skill (CX 11, p. 16; CX 10, p. 18).

7. Beatrice utilizes all major media and means of reaching the consumer public (CX 5-z8) and advertises and promotes its products from coast to coast. Prime time is used on all three national television networks along with spot TV, radio, national magazines and large space newspaper ads. It has sponsored such famous TV shows as "The Girl from Uncle," the "Today" and "Tonight" shows, "Huntley-Brinkley," "Walt Disney's Wonderful World of Color," and the "Dean Martin" and "Carol Burnett" shows (CX 10, p. 19; CX 11, p. 17; CX 11, p. 19).

8. Other means of advertising used by Beatrice include transport ads, contests, recipe folders, trade magazine ads and outdoor signs (CX 10, p. 19; CX 11, p. 17; CX 12, p. 17).

9. Beatrice uses major league athletes and celebrities to endorse its products. Promotions have been conducted in conjunction with the Clyde Beatty-Cole Brothers Circus and through distributions of more than 100 million coupons. Millions of consumers are reached through Beatrice store displays and window signs (CX 10, p. 19).

10. For fiscal year ended Feb. 29, 1968, Beatrice spent approximately \$27,000,000 for advertising (CX 5 z). Advertising expenditures reached \$38,000,000 in 1971 (CX 15 o).

11. Beatrice has been among the leaders in innovative packaging of many of its products (CX 10, p. 12).

12. Beatrice has a continuing program of improving profit potential through imaginative marketing (CX 10, p. 17; CX 15 l; CX 16 f).

13. The company has successfully marketed its household products through new packages, display materials, coupons, and special promotions (CX 10, p. 19; CX 18 c-d).

14. Major promotional programs have centered on products within the Chemical & Manufactured Products Division, including Melnor

sprinklers, Stiffel lamps and Airstream trailers (CX 12, p. 9; CX 11, p. 17; CX 10, p. 19).

15. Some of Beatrice's more famous advertised brands are:

Meadow Gold (Dairy products)
La Choy (Chinese foods)
Holloway Milk Duds (Candy)
Clark (Candy Bars)
Dannon (Yogurt)
Stiffel (Lamps)
Melnor (Lawn sprinklers)
Miracle White (Laundry cleaning agent)
Rosarita (Mexican foods)
Airstream (Trailers)
Charmglow (Outdoor gas lamps and barbeques)
Hart (Skis)
Morgan (Yachts)

(CX 10, pp. 1-27; CX 11, pp. 1-26; CX 12, pp. 1-26).

Marketing and Distribution

16. Beatrice is highly skilled and efficient in marketing and distribution. Realizing that distribution is expensive, it has established distribution centers which increase effectiveness in marketing its broad line of Beatrice grocery products (CX 17, p. 10; CX 15 l; CX 13, p. 11). Distribution centers have been established in and around Los Angeles, Calif., Atlanta, Portland, Oreg., Denver, Dallas, Memphis, Camden, N.J., Fortoria, Ohio, and Boston. These nationwide distribution facilities enable the provision of faster customer service and reduction of costs by consolidating a variety of products into one shipment thereby improving the ready availability of products in major market areas. Other consolidations enabled by Beatrice's distribution center system are for such functions as sales, billing and inventory control (CX 13, p. 11). In 1970, Beatrice owned a nationwide network of 25 warehouses (CX 13, p. 12), and it also had additional warehouse facilities located in other States (Felkay 3514).

Interstate Commerce

17. Beatrice is, and has been, at all times relevant herein, engaged in selling its products to purchasers located in various States of the United States, and caused such products, when sold, to be transported from its facilities in various States of the United States to such purchasers located in various States of the United States. In so doing, Beatrice is engaged in "commerce," as "commerce" is defined in the Clayton Act, as amended, and has been continuously so engaged at all times relevant herein (complaint and answer, Par. 4; Stipulation CX 1 a).

B. The First Acquired Company - Tip Top Brush Co., Inc. and Affiliated Companies

Introduction

18. Prior to and until July 31, 1969, Tip Top Brush Co., Inc. and its affiliated companies, Banner Brush Co., Inc.; Best-Set Brush Co., Inc.; United Brush Manufacturing Co., Inc.; First Synthetic Fibre & Brush Co., Inc.; West Side Leasing Corp.; Excello Roller Co., Inc.; and Star Brush Manufacturing Co., Inc. (hereinafter referred to collectively as "Tip Top"), were corporations organized, existing, and doing business under the laws of the State of New Jersey, with their offices and principal places of business located at 151 W. Side Ave., Jersey City, N.J., except with respect to Star Brush Manufacturing Co., Inc., which was organized, existing, and doing business under the laws of the State of New York, with its office and principal place of business located at 690 Harrison Ave., Boston, Mass. (complaint and answer, Par. 6).

19. Prior to acquisition by Beatrice, all of the issued and outstanding capital stock of each of the corporations listed in paragraph 18 above, were owned by Miklos Felkay and Madelaine Felkay. Mr. Felkay had been in the brush business in Hungary. In 1948, his business was nationalized by the Communists and he and his family came to the United States (CX 22). Felkay entered the United States' paint brush business in 1948 and began making artist brushes and small consumer, throwaway brushes (CX 22, Felkay 1248). A 1950 balance sheet of Tip Top's shows total assets of \$44,000 and a plant and equipment investment of \$7,000 (RX 215). These corporations were closely held and operated so as to mutually benefit each other (complaint and answer, Par. 7).

20. On July 31, 1969, Beatrice acquired all of the issued and outstanding capital stock of Tip Top in exchange for up to 85,000 shares of Beatrice's common stock (complaint and answer, Par. 10).

21. At the time of its acquisition by Beatrice and continuously since, Tip Top has been engaged in the manufacture and sale of paint brushes, paint rollers, and paint roller accessories (CX 5 z10-11).

Phenomenal Growth of Tip Top

22. Since its inception, Tip Top has experienced what the company describes as "phenomenal growth" (CX 22). Tip Top began operations in 1949 in New York City, engaging at that time in the manufacture and sale of paint brushes. By 1955, the company had moved to a more spacious location of 20,000 square feet and had opened a west coast warehouse located in Los Angeles, Calif. By that year, Tip Top had 50 employees and its name had become well known throughout the nation. Continuing expansion necessitated the company's move to its current location in Jersey City, N.J., in July 1961, where it occupied a large factory totaling more than 110,000 square feet as of the time of the

acquisition and engaged in the manufacture of a complete line of paint brushes and paint rollers (CX 22).

Growth Through Acquisition

23. Prior to its acquisition by Beatrice, Tip Top had acquired several paint brush and roller manufacturers. In the late 1950's or early 1960's, Tip Top purchased the United Brush Manufacturing Company, a long established producer of paint brushes (Felkay 974). In 1967, Tip Top acquired Pitegoff Brothers, Inc., a manufacturer of paint brushes (CX 34-36, Felkay 1327). On July 1, 1969, Tip Top purchased substantially all of the assets of Star Brush Manufacturing Co., Inc., a well-known manufacturer of paint and varnish brushes and distributor of paint rollers (CX 37). During the period prior to its acquisition, Tip Top considered purchasing additional paint brush and roller companies (Felkay 983, 984-85).

For fiscal year ended Sept. 30, 1968, Tip Top had net sales of approximately \$5,425,000 (CX 5 z-10). In that year, Tip Top was the fifth largest manufacturer of manually powered paint applicators in the United States (CX 108 b).

24. By 1969, due to its acquisitions and internal development, Tip Top had manufacturing facilities in Boston, Mass., and Jersey City, N.J., and warehouses in Los Angeles, Calif., and in Chicago, Ill. (CX 5 j; CX 22; CX 47 b, c.) Its initial employment of 10 had increased to in excess of 250 (Felkay 983). By the end of that year, Tip Top had become the third largest domestic manufacturer of manually powered paint applicators, with sales of approximately \$7.4 million (CX 108 c).

25. In 1969, Tip Top had one of the most completely automated manufacturing facilities in the industry (CX 22).

26. In 1969, it was the expressed intention of Tip Top management to become the number one factor in its industry. It was estimated that this goal could be achieved by 1974-75 (Felkay 992-94, Schlytter 1000).

Products and Distribution

27. Tip Top is and has been in the business of making and selling brushes and rollers. In 1958, Tip Top's products were sold throughout the United States directly to drug chains, food chains, lumber yards, variety stores (Felkay 1250) and mass merchandisers (Felkay 1261). Prior to 1958, Tip Top was unable to place its brush line with jobbers since the jobber who sold to small dealers (Felkay 1251) carried only products of the then-established old line brush concerns, i.e., Wooster, Baker, Rubberset and PPG (Felkay 1251). These products were professional paint brushes. Such brushes, in comparison with the Tip Top product, were thicker, heavier brushes with more and longer filaments and were made differently so as to carry more paint to a surface (Felkay 1254). In 1958, such brushes sold at retail from \$5-\$25,

whereas Tip Top's brushes sold from 99 cents to \$2.49 (Felkay 1261). Since 1968, Tip Top has sold a full line of paint brushes (Felkay 1327-28).

Tip Top first saw rollers in the market in the mid-50's (Felkay 1258). Ace, EZ Paint, Bestt and Thomas then sold rollers (Felkay 1258). In response to the advent of the roller, Tip Top introduced a lower priced 4 inch-brush (Felkay 1258). In comparison to earlier Tip Top brushes, this product was smaller and thinner, had a plastic (versus wood) handle and had lower quality filaments (Felkay 1259). The brush retailed for 99 cents (Felkay 1260).

In 1958, Tip Top began selling lower priced rollers (Felkay 1261). It purchased some of these products for resale from Ace Roller Co. (Felkay 1258, 1296). It also created in 1958 the Excello Roller Co. for its roller business (Felkay 976). Tip Top was an assembler of rollers. To 1969, the only part of the roller kit ever manufactured by Tip Top was the roller cover (Felkay 1296). Even as to these, the cores, fabrics and adhesives for covers were purchased elsewhere. These raw materials were not made by Tip Top (Felkay 1296, 1302). Tip Top never made any parts for roller frames (Felkay 1302).

In addition to making covers, Tip Top also purchased some complete covers elsewhere (Felkay 1325). Cheap, throwaway covers were purchased primarily for resale during 1965-70 from Jackson Roller (Felkay 1305), as well as Marshall Tubing Co. and Interstate Roller (Felkay 1304-06).

Tip Top's promotional roller kits (tray, cover and frame in one unit) retail from 59 cents to 99 cents (Felkay 1306).

The bulk of Tip Top's promotional roller kits are distributed on the east coast (Felkay 1315). Tip Top also sells some kits in the South (Atlanta to Florida) (Felkay 1318); as well as in the Western States (Felkay 1318) and in the Southwestern market (Texas and Louisiana) (Felkay 1323). In the Western States and in the Southwestern market, Tip Top's promotional kits are all jobbed (Felkay 1319, 1323).

28. Tip Top sells its products through salesmen and manufacturers' representatives. Prior to its acquisition by Beatrice, its principal outlets were hardware stores, lumber yards, food chains, paint stores, paint manufacturers, hardware wholesalers, drug stores and chains, discount stores, variety stores, variety wholesalers, general wholesalers, and rack jobbers (CX 5 s; Felkay 988, 1250; Edelson 2328). Recently, Tip Top has sold its merchandise to grocery supermarkets, such as Fred Meyers and Thrifty Acres (Zook 338, Edelson 2328).

Merchandising and Marketing

29. At the time of its acquisition, Tip Top was recognized as "the best merchandiser in the industry" (O'Conner 955). Prior to acquisition,

it had shown a record of continuous innovation in merchandising, as shown, by being:

- (a) first to design a complete merchandising program for different types of outlets retailing brushes and rollers (CX 22);
- (b) first to develop both the mass merchandiser and drug store as potential markets for paint applicators (Felkay 973-74);
- (c) first to utilize mobile display showrooms (Felkay 976);
- (d) first to offer premiums as an incentive to purchase paint applicator products (Felkay 987);
- (e) first to display brushes and rollers in relation to the type of paint being used (Felkay 987); and
- (f) first to offer color-coded brushes and rollers (CX 22).

Research and Development

30. By 1969, Tip Top possessed a reputation as a leader in research and development, and as a pioneer in the development of tapered nylon brushes designed particularly for the application of new, modern water- and rubber-based latex paints (CX 22).

Interstate Commerce

31. Prior to July 31, 1969, Tip Top sold its products to purchasers located throughout the United States and shipped its products to such purchasers from its facilities located in various States as described in findings 18 and 24. In so doing, Tip Top was engaged in "commerce," as defined in the Clayton Act, as amended (complaint and answer, Par. 9).
C. The Second Acquired Company - Essex Graham Company

Introduction

32. Prior to July 1, 1970, Essex Graham Company (hereinafter referred to as "Essex"), was a corporation organized, existing, and doing business under the laws of the State of Illinois, with its office and principal place of business located at 1700 W. Pershing Rd., Chicago, Ill. (complaint and answer, Par. 11).

33. On July 1, 1970, Beatrice acquired substantially all of the assets of Essex in exchange for shares of Beatrice common stock (complaint and answer, Par. 14).

Financial Growth

34. In 1969, the year preceding its acquisition by Beatrice, Essex had net sales of approximately \$2,216,000 and its total assets approximated \$2,322,000 (complaint and answer, Par. 12). In that year, it was the fifth largest manufacturer of paint rollers in the United States (CX 109 c).

35. In the 6-year period preceding its acquisition by Beatrice, Essex was an economically strong and viable concern. Based upon relatively stable sales during that period, operating income rose steadily each year, increasing from \$80,483 in 1964 to \$220,093 by 1969, while total

assets increased over 273 percent, rising from approximately \$510,000 in 1964 to approximately \$2,322,000 in 1969 (CX 39 a-c; CX 41 a-c; CX 42 f; CX 43 a-e).

Products and Distribution

36. Essex, at the date of its acquisition by Beatrice, was engaged solely in the manufacture, sale, and distribution of paint rollers and paint roller accessories (CX 5z11-12). Subsequent to the acquisition, it began to distribute paint brushes (CX 32 a, CX 32 l-p).

37. Prior to its acquisition by Beatrice, Essex sold its products through sales representatives and by competitive bids. These sales representatives do not sell exclusively to paint stores but sell to additional kinds of customers such as automotive stores (Greenberg 1459-60, Weiss 540, Zook 451A, Gartner 3207-08). At that time, the principal outlets for its products were paint stores and chains, hardware jobbers, paint and hardware distributors, variety stores and chains, mass merchandisers, department stores, the U.S. Government and other brush and roller manufacturers (CX 5 s-t; Felkay 1385-86; Freund 1415, 1429-30; Greenberg 1462). After its acquisition by Tip Top, Essex Graham supplied all of Tip Top's roller requirements (Strobel 3286). The bulk of these were in the lower priced category (Greenberg 1469).

38. Prior to July 1, 1970, Essex sold its products to purchasers located throughout the United States and shipped its products to such purchasers from its facilities in Illinois. In so doing, Essex was engaged in "commerce," as defined in the Clayton Act, as amended (complaint and answer, Par. 13).

II. NATURE OF THE TRADE AND COMMERCE

DEFINITIONS

Manually Powered Paint Applicators

39. Manually powered paint applicators consist of paint and varnish brushes, paint rollers, including covers, handles and attachments included in a paint roller kit, and miscellaneous flat applicators, primarily pads (Zook 229-30).

40. A paint brush is used for the manual application of paint to a surface. It consists of a handle, a ferrule and the filament (Zook 262, 266-67; Weiss 466-67; Lieberman 680).

41. A paint roller is used for the manual application of paint to a surface. It consists of a paint roller sleeve or cover that applies the paint, the frame which holds the cover, the tray into which the paint is poured, extension handles and miscellaneous accessories such as trim rollers and bucket grids. Other products included in the category are painter's mitts and pad applicators (Zook 233, 262; Weiss 466; Felkay

1302). A pad applicator is a device where roller fabric is cut to size and bonded to an oblong frame (Zook 267-68). It is included in the accounting of rollers because it is made of the same material (Zook 233, Lieberman 681).

Artist Brushes

42. The manufacture and sale of artist brushes differs in many ways from that of paint brushes:

(a) The industry recognizes that the manufacture and sale of artist brushes is a separate industry from that of paint brushes (Zook 230-32, Weiss 465-66).

(b) The manufacture of artist brushes requires a different type of knowledge, equipment, bristles, handles and ferrules than the manufacture of paint brushes (Zook 230-32, Weiss 465-66, Shulman 658).

(c) Different manufacturers produce artist brushes than produce paint brushes (Zook 230-32, Weiss 456-66, Edelson 2293-94).

(d) Artist brushes are distributed differently than paint brushes (Zook 230-32). Artist brushes, when sold in the same store, are displayed in a different part of the store than other paint brushes (Weiss 572).

(e) An artist brush is made of much more expensive filament material than are paint brushes (Zook 230-32, Weiss 465-66, Shulman 658).

(f) An artist brush is designed for a specialized use: to paint pictures or to do hobby work and are not interchangeable with or included among manually powered paint applicators (Zook 230, Shulman 658).

Paint Brushes and Rollers are Part of the Same Overall Market

43. Paint brushes and rollers are interchangeable in use to a very great degree (Weiss 471). Paint brushes and rollers are distributed by the same salesmen to the same buyers, shipped together, and stocked, merchandised and promoted together (Zook 258-59, 291-92; Weiss 462-63; Touchett 581-85, 595-604; Lieberman 672-73).

44. Both customers and salespersonnel exert pressure on manufacturers of manually powered paint applicators to sell both paint brushes and rollers (CX 52, CX 53, CX 54, CX 55, CX 56, CX 57, CX 58, Weiss 463, Touchett 585-96, Lieberman 672-73). These manufacturers believe that they would lose sales and that their businesses would be adversely affected if they did not sell both paint brushes and rollers (Touchett 585; Shulman 635; Felkay 977, 980-81; Gartner 2251; Lieberman 672-73). One industry leader felt it would be a definite threat to his company's position, while another felt that the existence of his business would be threatened if brushes could not be delivered along with paint rollers (Touchett 585, Shulman 635).

45. The overwhelming majority of significant manufacturers of

manually powered paint applicators in 1969 each manufactured both brushes and rollers in that year (Findings 46, 47, 48).

46. The eight largest and 13 of the top 15 manufacturers of manually powered paint applicators manufactured both brushes and rollers in 1969. These 13 firms accounted for approximately 75 percent of manually powered paint applicator shipments. The largest firm in the manually powered paint applicator industry which did not manufacture both brushes and rollers ranked 12th with a 2.6 percent market share (CX 108 c, CX 109 c, CX 110 c).

47. In 1969, the largest eight manufacturers of paint brushes also manufactured rollers. These top eight accounted for 58.6 percent of all shipments of paint brushes in that year (CX 109 c, 110 c). Only one of the top 15 did not manufacture paint rollers (CX 109 c, CX 110 c).

48. Every one of the 13 largest manufacturers of paint rollers in 1969 except Essex Graham also manufactured brushes in 1969 (CX 109 c, CX 110 c). These 12 firms accounted for 76.5 percent of shipments of paint rollers in that year (CX 109 c).

49. Both paint brushes and rollers are sold by manufacturers to the same types of retail outlets such as hardware stores, lumber yards, paint stores, department stores, mail order houses, mass merchandisers, and drug and grocery chains (CX 27 d; CX 115 z7, z8; Felkay 973-74, 988; Zook 258-59, 412-17; Lieberman 681; Bready 818-21; Zurawin 843-47; Brumm 1536, 1543; Gartner 2244; Edelson 2328).

Beginning in the latter 1950's and continuing until the late 1960's, competitors in the manually powered paint applicator industry began selling to mass merchandisers. As the number of mass merchandiser outlets increased, a growing number of manually powered paint applicator manufacturers began selling to this retail outlet. As witness Weiss succinctly stated, "** * * the manufacturing and distributing patterns are following the retail pattern*" (Weiss 532). By the latter 1960's, "** * * everybody was in the market * * **" (Felkay 1263). As respondent's proposed findings indicate, "*virtually all companies identified of record have gotten into this * * * business.*" (RPF, p. 47). Since this type of retail outlet was growing, it was to be expected that companies in the industry would begin making sales efforts to these outlets. But *all* companies in the industry, as indicated above, sought this growing business; companies did not specialize in sales to this one type of retail outlet. To characterize selling a new customer as "entry", in an antitrust sense, is illusory. The manufacturers did not "enter" anything; they simply added a new outlet. Nor did manufacturers forego selling other types of retail outlets to specialize in selling to mass merchandisers; the record shows clearly that manufacturers continued to sell to all types of outlets (Zook 258; Weiss 478; Felkay

1388-89; Cannon 1166; Shulman 636; Zurawin 845; Gartner 2237, 2244; Edelson 2328; CX 115 z7).

The reason that companies in the industry sell to all types of customers is because of the wide variety of brushes and rollers carried by these customers. As testified to by respondent's witness Felkay, paint and hardware stores do *not* carry only the more expensive brushes and rollers; rather they carry both the inexpensive and more costly products (Felkay 1387-88; See also Zook 451; Weiss 529; Cannon 1201). Mass merchandisers such as Sears carry "good, better, and best" paint applicator products (Brumm 1543, Cannon 1137). Mass merchandisers generally carry both more expensive and throwaway brushes (Cannon 1200, Felkay 1387). As a result, distribution channels are intermingled; jobbers and distributors sell to department stores, food stores and variety chains as well as to paint stores and paint contractors (Weiss 529, 534; Cannon 1202). These distributors carry lower priced manually powered paint applicator products (Edelson 2472, Tyler 2103, Felkay 1387), as well as more expensive brushes and rollers (Cannon 1170, 1172). Some paint and hardware stores are sold direct (Weiss 529, 533), as are some variety stores and large retail outlets (Cannon 1202). Both jobbers and mass merchandisers may carry a "professional line" of paint brushes (Weiss 529).

The same salesmen and manufacturer's representatives sell to all types of paint brush and roller outlets (Weiss 540, Zook 451A, Gartner 3207-08).

Pricing

50. Many retail outlets, such as Sears, mass merchandisers, hardware stores, paint stores and drug chains carry both lower priced and higher priced brushes and rollers (CX 27 e, f; Greenberg 1433; Brumm 1540-43; Cannon 1200-01; Zook 450; Felkay 1387).

51. Manufacturers of paint brushes and rollers do not consider the prices of aerosol cans and power spray equipment in setting paint brush and roller prices (Zook 304-05, Weiss 475, Touchett 596-97).

52. Retail outlets do not purchase aerosols to replace paint brushes and rollers, nor do they increase their purchases of aerosols or paint brushes and rollers to the detriment of the remaining category (Weiss 473).

53. The average retail price of both brushes and rollers sold by several major manufacturers and retailers is \$5.00 and under (Zook 302; Weiss 473-74; Edwards 711; Silverman 764-65; George 940).

54. In 1969, many leading paint brush and roller manufacturers made and sold both high and low priced brushes and rollers (Brumm 1540; Zook 302; Weiss 473; Shulman 637; Tyler 2125, 2129-30).

Recognition of the Industry

55. The paint brush and roller industry is generally recognized as a separate industry. Beatrice Foods made a study entitled "The Study of the Paint Brush and Paint Roller Market for Beatrice Foods Company" (Schlytter 999). The Bureau of Census categorizes brushes and rollers in the same five-digit SIC category, 39912. This category includes no other products (CX 74).

Other Paint Applicators

56. Other paint applicators consist of power spray equipment and aerosol cans. It has been stipulated in this action that "brushes and aerosols are interchangeable for certain uses" (Tr. 1874). The manufacture, distribution, sale and use of these products differ in many ways from that of paint brushes and rollers.

Aerosols

57. An aerosol paint spray (hereinafter "aerosols") consists of a metal container holding from 8 to 32 ounces of paint and propellant (Felkay 1272, DeGregory 1664). Aerosols apply paint directly to the surface, using the pressure of the propellant to force the paint through an orifice, which atomizes it (Weiss 468).

58. Aerosols are normally manufactured and sold by firms different from those which manufacture and sell manually powered paint applicators (Kerr 1905-06, CX 108 a-b, 109 a-c, 110 a-c).

59. Manufacturers of aerosols often package and sell many aerosol items other than aerosol spray paint (Mulliken 2101, Kerr 1900). Such other aerosol items can be produced on the same equipment used to produce aerosol spray paint (Mulliken 2101, Weiss 468-69, Kerr 1898). The same containers are used to package each type of aerosol product (Mulliken 2100-01, Weiss 468-69, Kerr 1898).

60. Aerosols are manufactured using different technology and machinery from that used to produce manually powered paint applicators (Weiss 468-69, Felkay 1304, Mulliken 2097).

61. Aerosol manufacturers recognize aerosols as a separate industry. There is a specialized trade organization for aerosol producers, the Chemical Specialties Manufacturers Association (Weiss 484; Mulliken 2030, 2033-34) and a specialized trade publication, "Aerosol Age" (Weiss 485). A seller of aerosols considers them to be in a market "completely different from the paint brush and paint roller market." (Weiss 472-73).

62. Aerosols are used for specialized painting applications for which the use of a paint brush or roller would be impractical (Chasen 2368). Aerosols are used for painting small, intricate objects, such as wrought iron chairs or radiators (Weiss 470-71, Touchett 595-602, Bready 821, Kerr 1872, Felkay 1272, Chasen 2368). Aerosols are not used for larger flat surfaces as their cost for such applications would far exceed the

cost of applying paint by paint brush or roller (Weiss 470-71, Touchett 595-602).

Spray Equipment

63. Sprayers consist of mechanical equipment for applying paint under force (Zook 262). There are three basic types of such sprayers, conventional, airless and electrostatic (Adams 772, Chasen 2369).

64. A conventional spray system is powered by compressed air generated by an air compressor (Adams 793). Conventional sprayers consist of a spray gun, made up of a container to hold the paint and a nozzle through which the paint is forced, and a compressor (Chasen 2369-70).

65. Airless sprayers use hydraulic pressure to force the paint through a small orifice (Adams 773, 792-93; Chasen 2369-70). The principal components of an airless sprayer are a high pressure pump, an airless spray gun, and the high pressure hoses which convey the paint from the pump to the gun (Adams 773).

66. Electrostatic sprayers apply paint to an object by placing an opposite electrical charge on the item to be coated from the electrical charge of the paint. The paint when released by such sprayers is thereby attracted solely to the object to be painted (Chasen 2369-70).

67. A cross section of witnesses directly involved in the making and/or selling of spray equipment testified on the prices of spray equipment. Their testimony shows that the range of prices of spray equipment is considerably higher than the range of prices for manually powered paint applicators (Findings 53, 68).

68. The least expensive complete spray unit sold by Sears had a list price of \$37.95 (Panoessa 2001). A painting contractor testified that the least expensive spray equipment used in his business cost \$50 and that some equipment used cost as much as \$1500 (Chasen 2376-77). Wooster manufactures spray equipment ranging in price from \$895 to \$1095 (Zook 262). The entire range of Bink's spray equipment was \$75 to \$1500 (Adams 778-79). Respondent's witness Salovich testified as to two models of spray applicators sold by Spraytech with suggested retail prices of \$50 and \$119 (Salovich 1946-53).

69. The manufacture of sprayers is totally different from the manufacture of paint brushes and rollers (Zook 262-68, Weiss 466-67, Touchett 630, Shulman 645-47, Lieberman 675-81). Sprayers are primarily a precision machined metal product. Their manufacture uses processes common to a standard machine and metal working shop (Adams 777).

70. The raw materials used to manufacture sprayers are entirely different from those used to manufacture paint brushes and rollers. The manufacture of sprayers requires special forgings, stampings and

steel bar stock while the manufacture of brushes and rollers requires filament, handles, glue, ferrules, fabric, and cardboard tubes (Adams 777, Weiss 466-67, Zook 266-68).

71. With few exceptions, sprayers are manufactured and sold by firms different from those which manufacture and sell manually powered paint applicators (Adams 810; Zook 293-95; Lieberman 673-74; Bready 823; CX 80 d; CX 81 d; CX 86 d; CX 87 g; CX 88 f; CX 90 a; CX 91 d, k; CX 93 g; CX 96 d; CX 97 d; CX 98 d).

72. The government and paint brush and roller manufacturers recognize spray applicators as a separate industry. One paint brush and roller manufacturer stated: "* * * the spray business is a completely different type of business. It requires a much more degree of technical skill, a greater degree of having facilities, a bigger * * * investment, * * *. It takes a completely different selling organization. I don't know of any of our reps * * * that in themselves handle a paint spray line or paint gun line, because they call on different buyers. It is a different animal in business." (Touchett 630-31).

73. A manufacturer of sprayers did not consider any paint brush or roller firm to be a primary competitor (Adams 771-72).

74. Special training is required to achieve good results with a spray gun (CX 77, Adams 816-17). They are difficult to use. There are a multitude of things that can go wrong (Zook 265).

75. Sellers of sprayers must provide repair services and spare parts. Such services are not provided by paint brush and roller manufacturers (Zook 265-66; CX 112; Bready 822). Manufacturers of sprayers do not consider the costs of paint brushes and rollers in setting sprayer prices (Zook 305, Adams 790).

76. Sprayers are used to apply paint on small specialty jobs such as iron work and irregularly surfaced items (Zook 300-01), and by painting contractors for large, outdoor jobs (Chasen 2371, 2378). A painting contractor would not use a sprayer to paint an average sized room or one wall, since it would be more expensive than using a brush or roller (Adams 780-82, Chasen 2377). The large commercial sprayer manufactured by Wooster would be used for large commercial jobs such as factory ceilings and huge projects (Zook 300-01).

Paint Brush and Roller Submarkets

77. The raw materials used to manufacture paint brushes are completely different from the raw materials used to manufacture paint rollers (findings 40, 41).

78. The machinery used to manufacture paint brushes is completely different from the machinery used to manufacture paint rollers (Brumm 1522; Linzer 3355, 3361; Shulman 646; Lieberman 675; Cantonis 2146).

79. The technology required to manufacture paint brushes is completely different from the technology required to manufacture paint rollers (Benson 3427-28, 3432; Freund 1428-29).

80. Paint brushes and rollers have specialized characteristics and uses. Paint brushes are preferred to rollers for smaller flat surfaces and trim work while paint rollers are preferred to brushes for medium and larger flat surfaces (Bready 821, Weiss 471). Brushes are normally used for applying paint to furniture (Weiss 471, Touchett 613), and are preferred for outdoor walls of houses (Touchett 614).

81. Paint brush manufacturers are represented by their own trade association. Continual efforts to include roller manufacturers within the American Brush Manufacturer's Association have met with defeat (Weiss 482-84).

Conclusionary Findings Re Nature of the Trade and Commerce

82. The manufacture and sale of artist brushes, power spray equipment and aerosol cans are not included in the manually powered paint applicator line of commerce (findings 42, 56-79).

83. The relevant line of commerce in this proceeding consists of the manufacture and sale of manually powered paint applicators (findings 39-76).

84. A relevant submarket in this proceeding consists of the manufacture and sale of paint brushes (findings 77-81). An additional relevant submarket in this proceeding consists of the manufacture and sale of paint rollers and accessories (findings 77-81).

Size and Concentration of the Manually Powered Paint Applicator Industry

85. In 1967, total shipments of manually powered paint applicators were \$88.6 million (CX 74, p. 39D-15).² Such shipments amounted to \$96.4 million in 1968 and \$98.2 million in 1969 (CX 75, p. 35).

86. The four largest manufacturers of manually powered paint applicators accounted for 36.6 percent of shipments in 1967, 38.1 percent in 1968 and 41.3 percent in 1969. The eight largest manufacturers of manually powered paint applicators accounted for 52.8 percent of shipments in 1967, 55.6 percent in 1968 and 62.5 percent in 1969 (CX 108 a-c).

87. Since 1967, concentration in the manufacture and sale of manually powered paint applicators has been increasing. Between 1967

² Respondent states that the use of "value of shipments" for SIC product category 39912, "paint and varnish brushes and paint rollers" (CX 74, p. 39D-15), is invalid (RPF 16-31). The Census data was used solely to corroborate other market share data (see findings 39-92), and the undersigned finds that the figures for the firms listed on CXs 108, 109, 110 represent the major known competitors in the industry. (See footnote to Finding 87, *infra*.) The Commission has repeatedly held that Census data may be used for the purpose of corroboration where there is independent evidence and identification of the major competitors in the market (*Papercraft Corp.*, Docket No. 8779, 3 CCH Trade Reg. Rep. ¶ 19,725, pp. 21,779-80 (F.T.C. 1971) [78 F.T.C. 1352]; *Avnet, Inc.*, Docket No. 8775, 3 CCH Trade Reg. Rep. ¶ 20,252, at p. 22,275 (1973) [82 F.T.C. 391]).

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Initial Decision

and 1969, the four firm concentration ratio increased 4.7 percent, and the eight firm ratio increased 9.7 percent. Calculated on a pro forma basis for 1969 to account for acquisitions made subsequent to 1969, the four firm concentration ratio increased to 47.4 percent, or a gain of 10.8 percent. Calculated on a similar pro forma basis, the 1969 pro forma eight firm ratio was 68.5 percent, or a gain of 15.7 percent over 1967.³ (CX 108 a-d).

In 1967, total shipments of paint brushes were \$62.2 million (CX 74, p. 39D-15). Such shipments amounted to \$68.9 million in 1967 and \$73.5 million in 1969 (CX 110 a, c).

88. The four largest manufacturers of paint brushes accounted for 35.5 percent of shipments in 1967, 36.0 percent in 1968, and 39.0 percent in 1969 (CX 110 a-c). The eight largest manufacturers of paint brushes accounted for 55.0 percent of shipments in 1967, 55.9 percent in 1968, and 58.6 percent in 1969 (CX 110 a-c).

89. Since 1967, concentration in the manufacture and sale of paint brushes has been increasing. Between 1967 and 1969, the four firm concentration ratio increased from 35.5 percent to 39.0 percent, or a gain of 3.5 percent. The eight firm concentration ratio increased 3.6 percent over 1967 (CX 110 a-c).

90. In 1967, total shipments of paint rollers were \$26.5 million (CX 74, p. 39D-15). Such shipments amounted to \$30.2 million in 1968 and \$32.1 million in 1969 (CX 109 b-c).

91. The four largest manufacturers of paint rollers accounted for 59.0 percent of shipments in 1967. Attributing the 1969 shipments of Essex Graham to Beatrice, the four largest manufacturers in 1969 accounted for 61.6 percent of shipments. The eight largest firms in 1967 accounted for 80.1 percent. Attributing the 1969 shipments of Essex Graham to Beatrice, the eight largest in 1969 accounted for 80.8 percent (CX 109 a-c).

Concentration in the manufacture and sale of paint rollers is high and rising. On the above basis of attributing Essex Graham 1969 shipments to Beatrice, the four firm concentration ratio rose 2.6 percent over the 1967 figure, and the eight firm concentration ratio rose 0.7 percent over the 1967 figure (CX 109 a-c).

Prior to 1969, the vast majority of leading producers of manually powered paint applicators were small firms whose products consisted

³ Respondent's attempt to impugn complaint counsel's concentration figures was notably unsuccessful. From 10 subpoenas duces tecum granted to respondent for the purpose of obtaining manufactured sales of manually powered paint applicators, respondent, with all its industry knowledge, could find no manufacturer remotely approaching complaint counsel's top eight competitors in its market and submarkets. Manufactured sales of the two largest firms introduced by respondent ranked 15th and 17th among manufacturers of manually powered paint applicators in 1969 and 14th and 15th among manufacturers of paint brushes in that year. No roller manufacturers of any substance were produced for the record (CX 108 c; CX 109 c; CX 110 c; RX 238, *in camera*; RX 239, *in camera*; RX 242, *in camera*; RX 243, *in camera*).

primarily of manually powered paint applicators (CX 108 a-c; CX 109 a-c; CX 110 a-c; Zook 229; Weiss 460; Shulman 634; Touchett 581-82; Lieberman 671; Silverman 715; Blum 898; Gallagher 900-01; Cantonis 2140; Edelson 2428; Leichter 3321; Rose 3406; Waksman 3462; findings 21, 36).

92. The record shows 21 acquisitions of firms producing manually powered paint applicators, 11 of which occurred between 1969 and December 1972, and 14 of which have occurred since 1967.

93. The following acquisitions took place between 1969 and December 1972:

Acquiring Company	Acquired Company	Source
Beatrice	Tip Top	Finding 20
Beatrice	Essex Graham	Finding 33
Pacific Lumber	Ideal Brush	Weiss 493
EZ Paint	American Brush Corp.	Touchett 584
EZ Paint	Masterset	Touchett 608
Masterset	King Paint Roller	Touchett 607
		Benson 3426, 3444
Baker Brush	Maendler Co.	Shulman 635
Demert & Dougherty	Benzinger Bros.	Paley 2575
Lieberman	Bestt Roller	Lieberman 672-73
Consolidated Foods	Praeger Brush	O'Connor 949-50
Tip Top	Star Brush	CX 37

94. The following other acquisitions have taken place in this industry, with dates where known:

Acquiring Company	Acquired Company	Source
Tip Top (1967)	Pitegoff	CX 34-36, Felkay 1327
Thomas Industries (1968)	Brush Division	Lieberman 686
Wooster (Prior to 1958)	Devoe & Reynolds	McIntosh 3391
Tobias Paint (1967)	Acme Brush	Zook 291-92
Tip Top (about 1960)	Colonial Brush	Kalman 2262
Rubberset	United Brush	Felkay 974
Empire Brush	Osborne Brush	Lieberman 685
Baker Brush	American Brush Corp.	O'Connor 952
	American Roller	Shulman 635
	Stippler	
Thomas Industries	Thomas Roller Co.	Lieberman 686
American Brush Co., Inc.	Gurtz-Lombard	Lieberman 686

Conclusions

The Relevant Line of Commerce
The Manually Powered Paint
Applicator Industry

The manually powered paint applicator industry is an appropriate line of commerce to analyze the anticompetitive effects of this acquisition. In *Brown Shoe*, the Supreme Court gave guidelines for determining the appropriate product market and submarkets as follows:

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. * * * [W]ithin this broad market, well-defined submarkets may exist which * * * constitute product markets for antitrust purposes.

* * * The boundaries of such a submarket may be determined by examining * * * 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. Because § 7 of the Clayton Act prohibits any merger which may substantially lessen competition "in any line of commerce" (emphasis supplied), it is necessary to examine the effects of a merger in each such economically significant submarket to determine if there is a reasonable probability that the merger will substantially lessen competition. If such a probability is found to exist, the merger is proscribed. *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962).

It is not necessary for each of the seven criteria set forth in *Brown Shoe* to be present in every merger case in order to establish a market. A relevant market has been found to exist where three or less of the *Brown Shoe* criteria were present. *United States v. E. I. du Pont de Nemours & Company*, 353 U.S. 586, 593-95 (1957); *General Foods Corporation v. FTC*, 386 F.2d 936, 941 (1967); *Reynolds Metals Co. v. FTC*, 309 F.2d 223 (D.C. Cir. 1962).

The above analysis when applied to the facts at hand shows that manually powered paint applicators is the relevant line of commerce. Manually powered paint applicators have the following common elements which distinguish them from all other products:

a. Manually powered paint applicator products are used for the same purposes and are interchangeable in use to a very great extent (finding 43). However, there is minimal interchangeability between manually powered paint applicators and other paint applicators because of differences in purpose, uses, skills required for application and convenience (findings 62, 74, 76, 80).

b. Manually powered paint applicators have uses for which there are no practical substitutes. The great majority of companies in this record which manufacture manually powered paint applicators make both paint brushes and paint rollers and no other type of applicator (CXs 80, 81, 86, 87, 88, 90, 96, 97, CX 108 c, CX 5z10-12).

c. No cross-elasticity of demand exists between manually powered paint applicator products and other paint applicator products. Manufacturers of manually powered paint applicators do not take into account prices of aerosols and spray equipment when pricing their products

(finding 51). Retailers purchase manually powered applicators independent of their purchases of other paint applicator products (finding 52).

d. Respondent and the government recognize that the manufacture and sale of manually powered paint applicators constitutes a separate market (finding 55). The aerosol and spray industries are also recognized as economic entities separate from the manually powered paint application industry (findings 61, 75).

e. Manually powered paint applicators are distinguished in price and cost of application from other methods of applying paint. The average brush and roller generally retails for under \$5. Spray equipment is priced as high as \$1500 (findings 53, 68). For any substantial surface, aerosols are by far a more costly means of application than manually powered paint applicators (finding 62).⁴

f. The mere fact that brushes and aerosols (spray equipment) may be interchangeable for certain uses (finding 56) does not vitiate the fact that for other reasons brushes possess sufficient differences because of their peculiar uses, characteristics and prices to support the finding that they constitute a distinct product line (see *American Brake Shoe Co.*, 73 F.T.C. 658, 669, 671).

g. Manufacture of manually powered paint applicators requires specialized know-how experience, and a trained labor force (findings 61, 69, 78). The facilities and raw materials for manufacturing manually powered paint applicators are completely different from those needed to manufacture other types of paint applicators (findings 40, 41, 60, 69, 70).

h. Manually powered paint applicators are grouped together for distribution, promotion and sales (finding 43).

By the above test, the relevant market for consideration in this matter is clearly the manually powered paint applicator industry.

Submarkets

Paint Brushes and Paint Rollers are Relevant and Appropriate Submarkets in this Proceeding

Applying the *Brown Shoe* criteria, the paint brush submarket can be distinguished from the paint roller (and paint roller accessories) submarket as follows:

⁴ The courts have repeatedly emphasized that price differentials are important in separating markets for antitrust purposes. Judge (now Chief Justice) Burger stated in *Reynolds Metal Company v. FTC*, 309 F.2d 223, 229 (D.C. Cir. 1962):

* * * We think price differentials have an important if not decisive bearing in the quest to delimit a submarket.
* * * Such a difference in price as appears on this record must effectively preclude comparison, and inclusion in the same market, of products as between which the difference exists, at least for purposes of inquiry under Sec. 7 of the Clayton Act.

Two years after *Brown Shoe*, the Supreme Court stated:

* * * to ignore price in determining the relevant line of commerce is to ignore the single, most important, practical factor in the business. (*United States v. Aluminum Co. of America*, 377 U.S. 271, 276 (1964))

a. Paint brush manufacturers are represented by a separate trade association, and repeated attempts of roller manufacturers to join that association have met with failure (finding 81).

b. Paint brushes and rollers have peculiar characteristics and uses. Brushes are usually used for certain applications, and rollers for others. In certain situations, only one of the products may be used (finding 80).

c. Paint brushes and paint rollers have separate and distinct production facilities. Production machinery is entirely different, as is the technology (findings 78, 79). Completely different raw materials and component parts make up brushes and rollers (finding 77).

The above facts illustrate that paint brushes and paint rollers are appropriate submarkets. While an overall line of commerce including these products does exist, each can be distinguished from the other. Therefore, for purposes of analysis in this matter, paint brushes and rollers constitute separate submarkets.

III. The Geographic Market

95. The geographic market with respect to each of the relevant lines of commerce shown in Part II, *supra*, is the United States as a whole. Many firms, including each of the major factors in the relevant lines of commerce, compete and distribute their products on a nationwide basis (CX 5 t-u; Zook 309, 445; Weiss 486; Touchett 602; Lieberman 672; Silverman 718; Zurawin 843; Blum 899; Gallegher 903; Felkay 1250, 1318, 1323; Greenberg 1431, 1462-63; Edelson 2290). One manufacturer who did not sell nationally plans to do so in the immediate future (Cantonis 2177). In 1968 and 1969, there were no imports of paint brushes into the United States (Felkay 1365).

IV. The Tip Top Acquisition

A. Beatrice as a Potential Entrant

Beatrice's Expansion into the Home and Garden Accessory Field

96. Beatrice has followed a policy over the years of growth by acquisition (findings 3, 4 and 5). During the period 1965-70, the company's sales almost doubled. Almost one-half total corporate sales in 1970 were accounted for by firms acquired by Beatrice during that period (CX 9, p. 17).

97. Respondent has no overall plan as to the kinds of concerns it will acquire (Karnes 1211). The basic guides followed by respondent in considering and making acquisitions are (1) is the subject company a going, viable, profitable concern situated in a growing industry, (2) will the company's management continue in the business, and (3) will the company contribute to, and not dilute, respondent's earnings per share

ratio (Karnes 1210). Respondent's business is operated on an individual profit center basis with decentralized management (Karnes 1212). Its companies must stand on their own feet (Karnes 1212).

98. In the years immediately preceding the Tip Top acquisition, Beatrice diversified into a number of nonfood fields appraised as having exceptional potential for growth of sales and profits (CX 11, p. 9; CX 13, p. 15). Included within such nonfood fields was the home and garden accessory field (CX 21, p. 9; CX 13, p. 15).

99. In 1964, Beatrice began demonstrating an interest in "leisure-time companies, home-and-garden companies-things for home and garden" (Karnes 1213). Following extensive research by management and market specialists (CX 12, p. 9), Beatrice began diversifying in 1965 into the home and garden accessories field by acquiring the Stiffel Company, a manufacturer of lampshades and decorator lamps (CX 2 f; Cannon 1144; CX 10, p. 6). Stiffel doubled its production capacity during the year following its acquisition (CX 10, p. 6).

100. Beatrice's continued interest in the home and garden accessory field led to a study of "the do-it-yourself market for the home consumer * * *" (Karnes 1213). This study was made in 1967 because of Beatrice's interest in Melnor Industries (Karnes 1213). This area was considered one of "very rapid growth and potential great profit" by Beatrice (Cannon 1163).

101. Beatrice made its second acquisition in the home and garden accessory field through its 1967 acquisition of Melnor Industries (CX 2 e), a manufacturer of water sprinkling equipment, garden supplies and lawn and garden care tools (Cannon 1136; CX 10, p. 8). Melnor distributes its products through department stores, drug stores, mass merchandisers, specialty stores, grocery stores, hardware stores, and variety stores (Cannon 1136-37).

102. During fiscal 1968, Beatrice continued its acquisitions in the home and garden accessory field by acquiring six additional companies. Companies acquired were World Dryer Corporation, Charmglow Products, Inc., Max Kahn Curtain Corporation, Indiana Moulding & Frame Co., Vogel-Petersen Co., and the Farboil Company (CX 11, p. 9; CX 2 c, d, f, h). As of the end of fiscal 1968, those companies manufactured the following home and garden accessory products:

World Dryer - small household electric appliances (CX 2 h).

Charmglow - electric and nonelectric lighting equipment (CX 2 c), gas fired barbeques (Cannon 1144), gas patio lamps (Cannon 1144).

Kahn Curtain - curtains and drapes (CX 2 d; CX 11, p. 9).

Indiana Moulding - wood moulding, mirrors, picture frames (CX 2 d; CX 11, p. 9).

Vogel-Petersen - wardrobe racks (CX 11, p. 9).

Farboil - speciality coatings and paints (CX 11, p. 9).

103. During 1969, Beatrice acquired Tip Top and five companies in

the home and garden accessory field. These were Beneke Corporation, Hekman Cabinets, Inc. and Hekman Furniture Co., Vatco Companies, A. H. Schwab Company, and Walton Laboratories (CX 2 a, f, g, h). These companies manufacture the following home and garden accessory products:

Beneke Corporation - wood and plastic products (CX 2 b).

Hekman - wood household furniture (CX 2 c).

Vatco - house furnishings, including carpets, rugs, mats (CX 2 f).

Schwab - infants' and children's wood furniture (CX 2 g).

Walton - small household electric appliances (CX 2 h).

104. In 1969, Beatrice established Beatrice Manufacturing Company, which manufactures electric barbeque grills (CX 2 c). Beatrice Manufacturing Company distributes its products to specialty patio and swimming pool supply stores, outdoor living stores and departments, and anyone that sells barbeques (Cannon 1144, 1146).

105. After it had acquired Essex Graham in 1970, Beatrice acquired two additional companies in the home and garden accessory field in 1971. These were Chicago Specialty Manufacturing and Homemaker Industries (CX 2 c, d). Chicago Specialty distributed plumbing specialties (CX 2 c) and Homemaker Industries made bedspreads, sheeting and other allied products (CX 2 d).

106. Prior to the Tip Top acquisition, Beatrice conducted a study of the "paint brush and paint roller market" (Schlytter 999; Karnes 1219; Cannon 1178-79, 1181). Beatrice acquired Tip Top because it passed respondent's guides for acquisitions (Karnes 1163). Beatrice viewed the "paint brush and paint roller market" as a growth market (Cannon 1173, Karnes 1218), and it was interested in this market because of its growth and profit potential (Cannon 1163, 1178; Karnes 1219). Beatrice also viewed Tip Top as being in the "do-it-yourself consumer home improvement market" (Cannon 1163, 1213) which was "in the same general field selling to the same general customers" as Melnor (Karnes 1213, 1220).

107. Beatrice considered entry *de novo* into the paint brush and roller industry by building a plant, etc. (Karnes 1235, 1240). The company decided not to enter *de novo* because of the costs and because it would have taken a long period of time to become profitable (Karnes 1240).

108. Immediately prior to the Tip Top acquisition, there were numerous small brush and roller manufacturers available for acquisition as shown by their having been acquired in the period since 1969. Firms available for acquisition by Beatrice in 1969 included Ideal Brush (Weiss 439), American Brush Corp. (Touchett 584), King Paint Rollers (Touchett 608), Maendler Co. (Shulman 635), Benzinger Bros. (Paley

2575), Bestt Roller (Lieberman 672, 673, 686), and Adams Products (RX 239).

109. Beatrice possessed the ability to expand a toehold acquisition (findings 4, 5-14, 113).

110. One of the principal needs of a toehold manufacturer of paint brushes and rollers is financing (Weiss 574-79, Walsh 2400-01). Beatrice had financial assets in excess of \$500 million (finding 4) and made substantial capital investments in its subsidiaries (finding 113).

111. When Tip Top decided to sell its business to another company, an acquisition specialist was hired to find a buyer (O'Connor 953-54). This acquisition specialist was also a former executive in the manually powered paint applicator industry (O'Connor 952-53). The specialist made formal presentations to only five companies, three of which were Beatrice, Consolidated Foods, and Borden (O'Connor 956). These were considered "similar" companies by the specialist in that they were large food companies which also carried nonfood items (O'Connor 956-58). The specialist's judgment was borne out by Beatrice and Consolidated Food's subsequent entry (finding 93).

112. On two other occasions when paint brush and roller companies decided to sell their businesses, the merger specialist made a presentation to a very limited number of possible acquirers, including Beatrice and Consolidated Foods (O'Connor 962, 964, 965).

113. Beatrice has made frequent and substantial capital improvements to the companies it has acquired in the home and garden accessory field so that it may continuously expand its product lines, services, distribution and sales in that field (CX 15 m; CX 17, p. 11; CX 10, p. 7; CX 11, pp. 1, 9; CX 12, pp. 4, 9; CX 13, p. 15; CX 14, p. 11).

114. Many products of Beatrice's home and garden accessory group are sold by Beatrice to common customers and distributed to similar outlets such as variety, hardware, grocery and mass merchandise stores, as follows:

<i>Customer</i>	<i>Beatrice Companies</i>
Montgomery Wards	Spiegel, Beneke, Chicago Specialty
Crane Supply Co.	Beneke, Chicago Specialty
Gibson Products, Inc.	Vatco Manufacturing, Beneke, Tip Top
Cotter & Company	Beneke, Melnor
J. M. Fields, Inc.	Beneke, Max H. Kahn
Walgreen Drug	Beneke, Essex Graham
Blue Chip Stamp Co.	Beneke, Melnor
Ace Hardware	Melnor, Chicago Specialty
Sears Roebuck	Chicago Specialty, Homemakers, Spiegel
S. S. Kresge	Chicago Specialty, Max H. Kahn,

1

Initial Decision

Coast to Coast (City Products)	Spiegel, Melnor, Tip Top Melnor, Tip Top, Essex Graham, Chicago Specialty
Arlans	Vatco, Max H. Kahn
Faber Distributing	Vatco, Melnor
McCrory-McLellan	Vatco, Tip Top
Community Discount	Vatco, Tip Top
Leeds Fox	Vatco, Melnor
Gaylords	Vatco, Max H. Kahn
Zayres	Homemaker, Max H. Kahn
Jewel-Jewel Turnstyle	Homemaker, Spiegel
J. J. Newberry	Max H. Kahn, Spiegel
J. C. Penney	Max H. Kahn, Melnor, Spiegel
F. W. Woolworth	Max H. Kahn, Tip Top
W. T. Grant	Spiegel, Essex Graham
G. C. Murphy	Spiegel, Tip Top

Source: CX 3 a-g, CX 5 t-u; see also Felkay 988; Cannon 1136-38, 1142-46, 1149.

115. Common customers of Tip Top, Essex Graham and other companies in the home and garden accessory group are as follows:

<i>Company</i>	<i>Customer in Common</i>
Beneke Corp.	Gibson Products, Inc. (Gibson Stores) Walgreen Drugs
Chicago Specialty Manufacturing Co.	S. S. Kresge Co. Coast-to-Coast (Division of City Products)
Vatco Manufacturing Co., Inc.	Gibson Products Co. (Gibson Stores) Community Discount
Max H. Kahn Curtain Corp.	S. S. Kresge Co. F. W. Woolworth Co.
Spiegel Industries Corp.	W. T. Grant Co. S. S. Kresge Co. G. C. Murphy
Melnor Industries	Coast-to-Coast (Division of City Products) S. S. Kresge Co.

Source: CX 3 a-g, CX 5 t-u

116. Beatrice has a nationwide warehousing and transportation system (Cannon 1140-41; CX 13, p. 12; finding 16). However, Tip Top does not use Beatrice warehouses (Felkay 3519). On one isolated occasion, Tip Top used the Soo Terminal in Chicago (Gartner 3158, Strobel 3289-90) and was billed for use of the space (Felkay 3506). Beatrice's non-food products if shipped on Beatrice trucks are charged the same rate as if they used outside commercial carriers (Cannon 1141). The use of Beatrice trucks to deliver roller fabric from a Milwaukee supplier was an isolated instance (Gartner 3158). In any

event, Tip Top as a Beatrice subsidiary may not use Beatrice trucks because of ICC regulations (Cannon 1148-49).

117. Grocery supermarkets and chains are becoming outlets for home and garden accessories, including paint brushes and rollers. Industry leaders believe food stores will become an increasingly more significant outlet for manually powered paint applicators in the near future (Weiss 478, Zook 258, Shulman 638-39, Edelson 2328, Gartner 2212).

118. Food brokers are an important method of distribution to food stores. A food broker is a manufacturer's representative selling food and nonfood products primarily to grocery stores (Zurawin 845-50). Beatrice has the largest team of food brokers of any company in the nation (CX 17, p. 10).

119. One paint brush and roller manufacturer testified that approximately half of his sales representatives were food brokers (Zurawin 847). A few other witnesses stated that they too were exploring this sales method (Baker 638, Weiss 478). There is no evidence that Tip Top uses food brokers, although Tip Top has sold to food stores for many years (Felkay 1250).

120. After Beatrice's acquisition of Essex Graham, it engaged in an isolated joint promotional effort with Chicago Specialty Manufacturing Company, another Beatrice subsidiary. However, the joint venture was unsuccessful and discontinued (Cannon 1160-61, CX 32 a-v). The record contains no evidence of any joint promotions by Tip Top with other Beatrice subsidiaries.

121. Corporate discounts are against respondent's company policy (Karnes 1224, Cannon 1155). A corporate discount is injurious to Beatrice's theories of permitting each company to price its own products and it deteriorates the profitability of these companies (Cannon 1156-58). Essex Graham never gave a discount to City Products (Cannon 1159). City Products in a negotiation with Beneke management was given a discount by Beneke "based on a local competitive situation at the time." (Cannon 1159). Felkay of Tip Top had no authority to offer discounts for other Beatrice companies (Cannon 1159). No corporate discount was ever offered to City Products by Beatrice (Karnes 1224).

122. During the period 1968-70, many major paint manufacturing companies commenced distribution and sale of paint brushes and rollers together with other paint products (Felkay 1266). These paint companies market their brushes and rollers together with paint through the same channels served by paint brush and paint roller manufacturers (Bechtel 2280-81). The major paint manufacturing companies have extensive marketing networks (Bechtel 2281). Large

paint manufacturing companies sometimes label their applicators with the company name and sometimes they private label them (Bechtel 2281, Earle 2485, Felkay 1276). Paint manufacturers' salesmen handle all of the paint and related products that a company offers for sale (Bechtel 2282). Paint companies compete against paint brush and roller companies for sale of these items (Bechtel 2282, 2284; Felkay 1283-84; Weiss 567; MacIver 2553). Large consumer paint companies have historically jointly promoted the use of paint sundries and brushes and rollers together (Wilson 1818). Large paint companies have provided Tip Top with its strongest competition in recent years (Felkay 1294, Cannon 1201-02). Other competitors have felt the competition from paint companies (Weiss 567).

123. Brooklyn Paint Co. has promoted brushes and rollers with its paint (Wilson 1818). Glidden-Durkee Division of SCM Corp. sells paint and a complete line of sundry closely related products such as paint applicators, brushes, rollers, aerosol products (Bechtel 2280). Glidden's applicators are sold through its own outlets as well as independent dealers. It has leased departments within mass merchandising stores (Bechtel 2281). Some applicators are labeled with the Glidden identification (Bechtel 2281). Sherwin-Williams sells paint, paint applicators and allied products (Earle 2482). These products are sold through Sherwin-Williams' branch stores and directly to dealers (Earle 2484). Sherwin-Williams' sales to the outside are by its Rubberset Company (Earle 2485). Colonial Brush Manufacturing Co. is owned by Tobias Paint Co. (Kalman 2262). Elder & Jencks Brush Co. is owned by Muralo Paint Co. (Tr. 2778). Paint manufacturing companies operating retail paint stores exert a strong influence in the markets for the products sold by Tip Top and its competitors (Bechtel 2280-81, Felkay 1284-85).

124. Media advertising is insignificant in and to the paint applicator industry (Zook 450, Weiss 527). Applicator customers do not buy based on such advertising (Bready 828). One industry competitor had no understanding of the term consumer advertising (Zurawin 877). One competitor testified that a large portion of its advertising expenses was of the display-type or promotions (Zook 450). Another competitor testified that he began an advertising campaign in the late 1940's and discontinued it because it was not worthwhile (Shulman 639-40). Competitors of Tip Top testified that private labeling is used extensively in paint brush and roller selling (Zook 450, Weiss 535-36). Wooster's business is between one-quarter and one-third in private label and this percentage has increased significantly over the years (Zook 449). Private label branding has paralleled the growth of sales to mass merchandisers who request private label items (Zook 450). An

industry with heavy private labeling is not generally engaged in advertising.

Conclusions

The complaint alleges the elimination of potential competition between Beatrice and Tip Top in the manufacture and sale of (a) manually powered paint applicators, (b) paint rollers, and (c) paint and varnish brushes. The leading cases dealing with potential competition in mergers found invalidity in situations where the merging firm was virtually the only likely or potential entrant. *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964); *FTC v. Procter & Gamble* ("P&G-Clorox"), 386 U.S. 568 (1967). These decisions and subsequent authorities have developed the applicable principles, so that for a merger to be barred because of its effect in eliminating potential competition between the merging companies, the following four factors must be established: (1) the particular market must be shown to be substantially concentrated; (2) the merging firm within the market must be shown to be a leading or major factor in that market; (3) the merging firm outside the market must be shown to be a likely entrant by internal growth or by a relatively small acquisition as an alternative to the proposed merger; and (4) the latter must be shown to be the most likely entrant, or one of few such likely entrants. *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964); *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158 (1964), 389 U.S. 308 (1967); *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967); *Bendix Corp.*, 3 CCH Trade Reg. Rep. ¶ 19,288, F.T.C. Opinion, June 18, 1970 [77 F.T.C. 731], remanded on other grounds, 450 F.2d 534 (6th Cir. 1971); Department of Justice Merger Guidelines, Sec. 18.

To expand on the factors principally relevant here, the firm within the market must be a leading or major factor, so that the merger cannot be justified as entry by a valid "foothold" or "toehold" acquisition. See *Bendix-Fram, supra*. A company outside the market will be viewed as a likely or potential entrant if it is shown to have distinctive capabilities, resources, incentives, and interests to enter the particular market. Thus, in *United States v. El Paso Natural Gas Co.*, 376 U.S. at 651, 660, the Supreme Court called for an assessment of a company's "nearness" to the market, its "eagerness" to enter that market, its "resourcefulness," and so on. In *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158, 175 (1964), the Court in remanding directed attention to such factors as the outside company's resources and know-how, its capacity to enter, its long-sustained interest in entering and its competitive and economic reasons to do so. Furthermore, it is essential to show that the merging firm's resources and incentives are distinctive and unusual, to establish that it is one of few likely entrants. If there

were many firms similarly situated, the elimination of only one (who entered by merger) would not significantly reduce the number of potential entrants or the likelihood of such entry. *United States v. El Paso Natural Gas Co.*, *United States v. Penn-Olin Chemical Co.*, *FTC v. Procter & Gamble Co.*, *Bendix Corp.*, *supra*. See also *United States v. Ford Motor Co.*, 286 F. Supp. 407 (E.D. Mich. 1968); *United States v. Crocker-Anglo National Bank*, 277 F. Supp. 133 (N.D. Cal. 1967).

The Commission has set out the governing law quite clearly in *R&G-Clorox* and *Bendix-Fram*. *Procter & Gamble Co.*, 63 F.T.C. 1465 (1963), *aff'd* 386 U.S. 568 (1967); *Bendix Corp.*, *supra*. In *R&G-Clorox*, the Commission found that Procter & Gamble was a potential competitor in liquid bleach, in fact, "virtually the only such prospect" because it was "a progressive and experienced manufacturer of many products in the same product line as liquid bleach", it actually considered independent entry and "by reason of its proximity, size, and probable line of growth", it was perceived as a likely entrant and it already exerted influence on the market (63 F.T.C. 1577-78). As the Supreme Court noted, liquid bleach was "a natural avenue of diversification since it is complementary to Procter's products, is sold to the same customers through the same channels, and is advertised and merchandised in the same manner." It also noted that "Procter's management was experienced in producing and marketing goods similar to liquid bleach," "Procter had considered the possibility of independently entering" and there was substantial evidence to support the Commission finding that it was "the most likely entrant" (386 U.S. 580-81).

In *Bendix-Fram*, the Commission found that Bendix was a likely entrant by acquisition (*not* by internal growth) into the relevant market on the basis of "objective evidence" of its major involvement in the automotive parts business, its manufacturing and sale of automotive filters, and its actual examination of the market with a view toward entering. It found that "only one conclusion is possible: the whole logic of Bendix's corporate development, its size, resources, and direct proximity to the passenger car filter aftermarket, and the unambiguous direction of its business growth, all pointed to expansion into the passenger car filter aftermarket." *Bendix*, *supra*, 3 Trade Reg. Rep. p. 21,444.

Recently, in *United States v. Falstaff Brewing Corporation*, 5 Trade Reg. Rep. ¶ 74,377, 93,739, Feb. 28, 1973, Justice Marshall in his concurring opinion stated:

Thus, mere entry by acquisition would not *prima facie* establish a firm's status as an actual potential entrant. For example, a firm, although able to enter the market by acquisition, might, because of inability to shoulder the *de novo* startup costs, be unable to enter *de novo*. But where a powerful firm is engaging in a related line of commerce at the fringe of the relevant market, where it has a strong incentive to enter the market *de*

novus, and where it has the financial capabilities to do so, we have not hesitated to ascribe to it the role of an actual potential entrant. 5 Trade Reg. Rep. p. 93,752.

Judge Marshall also noted that "the proper test is whether Falstaff would have entered the market *de novo* if the preferable alternative of entry by acquisition had been denied it." 5 Trade Reg. Rep. p. 93,756.

Both complaint counsel and respondent in their proposed findings and briefs fail to address themselves to the question of whether or not Beatrice was a likely entrant into the manually powered paint applicator, roller, or paint and varnish brush markets. Instead, the main thrust of complaint counsel's argument is that Beatrice's expansion was into the "home and garden accessory field," an undefined and much broader line of commerce than that referred to in the complaint herein and for which complaint counsel submitted no market data.

However, using the tests laid down by the courts, there has been no showing that Beatrice possessed distinctive capabilities, resources, incentives and interests to enter the manually powered paint applicator market, roller or paint and varnish brush submarkets. At best, complaint counsel have demonstrated that Beatrice was interested generally in any firm in the "home and garden accessory field," sometimes referred to as the "do-it-yourself home improvement market." In this connection, Beatrice acquired Melnor garden sprinklers, Charmglow gas fire barbeques, Kahn curtains and drapes, Indiana Moulding wood molding, mirrors and picture frames, Vogel-Petersen wardrobe racks, and World Dryer small household electric appliances, etc. There is no showing that the resources and know-how to manufacture these items could be used in any way in the manufacture and sale of paint brushes and rollers, etc. Complaint counsel have suggested that many of these products are sold to the same mass merchandisers, drug chains, food stores, etc., but this in and of itself certainly is not sufficient to satisfy the criteria set forth above. Moreover, there has been no showing that Tip Top was the dominant or leading firm in the manually powered paint applicator industry since, at best, it ranked third in 1969 with 7.6 percent of the market (CX 108 c).

As found above, many major paint companies, given their financial capabilities and resources and their nearness to the market, were the most likely entrants by virtue of the fact that they distribute brushes and rollers together with the paint they manufacture (findings 122, 123). Although the record shows that the manually powered paint applicator market is substantially concentrated, it certainly is not as highly concentrated as that for Clorox.

Due to the many factual distinctions between the instant case and those cited above, the undersigned finds that Beatrice was not a potential entrant *de novo* into the manually powered paint applicator

market, if the preferred alternative of entry by acquisition had been denied it. Furthermore, the undersigned finds that Beatrice was not a likely entrant by acquisition into the relevant market on the basis of objective evidence, since it was merely interested in the general overall "home and garden accessory field" which, due to its broad and undefined nature, cannot be said to constitute "the same or a related line of commerce."

Complaint counsel also seek to strike down the acquisition of Tip Top by Beatrice on the grounds that it constitutes entrenchment of a leading firm. *FTC v. Procter & Gamble, supra*, and *General Foods v. FTC*, 386 F.2d 936 (3d Cir. 1967), *cert. denied* 391 U.S. 919 (1968). In the above-cited cases, the acquired company was the manufacturer of the leading product in its field; large advertising expenditures were necessary in the industry and the industry was highly concentrated. In the instant case, national advertising expenditures for manually powered paint applicators are practically nonexistent, the degree of concentration in the industry nowhere approaches that found in the *Procter & Gamble* and *General Foods* cases, and Tip Top with only 7.6 percent of the market and ranking number 3 could hardly be equated to Clorox and SOS. Moreover, the evidence adduced fails to show that any economies of distribution and sale were taken advantage of by Tip Top after its acquisition by Beatrice. As a matter of fact, only isolated instances of joint warehousing and transportation were revealed. On the basis of the foregoing, the undersigned finds that it has not been established that entrenchment of Tip Top will occur to the detriment of its competitors solely from its acquisition by Beatrice. The acquisition subsequently by Beatrice of Essex Graham will be dealt with hereinafter.

V. THE ESSEX GRAHAM ACQUISITION

Essex Graham was Eliminated as a Direct
Competitor of Beatrice (Tip Top)

125. Tip Top perceived Essex Graham as its competitor before the acquisition. Elimination of Essex as a competitor to Tip Top was one of the reasons cited by the vice president of Excello Roller Division of Tip Top in a memo he wrote for Mr. Felkay which recommended the acquisition (Gartner 3128, 3132).

126. Other reasons cited in this memo were as follows:

- (a) it would expedite the acquisition of additional capacity;
- (b) certain cost advantages would be brought about by the integration of the roller manufacturing facilities of Essex Graham and Tip Top; and
- (c) elimination of duplicate sales efforts (Gartner 3131-33).

127. The reasons Tip Top believed the acquisition of Essex Graham should be made were discussed with at least three high ranking Beatrice officials, including Beatrice's acquisition specialist and group manager, concerning Tip Top's operations (Gartner 3133).

128. Since the acquisition of Essex Graham, Tip Top has ceased manufacturing rollers (Greenberg 3343; Strobel 3300-01). Essex Graham now provides all of Tip Top's roller requirements (Strobel 3286).

129. Tip Top purchases rollers from Essex Graham with the trade names "Tip-Top," "Best Set," "G. C. Murphy," "Star," "Pitegoff." It currently purchases no rollers from Essex Graham under the Excello label (Strobel 3305-06).

130. In 1969, Tip Top manufactured approximately 7.6 percent of the manually powered paint applicators shipped in the United States, and ranked third in such shipments (CX 108 c).

131. In 1969, Essex manufactured approximately 2.3 percent of the manually powered paint applicators shipped in the United States, and ranked 13th in such shipments (CX 108 c).

132. On the basis of the combined shipments of manually powered paint applicators of Tip Top and Essex in 1969, Beatrice manufactured and sold 9.9 percent of the manually powered paint applicators shipped in the United States (CX 108 c, d).

133. In 1969, Tip Top manufactured approximately 3.7 percent of the paint rollers shipped in the United States, and ranked eighth in such shipments (CX 109 c).

134. In 1969, Essex manufactured approximately 7.0 percent of the paint rollers shipped in the United States, and ranked fifth in such shipments (CX 109 c).

135. On the basis of combined roller shipments of Tip Top and Essex in 1969, Beatrice manufactured 10.7 percent of paint rollers shipped in the United States, and ranked third in such shipments (CX 109 c).

136. On the basis of the foregoing, it is found that actual competition was eliminated between Beatrice and Essex, in both the manually powered paint applicator market and roller submarket, by the acquisition of Essex Graham (findings 21, 28, 36, 37, 125-135).

Respondent's argument that Tip Top and Essex Graham sold in separate markets and did not compete is not supported by the record. Tip Top sold, at the time of the acquisition, to all types of brush and roller customers (Felkay 1389; CX 115 z7; Cannon 1166; CX 5, pp. T-U). Essex Graham sold lower priced as well as higher priced rollers (Greenberg 1469) to a variety of customers (CX 5, p. U), including mass

merchandisers (Karnes 1234) and drug chains (see also findings 21, 28, 36, 37, 49, 126).

A former Tip Top executive testified that the two companies competed prior to the acquisition (Gartner 3128, 3132), and respondent's documents so indicate (CX 5, pp. T-U; see also Karnes 1233-34). If the two companies did sell to "different markets," the best indication of that would have been a sales breakdown into the alleged "markets" by volume. Significantly, no such sales breakdown was ever introduced into evidence by respondent. Actually, Felkay's testimony concerning Tip Top's competition with the "professional line" of Pittehoff graphically refutes any such contention:

Q. Would you identify the Pittehoff Company?

A. It is a brush manufacturer.

Q. What products did that company manufacture from 1965, for example?

A. *Professional paint brushes.*

Q. What connection, if any, did you have with that company at any time, if any?

A. Prior to 1966 or '67, *they were competitors.*

Q. What connection, if any, did you have with them thereafter?

A. We acquired this company. (Felkay 1327) (emphasis supplied)

Barriers to Entry Have Been Heightened

Prospective entrants into the manually powered paint applicator industry will find it more difficult to obtain customers for their products. Customers in this industry will now give preference to Essex Graham because of Beatrice's size and stature (findings 2, 3, 4, 5, 10) and because Essex is now combined with Tip Top, a manufacturer of brushes. These customers prefer to deal with large established companies (Weiss 575), and with those who can supply both brushes and rollers. Essex, which was formerly an independent company and which previously did not manufacture brushes, now possesses these advantages over prospective entrants into roller manufacturing (findings 32-38).

The above facts confirm that entry of new competitive entities has been and may continue to be made more difficult, and that preexisting barriers have been made even higher in the manually powered paint application industry and submarkets by the acquisition of Essex by Beatrice (see also findings 146-158, *infra*).

Conclusions

The record confirms that Tip Top (as a Beatrice subsidiary) and Essex Graham were competitors in the manufacture and sale of manually powered paint applicator products. Tip Top considered Essex Graham a competitor prior to the acquisition, citing that the acquisition would "eliminate a competitor" as a reason for recommending the acquisition to Beatrice officials (findings 125, 126).

Tip Top and Essex Graham manufactured the same products, sold to

the same types of outlets, and met head on at certain accounts (findings 21, 28, 36, 37, 136). The companies had similar marketing programs. Combining teamwork in marketing to eliminate duplicate sales effort was another reason that Tip Top recommended the acquisition (finding 126).

Tip Top and Essex manufactured products that required similar facilities. When Tip Top required expanded production capacity in rollers, it could turn to Essex Graham in that Essex had equipment that performed the same manufacturing operations as Tip Top's equipment (finding 126).

Subsequent to the acquisition, Tip Top ceased to exist as a roller manufacturer, instead purchasing its roller requirements from Essex Graham. The "Excello" label no longer is used for roller sales by Tip Top (findings 128, 129).

The attitude of the Supreme Court, in cases such as this, has been made explicit in its holdings on horizontal mergers.

In *Brown Shoe Co. v. United States*, *supra*,⁵ *American Crystal Sugar Co. v. Cuban-American Sugar Co.*,⁶ 259 F.2d 524 (2d Cir. 1958); *United States v. Von's Grocery Co.*,⁷ 384 U.S. 270 (1966); *United States v. Pabst Brewing Co.*,⁸ 384 U.S. 546 (1966); *United States v. Atlantic Richfield Co.*,⁹ 297 F. Supp. 1061 (S.D.N.Y. 1969) (preliminary injunction granted); mergers which eliminated actual competition and involved similar or lesser market shares in analogous lines of commerce were prohibited.

In *Brown Shoe*, the Court stated as follows:

If a merger achieving a 5% control were now approved, we might be required to approve future merger efforts by Brown's competitors seeking similar market shares. The oligopoly Congress sought to avoid would then be furthered and it would be difficult to dissolve the combinations previously approved. *Brown Shoe, supra*, at 343, 344.

Similarly, the Court in *Alcoa* stated:

* * * If concentration is already great, the importance of preventing even slight increases in concentration * * * is correspondingly great. *United States v. Aluminum Company of America, supra*, at 279.

The analysis applied by the Commission in *the Matter of Litton Industries, Inc.* is determinative in the acquisition of Essex Graham,

This is a classic horizontal merger between two direct competitors. In a highly concentrated industry, the effect of such a merger is direct and immediate. No extensive economic analysis is required in such cases. Docket 8778, slip opinion, p. 36, dated Mar. 13, 1973.

Since these same factors apply to the manually powered paint

⁵ *Brown Shoe*: 7.2 percent of shoe stores or 2.3 percent of all retail shoe outlets.

⁶ *American Crystal Sugar*: 13 percent.

⁷ *Von's Grocery*: 7.5 percent.

⁸ *Pabst*: 4.49 percent.

⁹ *Atlantic Richfield*: 7.4 percent.

applicator industry and its submarkets, this merger should also be condemned.

Essex Graham was Eliminated as a Potential Competitor in the Manufacture of Paint Brushes

137. Paint rollers and paint brushes are used for the same purpose and distributed by the same salesmen to the same buyers (Zook 291-92).

138. Paint roller customers prefer to buy paint brushes from the same supplier from whom they purchase rollers (Weiss 462-63).

139. From the early 1960's to the present, there has been a trend for paint roller manufacturers to expand into paint brush manufacture (Zook 268-69, 291-92; Weiss 463-64).

140. The leading paint roller manufacturer in 1969 entered into paint brush manufacture by acquisition in 1969 (Touchett 585, CX 109 c). Similar roller firms recently have entered into brush manufacturing (Cantonis 2144, Zook 268-69).

141. In 1969, Essex Graham was the largest manufacturer of paint rollers who did not manufacture brushes (CX 109 c). In that year, it was the only manufacturer of paint rollers among the 13 largest manufacturers of rollers which did not manufacture brushes (finding 47).

142. From 1963 onward, Essex Graham considered acquiring a paint brush company (Freund 1416). Essex had considered acquiring at least four paint brush manufacturers, three of which could be considered toehold acquisitions (Freund 1417, CX 108, CX 109, CX 110). In addition, the company hired an acquisition specialist for the purpose of acquiring a brush company (O'Connor 960). The company gave slight consideration to *de novo* entry into brushes during the period 1965 to 1970, but was forestalled because of lack of technology intracompany (Freund 1428-29).

143. On the basis of the foregoing, it is found that potential competition between Beatrice (Tip Top) and Essex Graham was eliminated in the paint brush submarket by the acquisition of Essex Graham (findings 137-142).

The Trend of Concentration in a Highly Concentrated Industry Has Been Accelerated

144. In 1969, the four and eight firm concentration ratios in the manually powered paint application industry and roller submarket were high and rising (finding 86).

145. The acquisition of Essex by Beatrice accelerated this trend of rising concentration and reduced the possibility of decreasing the high concentration in the already highly concentrated paint brush submarket by eliminating Essex as a possible future entrant (findings 137-143).

The Supreme Court has often cited high concentration and a trend to

rising concentration as factors which cause mergers to be condemned under the Clayton Act. *Brown Shoe Co. v. United States*, *supra*; *United States v. Von's Grocery Co.*, *supra*; *United States v. Continental Can Co.*, 378 U.S. 441 (1964); *United States v. Aluminum Co. of America*, *supra*; *United States v. Pabst Brewing Co.*, *supra*.

Conclusions

Essex Graham was the most likely entrant into the highly concentrated paint brush manufacturing industry (finding 88). Essex had considered entry into this market for seven years prior to its acquisition (finding 142). Customers and salesmen pressured roller manufacturers to sell paint brushes and paint brush manufacturers to sell paint rollers (finding 44). All of Essex Graham's leading 12 competitors had entered into paint brush manufacturing by the end of 1969 (finding 48).

No firm stood closer to the edge of the paint brush market than Essex Graham. The company was going into brush manufacturing. The only question was how. When it was acquired by Beatrice, it was removed as the most likely entrant into the highly concentrated paint brush submarket and as the most significant roller manufacturer that might still have entered that industry *de novo* or by toehold acquisition. No paint roller manufacturer who entered into paint brush manufacturing after Essex Graham is indicated in this record to have had as much as a 0.3 percent share of the paint roller market in 1969 (CX 109 c). Entry of such a competitively insignificant firm into brush manufacturing would be of dubious competitive significance as regards effectively competing with significant paint brush manufacturers.

Essex Graham had the capability and incentive to enter the paint brush market, either by internal expansion or by toehold acquisition. It was the only substantial company in the paint roller industry not manufacturing paint brushes. Concentration in the paint brush industry was high and increasing (findings 48, 88, 137-145).

Barriers to entry into paint brush manufacture did exist (findings 146-158, *infra*; CX 109 c). Such barriers could have been surmounted by Essex Graham. The company already was a major factor in rollers and could have acquired a toehold brush company or the technological know-how necessary for entry *de novo* from another firm in the brush industry.

On the basis of the above facts, the removal of Essex Graham as a potential entrant violates Section 7 of the Clayton Act. See generally *United States v. El Paso Natural Gas*, *supra*; *United States v. Penn-Olin Chemical Co.*, *supra*; *FTC v. Procter & Gamble Co.*, *supra*; *Ekco Products Co. v. FTC*, 347 F.2d 745 (7th Cir. 1965); *Kennecott Copper Corp. v. FTC*, 467 F.2d 67 (10th Cir. 1972); *The Bendix Corp.*, Trade

Reg. Rep. ¶ 19,288 at 21,439 (F.T.C. 1970) [77 F.T.C. 731], remanded on other grounds, 450 F.2d 534 (6th Cir. 1971).

VI. Barriers to Entry into the Manually Powered Paint Applicator Industry

146. The capital investment to begin initial manufacture of paint brushes and paint rollers is not great. Felkay testified that he entered the brush business in 1948 making small artist brushes and small consumer throwaway brushes with a capital investment of \$4,400 (Felkay 1248, CX 22). A 1950 balance sheet for Tip Top shows total assets of \$44,000 and plant and equipment investment of \$7,000 (RX 215). In general, initial capital requirements for entry into the paint brush and paint roller industry are not high (Felkay 1376, 1381; Weiss 519). Felkay testified that production of approximately \$1 million worth of brushes a year can be accomplished with an investment in equipment of less than \$2,000 and a total working capital investment of \$10,000 to \$12,000 (Felkay 1381-96). Felkay also testified that he could produce \$4,000 to \$5,000 worth of brushes per day with a relatively modest amount of equipment and with about 12 to 15 employees (Felkay 1376, 1381, 1391-93). Felkay further testified that a total investment of \$10,000 to \$12,000 would be sufficient to sustain operations (Felkay 1396). However, another witness testified on rebuttal that approximately twice as many people would be needed to obtain the production to which Felkay testified (Edelson 3052). Another one of complaint counsel's witnesses estimated that \$25,000 worth of equipment would be sufficient to begin the manufacture of rollers (Weiss 519). Greenberg of Essex Graham testified, based on actual experience, that the equipment necessary for a roller plant would cost approximately \$7,000 (Greenberg 1468).

147. Another one of complaint counsel's witnesses testified that a paint brush plant with annual sales of \$2.5 million would require \$250,000 worth of machinery and \$5,000 for initial supplies (Lieberman 677-81). Another witness for complaint counsel testified that the construction of a new plant which would produce sales of \$3.5 million (primarily in brushes and also some in rollers) would cost one-half million dollars for machinery alone (Shulman 645, 647). In addition, a substantial amount of cash is required if a manufacturer is to make a successful entry into a new region (Weiss 575). Both of these witnesses, however, were testifying about duplicating existing plants or construction on a level much greater than that needed to make a meaningful entry (Lieberman 680, Shulman 645, 647).

148. One of complaint counsel's witnesses who was already a large manufacturer of brushes testified that he commenced the manufacture

of rollers with two part-time employees (Linzer 3358), that the production of rollers consisted of 2,000 to 3,000 square feet, located in the basement of his plant (Linzer 3360), that he utilized only two pieces of equipment in the manufacture of rollers, a winder and a trimmer and comb (Linzer 3360-61), and that with this plant equipment and personnel, he produced approximately \$25,000 worth of rollers the first year (Linzer 3367). Another witness testified that he was a manufacturer of brushes and was able to enter the manufacture of rollers on a modest scale (Waksman 3463).

149. A new entrant into the manually powered paint applicator industry, to be a significant competitive factor, must enter into both the manufacture of brushes and rollers. There is considerable pressure by customers on manufacturers to sell both paint brushes and rollers, and manufacturers feel they will lose sales and market position unless they sell both products (finding 44). Significant manufacturers of manually powered paint applicators in 1969 each produced both paint brushes and paint rollers in that year. The largest firm in the manually powered paint applicator industry which did not manufacture both brushes and rollers ranked 12th with a 2.6 percent of market share in 1969 (finding 46).

150. There have been no *de novo* entrants into the manufacture of paint brushes in the last 10 years (Lieberman 686). There have been no significant entrants *de novo* in the manufacture of paint rollers since 1965 (finding 151, *infra*).

151. Of seven companies characterized as new entrants into the roller business since 1965 by respondent's witness Pereles, who was neither a manufacturer nor seller of rollers, one denied ever having made rollers, one was a remnant of a previous manufacturer, one entered by acquiring assets and accounts of a company previously in business, and at least two others were producing on an insignificant scale in 1972. Combined sales of the latter two firms were less than \$150,000 in 1972 (Pereles 1577; Wolf 3269; Leichter 3321, 3325, 3375; Edelson 3076; Waksman 3463; Linzer 3366). Neither would have equaled the 13th largest manufacturer of rollers in 1969, which had 0.3 percent of industry shipments (CX 109 c).

152. The chairman of the board of Beatrice, Karnes, indicated the difficulty of entering into the manufacture of paint brushes *de novo* as follows:

* * * this [entry *de novo*] would have been very costly to us and would have been a long period of time getting it into a profitable position * * * (Karnes 1240).

Instead, Beatrice chose to enter by acquisition of Tip Top (CX 54).

153. Similarly, a roller manufacturer decided against manufacture

of brushes because of the need to commit large resources and "the question of feasibility and profitability * * *." (Gartner 2254).

154. Independent companies such as Ideal, Praeger, Tip Top and Essex Graham have been replaced by conglomerates such as Consolidated Foods, Pacific Lumber and Beatrice (finding 93). These conglomerates possess advantages over new entrants in having a "deep pocket," expensive promotion programs, large-company merchandising and marketing know-how, and distribution systems (findings 1-16).

155. Such companies have a competitive advantage in obtaining new customers. Paint brush and roller outlets are reluctant to deal with small firms or those firms which "lack a track record." (Weiss 575). It is Ideal's opinion that large customers prefer to buy from a brush or roller company with a large, financially strong parent (Weiss 575).

156. There is very little used machinery available for brush manufacturing, there is no machinery available for lease, and financing terms for brushmaking machinery are not available (Lieberman 691-92). Shortage of qualified personnel necessary to successfully manufacture paint brushes has discouraged entry *de novo* (Freund 1429). Also, equipment necessary for the manufacture of paint rollers is not readily available (Benson 3427, 3452).

157. There is a shortage of personnel required to manufacture paint brushes and rollers at the management, foremen and skilled labor levels. Plant managers and foremen are not available (Schulman 2947, 2950, 2951). Because skilled laborers cannot be obtained from other industries (Schulman 2967-68), manufacturers pirate them from other companies in the industry (Schulman 2962).

158. Upon the basis of the foregoing, the undersigned finds that substantial barriers to new entry exist in the manually powered paint applicator market, that entry of new competitive entities have been and may continue to be made more difficult, and that preexisting barriers have been made even higher in the manually powered paint applicator industry and submarkets by the acquisition of Essex by Beatrice.

Mergers having the effect of raising barriers to entry similar to those which occurred in this case were held to violate Section 7 in *FTC v. Procter & Gamble Co.*, *supra*; *General Foods Corp. v. FTC*, 386 F.2d 936 (3d Cir. 1967), *cert. denied* 391 U.S. 919; and *United States v. Wilson Sporting Goods Co.*, 288 F. Supp. 543 (N.D. Ill. 1968) (preliminary injunction granted).

The fact that the capital investment to begin initial manufacture of paint brushes and paint rollers may not be great, in and of itself, is not particularly significant. It is only one of many factors to be considered in appraising barriers to entry. But even if it were the sole factor in determining ease of entry, the Commission has repeatedly held that the

difficulty of entry factor is not indispensable to a finding of illegality under Section 7. See *American Brake Shoe Co.*, *supra*, 684; *Ekco Products Company*, 65 F.T.C. 1163, 1209.

VII. The Matter of EZ Paints Corp.

Respondent argues that the consent settlement *In the Matter of EZ Paints Corp.* (F.T.C. Docket C-2106) [79 F.T.C. 805] establishes the legality of the mergers by Beatrice which are the subject matter of this proceeding. In support of this, respondent cites the initial decision *In the Matter of Sterling Drug, Inc.*, Docket 8797 [80 F.T.C. 477], wherein reference was made to Sterling's reliance on the decision of the Commission in the divestiture phase approving the acquisition by Miles Laboratories of SOS after a full adjudication on the merits before the Commission and review by the courts (*In the Matter of General Foods Corp.*, Docket 8600, 69 F.T.C. 380 (Mar. 11, 1966), *aff'd* 386 F.2d 936 (3d Cir. 1967), *cert. denied* 391 U.S. 919 (1968)).

It is well settled that a decision approving an acquisition in a divestiture context amounts to a holding that the acquisition clearly does not violate Section 7 of the Clayton Act. See *United States v. Kennecott Copper Corp.*, 249 F. Supp. 154, 163 (S.D.N.Y. 1965). Indeed, it has been held that a divestiture would be rejected if it had any significant anticompetitive effects, even if not amounting to a violation of Section 7. *United States v. Aluminum Company of America (Alcoa-Rome)*, *et al.*, 1967 CCH Trade Cases ¶ 71,973 (N.D.N.Y. 1966).

In contrast to the procedures in a divestiture order, a consent order entered into by the Commission is not an adjudication on the merits of a matter and is not binding. The Commission in such a proceeding does not determine the legality or illegality of the conduct involved, consent orders contain no complete findings of fact, and many of the factors considered are known only to the Commission and are not a part of the public record. The courts and the Commission have consistently held that a consent decree is not a binding judicial precedent because of these factors, as well as the fact that they are based entirely upon the bargaining of the parties (*United States v. DuPont Co.*, 366 U.S. 316, 330, n. 12 (1961); *Oxwall Tool Co.*, Docket 7491, 64 F.T.C. 240, 243 (1959)). Moreover, a determination that consent orders are controlling precedents would severely limit the use of the consent settlement process.

In the absence of sufficient factual information and in view of the legal precedents cited above, any comparison or analysis of the *EZ Paints* consent settlement to the instant case would be inappropriate.

CONCLUSIONS OF LAW

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

2. At all times relevant to this proceeding, respondent Beatrice, Tip Top and Essex Graham were corporations engaged in "commerce" as defined by Section 7 of the Clayton Act, as amended (15 U.S.C. § 18).

3. The entire United States is the appropriate geographic market, or "section of the country," within which to consider the alleged competitive effects of the mergers of Beatrice and Tip Top and Beatrice and Essex Graham under Section 7 of the Clayton Act, as amended.

4. The manufacture and sale of manually powered paint applicators, paint and varnish brushes and paint rollers are appropriate product markets and submarkets, or lines of commerce, within which to consider the alleged competitive effects of the mergers of Beatrice and Tip Top and Beatrice and Essex Graham under Section 7 of the Clayton Act, as amended.

5. Counsel supporting the complaint have failed to sustain the burden of establishing, by substantial, reliable and probative evidence, that the effect of the acquisition by respondent Beatrice of Tip Top has been, or may be, substantially to lessen competition or to tend to create a monopoly in any line of commerce alleged in violation of Section 7 of the Clayton Act, as amended.

6. The acquisition by Beatrice of Essex Graham eliminated a direct competitor of Beatrice in the manually powered paint applicator market and paint roller submarket, and a potential competitor of Beatrice in the paint brush submarket.

(a) Beatrice, through its Tip Top subsidiary, and Essex Graham manufactured the same products which were distributed to the same outlets at the time Essex was acquired. Beatrice and Essex were direct competitors.

(b) The acquisition of Essex eliminated Essex as the most likely potential entrant into the paint brush submarket.

(c) The acquisition of Essex increased concentration and entry barriers into these lines of commerce.

7. The effect of the acquisition by respondent Beatrice of Essex Graham has been, or may be, substantially to lessen competition or to tend to create a monopoly in violation of Section 7 of the Clayton Act, as amended.

The Remedy

It is well settled that the choice of the remedial order is committed to

the discretion of the Commission. *FTC v. Mandel Bros.*, 359 U.S. 385, 392-93 (1959); *Niresk Industries, Inc. v. FTC*, 278 F.2d 337, 343 (7th Cir. 1960), *cert. denied* 364 U.S. 883 (1960); *L. G. Balfour Company v. FTC*, 442 F.2d 1 (7th Cir. 1971). The Commission has the power to order divestiture to restore competition to the state of health it might be expected to enjoy but for the acquisition. *FTC v. Dean Foods Co.*, 384 U.S. 597, 606 n. 4 (1966); see *Pan American World Airways Inc. v. United States*, 371 U.S. 296, 312-13 nn. 17 and 18 (1963); *Ekco Products Company*, 65 F.T.C. 1204, 1214-17 (1964). The remedial phase of antitrust cases is crucial and the primary focus of inquiry as to remedy is whether the relief adequately redresses the economic injury arising out of the violation. *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 326, 327. Moreover, "once the government has successfully borne the considerable burden of establishing a violation of law all doubts as to the remedy are to be resolved in its favor." *United States v. du Pont*, *supra*, at 334. Generally, the most appropriate remedy to redress a Section 7 violation is divestiture. *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967). Based upon the findings and conclusions of law set forth above, divestiture is the appropriate remedy in this proceeding.

ORDER

I

It is ordered, That, subject to the prior approval of the Federal Trade Commission, respondent Beatrice, through its officers, directors, agents, representatives, employees, subsidiaries, affiliates, successors and assigns, shall as soon as possible and in any event within one (1) year from the date this order becomes final, divest absolutely and in good faith all assets, rights, property and privileges, tangible and intangible, including all plants, equipment, machinery, raw material reserves, inventory, customer lists, trade names, trademarks, good will and other property of whatever description acquired by Beatrice as a result of its acquisition of Essex Graham Company (hereinafter referred to as Essex), including all additions and improvements thereto, which are necessary to restore Essex as a separate independent and viable going concern in the lines of commerce in which it was engaged prior to said acquisition.

II

It is further ordered, That, pursuant to the requirement of Paragraph I above, none of the stock, assets, rights or privileges, tangible or intangible, acquired or added by Beatrice shall be divested directly or

indirectly to anyone who is, at the time of the divestiture, an officer, director, employee, or agent of, or under the control, direction or influence of Beatrice or any of Beatrice's subsidiaries or affiliated corporations or who owns or controls more than one (1) percent of the outstanding shares of the capital stock of Beatrice.

III

It is further ordered, That, pending divestiture, respondent Beatrice shall not make or permit any deterioration in the value of any of the plants, machinery, parts, equipment, or other property or assets of the corporations to be divested which may impair their present capacity or market value unless such capacity or value be restored prior to divestiture.

IV

It is further ordered, That respondent Beatrice shall cease and desist for ten (10) years from the date this order becomes final from acquiring directly or indirectly, through subsidiaries or otherwise, without prior approval of the Federal Trade Commission, any part of the assets, stock, share capital, or other actual or potential equity interest or right of participation in the earnings of any domestic concern, corporate or noncorporate, which is engaged in the manufacture or sale of manually powered paint applicators or engaged in the manufacture or sale of raw materials to companies engaging in the manufacture or sale of manually powered paint applicators, or from entering into any arrangements or understandings with such a concern through which respondent Beatrice becomes possessed of that concern's market share.

For the purposes of this order, manually powered paint applicators are defined as: paint and varnish brushes; paint rollers, including pans, covers, handles, and other accessories sold separately, or as part of a paint roller kit; and miscellaneous paint applicators other than spray equipment and aerosol cans.

V

It is further ordered, That respondent Beatrice shall within sixty (60) days after date of service of this order, and every sixty (60) days thereafter until respondent Beatrice has fully complied with the provisions of this order, submit in writing to the Federal Trade Commission a verified report setting forth in detail the manner and form in which respondent Beatrice intends to comply or has complied with this order. All compliance reports shall include, among other things that are from time to time required, a summary of contracts or

negotiations with anyone for the specified stock, assets and plant, the identity of all such persons, and copies of all written communications to and from such persons.

VI

It is further ordered, That respondent Beatrice notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any change in the corporation which may affect compliance obligations arising out of the order.

OPINION OF THE COMMISSION

JULY 1, 1975

BY LEWIS A. ENGMAN, *Commissioner*:

This matter is before the Commission on cross-appeals by both the respondent and counsel supporting the complaint from the Initial Decision of the administrative law judge.

The complaint in this matter alleges that Beatrice Foods Company ("Beatrice") violated Section 7 of the Clayton Act in two respects; first, when it acquired the stock and assets of Tip Top Brush Company and its affiliated companies¹ (hereinafter referred to collectively as "Tip Top") in July 1969 and, second, when it acquired the Essex Graham Company ("Essex Graham") in July 1970. The complaint alleges that these acquisitions may result in a substantial lessening of competition in the manufacture and sale (1) paint and varnish brushes, (2) paint rollers, and (3) a market encompassing both paint and varnish brushes and paint rollers. (The latter market is given the infelicitous name "manually powered paint applicator" in the complaint. We refer to it here as simply the "brush-and-roller market." The two alleged submarkets will be referred to as the "paint brush" and "paint roller" markets or submarkets.)

At the time of the first acquisition—the acquisition of Tip Top—the parties agree that Beatrice was not then engaged in the manufacture or sale of any of the product lines involved in this case, so there is no question of a competitor being eliminated as a result of that merger. Rather, complaint counsel argue that Beatrice was a potential entrant into the brush-and-roller market and that by acquiring Tip Top a

¹ Banner Brush Co., Inc.; Best-Set Brush Co., Inc.; United Brush Manufacturing Co., Inc.; First Synthetic Fiber & Brush Co. Inc.; West Side Leasing Corp.; Excello Roller Co. Inc., and Star Brush Manufacturing Co., Inc. Banner Brush, Best-Set, and United Brush were not operating corporations but their names were used for private label business.

"leading manufacturer" of paint brushes and rollers, it chose a method of entering the market that removed the likely pro-competitive effects that would have ensued had it entered by way of a "toehold" acquisition and subsequently sought to expand the operations of such a smaller company. Complaint counsel further allege that the acquisition has "entrenched" Tip Top as a market leader to the detriment of competition.

As to the subsequent acquisition of Essex Graham—a manufacturer of paint rollers, but not of paint brushes—complaint counsel argue that this transaction was a horizontal merger between two substantial competitors in the brush-and-roller market and the paint roller submarket. In addition to eliminating a significant competitor in those markets, it is alleged that the acquisition also eliminated Essex as a potential entrant into the paint brush submarket.

The administrative law judge, after extensive hearings, found that the acquisition of Essex Graham transgressed Section 7 of the Clayton Act as alleged in the complaint. However, he dismissed the complaint as to the Tip Top acquisition. Divestiture of Essex Graham only was therefore ordered.

Complaint counsel appeal from the law judge's dismissal of the challenge to the Tip Top acquisition. Respondent appeals from his decision insofar as the Essex Graham acquisition was found unlawful. Since respondent's challenge to the appropriateness of the product lines adopted in the initial decision is relevant to both appeals, we will take that question up first.

I. The Relevant Product Markets

The administrative law judge found that "paint brushes" (which includes varnish brushes) constitute a line of commerce for purposes of Section 7, and that "paint rollers" (which includes accessory products such as paint roller covers, handles, trays, trimmers, and flat pad applicators) constitute an appropriate line of commerce.

The law judge found that paint brushes and rollers taken together also constitute a line of commerce for purposes of this case.

Respondent contends that there are a number of errors in the definitions of lines of commerce. It argues that the traditional brush or roller manufacturer sells products in two distinct lines of commerce—a higher priced "professional" brush or roller and a cheaper "throwaway" version for the "do-it-yourself" buyer.² Respondent also argues that

² Respondent's briefs do not suggest what criteria should be used to distinguish these two lines of commerce. In its statement of the issues it says "a professional brush may sell for \$30 or more and a throwaway brush may sell for 99 or less" (appeal brief pp. 2,4). This hardly answers the question in which of the two lines belong products that *retail*

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aerosol and power spray equipment should be included in any paint applicator market.

It may well be that paint brushes and rollers could be divided into product submarkets according to quality-derived price distinctions. However, the question presented by respondent is whether brushes and rollers *must be* segregated into entirely *separate product* markets according to price/quality distinctions. We find that any such division into separate product markets is unwarranted. Unless articles within a product classification are sold in clearly separated price groupings that have little price sensitivity between them, there will always be the problem of just where market divisional lines should be drawn along the price/quality spectrum. As the Court observed in *Brown Shoe Co. v. United States*, 370 U.S. 294, 326 (1962). "It would be unrealistic to accept Brown's contention that, for example, men's shoes selling below \$8.99 are in a different product market from those selling above \$9.00."

At the time the hearings were held, the bulk of rollers and paint brushes were sold at retail prices below \$5.00 (Tr. 474, 637, 656, 711, 764). As indicated in the preceding footnote, retailers offer a range of painting utensils of differing quality and price with considerable overlap between paint applicators listed by manufacturers as "professional" in quality and those promoted to the "homeowner." (See also Tr. 302, 473-74, 637, 764-65, 1387, CX 27H-Z, CX 32Q, CX 33B.) As in *Brown Shoe*, we think it would be unrealistic to divide the brushes and rollers into separate product markets at some arbitrary point such as \$2.49. The fact that Tip Top specialized in selling and promoting rollers that were lower in quality and price than most of the rollers sold by Essex Graham is a factor that should be considered in weighing the effects of the merger between those companies, not in defining market boundaries, *Brown Shoe, supra*, 326.³

We also find that the law judge was correct in determining that sales of aerosol paint cans and power spray equipment need not be included

between 99 cents and \$30. At another point respondent suggests that "throwaway" brushes and rollers are those that sell for "no more than \$2.49" (*id.* at 34). Yet its own exhibits show that both higher- and lower-priced brushes and rollers are promoted to homeowners and their prices substantially overlap with brushes advertised as "professional" paint brushes. For instance, Respondent's Exhibit 8-I, a page from a Sears catalogue, shows "Homeowner Brushes * * * Nickel plated ferrule * * * Plastic handles" ranging from \$4.55 for 4-inch nylon-bristle brushes to \$1.70 for 2-inch nylon-bristle brushes. On the same page are listed "Professional Brushes * * * Hardwood handles * * * Copper-plated ferrules" that range from \$5.67 for 4-inch nylon-bristle brushes to \$2.55 for 2-inch nylon brushes. "Professional" sash and trim brushes are priced from \$1.49 to \$2.10. Sears also offers low, medium, and high quality paint rollers (Tr. 1543).

³ Furthermore, if a manufacturer of more expensive brushes or rollers can easily shift his production facilities to make a cheaper version in response to increased demand for such products, then the market may be defined broadly to include "all brushes" and "all rollers" and market shares based on firms' total output. *Brown Shoe, supra*, at 325 n. 42; *Sterling Drug Co.*, 80 F.T.C. 477, 585, *et seq.* (1972). The record indicates that such "cross-elasticity of supply" exists throughout the price/quality continuum with respect to the manufacture of rollers (Tr. 646, 1303-04, 1526-28). Thus, after its acquisition by Tip Top, much of Essex Graham's production of paint rollers was converted to supply lower priced rollers whereas previously that company made higher quality rollers for the most part. Although more hand labor and better material are used in manufacturing finer brushes than cheaper ones, it appears that similar production interchangeability exists. (Tr. 266-67, 466, 451A, 2472, RX179).

along with brush and roller sales in measuring market concentration. Clearly his conclusion on this point is correct insofar as the "submarkets" in this case are concerned. Paint brushes have their own peculiar characteristics and uses that distinguish them from all other paint applicator devices such that buyers will prefer them for certain uses. Paint rollers likewise have their own peculiar advantages for certain paint jobs because of the ease and speed with which they can apply paint.

A closer question is whether sales of brushes and rollers *combined* constitute a separate product market. Although sales of some paint brushes are complementary to paint roller sales such that the buyer will often buy both products rather than one for the other, respondent does not dispute that rollers and brushes also compete in sales for certain end uses. Respondent agrees, for instance, that rollers compete with 4-inch brushes for large flat area paint jobs and that with the introduction of the roller in the market in the 1950's brush manufacturers were compelled to develop lower priced 4-inch brushes to compete with rollers. However, since aerosol paint cans and power spray equipment also "apply" paint and sales of these products collectively are acknowledged to be substantial by complaint counsel, respondent contends that their sales should also be included in measuring any of the markets involved.

In determining the outermost boundaries of a product market, analysis should be guided by examination of the "reasonable interchangeability of use" or the cross-elasticity of demand between the product and substitutes for it. *Brown Shoe v. United States*, *supra*, 370 U.S. at 325; *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956). A market definition that combines paint rollers with paint brushes is a proper market in our opinion as it defines products that are to a large degree interchangeable for an important use, namely the application of paint to large flat areas such as walls, ceilings, exteriors of buildings, etc. As previously noted, it is with regard to this type of application that paint rollers have made inroads on sales of brushes and forced the appearance of competitively priced brushes.

Aerosol paint cans, on the other hand, are convenience items used mainly around the home where only a small amount of paint is required. The record establishes that aerosols are most commonly used to paint small pieces of furniture, decorative ironwork, craft projects, automobile touch-ups, and so forth (Tr. 300, 596, 821, 826). The cost factor, among other things, makes them too expensive for extensive paint application on most architectural surfaces where rollers and brushes are more suitable (Tr. 471, 2368). Once the paint is used up, the aerosol can is not re-usable. Also the range of colors and types of paint offered

in aerosol cans is limited (Tr. 704). In contrast, rollers and brushes can be used many times, are clearly more suitable for large paint jobs, and can be used with a wider variety of paints.

It was also proper for the law judge to exclude sales of power spray equipment. Although professional painters do sometimes use power spray equipment to paint architectural structures, such use is usually limited to industrial buildings such as warehouses and factories, not houses or apartments where fall-out from the overspray would create a problem (Tr. 300-01, 596, 780-82, 814, 833-34, 2377-78). Furthermore, these devices are not competitively priced with rollers and brushes and require skills and maintenance (not to mention purchase price) that do not ordinarily appeal to consumers. For that reason many paint stores, hardware stores, and other retail outlets do not carry power spray equipment, although all retail outlets that sell interior and exterior house paint consider it necessary to carry a full line of both brushes and rollers (Tr. 479-699). The bulk of power spray equipment is sold and used for industrial purposes or specialty jobs where brushes and rollers would not be suitable (Tr. 300, 451-A, 779, 1990-91).

Arguably, in measuring the size of the brush-and-roller market, the "brush" segment could be limited to sales of large brushes—e.g. 4-inch brushes—that are most commonly used for large paint jobs and are most competitive with paint rollers. However, such "fine tuning" of brush sales to "end use" seems entirely unnecessary here. In the first place, many paint purchasers do in fact buy smaller paint brushes along with paint rollers to do edging and trimming work on interior walls and ceilings. Interchangeable and competitively priced with such brushes are trimming roller devices that are also designed to perform that function (Tr. 821, 833). Secondly, the inclusion of "all brush sales" in the combined market—as distinguished from some portion of total brush sales or sales of particular size brushes—would make little difference in the final picture of market concentration. Major paint brush manufacturers sell a full line of brush sizes to redistributors or directly to retailers. There is no reason to believe that one brush manufacturer sells, for example, more 4-inch brushes proportional to his line than any other full line manufacturer. Furthermore production interchangeability exists among brush sizes. We fail to see how the picture of market concentration would be changed were the brush segment of this market limited to sales of only 4-inch brushes, as respondent seems to suggest.⁴ Indeed, since concentration ratios are considerably lower in sales of

⁴ Cf. *Brown Shoe Co. v. United States*, *supra*, 370 U.S. at 327:

"Brown's sharpest criticism is directed at the District Court's finding that children's shoes constituted a single line of commerce. Brown argues, for example, that 'a little boy does not wear a little girl's black patent leather pump' and that '[a] male baby cannot wear a growing boy's shoes.' * * * Assuming, *arguendo*, that little boy's shoes for example, do have sufficient peculiar characteristics to constitute one of the markets to be used in analyzing the effects of this

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paint brushes than in sales of rollers (CX 109, 110), any bias in concentration figures resulting from using "all brush sales" in the product mix favors respondent.

That paint rollers and paint brushes combined can properly constitute a line of commerce which is measured by the total sales of both products, and excluding more distant substitute products such as aerosols and power spray equipment, is supported by *United States v. Continental Can Company*, 378 U.S. 441 (1964). In that case, involving a merger between a glass container manufacturer and a metal can manufacturer, the Court determined that since there was considerable interchangeability for some end uses between glass containers and metal cans that "quantitywise [were] very substantial," the district court should have recognized the existence of a "glass and metal container" market. The Court held that complete overlap in end use need not be present and stated: "[N]or are we concerned by the suggestion that if the product market is to be defined in these terms it must include plastic, paper, foil and any other materials competing for the same business. That there may be a broader product market made up of metal, glass and other competing containers does not necessarily negative the existence of submarkets of * * * cans and glass together, for 'within this broad market, well-defined submarkets may exist which in themselves, constitute product markets for antitrust purposes' [citing *Brown Shoe*]." *id.* 457-58. See also *United States v. Connecticut National Bank*, 418 U.S. 656, 663 n. 3 (1974). Similarly, the fact that aerosols and other spray equipment are interchangeable with brushes or rollers for some limited end uses does not negative the existence of a separate brush-and-roller market.

In conclusion, we affirm and adopt the law judge's conclusions that "paint brushes" and "paint rollers" each constitute a line of commerce and that paint brushes and rollers combined properly constitutes an overall line of commerce for purposes of this case.

II. Section of the Country

The administrative law judge found the relevant geographic market to be the United States as a whole. Although disputed by respondent, this finding is amply supported by the record. Many manufacturers of paint brushes and rollers testified in this case. Nearly all stated that

merger, we do not think that in this case the District Court was required to employ finer 'age/sex' distinctions than those recognized by its classifications of 'men's,' 'women's,' and 'children's' shoes. Further division does not aid us in analyzing the effects of this merger. * * * Appellant can point to no advantage it would enjoy were finer divisions than those chosen by the District Court employed. Brown manufactures significant, comparable quantities of virtually every type of nonrubber men's, women's and children's shoes, and Kinney sells such quantities of virtually every type of men's, women's and children's shoes. Thus, whether considered separately or together, the picture of this merger is the same."

they ship their products for sale throughout the United States. Respondent cites instances where some manufacturers testified that freight costs are a significant factor and give local manufacturers, *i.e.* firms with factories in a given area, a competitive advantage. However, none with the exception of a witness from Beatrice claimed that freight was so prohibitive as to foreclose firms from selling in any particular section of the country. Even here the item in question was a "promotional roller kit"—a cheap and relatively bulky item for which freight is obviously a more significant factor than it is for other paint applicator products. The majority of products involved in this proceeding are distributed nationally and the major firms compete with others throughout the United States, a fact that compels finding that the nation as a whole constitutes the relevant market.

III. The Acquisitions

Respondent Beatrice is a large, diversified corporation which had its origin in the dairy business. It also engages in the manufacture and sale of nonfood products and has chemical, manufacturing, and international divisions which by 1970 accounted for over 30 percent of its sales. Nonfood products now sold by Beatrice range from house trailers to skis. For the fiscal year ending Feb. 28, 1970, Beatrice's overall net sales reached approximately \$1,575,000,000 and total assets approximated \$504 million.

Tip Top Brush Co. Inc. and its affiliated companies (see n. 1, *supra*) were corporations collectively engaged in making and selling paint brushes and rollers. Tip Top's principal office was located in Jersey City, N.J. Prior to acquisition by Beatrice, the outstanding stock of the corporations was owned by Miklos Felkay and his wife, Madelaine Felkay, who had entered the paint brush business in this country in 1948.

During the ensuing years, Tip Top expanded rapidly. By 1955 the company had opened a warehouse in Los Angeles, Calif. and its name had become known in the trade throughout the country. By the end of 1969, it had expanded to become the third largest manufacturer in the combined paint brush-and-roller market, having approximately 7.6 percent of sales in that market. It had manufacturing facilities in Boston and Jersey City, and warehouses in Chicago and Los Angeles. Total sales in 1969 approximated \$7.4 million.

Paint rollers first entered the market in the mid-1950's. In response to the roller, Tip Top introduced a lower priced 4-inch brush that retailed for 99 cents. In 1958, Tip Top commenced selling rollers and created the Excello Roller Company as an assembler of rollers. Tip Top

sold its brushes and rollers through hardware stores, food chains, paint stores, drug stores and variety stores.

By the time of its acquisition it had been recognized as being an innovative merchandiser. According to Mr. Felkay, it was the first to develop the mass merchandiser and drug store as potential markets and one of the first to display brushes and rollers in relation to the type of paint being used (Tr. 976, 973-74).

In 1968, the Felkays decided to put their company up for sale and initiated contacts with several companies, including Beatrice, seeking a purchaser. On July 31, 1969, Beatrice acquired Tip Top through an exchange of stock.

On July 1, 1970--11 months after its acquisition of Tip Top--Beatrice acquired the Essex Graham Company, a Chicago-based manufacturer of paint rollers.

The record shows that in the six year period preceding the acquisition, Essex Graham was an economically strong and viable competitor in the industry. Its assets increased from approximately \$510,000 in 1964 to approximately \$2,322,000 in 1969. Sales amounted to \$2,216,000 in 1969 and in that year it was the fifth largest manufacturer of paint rollers in the United States. After the acquisition, Essex Graham began to distribute paint brushes.

IV. Complaint Counsel's Appeal from the Dismissal of the Complaint as to the Tip Top Acquisition.

A. Beatrice as a potential entrant

As previously noted, in the years preceding the Tip Top acquisition, Beatrice had diversified into a number of nonfood fields. These were fields appraised by Beatrice as having exceptional sales growth potential. Included was the home and garden accessory field. In 1965 Beatrice diversified into home and garden accessories by acquiring the Stiffel Company, a manufacturer of lamp shades and decorator lamps. In 1967, Beatrice made a study of the "do-it-yourself" market for the home consumer that led to a second acquisition--Melnor Industries, a manufacturer of water sprinkling equipment and garden and lawn supplies. During 1968, Beatrice continued its acquisition in the home and garden field by acquiring the following manufacturers: World Dryer Corporation (small household electric appliances); Charmglow Products, Inc. (lighting equipment, patio lamps, and gas barbeques); Max Kahn Curtain Corporation (curtains and draperies); Vogel-Petersen Co. (wardrobe racks); and the Farboil Company (specialty coatings and paints).

After having been approached by a representative of Tip Top who was seeking a purchaser for that company, Beatrice conducted a study

of the paint brush-and-roller market. Beatrice concluded that this was a growth market and, according to testimony of its officials, acquired Tip Top because that firm met the prerequisites that Beatrice requires of prospective acquirees: (1) that it is a profitable company doing business in a growth market; (2) that its management agrees to continue with the firm after the merger; (3) that the acquisition will contribute to the per-share earnings of Beatrice (Karnes, Tr. 1210-19)⁵.

The administrative law judge concluded that an insufficient showing had been made that Beatrice was a likely potential entrant into the brush-and-roller market. He also found that even if Beatrice were considered a potential entrant, elimination of it as a future entrant would not substantially lessen competition. His reasoning consisted of the following points and observations:

1. Complaint counsel had failed to address themselves to question whether Beatrice was a likely entrant into the paint brush-and-roller market. Rather, the thrust of their case was that Beatrice was potential entrant into the "home and garden accessory field" a much broader market and one not alleged as a line of commerce in this proceeding.
2. There was no showing that Beatrice possessed distinctive capabilities and incentives to enter the brush-and-roller market.
3. There was no showing that Tip Top was the dominant or leading firm in that market, since it had only 7.6 percent of the market in 1969.
4. Many major paint companies, given their financial capabilities and closeness to the market were more likely entrants.

As the Commission has recognized before, injury to competition by the elimination of a potential competitor can come about by one or both of two ways. First, the elimination by acquisition of a substantial firm perceived to be waiting at the edge of a market and ready to enter if profit opportunities beckon may remove an important restraining influence on prices of leading firms in a concentrated market. *United States v. Falstaff Brewing Corp.*, 410 U.S. 526 (1973). Secondly, elimination of likely entry into the market could remove one of the few remaining opportunities for deconcentration in a market characterized by concentration and high entry barriers. In other words, had the acquisition not occurred the potential entrant might have entered the market *de novo* or expanded a toehold acquisition, thereby creating greater capacity and competition.

Complaint counsel do not claim that Beatrice was perceived as a

⁵ As to the latter prerequisite, see *Beatrice Foods Co.*, 81 F.T.C. 481, 519 n. 2:

It has frequently been noted that one of the incentives for acquisitions by diversified companies is to increase earnings per share on common stock. This occurs when the company which is being acquired has a lower price-to-earnings ratio than the acquiring company. Simply through acquisition of such a corporation the first company can immediately increase its earnings per share and usually the value of its stock on the market. See, e.g., Scherer, *Industrial Market Structure and Economic Performance* 114 (1970); Staff Report to the F.T.C., *Economic Report on Corporate Mergers* 122-138 (1969).

potential entrant by firms in any of the markets involved here and therefore do not claim that its alleged presence at the edge of the market had a disciplining effect on prices. Rather, they argue that injury has come about in the second manner—that Beatrice was in fact a future entrant into the relatively concentrated brush-and-roller market and that by choosing to enter by way of acquisition of a leading company (Tip Top), Beatrice eliminated any possibility of its entering in a more competitive manner.⁶ Complaint counsel do not contend that Beatrice would have entered this market *de novo* but argue that both “objective evidence” and “subjective evidence” demonstrate that Beatrice was a likely entrant by way of a “toehold acquisition.” Cf. *The Bendix Corp.*, 77 F.T.C. 731 (1970) *reversed and remanded on other grounds*, 450 F.2d 534 (6th Cir. 1971).

Complaint counsel’s objective evidence is based on the fact that Beatrice was already engaged in the production and sale of certain home and garden accessory products, such as Stiffel lamps, Melnor garden tools and sprinklers and gas-fired barbeques and that following the acquisition it acquired the Chicago Specialty Company which distributed plumbing specialties to hardware stores. However, the home and garden accessory field is so large and amorphous that we must agree with the law judge’s rejection of this line of argument. There has been no showing that know-how in the manufacturing of any of the above items made by Beatrice divisions would create an incentive for Beatrice to diversify into paint brushes or rollers. And even if Beatrice’s interest in the home and garden accessory field were deemed somehow to place it as a potential entrant into the paint brush-and-roller category, there is no reason why it should be considered a more likely entrant than the numerous other firms similarly engaged in marketing such consumer products—many of whom, like Beatrice, are large multi-product corporations. As the Commission stated in regard to a similar argument presented in *Sterling Drug, Inc.*, 80 F.T.C. 477, 604 (1972):

A stroll through any supermarket or drug store will show that there are scores, if not

⁶ That a violation of Section 7 can come about in the second manner discussed above—elimination of an “actual” potential entrant as distinguished from the elimination of a “perceived” potential entrant having a present influence on prices in the market—is not disputed by respondent. The Supreme Court has not had occasion to reach the question whether elimination of a non-perceived but likely potential entrant can violate Section 7 and has expressly reserved decision on that point. *Falstaff Brewing Corp.*, *supra* 410 U.S. at 537; *United States v. Marine Bancorporation, Inc.*, 42 U.S. L.W. 5210, 5217 (1974). However, the Commission and several lower courts have recognized that elimination of likely future competitor can violate Section 7. *Ekco Products v. Federal Trade Commission*, 347 F.2d 745, 752-53 (7th Cir. 1965); *General Mills, Inc.* Dkt. 8836, Trade Reg. Rep. ¶20, 457 (1973); *Beatrice Foods Co.*, *supra*, 81 F.T.C. at 817 (1973); *The Bendix Corp.*, 77 F.T.C. 731, 817 (1970) *reversed and remanded on other grounds*, 450 F.2d 534 (6th Cir. 1971); *United States v. Phillips Petroleum Company*, 367 F. Supp. 1226, 1234 (C.D. Cal. 1973), *aff’d without opinion*, 94 S. Ct. 3199 (1974); *United States v. Standard Oil Co.*, 253 F. Supp. 196, 227 (D.N.J. 1966). In view of our ultimate dismissal of the allegations of injury to potential competition we see no reason to reconsider the arguments that have been given in support of that interpretation. Compare Turner, “Conglomerate Mergers and Section 7 of the Clayton Act,” 78 Harv. L. Rev. 1313, 1379-80 (1965) with Rahl, “Applicability of the Clayton Act to Potential Competition,” 12 A.B.A. Antitrust Section 143 (1958).

hundreds, of diverse "household products" in which Sterling—or any other established supplier of consumer items—might with equal logic be deemed a "potential entrant." Such a test, however, would nullify any meaningful distinction between likely potential competitors and all other firms. Elimination of one among such a multitude of firms could not be said to eliminate substantial potential competition.

Complaint counsel claim, however, that the law judge completely ignored evidence evincing Beatrice's strong subjective desire to enter the brush-and-roller market. We have examined the evidence cited and find it unpersuasive. The evidence of corporate intent that complaint counsel rely upon most heavily is the fact that prior to its decision to acquire Tip Top, a study was commissioned by Beatrice management entitled "Study of the Paint Brush and Paint Roller Market" wherein it was concluded that sales of paint brushes and rollers to homeowners was a growing market as it was part of the increasing do-it-yourself, home improvement trend (Tr. 1216-1219). However, this study was not made until after Tip Top approached Beatrice with a merger proposal and it was made in connection with Beatrice's appraisal of Tip Top as an acquisition candidate. It was standard procedure for Beatrice to appraise not only the past performance record of a prospective merger candidate but also of course its potential for future growth, which entails a prediction of whether the market it does business in is a growth market. The study referred to was listed as a prospective exhibit but was not offered in evidence by complaint counsel. We can only assume in its absence that the conclusions stated in it were not inconsistent with the testimony at the hearing by Beatrice executives that the company had no overall plan to enter the market aside from the Tip Top acquisition.

Complaint counsel also point to evidence that subsequent to the Tip Top acquisition, Beatrice considered acquiring brush parts suppliers and other firms in the brush or roller business—one of them, of course, being Essex Graham which in fact was acquired one year later. However, these considerations, including the Essex Graham acquisition, were for the purpose of broadening Tip Top's production and strengthening its position in the market. Post-merger expansion through acquisition of suppliers or competitors may independently raise problems under Section 7, but standing alone do not demonstrate that prior to the acquisition the acquiring company was a potential entrant into that line of commerce.

We are not holding that simply because corporate executives testify that they had no plans to enter a particular market that their testimony must be accepted at face value. Expressions by corporate management that their company did not intend to enter a market except by a particular acquisition are by their nature self-serving and may express only transitory views of the corporation. "While * * * subjective

evidence is probative on the issue of potential entry, it is inherently unreliable and must be used with great care * * * [S]ubjective evidence should be preferred only when the objective evidence is weak or contradictory." *United States v. Falstaff Brewing Corp.*, *supra*, 410 U.S. 548 (Marshall, J., concurring); Here, however, there is no persuasive evidence, objective or subjective, that rebuts the testimony of Beatrice's executive officers that the company had no plans to enter the market but for this acquisition. By relying on the fact that Beatrice studied the growth potential of the market in which Tip Top did business, complaint counsel are in effect arguing that the willingness of Beatrice to acquire Tip Top demonstrates *ipso facto* that Beatrice was a likely entrant into the market. But as was noted in *Ekco Products v. Federal Trade Commission*, 347 F.2d 745, 752 (7th Cir. 1965), that rule would make virtually every merger unlawful.⁷ The test is whether "the acquiring corporation * * * would have entered the field by internal expansion but for the merger" *id.* at 752-753. Or, looking at the matter from a different perspective, whether the respondent would probably re-enter the market by internal expansion or equivalent means if divestiture were ordered. *General Mills, Inc.*, Dkt. 8836, Trade Reg. Rep. ¶ 20, 457 (1973) [83 F.T.C. 696].

Having concluded that the record fails to support any finding that Beatrice was a probable entrant into any of the relevant product markets involved in this case aside from its acquisition of Tip Top, we find no necessity to pass on the additional arguments relied upon by the law judge in dismissing the charge that potential competition was eliminated as a result of the Tip Top acquisition.

B. "Entrenchment" Arguments

Complaint counsel contend that quite apart from whether Beatrice was a potential entrant into the relevant market, the acquisition entrenched Tip Top in the market in a manner that will hinder competition. Complaint counsel argue *inter alia*:

1. [After the subsequent acquisition of Essex Graham] Tip Top was able to greatly expedite its expansion of capacity in rollers, vertically integrate its roller production to include certain roller manufacturing operations of Essex Graham previously not performed by Tip Top and reduce overall costs of both companies.

2. Tip Top has obtained the warehousing and trucking facilities of the entire Beatrice organization * * * Having a warehouse system located throughout the country enables mass merchandisers and other accounts to be serviced more efficiently than has been the practice in this industry.

3. Beatrice can provide extensive financial resources to expand product lines, service and sales.

4. Beatrice studied Tip Top production and distribution processes and made suggestions for improvement.

⁷ See also *United States v. Falstaff Brewing Corp.*, *supra*, 410 U.S. 561: "[M]ere entry by acquisition would not prima facie establish a firm's status as an actual potential entrant" (Marshall, J., concurring).

5. Beatrice greatly expanded Tip Top's rebate program to jobbers and distributors. Maximum rebates increased from 5 percent prior to the acquisition to 10 percent following the acquisition. Various conditions and requirements placed on dealers to be eligible for the rebate program have been eliminated since the acquisition of Tip Top.

Although there is scant record support for most of the assertions that operating costs have been reduced as a result of the merger, even assuming all these changes were effected, improved efficiencies and price reductions are certainly no reason to condemn a merger not otherwise shown to be anticompetitive. Although it has been said that merger cannot be "defended" on the ground that a more efficient industrial entity has resulted, such statements have always appeared in the context of a merger having overriding anticompetitive consequences such as elimination of a competitor and vertical foreclosure of markets, *Brown Shoe Co. v. United States*, *supra*, 370 U.S. at 344; or the raising of substantial entry barriers having little relationship to real efficiencies, *Federal Trade Commission v. Procter & Gamble Co.*, 386 U.S. 568, 580 (1967).

More relevant to the issue of anticompetitive effects of the merger is complaint counsel's argument that the acquisition may create psychological barriers to new competition, that "no one can expect new entrants into an industry dominated by a Beatrice * * *." However this argument depends, as complaint counsel seem to agree, on Beatrice occupying a dominant position in the industry. But in the year of acquisition, Tip Top, although it ranked third in the industry, had but 7.6 percent of sales.⁸ In contrast, in the cases relied upon by complaint counsel, the acquired firms did have a dominant position and their acquisition by an even larger corporation that manufactured related product lines threatened permanently to entrench the already dominant firm. In *Procter & Gamble supra*, the acquired firm, Clorox, represented nearly 50 percent of sales of liquid bleach nationally and had even higher shares of regional markets. In *General Foods v. Federal Trade Commission*, 386 F.2d 936 (3d Cir. 1967), the acquired company, S.O.S., had 51 percent of total sales.⁹ In both cases, the remaining firms were small single-product firms that could not qualify

⁸ In previous cases involving the "toehold" doctrine, the Commission has considered firms having market shares below 10 percent as toehold companies, acquisition of which would have been procompetitive. *The Bendix Corp.*, 77 F.T.C. 731, 821 (1970) (fourth-ranked Wix Corporation, with 9.5 percent of the market); *Stanley Works*, 78 F.T.C. 1023, 1072 (1971), 469 F.2d 498, 501 (2d Cir. (1972) (third-ranked Ajax, with about 8 percent of the market). Although these cases can perhaps be distinguished from the instant one in that different industries and other factors were involved, in this case complaint counsel argue that had Beatrice acquired Masterset Brush Company, which had 3.6 percent of the market, competition would have benefited as Beatrice would have used its deep pocket resources to expand Masterset thereby challenging the position of market leaders. In contrast, complaint counsel assert that Beatrice's deep pocket rendered the Tip Top acquisition anticompetitive and unlawful. It is difficult, however, to see how a difference in only 4 percentage points in market shares (Masterset's 3.6 percent compared to Tip Top's 7.6 percent) can make the difference between a procompetitive merger and one that it is claimed will substantially lessen competition.

⁹ In *United States v. Wilson Sporting Goods Co.*, 288 F. Supp. 543 (N.D. Ill. 1968), another case cited by complaint counsel, the acquired firm was number one in its market with a 32 percent market share.

for the substantial advertising volume discounts that were then available to large multi-product advertisers such as Procter & Gamble and General Foods.¹⁰ The record clearly shows, despite complaint counsel's arguments to the contrary, that media advertising is not an important factor in paint applicator markets.

In support of their position that Beatrice's bigness and diversity will enable it to gain business at the expense of smaller brush-and-roller competitors, complaint counsel point to evidence that, subsequent to the acquisition, Tip Top's management in an effort to get a large chain store company to switch to Tip Top as its supplier of brushes and rollers represented that purchases of Tip Top products would help earn the company rebates on other Beatrice home and garden accessory products carried by the company's stores. However, unchallenged evidence was introduced by Beatrice that such a corporate-wide discount was against Beatrice's policy—that each division operates as individual profit centers with independent pricing policies—and that Beatrice made supervisory changes within Tip Top to prevent a recurrence of such representations (Tr. 1224). No such corporate-wide discount in fact existed or was ever granted to the buyer (Tr. 1155-59). We cannot find on the basis of this isolated incident that Beatrice will be inclined to use truly predatory methods to gain new customers for Tip Top.

It is true that as a result of the acquisition, Tip Top gained access to Beatrice's "deep pocket" for capital expansion loans. No significant competitive advantage would appear to result, however, since this industry is not capital intensive. With firms like PPG Industries, Consolidated Foods, and Sherwin Williams manufacturing brushes and rollers we find it difficult to accept the argument that Beatrice's deep pocket will enable Tip Top to dominate or restructure this industry.

V. Respondent's Appeal from the Finding that the Essex Graham Acquisition Violated Section 7.

On July 1, 1970, approximately one year after the Tip Top acquisition, Beatrice acquired substantially all the assets of the Essex Graham Company. Essex Graham at the date of acquisition was engaged solely in the manufacture and sale of paint rollers and roller accessories, shipping its products to purchasers located throughout the United States from production facilities in Illinois.

The administrative law judge found that the acquisition substantially lessened actual competition in both the combined brush-and-roller

¹⁰ Since those cases were decided, the networks have abandoned volume discounts. *Sterling Drug, Inc.* 80 F.T.C. 477, 605 (1972). See also Peterman, "The Clorox Case and the Television Rate Structure," 12 J. Law & Economics 321 (1968).

market and the roller submarket and that Essex Graham was eliminated as the most likely entrant into the paint brush submarket.

The law judge accepted complaint counsel's market figures and found that in 1969, Tip Top manufactured 7.6 percent of the combined brush-and-roller market, ranking third in such shipments. In the same year Essex's shipments of rollers represented 2.3 percent of that market, giving it a rank of 13th. In the same year, Tip Top ranked number eight in the paint roller submarket, manufacturing approximately 3.7 percent of all paint rollers. Essex Graham ranked fifth, with 7.0 percent of paint rollers shipped in the United States.

The law judge found that concentration in the relevant markets was high and rising and that the acquisition of Essex Graham by Beatrice accelerated the trend. On the basis of these and other factors cited in the Initial Decision he concluded that Section 7 had been violated and ordered divestiture of the acquired assets and all additions and improvements thereto and further ordered respondent to cease and desist from any further acquisitions of firms doing business in the market for a period of ten years without the approval of the Commission.

Our examination of the market structure and trends in the market persuades us to affirm the law judge's decision. Prior to the acquisition there had been a clear increase in concentration between 1967 and 1969.¹¹

4-FIRM RATIOS

(BRUSHES-AND-ROLLERS) YEAR

36.6%	1967
38.1%	1968
41.3%	1969

8-FIRM RATIOS

(BRUSHES-AND-ROLLERS) YEAR

52.8%	1967
55.6%	1968
62.5%	1969

As previously indicated, Tip Top ranked third in shipments in this market in 1969. Adding Essex Graham's 1969 shipments to Tip Top's, four-firm concentration increased from 41.3 percent to 43.6 percent as a result of this merger.¹² Eight-firm concentration increased from 62.5 percent to 64.8 percent as a result.

¹¹ In the following tabulations, we have omitted any *pro forma* increase in concentration brought about by horizontal acquisitions in 1969 and 1970 by the EZ Paints Corporation which are discussed *infra*.

¹² The top four companies and Essex had the following sales and market shares in 1969 (CX 108c):

	Shipments (\$000)	%
The Wooster Brush Co.	14,961	15.2

(Continued)

A similar increase in concentration in the paint roller submarket resulted from the merger. The top four companies in this market collectively made 58.1 percent of total shipments of paint rollers in 1969, Essex Graham ranked number five and Tip Top ranked number eight in the market. After the merger, Tip Top's position moved to number three in the market with a 10.7 percent combined share.

These two markets are "concentrated" under definitions accepted by the Commission and courts in prior merger cases. *Stanley Works*, 78 F.T.C. 1023 (1971), *aff'd* 469 F.2d 498 (2d Cir. 1972). The fact that concentration was increasing at a rapid rate at the time of the merger is added reason to order divestiture. Where there has been a "history of tendency toward concentration in the industry," mergers leading toward further concentration "are to be curbed in their incipency," *Brown Shoe Co. v. United States*, *supra*, 370 U.S. at 345, and where "concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great," *United States v. Philadelphia National Bank*, 374 U.S. 321, 365 n. 42 (1963). See also *United States v. Von's Grocery*, 384 U.S. 270 (1966); *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966); and *United States v. Continental Can Co.*, 378 U.S. 441. The trend toward greater concentration in the markets involved here was accompanied by a number of horizontal acquisitions.

The clear rise in concentration, substantially augmented by this merger, outweighs in our view any consideration of the fact that prior to the acquisition most of Essex Graham paint rollers may have been generally of higher quality and sold at a higher price than of Tip Top's rollers. Furthermore, the record shows that Essex Graham did sell lower-priced rollers and roller kits as well, and distributed roller products to the same type of outlets that Tip Top sold to, including mass merchandisers and drug chains (Tr. 1387, 1389, 1166, 1234, 1405, 1442, 3128, 3132, CX 115 Z7, CX 7-D, CX 5T-U). Also, Tip Top manufactured and sold quality paint brushes as well as "throwaways" (Tr. 1328, CX 115 F, RX 179A). The president of Tip Top considered manufacturers of professional applicators as competitors of Tip Top (Tr. 1263, 1327). Elimination of Essex as "a competitor" was one of the reasons cited by a vice president of Tip Top in recommending its acquisition (Tr. 3128-33).

EZ Paints Corp.	10,902	11.1
Tip Top Brush Co., Inc.	7,437	7.6
The Sherwin-Williams Co.	7,299	7.4
* * *		
Essex Graham	2,245	2.3
Universe	98.2 million	

Unless the market share data placed in the record by complaint counsel is flawed and substantially overstates the degree of concentration in these markets, the only reasonable conclusion to be drawn from the record is that this merger lessened competition in the manner proscribed by Section 7.¹³

We now turn to respondent's challenge to these data.

Complaint counsel's universe figures for total shipments by manufacturers in the markets involved in this case were obtained directly from published Census reports—the 1967 Census of Manufactures and the Annual Surveys of Manufactures for 1968 and 1969. The Standard Industrial Code (SIC) 39912 and its subcategories cover shipments of paint brushes and paint rollers and do not include any products that are extraneous to this proceeding. Market shares were obtained by dividing shipments of individual companies by the universe figures obtained from the Census reports. Shipments of individual firms were obtained as follows: Companies known to be in the market were interviewed by a Commission economist and were asked to list the 12 leading companies in the brush-and-roller industry. To each firm so identified by an interviewee, the economist directed a letter requesting shipment figures of products in the relevant markets for the years 1967 through 1969. Furthermore these addressees were also requested to list the companies which they considered to be the 12 leading firms in the market. Any company not surveyed originally but listed in more than one response was then also sent such an inquiry. Twenty-eight firms were eventually surveyed in this manner. Respondent was given the opportunity to cross-examine each firm whose shipment data was placed in the record as well as an opportunity to check the accuracy of the shipment figures against original records.

The administrative law judge granted respondent ten discovery subpoenas to search for any substantial firms which may have been omitted from the above survey. The two largest firms that respondent was able to locate that had not been included in complaint counsel's survey ranked 15th and 17th in the market for 1969.

Respondent argues that the universe figures taken from Census Reports are incomplete for the reason that the Census data was obtained only from firms where paint brushes or rollers constituted the *primary* product at a given plant and not any of its secondary products. This contention is refuted by the record. The heading of the Census Table showing industry shipments states that it "Includes quantities

¹³ The law judge also found that competition was substantially lessened in the paint brush submarket by the elimination of Essex Graham as the most likely future entrant into that line of commerce. In view of the clearer violations occurring in the overall market and the paint roller submarket, we find it unnecessary to decide whether elimination of Essex Graham as a potential entrant into the paint brush market was so significant as to amount to a separate violation of Section 7.

and value of the products reported not only by establishments classified in this industry but also by establishments classified in other industries, and shipping these products as 'secondary' products." (CX 74, p. 39D-15). A Bureau of Census official testified that when annual surveys are sent to a company it is instructed to report every product it makes based upon an SIC category (Tr. 1065). Thus, even a company in a completely unrelated industry who made a small volume of paint brushes was surveyed as to its production of paint brushes and paint rollers (Tr. 1043-50).

Respondent asserts that Tip Top should be viewed as an "assembler" of paint rollers, that it did not "manufacture" *all* the component parts that go into a roller unit. We find this argument confusing, as respondent admits that "The notion that an assembler in this particular industry is on the same footing as a manufacturer is a concept accepted by the Bureau of Census."¹⁴ In view of its acknowledgment that the Census universe includes shipments of such assemblers we fail to see what respondent hopes to get from this argument. If the point that is intended is that there may be other roller "assemblers" *larger* than Tip Top or Essex Graham in the market that were not surveyed by complaint counsel and hence their individual shipment figures would not have been obtained, then we fail to see how respondent was prevented from obtaining their shipment figures. As noted previously, the law judge allowed respondent opportunity to subpoena any firms thought to be important factors in the industry and missed by complaint counsel in their survey. He indicated that if a showing was made, further subpoenas would be available. The initial grant of ten discovery subpoenas to respondent for such purpose was clearly adequate. Cf. *Papercraft Corp. v. Federal Trade Commission*, 472 F.2d 927 (7th Cir. 1973).

Finally, respondent complains that the law judge refused its request to subpoena approximately one hundred subpoenas to companies, many of whom are paint companies, who purchase paint applicator products from manufacturers and then repackage them for resale. The law judge was clearly correct, however, in refusing this request. The lines of commerce involved in this proceeding, as clearly indicated in the complaint, is the *manufacture* of paint applicator products. The fact that a redistributor may sell under his own label does not place him in the same position as a manufacturer. The private label distributor must still pay someone to produce his product. Companies that redistribute brushes and rollers purchased from manufacturers are at an obvious

¹⁴ Respondent goes on to point out, correctly, that the instructions on the Census reporting form "specifically requires the inclusion in the manufacturing category of these products which have been assembled from purchased components (CX 102, p. 3 - 1967 "Instructions for the Annual Survey of Manufactures")." Resp. Appeal Brief pp. 13-14.

cost disadvantage with respect to manufacturers who compete in selling to the trade (Tr. 2282-84). To include in the universe sales of such redistributors would result in "double-counting" and would serve only to confuse and distort any analysis of the probable effects of the challenged acquisition.

VI. The Commission's Proceedings in EZ Paints Corp., Dkt. C-2106 Do Not Compel Dismissal of the Complaint

At the time a "proposed complaint"¹⁵ was served on respondent Beatrice, the Commission also served a proposed complaint on the EZ Paints Corporation, a manufacturer of paint rollers, which challenged that company's acquisition in 1969 of the American Brush Corporation of Chicago, Ill. ("ABC")¹⁶ and its acquisition in 1970 of Masterset Brushes, Inc. ("Masterset") and King Paint Roller, Inc. ("King"). The latter two companies, Masterset and King, were purchased together and had been closely held corporations owned and operated by the same persons. The EZ Paints complaint alleged, *inter alia*, that prior to the acquisitions, EZ Paints was the nation's largest manufacturer of paint rollers, accounting for 29.7 percent of domestic plant shipments in 1968 and that ABC and King respectively shipped 0.5 percent and 1.2 percent of paint rollers in that year. The complaint alleged a violation of Section 7 in the paint roller line of commerce and also the overall paint applicator market (brushes and rollers) and the paint brush segment.¹⁷

The Commission and EZ Paints subsequently entered into a consent order agreement. The major terms of the consent order required EZ Paints to divest all the paint roller facilities it acquired; partial divestiture was required of the paint brush business acquired from ABC and no divestiture was required of the paint brush business acquired from Masterset. Sales of the acquired properties required to be divested under the terms of the order were subsequently effectuated with Commission approval.

In the meantime, on Oct. 1, 1971, the Commission issued its formal complaint against Beatrice commencing adjudicative proceedings, no settlement having been reached under consent order procedures.¹⁸

Respondent argues that the Commission "approved" the concentra-

¹⁵ Under the Commission's procedure then in effect, "proposed complaints" were served on respondents prior to issuance of a formal complaint, with notice that they had an opportunity to settle the matter under the Commission's non-adjudicative consent order procedures then in effect.

¹⁶ This company should be distinguished from the American Brush Company of Boston, Mass., which is several times larger and is not affiliated with this company.

¹⁷ Although EZ Paints did not manufacture paint brushes prior to 1969, ABC and Masterset did. Hence the complaint alleged a violation in the paint brush line of commerce as well.

¹⁸ The record before us does not disclose whether Beatrice made any offer of settlement. As we understand its argument, however, it is not complaining of disparate treatment during the consent order stages of the two proceedings but that any adjudication of illegality of the Essex Graham acquisition would be inconsistent with the Commission's action taken in the EZ Paints matter.

tion level in the industry when it allowed EZ Paintr to keep the paint brush manufacturing capability of ABC and the Masterset Brush Company. It argues that these properties in EZ Paintr hands increased concentration more than the consolidation of Essex Graham into the Tip-Top Beatrice organization.

It is true that the ABC and Masterset acquisitions, at least when viewed in the context of an overall brush-and-roller market, would appear to have been of greater magnitude than the Tip-Top (Beatrice)-Essex Graham merger. Combined sales were about \$14 million.¹⁹ By comparison Tip-Top applicator sales in 1969 were \$7,437,000 and Essex Graham's were \$2,245,000, or a combined total of somewhat less than \$10 million.

Nevertheless these facts are not controlling here. Although the Commission made a determination that the settlement in *EZ Paintr* was in the public interest, that was not tantamount to a ruling that any portions of the *EZ Paintr* acquisitions not ordered to be divested were lawfully acquired or that acquisitions of no greater magnitude in the industry are immune from attack. The standards for determining that a proposed consent settlement is in the public interest embrace a number of considerations, including resource allocation factors, which may convince the Commission in a particular case that entry of a non-contested order containing less than a full divestiture would be preferable to seeking full divestiture after the hazards and delay of adjudication. The circumstances surrounding negotiated divestitures are so different that they usually cannot be cited in a litigation context. *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 330 n. 12 (1961).

An examination of additional facts surrounding the *EZ Paintr* matter show that it is distinguishable in any event.²⁰ By 1971 ABC had been losing market position and sales and was in financial difficulties

¹⁹ In 1968, the year prior to EZ Paintr's acquisition of ABC, EZ Paintr had total applicator sales (all were paint rollers, as it sold no paint brushes) of \$8,835,000 and ABC paint brush sales amounted to \$1,500,000. In 1969, the year prior to its acquisition, Masterset's sales (paint brushes, as it did not make rollers) amounted to \$3,570,000 and EZ Paintr's applicator sales were \$9,244,000.

²⁰ Respondent contends that it was denied sufficient access to documents in the *EZ Paintr* files of the Commission to enable it adequately to confront the Commission with the precedents of the decisions it made in that proceeding.

The ALJ on Aug. 2, 1972 denied respondent's pre-hearing discovery motion for an order requiring production of all non-public documents in the *EZ Paintr* files. Assuming *arguendo* that, because of the facial similarity between the two proceedings, access to material information in the files beyond that available from the public docket in C-2106 was required, cf. *Sterling Drug Inc. v. Federal Trade Commission*, 450 F.2d 698, 711-712 (D.C. Cir. 1971), we are satisfied that respondent obtained it. Pursuant to a Freedom of Information Act request Beatrice filed with the Commission on Sept. 8, 1972, the Commission granted it access to all records pertaining to the *EZ Paintr* matter except certain confidential financial data, customer lists, and portions of intra-agency memoranda expressing individual opinions and recommendations. (No Commission memorandum or opinion, as distinguished from memoranda containing staff or individual Commissioner views, existed.) Respondent subsequently placed a number of those documents into the record of this case.

Although respondent argues that it should have had complete access to intra-agency memoranda discussing the *EZ Paintr* settlement and divestitures, we fail to see the precedential value of such discussions since none constituted or contained statements adopted by the Commission.

when the consent settlement was reached. Its brush manufacturing plant had been relocated in another city as a result of an urban renewal project, causing it to lose most of its experienced personnel. It was estimated by one official that production had dropped 65 percent as a result (RX 109). The public docket file indicates that EZ Paints itself had substantial financial difficulties during 1970 and 1971 (C-2106-1-2-1, p. 77). These factors may have persuaded the Commission that full divestiture was impractical or not in the public interest. Cf. *Litton Industries*, Dkt. 8778 (slip opinion, Mar. 4, 1975) [85 F.T.C. 333]. In contrast, Essex Graham and Beatrice were growing, profitable companies.

Also it should be noted that, although EZ Paints was permitted to retain much of the paint brush manufacturing capacity it had acquired, the consent order required full divestiture of the businesses in the line of commerce in which EZ Paints was previously engaged, the manufacture of paint rollers. Tip Top and Graham were also substantial factors in that market. Clearly, insofar as preserving intra-product competition in paint rollers, consistent treatment would call for an order of divestiture of Essex Graham, not dismissal of the complaint as respondent urges.²¹

VII. Respondent's Challenge to Evidentiary Rulings

Respondent claims that the ALJ erroneously prevented it from introducing competent evidence. Respondent's principal objection is that the ALJ erred in sustaining objections to questions posed by respondent's counsel to his witnesses on the ground that they were leading questions. We find no prejudice to have occurred since counsel was permitted to make offers of proof as to the expected testimony and we have accepted and considered as record evidence the offers of proof. For instance, the ALJ sustained objections to respondent counsel's asking three of his witnesses whether in their experience they regarded aerosol paint cans as competitive with brushes or rollers.²² The offers of proof indicated that the testimony would simply have

We conclude that Beatrice has been given sufficient access to the relevant information in the *EZ Paints* files enabling it "to argue the precedential value of that case," *Sterling Drug, Inc. v. Federal Trade Commission*, *supra* at 711.

²¹ Respondent also points to the fact that subsequent to the entry of the consent order in *EZ Paints*, the Commission allowed EZ Paints to divest the roller companies it had acquired (Frank Gill Company (the paint roller division of ABC) and King Paint Roller Company) to members of the applicator industry. Again, however, these transactions are distinguishable. The company, that acquired Frank Gill (Bentzinger Bros., Inc.) had only \$80,000 in paint roller sales. This figure combined with Gill's roller sales in 1971 (Gill's sales had declined considerably between 1969 and 1971) gave Bentzinger only a *de minimis* share—less than 1 percent—of the paint roller market based on 1969 industry data.

The divestiture of the King Paint Roller Company is also distinguishable. The acquiring company, Red Devil Inc., did not manufacture paint applicator products for sale in this country (Tr. 2508). None of these divestiture sales approved by the Commission are comparable to the Beatrice acquisition of Essex Graham.

²² The ALJ sustained the objections to this question on the ground it was leading (Tr. 1674, 1874, 2128). Complaint

(Continued)

been that aerosols and small brushes are interchangeable for some uses—a fact which was conceded by complaint counsel anyway and which, as we indicated *supra* p. 8 [p. 59], does not negate the market definitions adopted in this case. We have examined the other evidentiary rulings cited by respondent and find no prejudicial error.²³

We wish to note our disagreement, however, with the ALJ's apparent belief that leading questions are improper even when used to introduce a subject matter or to refresh a witness' memory which, unaided, has been exhausted.²⁴ The general rule is to the contrary.

Roberson v. United States, 249 F.2d 737 (5th Cir. 1957); *Green v. United States*, 348 F.2d 340 (D.C. Cir. 1965). Indeed we see little point in worrying about leading questions which seek to elicit information within the business expertise of witnesses that have been qualified to give opinion evidence. The "evil . . . of supplying a false memory for the witness" *United States v. Durham*, 319 F.2d 590, 592 (4th Cir. 1963), is unlikely to occur in such circumstances.

The examiner also disallowed a respondent's witness the opportunity to see if he could refresh his memory of names of customers from a written list. Apparently the ALJ so ruled because the list did not originate in his company and he had not seen it before. Again, however the rule is generally that any document, regardless of its origin, can be used to refresh a witness' memory. McCormick, Evidence §9 (1971). Nevertheless no prejudice occurred since an offer of proof was made and we have considered it as part of the record evidence (Tr. 2242).

Much of this record is filled with debate, acrimonious at times, over technical objections as to forms of questions. Counsel on both sides frequently indulged in raising such objections, apparently believing that they would gain some advantage in doing so. The objections did not, however, improve the quality of the evidence and served only to delay the proceeding. We reiterate what a distinguished panel of appeal judges observed many years ago in *Samuel H. Moss v. Federal Trade*

counsel, however, was permitted to ask the identical question of one of his own witnesses over respondent's objection it called for a legal conclusion, (Tr. 472). Presumably, had respondent counsel raised an objection that the question was leading, the ALJ would have sustained it. In any event, we reject respondent's argument that these or any of the other instances cited in their brief amounted to prejudicial treatment favoring complaint counsel.

²³ Respondent contends that on several occasions the ALJ refused to allow offers of proof when objections were sustained. This is not accurate. Of the instances cited, there was only one (Tr. 1861-1865), where respondent was unable to make an offer of proof. No prejudice resulted since the question dealt only with a tangential issue.

Finally, we have examined respondent's arguments with respect to alleged disparate treatment between witnesses Zook and Felkay and find no error on the part of the ALJ.

²⁴ A sample of questions that were ruled to be improper leading questions are:

"What, if any, discount have you ever given them?" (Tr. 1446)

"In your research, are there any other products that you use besides those to which you have testified?" (Tr. 1861)

"Would you have telephone contact with your customers?" (Tr. 1816)

"In your business activity did you have an opportunity to observe the promotions of your competitors, if any?" (Tr. 1818)

"In your job as sales manager, do you call on some customers?" (Tr. 2143)

"Do you know the Ideal Brush Company?" (Tr. 2150-51)

Final Order

86 F.T.C.

Commission, 148 F.2d 378, 380 (2d Cir. 1945) (per curium by Clark, A. Hand and L. Hand, JJ):

* * * Why either he [hearing examiner] or the [Federal Trade] Commission's attorney should have thought it desirable to be so formal about the admission of evidence, we cannot understand. Even in criminal trials to a jury it is better, nine times out of ten, to admit, than to exclude, evidence and in such proceedings as these the only conceivable interest that can suffer by admitting any evidence is the time lost, which is seldom as much as that inevitably lost by idle bickering about irrelevancy or incompetence.

Although we are satisfied that no prejudice to the parties resulted from any of the ALJ's rulings, the record in this case would have been considerably shorter had the above advice been heeded.

An appropriate order is appended.

FINAL ORDER

This matter having been heard by the Commission upon briefs and oral argument in support of cross appeals filed by respondent and complaint counsel from the initial decision in this matter; and the Commission for the reasons stated in the accompanying opinion having concluded that the appeals should be denied;

It is ordered, That the initial decision, as supplemented and modified by the Commission's opinion in this matter, and the order contained in said initial decision, be, and hereby are adopted as the decision and order of the Commission;

It is further ordered, That the parties' motions for correction of the transcript of oral argument before the Commission be, and hereby are, granted.
