

## Findings, Opinions and Orders

IN THE MATTER OF

### THE CLOROX COMPANY

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

*Docket C-2975. Complaint, July 2, 1979 — Decision, July 2, 1979*

This consent order, among other things, requires an Oakland, Calif. manufacturer of household cleansers, detergents, bleach, specialty food products and charcoal briquets to cease misrepresenting characteristics, properties, quality or use of any cleanser; to cease advertising any of the above without first having in their possession documentation supporting their claims; to cease failing to maintain adequate records of substantiation documentation; and to cease failing to disclose precautionary measures specified in the order.

#### *Appearances*

For the Commission: *Jeffrey A. Klurfeld.*

For the respondent: *James O. Cole, Oakland, Calif.*

#### COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that The Clorox Company, a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

PARAGRAPH 1. Respondent The Clorox Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 1221 Broadway, Oakland, California.

PAR. 2. Respondent is now, and for some time last past, has been engaged in the manufacture, advertising, offering for sale and sale of household cleansers and detergents, bleach, specialty food products, and charcoal briquets. Sales by respondent for fiscal year 1978 exceeded \$1 billion.

PAR. 3. Respondent maintains, and has maintained a substantial course of business, including the acts and practices as hereinafter set

forth, which are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In 1976, respondent introduced a new household cleanser, marketed under the name "Soft Scrub." Soft Scrub was allegedly formulated to effectively clean the following surfaces which would otherwise be abraded and scratched if cleaned with scouring powder: formica, fiberglass, plastic, stainless steel, ceramic tile, chrome, appliance enamel, porcelain and aluminum. Approximately 50% of household surfaces are composed of these materials.

PAR. 5. Since its introduction, Soft Scrub has enjoyed great success. It is estimated that approximately 8,000,000 American households use the product.

PAR. 6. In marketing Soft Scrub, respondent affixed labels to containers thereof that represented directly or by implication that Soft Scrub could be safely used on appliance enamel without risk of substantial abrasion or scratching. Among the other surfaces on which Soft Scrub was recommended were plastic and fiberglass.

PAR. 7. In truth and in fact, Soft Scrub cannot be used on appliance enamel, plastic and fiberglass without risk of substantial abrasion and scratching thereto, unless certain precautionary measures are taken. These measures involve the type of applicator used, the quantity of product used, and the degree of pressure applied in cleaning.

Therefore the representations set forth in Paragraph Six concerning appliance enamel, plastic and fiberglass were, and are, unfair or deceptive acts or practices.

PAR. 8. Through the use of the representations set forth in Paragraph Six concerning appliance enamel, plastic and fiberglass, respondent has represented, directly or by implication, that at the time it made said representations, it possessed and relied upon a reasonable basis for making the representations.

PAR. 9. In truth and in fact, respondent did not possess and rely upon a reasonable basis for making the representations set forth in Paragraph Six concerning appliance enamel, plastic and fiberglass.

Therefore the representations set forth in Paragraph Six concerning appliance enamel, plastic and fiberglass were, and are, unfair or deceptive acts or practices.

PAR. 10. In the course and conduct of its business, and at all times mentioned herein, respondent has been, and now is, in substantial competition in or affecting commerce with corporations, firms and individuals engaged in the manufacture, advertising, offering for sale and sale of merchandise of the same general kind and nature as merchandise sold by respondent.

PAR. 11. The use by respondent of the aforesaid false, misleading and

deceptive statements, representations, acts and practices, directly or by implication, has had, and now has, the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that said statements and representations were, and are, true and complete, and into the purchase of substantial quantities of respondent's products by reason of said erroneous and mistaken belief.

PAR. 12. The acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors, and constituted, and now constitute, unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The acts and practices of respondent, as herein alleged are continuing, and will continue, in the absence of the relief herein requested.

#### DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the San Francisco Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by the respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent The Clorox Company is a corporation organized, existing and doing business under and by virtue of the laws of the

State of California, with its office and principal place of business located at 1221 Broadway, in the City of Oakland, State of California.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

#### ORDER

For the purposes of this order, the following definition shall apply: "Cleanser" is defined as "Soft Scrub," or as any other product with the same or similar chemical formulation which is manufactured, offered for sale or sold by The Clorox Company.

*It is ordered*, That respondent The Clorox Company, a corporation, its successors and assigns, and respondent's officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, labelling, offering for sale, sale or distribution of any "cleanser," as hereinabove defined, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

#### I

1. Misrepresenting, directly or by implication, any characteristic, property, quality or use of any cleanser.

2. Representing, directly or by implication, any characteristic, property, quality or use of any cleanser unless prior to the time such representation is first made, respondent possesses and relies upon a competent and reliable scientific test or tests or other objective data which substantiate such representation.

3. Failing to maintain accurate and adequate records which may be inspected by Commission staff members upon reasonable notice of all documentation in substantiation of any representation regarding any characteristic, property, quality or use of any cleanser.

4. Failing to clearly and conspicuously disclose (in print of a size and type no less prominent than the majority of the text) the following statement, with nothing to the contrary or in mitigation thereof, on any label affixed to any bottle or other container of any cleanser that is intended for retail sale:

**ATTENTION:** To prevent scratching fiberglass, plastic, and appliance enamel on refrigerators, dishwashers, oven doors and on other appliances: **USE SPARINGLY: AND RUB GENTLY WITH A DAMP SPONGE.**

5. Other than on any label affixed to any bottle or other container of any cleanser, failing to clearly and conspicuously disclose the

Decision and Order

following statement, with nothing to the contrary or in mitigation thereof, in any advertisement promoting the sale of any cleanser:

Use only as directed

II

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

III

*It is further ordered,* That respondent 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 other change in the corporation which may affect compliance obligations arising out of the order.

IV

*It is further ordered,* That respondent shall forthwith distribute a copy of this order to each of its operating divisions.

Complaint

94 F.T.C.

IN THE MATTER OF

SKF INDUSTRIES, INC., ET AL.

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION  
OF THE FEDERAL TRADE COMMISSION ACT*Docket 9046. Complaint, July 22, 1975 — Final Order, July 5, 1979*

This order, among other things, requires SKF Industries, Inc. ("SKF") and Federal-Mogul Corporation ("FM"), two bearings manufacturers, to cancel their December 17, 1974 by-sell agreement whereby SKF agrees to cease distribution of certain bearings to the automotive aftermarket in exchange for FM's agreement to purchase its tapered roller bearings requirements from SKF, and other similar arrangements between them. The order prescribes specific limitations on FM's purchases of tapered roller bearings from SKF for 12 years following the effective date of the order, and requires the companies to notify their sales and policy-making staff of the terms of the order. Additionally, twice annually for each of two years, respondents are required to publish those terms in two major trade journals.

*Appearances*

For the Commission: *K. Keith Thurman, John R. Hoagland, Rhett R. Krulla and Annthalia Lingos.*

For the respondents: *Larry L. Williams and Robert J. Pope, Clifford, Glass, McIlwain & Finney, Washington, D.C. for SKF Industries, Inc., Fred W. Freeman and Kenneth J. McIntyre, Dickinson, Wright, McKean, Cudlip & Moon, Detroit, Mich. for Federal-Mogul Corporation and Haliburton Fales, 2d, Peter J. Dias and Alan L. Morrison, White & Case, New York City for Aktiebolaget SKF.*

## COMPLAINT

The Federal Trade Commission, having reason to believe that SKF Industries, Inc. and Aktiebolaget Svenska Kullagerfabriken, corporations subject to the jurisdiction of the Commission, have violated Section 7 of the Clayton Act, as amended, (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45), and that Federal-Mogul Corporation, a corporation subject to the jurisdiction of the Commission, has violated the provisions of Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45) and it appearing that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint and states its charges as follows:

## I. DEFINITIONS

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

(a) "Bearings" are nonminiature machine parts which bear the friction occasioned when parts are in contact and have relative motion and which employ either balls or rollers as the moving elements. [2]

(b) The term "automotive aftermarket" includes all sales for replacement use directly to automotive wholesalers or retailers, other than vehicle dealers.

(c) The term "automotive" refers to parts having application on selfpropelled land vehicles, including, but not limited to, automobiles, trucks, buses, tractors, selfpropelled agricultural equipment and construction equipment.

## II. AB SKF

2. Aktiebolaget Svenska Kullagerfabriken (hereinafter "AB SKF") is a corporation organized and doing business under the laws of the Kingdom of Sweden since 1907, with its principal place of business at Gothenburg, Sweden.

3. AB SKF had sales of approximately \$1 billion in 1971 and assets of \$1.4 billion at the end of that year. In 1971, 85% of AB SKF's sales consisted of bearing sales, making it the world's largest manufacturer of bearings, with a 22% market share of bearings sold outside Communist countries.

4. Since its inception in 1907, AB SKF has expanded aggressively both by internal development and acquisitions. The Swedish corporation now has subsidiary or affiliate corporations in the United States, United Kingdom, France, Germany, Holland, Canada, Brazil, India, South Africa, Italy, Argentina, Spain, Australia and New Zealand. By 1971, AB SKF owned 16 manufacturing companies with 66 factories and maintained sales offices in practically all countries.

5. In 1915, AB SKF established a ball bearing plant in the United States. Until 1933, this plant was operated by the SKF Ballbearing Company of Hartford, Connecticut. On December 13, 1933, SKF Industries, Inc. (hereinafter "SKF") was incorporated under Delaware law as a successor to the SKF Ballbearing Company. In 1973, AB SKF held the beneficial ownership in approximately 94% of the capital stock of SKF. [3]

6. In 1965, AB SKF acquired controlling interest in RIV Officine di Villar Perosa S.p.A. (hereinafter "RIV"), an Italian producer of ball, taper roller (hereinafter "TR") and other bearings. Prior to its

acquisition by AB SKF, RIV sold ball and TR bearings in the United States.

7. AB SKF and several of its European affiliates export finished bearings and parts to the United States. Sales in the United States are made by AB SKF not only through SKF but also directly by AB SKF or its foreign subsidiaries. SKF Group shipments of bearings to the United States were approximately \$5.5 million in 1972.

8. At all times relevant hereto, AB SKF and SKF sold and shipped their products throughout the United States and engaged in commerce within the meaning of the Clayton Act, as amended, and were corporations whose businesses were in or affected commerce within the meaning of the Federal Trade Commission Act, as amended.

### III. SKF INDUSTRIES, INC.

9. SKF is a corporation organized and doing business under the laws of the State of Delaware, with its principal office and place of business located at Front St. and Erie Ave., Philadelphia, Pennsylvania.

10. SKF is the nation's third largest manufacturer of bearings, with net sales of approximately \$126 million in 1971. In that year, SKF held assets in excess of \$113 million and realized a net income of approximately \$1.48 million. SKF does not and has not engaged in the sale of significant quantities of any product other than bearings, almost all of which were ball or TR bearings.

11. In the last twenty years, SKF has grown rapidly through several acquisitions of stock or assets, including, among others:

(a) Tyson Bearing Corporation (hereinafter "Tyson"), a Delaware corporation acquired in 1955 whose principal place of business was in Massillon, Ohio. At the time of the acquisition, Tyson was a subsidiary of Nice Ball Bearing Company, was the nation's third largest manufacturer of TR bearings, and was engaged in or its business affected commerce within the meaning of the Federal Trade Commission Act, as amended. [4]

(b) Nice Ball Bearing Company (assets acquired in 1960) (hereinafter "Nice") then a division of Channing Corporation, a corporation organized and doing business under the laws of the State of Delaware with its principal place of business in New York, New York. At the time of the acquisition Nice was a substantial manufacturer of ball bearings and was engaged in commerce within the meaning of the Clayton Act, as amended, and the Federal Trade Commission Act, as amended.



Since their acquisitions, Tyson and Nice have become and been operated as divisions of SKF.

#### IV. FEDERAL-MOGUL CORPORATION

12. Respondent Federal-Mogul Corporation (hereinafter "F-M") is a corporation organized and doing business under the laws of the State of Michigan, with its principal office and place of business located at 26555 Northwestern Highway, Southfield, Michigan.

13. During 1971, F-M had net sales of \$269.6 million, assets in excess of \$201 million and net earnings of \$13.3 million. F-M manufactured automotive engine parts and bearings, with the latter accounting for one-third of its 1971 net sales. In 1971, F-M was the nation's fourth largest bearing producer and the largest seller of bearings to the automotive aftermarket.

14. At all times relevant hereto, F-M sold and shipped its products throughout the United States and engaged in or its business affected commerce within the meaning of the Federal Trade Commission Act, as amended.

15. On or about July 8, 1971, F-M and SKF commenced negotiations regarding the termination by F-M of the manufacture of TR bearings with an outside diameter of 4 inches or smaller and the purchase of such bearings by F-M from SKF for resale. [5]

16. In January 1972, SKF decided to discontinue the marketing of bearings to the automotive aftermarket.

17. On or about January 11, 1972, an agreement was reached between F-M and SKF whereby SKF promised to sell TR bearings, ball bearings and other bearings to F-M for resale to the automotive aftermarket. Under this agreement F-M would supply bearings to the former SKF customers in the automotive aftermarket with SKF personnel assisting F-M in changing over such SKF customers to F-M. Such agreement has been performed according to the terms set forth in this paragraph.

#### VII. TRADE AND COMMERCE

18. The relevant geographic market is the United States as a whole and includes all bearings produced in the United States or manufactured abroad and imported into the United States.

19. The relevant product markets are:

- (a) the manufacture and sale of TR bearings;
- (b) the manufacture and sale of ball bearings; and
- (c) the sale of bearings direct to the automotive aftermarket.

20. Sales of ball and TR bearings in the United States are substantial. In 1971, domestic sales of TR bearings were over \$381 million and ball bearing sales were over \$523 million.

21. Concentration in the manufacture and sale of TR bearings and ball bearings in the United States has been high since 1955. In 1971, the four largest sellers accounted for the following percentages of domestic shipments:

- (a) TR bearings - 92%; and
- (b) ball bearings - 63%. [6]

22. Entry into the manufacture and sale of TR and ball bearings is extremely difficult. A successful entrant must possess both considerable technical expertise and substantial financial resources.

23. No company has successfully entered the domestic manufacture of ball or TR bearings except through acquisition since World War II.

24. Prior to its acquisition of Tyson, AB SKF through SKF was one of the few most likely entrants into the domestic TR bearing market. AB SKF and SKF had the expertise (derived in part from AB SKF's production of identical items outside the United States), resources, and distribution system to be a significant competitor in the domestic TR bearing market, and had given serious consideration to entering that market by means of internal expansion.

25. In 1955, Tyson was the nation's third largest producer of TR bearings, with sales of such bearings of \$2.95 million, accounting for 2% of total 1955 sales of TR bearings.

26. In 1958, SKF was a substantial domestic manufacturer of ball bearings with sales of \$24 million, accounting for 9.5% of the domestic ball bearing market.

27. In 1958, Nice was a substantial manufacturer of ball bearings with sales of \$6.8 million, accounting for 2.3% of total 1958 domestic ball bearing shipments of \$255 million.

28. In 1971, SKF, with TR bearing sales of \$17.6 million and ball bearing sales of \$49.6 million, accounted for 4.6% of domestic TR bearing sales and 12% of domestic ball bearing sales.

29. In 1971, F-M was the nation's second largest producer and seller of TR bearings. In that year, F-M had sales of TR bearings of \$53.2 million and accounted for 14.0% of total domestic sales of TR bearings. In that same year, F-M's sales of ball bearings were \$26.6 million, accounting for 6.3% of the domestic ball bearing market, making it the 4th largest seller in that market. [7]

30. Sales of bearings to the automotive aftermarket are substantial, with 1970 shipments of \$55.9 million. Concentration in this market

is high. In 1970, the four largest sellers accounted for 78.2% of total sales of bearings in the automotive aftermarket.

31. Entry into the sale of bearings to the automotive aftermarket is difficult. A successful seller must operate a large, sophisticated distribution system, offer products with a reputation for high quality and have ample financial resources and considerable expertise. An additional barrier to entry exists in the fact that many purchasers in the automotive aftermarket prefer to deal with a seller offering a full line of bearings rather than just a few types or sizes.

32. In 1970, SKF's sales of bearings in the automotive aftermarket were \$4.1 million, accounting for 7.3% of that market. SKF was the nation's fourth largest seller of bearings to the automotive aftermarket in 1970.

33. In 1970, F-M's sales of bearings in the automotive aftermarket were \$20.4 million, accounting for 36.5% of that market. In 1970, F-M was the nation's largest seller of bearings to the automotive aftermarket.

34. The acquisition of Tyson by SKF; the subsequent acquisition of foreign bearing companies including, among others, United Bearing Co., Ets. Rossi Freres S.A., RIV, and four Spanish bearing companies by AB SKF; and the arrangement between SKF and F-M, individually or taken as a whole, constitute an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act, as amended, in that substantial actual and potential competition between and among AB SKF (including SKF), Tyson, F-M and others in the manufacture and sale of TR bearings has been eliminated.

35. The acquisition of Nice by SKF; the subsequent acquisitions of foreign bearing companies including, among others, United Bearing Co., Kugellagerfabrik Saarland, Les Applications du Roulement, RIV, Compagnie Generale du Roulement, and four Spanish bearing companies by AB SKF; and the arrangement between SKF and F-M, individually or taken as a whole, constitute an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act, as amended, in that substantial actual and potential competition between and among AB SKF (including SKF), Nice, F-M and others in the manufacture and sale of ball bearings has been eliminated. [8]

36. The effects of the acquisition of Nice by SKF are substantially to lessen competition or tend to create a monopoly in the manufacture of ball bearings throughout the United States in violation of Section 7 of the Clayton Act, as amended, in that substantial actual competition between Nice, SKF and others in the manufacture and sale of ball bearings has been eliminated.

37. The arrangement between SKF and F-M constitutes an unfair

method of competition in violation of Section 5 of the Federal Trade Commission Act, as amended, in the following ways, among others:

(a) Substantial competition between and among SKF, F-M and others in the sale of bearings in the automotive aftermarket has been eliminated.

(b) The arrangement has eliminated F-M as a substantial potential purchaser of TR and ball bearings from manufacturers other than SKF.

INITIAL DECISION BY MORTON NEEDELMAN, ADMINISTRATIVE LAW  
JUDGE

MAY 12, 1978

I.

STATEMENT OF THE CASE

The complaint in this proceeding issued on July 22, 1975. It charges that beginning in 1955, acting alone or in combination, respondents have committed various antitrust offenses both in the United States and abroad which have had the effect of reducing actual and potential competition in three domestic bearings markets — the manufacture and sale of tapered roller bearings ("TRB"), the manufacture and sale of all ball bearings, and the distribution of all bearings, including TRB, to the automotive aftermarket. Specifically, the challenged acts are:

1. A 1955 acquisition by SKF Industries, Inc. ("SKF") of Tyson Bearing Corp. ("Tyson"), a manufacturer of TRB.

2. A 1960 acquisition by SKF of Nice Ball Bearing Company ("Nice"), a manufacturer of ball bearings.

3. A series of acquisitions by Aktiebolaget SKF<sup>1</sup> ("AB SKF") of TRB and ball bearings manufacturers located outside of the United States. [3]

4. An "arrangement", entered into sometime during the period 1971-1974 and continuing to the present, between SKF and Federal-Mogul Corporation ("FM") relating to the manufacture and distribution of TRB and other bearings to the automotive aftermarket. This "arrangement" allegedly contemplates that SKF would continue to manufacture automotive bearings but would withdraw from distribution of bearings to the automotive aftermarket while FM would continue to distribute to the automotive aftermarket, but would withdraw from the manufacture of automotive TRB. The effects of

<sup>1</sup> The complaint as issued names Aktiebolaget Svenska Kullagerfabriken. The corporate name of the Swedish respondent was changed on May 31, 1977 to Aktiebolaget SKF. Tr. 1076.

this arrangement are said to be the elimination of competition between FM and SKF as well as the elimination of FM as a substantial purchaser of TRB and ball bearings from manufacturers other than SKF.

The complaint does not allege that each of the four acts cited above constitutes a distinct violation. Thus the complaint does not charge that the 1955 acquisition of Tyson standing alone violates either Section 7 of the Clayton Act or Section 5 of the Federal Trade Commission Act. Instead, Paragraph 34 of the complaint states that the acquisition of Tyson, as well as the foreign acquisitions by AB SKF *and* the arrangement between SKF and FM, "individually or taken as a whole" constitute an unfair method of competition in that substantial, actual, and [4] potential competition between AB SKF, SKF, Tyson, FM, and other manufacturers of TRB has been eliminated.

Similarly, the foreign acquisitions of AB SKF are not cited as separate violations of Section 5. They are challenged as part of a pattern of anticompetitive activity by AB SKF which is said to impact adversely on domestic bearings markets by eliminating independent foreign sources which could conceivably export to the United States and compete on their own against SKF in the domestic market.

While the acquisition of Nice is charged as a separate Section 7 violation (Complaint, ¶ 36), this act, too, is linked together in Complaint Paragraph 35 with the foreign acquisitions by AB SKF as well as the SKF and FM "arrangement", and all of these acts (again, "individually or taken as a whole") are alleged to be an unfair method of competition.

Finally, the complaint charges separately (Complaint, ¶ 37) that the "arrangement" between SKF and FM constitutes an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act by reason of the elimination of substantial competition between SKF and FM in the automotive aftermarket.

SKF's answer, filed on September 26, 1975, denies all material allegations of the complaint and avers that the 1955 acquisition of Tyson was a toe-hold acquisition of a [5] failing company, and the 1960 acquisition of Nice involved a firm which did not compete against SKF. In addition, the SKF answer raises the following affirmative defenses:

1. The 1955 acquisition of Tyson and the 1960 acquisition of Nice had been investigated by the Federal Trade Commission at the time they occurred, and SKF had been informed by the Federal Trade Commission that no enforcement action was contemplated. Relying upon this "clearance", SKF spent substantial sums of money on the acquired firms during the past 20 years. Under the doctrines of

equitable estoppel or laches, the Commission may not now challenge what it has approved in the past.

2. The proposed order — divestiture of the combination of Tyson and Nice and cancellation of the “arrangement” between SKF and FM — will have adverse effects on competition in that this relief will only serve to enhance the dominant position of others in the manufacture and sale of TRB.

While not conceding that the Federal Trade Commission has either in personam or subject matter jurisdiction over a Swedish company which has made acquisitions outside of the United States, AB SKF filed an answer on September 29, 1975 which denied all the material allegations of the complaint relating to it. Later, AB SKF agreed to waive [6] all objections to personal jurisdiction for the purpose of this suit only.<sup>2</sup>

FM’s answer, filed on September 26, 1975, denied all substantive portions of the complaint relevant to it. In addition, FM raised affirmative defenses including inexcusable delay in bringing a proceeding relating to a 1972 agreement, and the claim that certain aspects of FM business were “failing companies” at the time when the so-called “arrangement” was made between FM and SKF.

In the prehearing stage, all parties were allowed some discovery, requests for admissions were answered, and stipulations were filed. Upon completion of the prehearing stage, the case-in-chief began on October 3, 1977 and was completed on October 13, 1977. The defense case was presented between November 28 and December 9, 1977. Hearings for rebuttal were held during the week of January 9, 1978. During the hearings all counsel were given full opportunity to be heard, and to examine and cross-examine witnesses.

The record was closed on January 13, 1978. Proposed findings of fact and briefs were filed by all parties on [7] February 14, 1978. Answering briefs were filed on March 1, 1978.<sup>3</sup>

After reviewing all the evidence as well as the proposed findings and briefs submitted by the parties, and based on the entire record, I make the following findings of facts:<sup>4</sup>

<sup>2</sup> Proposed Findings of Facts, Conclusions of Law, and Main Brief of AB SKF, p. 33.

<sup>3</sup> By leave of the Commission, the filing date for this Initial Decision was extended from April 12, 1978 to May 12, 1978.

<sup>4</sup> Proposed findings not adopted in the form proposed or in substance are rejected, as either not supported by the entire record, or as involving immaterial or irrelevant matters.

The following abbreviations are used throughout in citing to the record: “Tr.” (transcript of testimony); “CX” (complaint counsel exhibit); “RSX” (respondent SKF exhibit); “RAX” (respondent AB SKF exhibit); “RFX” (respondent FM exhibit). CX’s 1A–1Z–26, an index to complaint counsel’s exhibits, contain a description of each exhibit and the date received in evidence or rejected. The same information for respondents’ exhibits appears on RSX’s 1A–H (for SKF); RFX’s 150A–E (for FM); and RAX’s 250A–C (for AB SKF). These indices also indicate which exhibits are *in camera*. References in citations to exhibits to “No.” refer to numbered requests for admissions and answers to requests for admissions or paragraph numbers of stipulations. By the terms of my omnibus *in camera* order there is no

## Initial Decision

## [12] II.

## FINDINGS OF FACT

## The Respondents

## Federal-Mogul (FM)

1. FM is a Michigan corporation whose headquarters is located at Southfield, Michigan. It manufactures and distributes a wide-range of

limitation whatever on the public use of this material in decisions written by the undersigned, the Commission, or other reviewing authorities. See "Omnibus *In Camera* Order," dated October 4, 1977. This order further provides that *in camera* exhibits are to be placed on the public record five years after the record closed — that is, on January 18, 1983.

[8] The appearances of the witnesses were as follows:

NAME	CALLED BY	TR. PAGES
Joseph F. Toot The Timken Company (Bearings Manufacturer)	Complaint Counsel ("c.c.")	399-514
H. E. Markley The Timken Company (Bearings Manufacturer)	Stipulated Testimony	496-497
Shunji Ishino NTN Toyo Bearing Manufacturing Co., Ltd. (Bearings Manufacturer)	c.c.	519-578
Thomas W. Morrison (Retired, Former Chairman, SKF)	c.c.	744-815
Paul Joseph Tracy American Koyo Corporation (Bearings Manufacturer and Importer)	c.c.	823-871
Russell S. Strickland (Retired, former Vice President and Bearings Group Manager, F-M)	c.c.	877-985
Walter P. Wieland FAG, Kugelfischer, Georg Schaefer & Co. (Bearings Manufacturer)	c.c.	998-1071
Bruce R. Paxton Hoover NSK Bearing Company (Bearings Manufacturer)	c.c.	1078-1109
[9] Frank V. Smith, Jr. Lipe Rollway Corporation (Bearings Manufacturer)	c.c.	1109-1143
Warren E. Milner (Retired, former General Manager, New Departure-Hyatt Bearing Division of General Motors Corporation)	c.c.	1166-1181
Philip B. Ziegler New Departure-Hyatt Bearing Division of General Motors Corporation (Bearings Manufacturer)	c.c.	1182-1215
Augustino Canonica RIV Officine di Villar Perosa S.p.A. (Bearings Manufacturer)	resp. AB SKF	1251-1334

(Continued)

Initial Decision

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automotive products including ball bearings and TRB, oil seals, O-rings, gaskets, and pistons. In 1971, FM's sales were \$269.6 million.<sup>5</sup>

2. In 1970, the Bower Division of FM ("Bower") produced TRB at

William J. Kelly Winstead Precision Ball Corporation and Former Vice President, FAG Bearings Corp. (Bearings Manufacturer and Importer)	resp. SKF	1840-1424
Philip Sutherland (Former Treasurer of Tyson)	resp. SKF	1428-1448
A. Stuart Murray (Retired, former Vice President of SKF)	resp. SKF	1449-1515
John A. McAdams SKF (Treasurer)	resp. SKF	1520-1551
[10] Henry M. McAdoo (Retired, former President, Nice Ball Bearing Division of SKF)	resp. SKF	1556-1608
Joseph A. Heron SKF (Assistant Treasurer)	resp. SKF	1608-1686
Tibor E. Tallian SKF (Vice President, Technology Services)	resp. SKF	1637-1681
Shaun F. O'Malley Price Waterhouse & Company (Retained Expert)	resp. SKF	1775-1906
Fred H. Meyer and Leonard J. Brzozowsky Cresap, McCormick and Paget, Inc. (Retained Experts-Joint Appearance)	resp. SKF	1944-2039
Thomas F. Russell FM (Chairman and Chief Executive Officer)	resp. FM	2050-2218
William Webster FM (Vice President and Group Executive, World Wide Marketing Group)	resp. FM	2270-2294
[11] Raymond Peck FM (Automotive Aftermarket Sales Manager, World Wide Marketing Group)	resp. FM	2400-2431
Donald R. Potter FM (Director of Pricing, World Wide Marketing Group)	resp. FM	2436-2536
Richard F. Harrington Aetna Bearings Company (Bearings Manufacturer)	c.c. (on rebuttal)	2547-2579
W. Stewart Johnson Brenco, Inc. (Bearings Manufacturer)	c.c. (on rebuttal)	2672-2718
Stephen R. Nelson Economist Federal Trade Commission (Expert Witness)	c.c. (on rebuttal)	2733-2868



two plants located in Detroit, Michigan (the Shoemaker and Hart plants) and a plant located in Macomb, Illinois.<sup>6</sup> The circumstances surrounding the closing of the Shoemaker and Hart plants are among the central issues of this proceeding.

3. FM currently has two TRB plants. In 1974, a TRB plant came on stream in Hamilton, Alabama. This plant manufactures TRB having an OD (outer diameter) of 4" to 8", and as of 1977 produces low-volume TRB in the 0" to 4" [13] range.<sup>7</sup> FM continues to manufacture TRB at the Macomb, Illinois plant. This plant produces TRB having an OD of 8" or over as well as straight roller bearings.<sup>8</sup>

4. At all times relevant to this case FM sold and shipped bearings throughout the United States and engaged in or its business affected commerce within the meaning of the Federal Trade Commission Act.<sup>9</sup>

#### Aktiebolaget SKF (AB SKF)

5. AB SKF is a Swedish corporation founded in 1907. Its principal place of business is located in Gothenburg, Sweden.<sup>10</sup>

6. In 1971, worldwide sales of AB SKF, including subsidiaries and affiliates, were over \$1 billion. Of this total about 80 percent was derived from the sale of bearings.<sup>11</sup> [14]

7. AB SKF is the world's largest bearing producer (it accounts for over 20 percent of the world market) and worldwide it is one of the three leading TRB producers.<sup>12</sup>

8. AB SKF has owned or partially-owned affiliates producing TRB or ball bearings in Europe, South America, Africa, India, Australia, New Zealand, and the United States.<sup>13</sup>

9. AB SKF's United States affiliate, respondent SKF, is engaged in commerce and its business affects commerce.<sup>14</sup> In addition, AB SKF's foreign affiliates export bearings to the United States and thus the Swedish firm is engaged in foreign commerce with the United States.<sup>15</sup> Moreover, as noted later in this Initial Decision, AB SKF participated in and ratified an illegal market allocation which substantially affects the commerce of the United States.<sup>16</sup> [15]

<sup>6</sup> RFX 163V; Tr. 2075-77.

<sup>7</sup> CX's 250Z-37 (Nos. 196a, b); RFX 214 (p. 1) *in camera*; Tr. 2150-51, 2357.

<sup>8</sup> CX's 250Z-37 (Nos. 197a, 198a), 251D (Nos. 21-22); RFX 214 (p. 1) *in camera*.

<sup>9</sup> Complaint and FM Answer, ¶ 14.

<sup>10</sup> Complaint and AB SKF Answer, ¶ 2.

<sup>11</sup> CX's 2H, S, 250Z-188 (No. 678).

<sup>12</sup> CX's 4G, 250Z-188 (No. 681), 250Z-188 (No. 679), 341D; Tr. 1001, 1406.

<sup>13</sup> Complaint and AB SKF Answer, ¶ 4; CX's 2Z-11-13.

<sup>14</sup> Finding 14.

<sup>15</sup> CX's 10B-N *in camera*, 253A-U *in camera*.

<sup>16</sup> Findings 52, 74, 85, 91, 92, 94.

### SKF Industries (SKF)

10. In 1915, AB SKF formed the SKF Ball Bearing Company of Hartford, Connecticut. A successor company, SKF Industries, Inc. ("SKF"), was incorporated under Delaware law in 1933. SKF's principal place of business is located in Philadelphia, Pennsylvania.<sup>17</sup>

11. Throughout its existence SKF has been a manufacturer of bearings. Recently, however, it has diversified into other automotive products. In 1971, SKF had net sales of approximately \$126 million.<sup>18</sup>

12. Currently, SKF through its Tyson Division manufactures TRB in Massillon, Ohio and Glasgow, Kentucky. The Massillon facility manufactures TRB over 4" OD while the Glasgow plant produces TRB in 0" to 4" OD range.<sup>19</sup>

13. SKF's Nice Division manufactures ball bearings at plants located in Philadelphia and Kulpville (Lansdale), Pa.<sup>20</sup> [16]

14. At all times relevant to this case SKF sold and shipped its products throughout the United States and engaged in commerce within the meaning of the Clayton and Federal Trade Commission Acts, and was a corporation whose business affected commerce within the meaning of the Federal Trade Commission Act.<sup>21</sup>

### The AB SKF-SKF Relationship

15. AB SKF is the beneficial owner of 94 percent of SKF's common stock.<sup>22</sup> However, by the terms of a voting trust agreement dated April 1, 1955, AB SKF has assigned legal title to its SKF common stock to three voting trustees, each of whom is a United States citizen domiciled in the United States. All actions by trustees must be unanimous. Voting trustees may elect themselves to the SKF board and may serve as officers of the company. AB SKF, as the holder of voting trust certificates, receives dividends declared on SKF stock. The voting trust agreement, with minor changes, has continued in effect from 1955 to the present.<sup>23</sup> [17]

16. AB SKF's annual reports describe SKF as a member company of the AB SKF "Group",<sup>24</sup> and AB SKF's relationship with its

<sup>17</sup> Complaint and SKF Answer, ¶¶ 5, 9; CX 250Z-184 (No. 685).

<sup>18</sup> Complaint and Answers of SKF and AB SKF, ¶ 10; CX's 250Z-187 (Nos. 707-08), 252B (No. 13). See Finding 101 for recent acquisition by SKF of diversified auto products manufacturer.

<sup>19</sup> CX's 250Z-27-28 (Nos. 164-65), 250Z-133-134 (Nos. 537-39).

<sup>20</sup> CX's 250Z-71 (No. 320), 250Z-134 (No. 540).

<sup>21</sup> Complaint and SKF Answer, ¶ 8.

<sup>22</sup> Complaint and AB SKF Answer, ¶ 5; CX 250Z-184 (No. 688).

<sup>23</sup> CX's 5A-9i; Tr. 1547. A 1976 amendment, apparently dictated by the Department of Defense for security reasons, creates special obligations on the voting trustees to avoid disclosure of classified information to AB SKF. RSX's 2A-J.

<sup>24</sup> CX 2Z-13.

subsidiaries has been described as “geocentric”.<sup>25</sup> Details of the relationship between SKF and AB SKF, however, have not been extensively explored on the record beyond evidence showing that prior to 1954 AB SKF had at one time loaned money to SKF in the form of extended payment terms for the purchase of merchandise;<sup>26</sup> SKF purchases steel from AB SKF;<sup>27</sup> SKF personnel have participated in technical exchanges with AB SKF personnel;<sup>28</sup> unnamed AB SKF officials visited the Tyson facility before [18] and after SKF’s acquisition of Tyson;<sup>29</sup> and when SKF contemplated a joint venture in needle roller bearings with a French firm called “Nadella”, AB SKF was consulted.<sup>30</sup>

17. While the evidence relating to day-to-day control by AB SKF over SKF is inconclusive, the involvement of the Swedish parent in the FM-SKF “arrangement” is plainly shown on the record and is the basis for my conclusion that an order should be issued against AB SKF. See Findings 52, 74, 85, 91, 92, 94.

#### The Products

18. Anti-friction bearings, which are designed to reduce the friction created by a rotating load, consist of a cup which accommodates a cone. The cone is made up of rolling elements retained by a “cage”. The rolling elements, which are either balls (as in ball bearings) or rollers (as in tapered roller bearings) are the crucial determinants of the operating characteristics of the bearing.<sup>31</sup> Ball [19] bearings are produced in various grades and types including radial (annular), angular contact, self-aligning, and thrust.<sup>32</sup> The most commonly used roller bearings are tapered,<sup>33</sup> spherical,<sup>34</sup> and cylindrical.<sup>35</sup> Tapered roller bearings (TRB or “tapers”) are designed to absorb both vertical and horizontal loads in such applications as the front wheels of passenger cars.<sup>36</sup>

19. The practices challenged in this complaint are said to take place

<sup>25</sup> CX 258B. Also see CX 416E *in camera* for reference by independent consultant to “worldwide SKF product/plant rationalization” and CX 190L for evidence of SKF’s worldwide pricing strategy. But see Tr. 2827 for indication that national divisions of AB SKF enjoy considerable organizational autonomy and CX 258B which shows that a U.S. consent decree limits the ability of AB SKF to apply multi-national concepts to SKF.

<sup>26</sup> Tr. 1547-49. SKF, however, establishes its own budget and does its own financing. Tr. 1539.

<sup>27</sup> Tr. 760-61.

<sup>28</sup> Tr. 760-61, 1653.

<sup>29</sup> CX 421C (No. 18). AB SKF provided no funds to SKF for use in acquiring Tyson or Nice. Tr. 1528-29. SKF has never been consulted by AB SKF about the parent’s foreign acquisitions. Tr. 1539-40.

<sup>30</sup> The Swedish parent’s involvement was apparently limited to offering antitrust advice.

<sup>31</sup> CX’s 250E-G (Nos. 11-17); Tr. 403.

<sup>32</sup> CX’s 376B, 377B, 392A-Z-67; Tr. 1597-98.

<sup>33</sup> By far the largest use of TRB is in such automotive applications as gearboxes, front wheels, and drive units. CX 2Z-6.

<sup>34</sup> Used in heavy industry applications such as mining, steel, and paper machinery. CX 2P.

<sup>35</sup> Used where heavy loads are present such as rolling mill and mining machinery. CX 2V.

<sup>36</sup> CX’s 249D-E, i, 250Z-17 (No. 130), 250Z-18 (No. 134); Tr. 429.

in three alleged markets — the manufacture of TRB (Finding 104), an all ball bearing manufacturing market (Findings 129–146), and the sale of all bearings, including TRB and ball bearings, to the independent auto aftermarket (Findings 20–22). [20]

There is no dispute between the parties that the markets for anti-friction bearings do not break down to geographic areas: all bearings markets are national in scope.<sup>37</sup>

### The SKF-FM “Arrangement”

#### The Aftermarket For Automotive Bearings

20. The so-called “arrangement” between SKF and FM relates to the distribution of all bearings to the automotive<sup>38</sup> aftermarket.

21. Various kinds of bearings are sold in the auto aftermarket — ball bearings (including clutch throw out bearings), cylindrical, needle and spherical roller bearings, and TRB.<sup>39</sup> In rank of importance, automotive TRB constitute about 40 percent of all bearings purchased by a warehouse distributor to the auto aftermarket<sup>40</sup> and about 90 percent of TRB used in passenger car automotive [21] applications are in the 0” to 4” outer diameter range.<sup>41</sup> TRB sold in the auto aftermarket are standard bearings which fit all makes of domestic and foreign cars and the worldwide production of these products is interchangeable.<sup>42</sup>

22. While the parties agree that there exists a bearings auto aftermarket, respondents disagree sharply with complaint counsel about how that market should be defined. As complaint counsel would have it, there exists an economically significant “independent auto aftermarket” which consists of competition at the manufacturing level for the business of independent warehouse distributors (WD’s), but does not include sales by bearings manufacturers to auto companies for resale to franchised car dealers — that is, the so-called “OE (original equipment) service market.” Respondents, on the other hand, say that sales to the OE service market must be included in one auto aftermarket because franchised car dealers — the penultimate customers in the OE service market — are in direct competition with the last commercial buyers in the WD distribution chain, that is, franchised car dealers, garages, service [22] stations, mass merchandisers, and do-it-

<sup>37</sup> Complaint and Answers of AB SKF and SKF, ¶ 18; CX 35Z–11.

<sup>38</sup> For purposes of compiling universe figures, the term “automotive” includes passenger cars, light and heavy trucks, buses, trailers, tractors, self-propelled agricultural and construction equipment, and vehicles, such as trailers and agricultural equipment, pulled by self-propelled vehicles. CX’s 35E, 250Z–133 (No. 534).

<sup>39</sup> Tr. 2752.

<sup>40</sup> Tr. 2861.

<sup>41</sup> Tr. 1347, 2863.

<sup>42</sup> CX’s 249J–K; see CX’s 35E, F for list of automotive applications for bearings. Tr. 2207.

yourself shops which buy from the automotive jobbers supplied by automotive WD's.<sup>43</sup>

The record supports complaint counsel's position that at the manufacturing level, two distinct markets exist — one representing sales to WD's (the independent auto aftermarket),<sup>44</sup> the other consisting of an OE service market. The record shows the following: [23]

(a) The bearings industry, including respondents, recognizes as a distinct market the independent auto aftermarket — *i.e.*, sales to automotive WD's who, in turn, sell only to jobbers.<sup>45</sup>

(b) Distinct prices prevail in the independent auto aftermarket which are insensitive to price changes in the OE service market.<sup>46</sup>

(c) Industry members maintain separate sales forces for the independent auto aftermarket.<sup>47</sup>

(d) In terms of range of products, the requirements of the independent aftermarket are different from those of the OE service market. The independent automotive aftermarket requires bearings for every make and model for which there is still a large number of registered vehicles. The OE service market needs only a few items.<sup>48</sup> [24]

(e) OE service customers — the automobile companies — exercise considerable buying power since they purchase not only for replacement use but also for OE installation. WD's in the automotive aftermarket are smaller firms which stock a wide variety of parts for resale to jobbers, and lack the leverage of the automobile manufacturers.<sup>49</sup>

23. The sale of bearings (including TRB) to the independent auto aftermarket, as defined in Finding 22, is highly concentrated.

<sup>43</sup> See RSX 123 and Tr. 2365-67. See also RSX 33E. There is some disagreement, but not nearly as intense, about whether certain sales by bearings manufacturers to industrial distributors should be included. There are some anecdotal references in the record to sale by industrial distributors to automotive jobbers. See, *e.g.*, RSX 111A; Tr. 2452. But there is no real dispute that industrial distributors are a distinct group of buyers from bearings manufacturers, who handle different products (as well as a different range of products), sell at different prices, and distribute to different customers than the automotive WD's. CX's 190o-P, 250Z-9 (Nos. 105-06), 250Z-18 (Nos. 452b, c), 250Z-126 (No. 513), 250Z-127 (No. 514), 250Z-131 (No. 526); RSX's 59F, 91L; RFX 214 (pp. 32-34) *in camera*; Tr. 419-20, 917-18, 1469, 2061-66, 2151-52, 2275, 2296-97.

<sup>44</sup> To the extent that bearings manufacturers sell directly to jobbers and mass merchandisers these sales are included in the independent auto aftermarket. Tr. 2852. Such jobber sales have become uncommon since the 1960's when bearings manufacturers limited their automotive wholesale distribution essentially to WD's. Tr. 2119. Complaint counsel's universe also includes sales by the bearings division of auto manufacturers to WD's.

<sup>45</sup> CX's 200A-201F; RSX 91D; RFX 214 (pp. 33-34) *in camera*; Tr. 2209, 2425.

<sup>46</sup> CX 416J *in camera*; Tr. 2524.

<sup>47</sup> Tr. 1196, 2523-24. Parts manufacturers do not make sales by calling directly on car dealers; they always use a WD, who, in turn, relies on jobbers. Tr. 2854; see also CX 250Z-133 (No. 536).

<sup>48</sup> Tr. 2753-57. It has been estimated that presently a WD needs between 260 to 300 part numbers in the 0" to 4" range. Tr. 2444, 2494, 2536, 2864-65. A part number is either a cup or a cone or an assembly of cup and cone. Tr. 2449-50.

<sup>49</sup> Tr. 2755-56.

## Initial Decision

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TABLE 1: MARKET SHARES OF SALES OF ALL BEARINGS TO THE AUTO AFTERMARKET (PERCENT)<sup>50</sup>

	1970	1971	1972	1973	1974	1975
FM	35.4	36.2	41.8	46.5	44.7	44.8
GM (New Departure- Hyatt)	25.9	23.7	25.1	21.6	22.1	20.6
SKF	7.8	8.2	0	0	0	0
Federal Bearings (not related to FM)	7.7	8.1	8.4	7.6	6.5	7.1
L&S	8.7	7.7	8.5	8.3	9.3	10.0
Timken	6.0	6.6	7.5	7.6	9.4	11.2
Green	4.1	5.3	3.9	3.7	3.9	2.6
Li-pe- Rollway	3.8	4.1	4.3	4.2	3.6	3.1
Aetna	.6	.2	.3	.4	.5	.5

Source: CX's 215i, 254A-N (Nos. 79-99, 102-113, 120-130) *in camera*, 349A-E (Nos. 79-125) *in camera*, 351A-D *in camera*, 353A-B (Nos. 79-131) *in camera*, 423A-B; RSX's 91H *in camera*, 122B *in camera*; RFX 154 *in camera*.

[25] 24. The segment of the auto aftermarket most directly involved in this case — sales of TRB to the auto aftermarket — is even more highly concentrated than indicated in Finding 23.

TABLE 2: MARKET SHARES OF SALES OF TRB TO AUTO AFTERMARKET IN 1970 AND 1973 (PERCENT)<sup>51</sup>

	1970	1971	1972	1973	1974	1975
FM	35	48	52	55	48	45
Timken	35	24	25	23	28	31
GM (NDH) <sup>52</sup>	12	13	13	13	13	11
L&S	N.A.	8	9	7	10	12
Tyson	6	5	0	0	0	0
Others	12	2	1	2	0	1

Sources: CX's 180 *in camera*, 190M, 254C-D *in camera*; RSX's 93D *in camera*, 95E *in camera*, 105B *in camera*; RFX 154 *in camera*; Tr. 2332, 2473-74, 2518.

25. Entry into the manufacture of bearings for sale to auto aftermarket is difficult, particularly for foreign firms. The record shows the following:

<sup>50</sup> Total dollar sales increased from about \$52.5 million in 1970 to about \$78.2 million in 1975. See Sources cited in Table 1.

<sup>51</sup> In 1970, total TRB sales to the automotive aftermarket were \$17 million. In 1973, total sales were \$22 million. See sources cited in Table 2.

<sup>52</sup> New Departure-Hyatt Division of General Motors.

(a) Because of the small quantity and large variety of bearings involved in sales to WD's, it is uneconomical for foreign bearings manufacturers to sell in the United States auto aftermarket. Other conditions which make it virtually impossible for a foreign exporter to compete in [26] the domestic auto aftermarket are lack of a large sales force, inability to make prompt deliveries, and unstable prices resulting from fluctuating currencies.<sup>53</sup>

(b) Effective aftermarket distribution requires a large sales force supported by warehouse facilities located throughout the country.<sup>54</sup>

(c) WD's prefer to deal with a single source of bearings who not only carries a complete line of ball bearings, cylindrical bearings, needle bearings and TRB, but within each type of bearing, the supplier is expected to carry the many different part numbers required in the replacement field.<sup>55</sup>

(d) WD's also prefer to deal with a supplier who carries products other than bearings such as gaskets, O-seals, pistons, and other automotive products.<sup>56</sup>

26. Since 1970, there have been no new entrants into the sale of bearings to the automotive aftermarket except for Schatz Manufacturing Co. and American Koyo. In 1975, [27] Schatz had achieved only a minuscule share of sales and by 1976, this firm had been acquired by Federal Bearings (not related to FM).<sup>57</sup> American Koyo, a subsidiary of the large Japanese producer Koyo Seiko, has recently entered the automotive aftermarket, but its chances of success are slight.<sup>58</sup>

#### The Condition of FM in the TRB OEM and TRB Aftermarket

27. In 1970, FM manufactured TRB for both the original equipment market (OEM) and the auto aftermarket.<sup>59</sup>

28. For several years prior to 1970, FM's TRB manufacturing arm, Bower, had declining profits.<sup>60</sup>

29. In early 1970, FM retained the Boston Consulting Group Inc. ("BCG"), an independent market analysis firm, for the purpose of examining Bower's position in various TRB markets and to suggest alternative ways to improve profitability.<sup>61</sup> [28]

30. The BCG study, which is dated July 1970, found that The Timken Roller Bearing Co. (Timken) was dominant in several OEM

<sup>53</sup> CX's 190N, 249L, 250Z-25-26 (No. 157), 250Z-89 (No. 385), 250Z-116 (No. 477); Tr. 2191, 2782-83.

<sup>54</sup> Complaint and SKF Answer, ¶ 31; CX's 250Z-10 (Nos. 110-111); RSX 33C.

<sup>55</sup> Tr. 1422-23, 2296-97, 2299, 2536, 2865.

<sup>56</sup> CX 190N; Tr. 1422-23, 1470, 2283, 2296-97.

<sup>57</sup> CX's 254i (No. 112) *in camera*, 422.

<sup>58</sup> Tr. 870, 2782.

<sup>59</sup> Tr. 2101-03.

<sup>60</sup> CX 190E; Tr. 2140-41.

<sup>61</sup> Tr. 2141-42.

TRB markets including the OEM automotive, farm equipment, and construction markets as well as the industrial aftermarket.<sup>62</sup> Given its huge shares of these markets, and its low costs resulting from economies of scale, Timken was able to use selective price cuts whenever Japanese imports became a threat as was the case in the automotive OEM market for high-volume 0" to 4" TRB,<sup>63</sup> the very products manufactured by Bower's Shoemaker plant. According to BCG, Timken's costs would always be less than Bower's, Bower would never be more than marginally profitable, and even this poor performance by Bower would be at Timken's sufferance.<sup>64</sup>

31. BCG concluded that continuation of FM's production of 0" to 4" TRB at its Shoemaker and Hart plants could [29] not be justified.<sup>65</sup> The profitability of the Shoemaker plant as a percentage of sales had already declined from 18.5 percent in 1964 to 5.1 percent in 1969, and BCG anticipated further declines in profitability as a result of accelerated price-cutting by Timken to meet the threat of Japanese imports of low-priced, high-volume 0" to 4" TRB.<sup>66</sup>

32. In its July, 1970 report to FM management, BCG considered several alternatives:

(a) Bower could conceivably refocus from the automotive, farm equipment and construction equipment OEM markets and concentrate on such growth markets as the railroad, industrial or steel industry use of bearings in which FM had little or no penetration. BCG concluded, however, that the tooling expenses and the delay inherent in such a drastic change made this alternative unprofitable.

(b) Continuation in the automotive, farm equipment and construction equipment OEM and aftermarkets as the second source to Timken was considered by BCG to be an unattractive choice because this alternative required [30] extensive investment at a time when there was a strong prospect of further price-cutting by Timken to meet Japanese imports.

(c) Withdrawal of FM completely from the production and sale of TRB including termination of sales to the auto aftermarket.<sup>67</sup>

33. On balance, BCG recommended the last alternative — complete withdrawal of FM from all aspects of the TRB market, including aftermarket distribution.<sup>68</sup>

<sup>62</sup> Timken's share of the OEM automotive, farm equipment, and construction markets was 41%. Timken's had 64% of OEM industrial sales and 84% of industrial aftermarket sales. CX 190H.

<sup>63</sup> About 90% of the U.S. TRB market is concentrated in the 0" to 4" range. CX 249J.

<sup>64</sup> CX's 190E, F, G, i-L, o, R-T, V, Z-Z-1.

<sup>65</sup> Shoemaker produced 62 high-volume 0" to 4" TRB part numbers. Tr. 2075-76. FM's Hart Avenue plant in Detroit produced low-volume 0" to 4" and over 4" TRB. CX 250Z-42 (No. 212a); Tr. 2077.

<sup>66</sup> CX's 190F, G, T-V.

<sup>67</sup> CX's 190W-Y.

<sup>68</sup> CX's 190Z-Z-1; Tr. 2143.



34. In Spring, 1971, a document entitled "Bower Division Strategy Plan" was prepared by FM management for the Board of Directors. This document analyzed the problems and strengths of Bower, considered various alternative plans, and reached conclusions which agreed in some parts and disagreed in others with the recommendations of BCG. Among the conclusions reached were:

(a) The production of high-volume 0"-4" TRB at the Shoemaker plant should be terminated.

(b) The Hart Avenue, Detroit, Michigan plant of Bower, where low-volume 0"-4" TRB and TRB over 4" were produced, should be closed. [31]

(c) A new plant should be constructed in the Southeast at which 4"-8" TRB would be produced.

(d) Equipment and tooling required to produce TRB in excess of 8" should be moved from the Hart Avenue, Detroit, Michigan plant to the Macomb, Illinois plant of Bower.<sup>69</sup>

35. In still additional recommendations to FM Board of Directors made on July 27, 1971 in an "add-on study", FM management confirmed the principle recommendation made in its Spring, 1971 "Bower Division Strategy Plan" — that is, to close the Shoemaker and Hart plants. But the "add-on study" did not endorse the complete TRB withdrawal recommendation of BCG and noted, instead, the request of the auto aftermarket division that FM retain its position as a distributor of TRB to the auto aftermarket by purchasing these products from outside sources.<sup>70</sup>

36. Eventually FM management decided to stay in the bearings auto aftermarket because it believed that the loss of TRB would seriously affect aftermarket sales of other products. This view derived from the knowledge that [32] the success of FM in the automotive aftermarket was largely attributable to its ability to offer the convenience of a "package" of products including tapered roller bearings, engine bearings, cylindrical roller bearings, ball bearings, oil seals, O-rings and pistons.<sup>71</sup>

37. A measure of the success of this package concept is shown by the ability of FM to command a premium of up to 20 percent on TRB sales since WD's prefer to deal with a single source rather than multiple suppliers of separate items.<sup>72</sup>

38. Still another factor considered by FM management was the possible adverse effects on other aspects of FM's manufacturing

<sup>69</sup> CX's 18A-Z-26; Tr. 2144.

<sup>70</sup> CX's 189A-K; Tr. 2144-45. Also see CX's 191B and 341D for summary of reasons for closing the Detroit plants.

<sup>71</sup> CX's 190N, 198B; RFX 214 (pp. 1, 35) *in camera*; Tr. 2057-58, 2282-84, 2296, 2751-52.

<sup>72</sup> RFX 214 (pp. 39-40) *in camera*; Tr. 2390. One such package consists of a line of anti-friction bearings and oil seals. Tr. 2284. See also CX 255C; RFX 208.

business which might result from the loss of TRB sales. As noted in Finding 36, it had been the experience of FM's Service Division that certain groupings of different automotive aftermarket parts comprise a particularly attractive offering to WD's. Ball bearings, TRB and oil seal comprise one such offering. FM through its National Seal [33] Division was a leading manufacturer of oil seals, and, through its BCA Division, produced ball bearings. Both oil seals and bearings were profitably distributed to the automotive aftermarket by FM in 1971, and notwithstanding the closing of the Shoemaker and Hart plants continued distribution of TRB was considered to be important by FM management not only to protect its huge market share in the TRB aftermarket, but also so as to protect its profitable aftermarket sales of oil seals and ball bearings.<sup>73</sup>

39. Based upon the management recommendations made on July 27, 1971, the FM Board of Directors voted to close the Shoemaker and Hart plants on October 27, 1971.<sup>74</sup> On the same day, FM publicly announced its decision to phase out of the OEM market for passenger car TRB within 12 to 24 months. The decision was attributed to the encroachment of foreign imports as well as entrenched domestic competition. The announcement stated that FM had "no intention of [34] abdicating its position in the passenger car tapered roller replacement market."<sup>75</sup>

40. FM's inability to compete effectively in the manufacture of 0"-4" TRB because of foreign competition and Timken's reaction to this foreign competition has been substantiated by the United States Department of Labor. On November 12, 1973, the Department of Labor published a notice stating that the former workers<sup>76</sup> at FM's Shoemaker and Hart plants were eligible for adjustment assistance because the U.S. Tariff Commission had found that increased imports of TRB, resulting in large part from trade concessions, was a major factor causing unemployment.<sup>77</sup> [35]

#### The Condition of SKF in the Bearings Automotive Aftermarket

41. SKF's Automotive Products Division (APD), its auto aftermarket distribution arm, was created in 1962.<sup>78</sup>

42. APD offered a single line of products, bearings, for distribution

<sup>73</sup> RFX 214 (pp. 1, 24) *in camera*; Tr. 2073. See also CX's 238-243.

<sup>74</sup> RFX's 202A-C; Tr. 2138, 2147.

<sup>75</sup> CX's 191D, 250Z-108 (Nos. 453a, b), 265A-C. The announcement also stated that the decision would result in an extraordinary, one-time write-off, net of taxes, of \$10 million, equivalent to \$1.81 a share. Later, an additional \$5 million was written off. In effect, FM's shut down of its Detroit TRB plants meant it was giving up about \$20 million in annual OEM sales. CX 327A; Tr. 2147-48.

<sup>76</sup> The closing of the Shoemaker and Hart plants resulted in a lay-off of some 1900 Detroit workers. Tr. 2147.

<sup>77</sup> RFX's 165A-B. See also CX's 249Q, W, 341D.

<sup>78</sup> CX 250Z-104 (Nos. 438b, c).

in the automotive aftermarket. The APD line consisted of clutch release bearings and front wheel ball bearings manufactured by SKF's Nice division, and TRB manufactured by both the SKF Tyson division and SKF's parent, AB SKF. However, less than one-half of APD's TRB requirements were supplied by Tyson. APD's major outside source of TRB was FM — that is, before FM itself discontinued the manufacture of 0" to 4" TRB. APD also distributed needle roller bearings and cylindrical roller bearings.<sup>79</sup>

43. APD's sales grew from \$803,972 in 1962 to \$4,582,247 in 1971. In 1971, APD consisted of a general manager, five district managers, and fifteen salesmen.<sup>80</sup> APD had six warehouses from which it served its customers.<sup>81</sup> [36] APD's sales consisted of 20 percent TRB, 40 percent clutch throwout bearings, and the balance in other ball bearings and other parts.<sup>82</sup> APD sold to large WD's, small WD's, and jobbers.<sup>83</sup>

44. In 1971, APD and FM's aftermarket distribution division (Service Division and later World Wide Marketing) were competitors in the sale of bearings to the auto aftermarket.<sup>84</sup>

45. Prior to 1971, APD had a record of poor performance. This was mainly attributable to the limited product line it had available in a market in which buyers prefer to deal with as few sources as possible.<sup>85</sup> As a result, APD had losses in each of the years 1965 to 1970.<sup>86</sup>

46. In 1971, however, APD showed a profit.<sup>87</sup> An SKF study conducted during the negotiations over the [37] "arrangement" with FM (which eventually led to the shut down of APD) found:

APD has been gradually expanding shipments and decreasing the ratio of selling expenses to sales over the past few years and is now showing a small profit. If APD were discontinued, any decision in the future to re-enter this market would entail a similar long period of loss years to build up the division.<sup>88</sup>

#### The Development of the FM-SKF Arrangement

47. Since it became apparent by mid-1970 that the future of FM's TRB manufacturing arm was bleak (see Finding 30), FM began to consider possible alternative sources of supply as early as February 1971. The search by FM for an adequate source of supply of TRB for the auto aftermarket distribution was influenced by the requirement

<sup>79</sup> CX's 250Z-129-30 (Nos. 520-24); Tr. 1468-71, 2463-66.

<sup>80</sup> CX 250Z-104 (No. 441).

<sup>81</sup> Tr. 2369, 2409.

<sup>82</sup> Tr. 2473-74.

<sup>83</sup> Tr. 2411, 2423.

<sup>84</sup> CX's 45B, 260A, 261C; Tr. 2405, 2470.

<sup>85</sup> Tr. 1470-71.

<sup>86</sup> RSX 80A.

<sup>87</sup> RSX 80A. These 1971 results tend to undermine the reliability of a 1970 SKF study which predicted APD losses in the foreseeable future. RSX 62.

<sup>88</sup> CX 45B.

that a company servicing the TRB automotive aftermarket maintain an inventory which includes a wide range of slow-moving items, as well as a stock of the popular high-volume parts. Accordingly, in order to compete effectively a TRB automotive aftermarket supplier must make supply arrangements which assure a reasonably full line of TRB.<sup>89</sup> [38]

48. Beginning in March 1971, one possibility actively considered by FM as a source of TRB was a joint venture in the United States with the Japanese producer Koyo Seiko.<sup>90</sup>

49. As noted in Finding 34, in Spring, 1971, Bower management endorsed the BCG recommendation that the Shoemaker and Hart plants be closed.

50. At about the same time (April 1971) FM began to consider Timken and General Motors as possible "outside" sources of supply. Discussion with Timken ended when on advice of its counsel, Timken refused to supply any TRB.<sup>91</sup> Also in Spring, 1971, General Motors' New Departure-Hyatt Division concluded that it could only supply FM on an emergency basis since its limited capacity was needed for captive use.<sup>92</sup>

51. Sometime prior to May 1971, officials of SKF heard industry rumors that FM intended to withdraw from the production of 0"-4" TRB but that it was going to remain in aftermarket distribution.<sup>93</sup> [39]

52. On or about May 13, 1971, at a meeting of the Anti-Friction Bearing Manufacturers Association ("AFBMA"), FM's MacArthur<sup>94</sup> discussed with SKF's A. Stewart Murray<sup>95</sup> and James H. Sutherland<sup>96</sup> the line of automotive bearings then available through SKF. These discussions were initiated by FM. FM indicated its interest in obtaining from SKF for aftermarket distribution TRB in the 0" to 4" range which it no longer intended to manufacture. SKF said it was interested in supplying these TRB to FM. SKF knew that it would have to rely on AB SKF's European production for many of the TRB needed by FM, and SKF's dependence on AB SKF production was assumed by both parties at every stage of the negotiations between FM and SKF.<sup>97</sup> [40]

<sup>89</sup> Tr. 2536, 2364-65. FM's assessment of the range of TRB required for the auto aftermarket has varied with time. As matters now stand FM apparently can get by with 259 TRB parts. Tr. 2356-57. See also CX's 13A, 255A. In 1971, the minimum number was reduced from 300 to 600. Tr. 2356-57, 2443-44.

<sup>90</sup> Tr. 2124-26.

<sup>91</sup> Tr. 496-97, 2154-56.

<sup>92</sup> Tr. 1203-04, 2156-57. In December 1971, American Koyo appeared to be reluctant to bid for FM's low-volume auto TRB although the high-volume business was attractive. CX 331A.

<sup>93</sup> Tr. 772, 803-04.

<sup>94</sup> MacArthur was Chief Executive Officer between 1970-75. Tr. 2052, 2116.

<sup>95</sup> Executive Vice-President and director of sales, marketing, and engineering. CX 258A; Tr. 1451.

<sup>96</sup> Vice-President and director of distributor sales. CX 98.

<sup>97</sup> CX's 35K, 53F-S, 105, 115A, 250Z-135 (Nos. 541b, c), 250Z-160-61 (No. 630), 352G, (No. 70); Tr. 2159, 2169-70, 2335, 2477, 2479. See also Tr. 809 for description of limited range of SKF line. The limits of SKF's line were well-

53. Also sometime in May 1971, officials of Koyo Seiko and FM met in Florida and came to a general agreement about the kinds of parts, division of ownership, and management of a United States joint venture involving the two firms. It was contemplated that the joint venture would assemble and finish high-volume 0" to 4" TRB and ball bearings from components provided by FM or Koyo Seiko or some third-party source depending upon lowest cost.<sup>98</sup> FM believed that the economies of scale resulting from the joint venture, together with the provision for low-cost acquisition of components, would result in lower costs than the cost of producing the same parts in FM's own plants.<sup>99</sup>

54. Shortly after the May AFBMA meeting with SKF, in June 1971, FM officials internally assessed their alternatives (when they closed the Shoemaker and Hart plants) as follows: [41]

(a) Sourcing its aftermarket needs for certain popular 0"-4" TRB through a joint venture with the Japanese firm, Koyo Seiko.

(b) Importing 0"-4" TRB from sources outside the United States.

(c) Sourcing 0"-4" TRB with SKF, GM or Brenco.

(d) Selling only TRB over 4" OD.

(e) Abandoning all roller bearing sales, including auto aftermarket sales.

(f) Closing down FM's field warehouses.

(g) Adding other products to be sold by FM's aftermarket operations.<sup>100</sup>

55. On June 3, 1971, Russell<sup>101</sup> of FM sent officials of Koyo Seiko a rough draft of a letter of intent for the creation of the joint venture to be known as FMK, Inc. It was proposed that FMK, Inc. would produce high-volume 0" to 4" TRB only.<sup>102</sup> [42]

56. On June 19, 1971, Peck, who had responsibility for FM's Service Division sales to the domestic auto aftermarket,<sup>103</sup> recommended to FM's management that it source at least some of their 0" to 4" TRB needs with SKF. The reasons cited were:

known at FM since FM had supplied TRB to SKF prior to the closing of the Detroit plants. CX 35Y-Z; Tr. 2322, 2462-66. In contrast, AB SKF had a relatively complete range of bearings available from its European and other foreign plants. CX 250Z-78 (No. 328c).

<sup>98</sup> CX's 202A-C; Tr. 2127-28. The proposed venture would produce a maximum of seven part numbers. Tr. 2131. It has always been the pattern of the TRB industry that a few standard items account for most of the business. CX 250Z-24 (Nos. 151a, b). Thus in 1973 eight part numbers (4 cups, 4 cones) accounted for 84% of all 0" to 4" TRB imported from Japan and 38% of all 0" to 4" domestically consumed. RFX's 158U, V. Of all 0" to 4" TRB sold to the auto aftermarket, 30 part numbers represent about 60% of the dollar sales volume. Tr. 2530-31. These popular TRB part numbers are used globally in all makes of cars. Tr. 2289.

<sup>99</sup> Tr. 2128.

<sup>100</sup> CX's 259A-B.

<sup>101</sup> Between 1970-1975, Russell was the second ranking officer of FM. Since 1975 he has been Chief Executive Officer. Tr. 2052, 2117.

<sup>102</sup> CX's 203A-F; Tr. 2416, 2330.

<sup>103</sup> CX 184; Tr. 2403.

This would be our first choice with regards to the anti-friction line. We [FM] would become SKF's marketing arm to the automotive aftermarket. This would be more palatable to all of our distributors and I could see some business gained by taking over SKF's existing customers.<sup>104</sup>

57. On July 1 and 2, 1971, FM met with Koyo Seiko to review the joint venture proposal.<sup>105</sup> In a letter of intent dated July 2, 1971, FM again outlined the purpose of the joint venture — *i.e.*, initially to assemble the highest volume TRB — and set forth details relating to the number of shares, percent of ownership, the proposed name of the company (FMK, Inc.), management responsibility, [43] the financial support to be provided by each joint venture partner, restrictions on the disposition of each partner's share, and profit goals. The proposal as drafted by FM was approved by Koyo Seiko.<sup>106</sup>

58. A meeting between SKF and FM took place in Detroit, Michigan, on July 8, 1971, and involved FM's MacArthur, Russell, Webster,<sup>107</sup> and Potter<sup>108</sup> and SKF's Murray and Sutherland. FM again informed the SKF officials that FM was considering closing its Hart and Shoemaker plants in Detroit, but that it intended to remain in the TRB automotive aftermarket provided a satisfactory source for these bearings could be found. There was a discussion of SKF as a possible source of supply, with emphasis on sizes and quantities which SKF could offer.<sup>109</sup>

59. On July 9, Peck of FM's aftermarket distribution arm repeated his endorsement of SKF as a source of supply and added: [44]

In fact there would be definite pluses here. If SKF discontinued sales to the automotive aftermarket we would enjoy approximately \$3,000,000 to \$4,000,000 in additional sales of the Bower line. It would also open the door to customers we do not sell, such as American Parts System.<sup>110</sup>

60. Also, in June or July 1971, SKF officials (Murray, Sutherland, and Morrison) discussed the connection between FM taking over the APD accounts, and SKF supplying bearings to FM for aftermarket distribution.<sup>111</sup>

61. As noted earlier, on July 27, 1971, FM management, in an "add-

<sup>104</sup> CX 259A. This June 19 memo also indicates that the proposed joint venture with Koyo Seiko would have been an acceptable alternative as a source of high-volume TRB. ("... I do not feel we would have a problem integrating these [Japanese] numbers into our anti-friction and seal package"). CX 259A; see also Tr. 2416.

<sup>105</sup> CX's 204, 205A-E; Tr. 2128-29.

<sup>106</sup> CX 206A-D. See also FM's draft of joint venture agreement. CX's 207A-Z-25.

<sup>107</sup> Since 1969 Webster has been in charge of all operations of the FM Service Division which includes sales to the auto aftermarket. CX 185; Tr. 2272.

<sup>108</sup> Since 1968 Potter has held a variety of high-ranking jobs in the Service Division of FM. Tr. 2436-42.

<sup>109</sup> CX's 35Z, 250Z-135 (Nos. 542-43); Tr. 1475-76, 2160, 2321.

<sup>110</sup> CX 261C. American Parts System, a former account of APD, is a major WD chain and one of the largest purchasers of bearings among WD's. Tr. 2369; see also CX's 56A-o. For proof of the special importance attached to this account by FM see CX's 54A-55C; Tr. 2343.

<sup>111</sup> Tr. 773, 806-07.

on study" to its April, 1971 submission, recommended to its Board of Directors that it approve the closing of FM's 0" to 4" TRB production facilities and that 0" to 4" TRB be purchased from an outside source.<sup>112</sup>

62. At a meeting in Philadelphia on September 2, 1971, involving FM's Russell and Webster and SKF's Murray and Sutherland, the matter of SKF becoming a source of TRB [45] for FM was discussed in detail. As a result of these discussions, Russell felt that he had "some assurance" that SKF would sell a line of 0" to 4" TRB to FM.<sup>113</sup> In addition, there was a discussion of SKF supplying automotive ball bearings to FM for aftermarket distribution.<sup>114</sup>

63. During the September 2 meeting, the SKF and FM officials also discussed APD's problems.<sup>115</sup> SKF asked FM to assist SKF in the preparation of APD's parts catalogue, a substantial cost to SKF which could be reduced through use of FM's data. FM eventually refused to provide this service to a competitor.<sup>116</sup> As part of the September discussion, apparently SKF and FM considered the desirability of FM taking over the APD accounts since Webster's notes of the September 2, 1971 meeting contained the following:

Followup on combining APD-FMS [FM Service Division] — around October 1st.<sup>117</sup>

[46] 64. After the September 2, 1971 meeting, FM submitted a letter to SKF which stated that FM had asked SKF if SKF would quote on certain high-volume TRB.<sup>118</sup>

65. Also following the September 2, 1971 meeting with FM officials, SKF officials commissioned a study to consider the relative profit to be had in selling to FM as compared to continuing the APD operation. The study, which was completed on December 20, 1971, concluded that it might be more profitable for SKF if FM took over APD's customers, and SKF sold bearings to FM for aftermarket distribution.<sup>119</sup>

66. In September and November 1971, FM officials continued to meet with Koyo Seiko representatives. The Koyo Seiko representatives were told that the joint venture was still being considered.<sup>120</sup>

67. On October 27, 1971, FM announced the closing of its Shoemak-

<sup>112</sup> Finding 35.

<sup>113</sup> Tr. 2163.

<sup>114</sup> Tr. 2324.

<sup>115</sup> Tr. 2161-67, 2325.

<sup>116</sup> Tr. 2470.

<sup>117</sup> CX 263; Tr. 2324. See also Tr. 807.

<sup>118</sup> CX 102.

<sup>119</sup> CX's 45A-C; Tr. 774-75. The relative profitability of selling through FM is dependent, of course, on the sale price which is subject to negotiation. CX's 45A-B, 49A-C; Tr. 775, 1538.

<sup>120</sup> Tr. 2131-32.

er and Hart TRB manufacturing facilities and its intention to remain in the automotive aftermarket.<sup>121</sup> [47]

68. On October 28, 1971, Webster of FM received a telephone call from Morrison of SKF in which Morrison stated that he wished FM to understand that although there had been discussions concerning a supply arrangement no agreement had been reached. During the telephone conversation, Morrison said that FM had weakened its bargaining position with SKF by stating in the October 27 public announcement that it was going to stay in the TRB aftermarket without first having come to any firm arrangement with SKF about the supply of TRB.<sup>122</sup>

69. On November 3, 1971, officials of SKF (Murray and Sutherland) and FM (Russell and Webster) met in Philadelphia. The nature of the discussion between these competitors is revealed in CX's 264A-C, Webster's notes of the November 3 meeting.<sup>123</sup> In addition to a discussion relating to quantity, range, and price of TRB required by [48] FM from SKF and AB SKF overseas, Webster's notes show that the following subjects came up:

10. APD-Nice CTO's [clutch throwout bearings manufactured by Nice Division of SKF] only problem.<sup>124</sup>

11. FMK numbers may be critical to the arrangements.<sup>125</sup>

12. Possibility

a. We source FMK with SKF.

b. SKF goes out of APD.

c. We source some CTO's with Nice.

d. SKF goes out of marketing CTO's *in Replacement*.

\* \* \* \* \*

24. APD could be phased out tomorrow.<sup>126</sup>

70. Sometime in November 1971, FM informed Koyo Seiko that FM would have to review its total TRB picture.<sup>127</sup> [49]

71. A meeting between representatives of FM and SKF was held on November 24, 1971. It was at this meeting that FM first offered to

<sup>121</sup> Finding 39. Closing-down operations were not completed until June 1973 for Shoemaker and March 1974 for Hart. CX's 250Z-96 (Nos. 194a, b), 250Z-37 (Nos. 195a, b).

<sup>122</sup> Tr. 2327-28. Respondent makes much of this point as indicating that FM had no leverage to negotiate for the close of APD. But surely in the give-and-take of this kind of conversation, FM might have regained a measure of leverage if the proposed joint venture with Koyo Seiko and the prospect of still additional competition for Tyson had been casually mentioned in passing. See Finding 69 for evidence that the Koyo Seiko venture was, in fact, mentioned at the very next meeting.

<sup>123</sup> Tr. 2328-31.

<sup>124</sup> This is a reference to the obvious problem of disposing of Nice's production of auto clutch throwout bearings should APD be closed. Tr. 2329-30.

<sup>125</sup> Reference is to FMK — the proposed FM-Koyo Seiko joint venture — and the high volume part numbers to be produced by this joint venture. Tr. 2330. See Findings 53, 55.

<sup>126</sup> CX's 264A-B [Emphasis in original].

<sup>127</sup> Tr. 2132.



buy from SKF its requirements of high-volume TRB, including the so-called "FMK numbers" covered by the proposed joint venture with Koyo Seiko.<sup>128</sup>

72. Also, at the November 24, 1971 meeting, FM and SKF had further discussions about the condition of APD. APD's sales by product line segments were discussed<sup>129</sup> and SKF told FM "Target for elimination of APD 2/1/72."<sup>130</sup> Webster of FM, who was present at this meeting, testified as follows:

Well, we felt that SKF's attitude toward its aftermarket operation was in response to our expressing a desire and willingness to source certain large volumes of zero to four tapered roller bearings with SKF.<sup>131</sup>

[50] He added:

If the people at SKF were to close out their aftermarket operation, obviously we would be interested in seeing if we could achieve some of that business.<sup>132</sup>

73. Finally, at SKF's insistence, agreement was reached during the November 24 meeting that automotive ball and clutch throw out bearings were to be included in the arrangement (although FM itself manufactured the same bearings) because APD was being closed and as a result SKF would no longer have an outlet for these bearings.<sup>133</sup>

74. Both before and after the November 24 meeting, FM and SKF discussed the supply arrangement on practically a daily basis.<sup>134</sup> FM expressed its concern over the ability of SKF to produce all of the 0" to 4" OD TRB [51] (some 400 items)<sup>135</sup> which FM required. As noted earlier (Finding 52) both sides to the "arrangement" proceeded on the assumption that SKF would have available to it the overseas facilities of AB SKF to meet FM's requirements. Without such assistance SKF's

<sup>128</sup> Tr. 2333-34, 2475. See also Webster's notes of the November 24 meeting which indicates that "F-MK numbers" (i.e., the Koyo Seiko joint venture bearings) were to be included in the arrangement (CX 103) and notes of the November 3 meeting which state that "FMK numbers may be critical to the arrangements." CX 264A.

<sup>129</sup> Tr. 2473-74.

<sup>130</sup> CX 103; Tr. 2476. Although there is clear evidence that a decision to close down APD had been reached by November 1971, the SKF Board of Directors was not informed of this decision until January 31, 1972. CX's 250Z-137 (No. 549), 352E (No. 50); RSX 66D.

<sup>131</sup> Tr. 2334.

<sup>132</sup> Tr. 2334.

<sup>133</sup> CX's 85Z-6-7, 51A; Tr. 2332, 2356. The insistence of SKF was clearly the dominant reason (see Tr. 807-08) notwithstanding the testimony of FM officials that bearings were included because this might produce a favorable price to FM on TRB, or because it may have been more profitable for FM to source high-volume bearings with outside sources rather than produce them itself. Even if this latter point had some validity it would not explain why SKF would necessarily be chosen as the outside source. Tr. 2332-33, 2472-73.

<sup>134</sup> Tr. 2471.

<sup>135</sup> The number had been reduced from 600 to 400 because the Detroit facilities of FM were to produce 200 items on an "all-time" (5 years supply) basis prior to shutdown. CX 107; Tr. 2333, 2470-71.

own line was clearly too limited to meet FM's aftermarket requirements.<sup>136</sup>

75. On January 11, 1972, SKF and FM officials met and came to a final agreement on the terms for supplying TRB.<sup>137</sup> At this meeting respondents also discussed SKF's role in transferring the APD accounts to FM.<sup>138</sup>

[52] 76. On January 13, 1972, Webster of FM wrote to Murray of SKF "for the purpose of setting forth and confirming our *mutual understanding* as a result of our discussion on January 11th" [Emphasis added]. According to this letter the "mutual understanding" included:

Since it is our [FM's] intention to buy all our requirements for the bearings in these five categories [including high volume TRB] from you . . . SKF will automatically participate in our sales volume increases. History dictates that our sales volume should continue on a steady incline.

A formal agreement covering our purchases is now being prepared.

You have advised us of your intention to close your Automotive Products Division (APD) and have asked us to supply your present customers.<sup>139</sup>

77. During the hearings SKF officials testified that APD would not have been closed unless they were certain that SKF was assured of the FM aftermarket business for TRB.<sup>140</sup> It is clear that this assurance included an agreement that SKF would supply FM's needs for high-volume TRB.<sup>141</sup>

[53] 78. Morrison of SKF testified that APD was closed because he believed that more profit could be made by selling bearings, including ball bearings, to FM than through APD.<sup>142</sup> The prospect of ball bearing sales to FM was important to SKF since the manufacture of ball bearings was more profitable than TRB production.<sup>143</sup> SKF officials also testified that the closing of APD was part of a company-wide retrenchment brought about by declining overall corporate profits in the period 1965 to 1971.<sup>144</sup> No explanation was given as to why this retrenchment would require the closing of APD at the exact moment in its development when it first showed a profit. [54]

<sup>136</sup> It was contemplated that about 100 of the 400 TRB to be supplied by SKF would be produced by SKF, the remaining coming from AB SKF's plants in England (Luton), Italy, Germany and other overseas facilities. Tr. 2479. In dollar amount, \$3 million of the annual amount of TRB were to come from SKF, while \$2 million were to be produced by AB SKF overseas. Tr. 2480.

<sup>137</sup> CX's 47A-E; Tr. 2172, 2339, 2479-80.

<sup>138</sup> CX's 47C-D, 250Z-136 (No. 547); Tr. 2339.

<sup>139</sup> CX's 47B-C. This letter agreement was not signed by SKF.

<sup>140</sup> Tr. 775-76, 1500.

<sup>141</sup> See Findings 72, 76.

<sup>142</sup> Tr. 774-75.

<sup>143</sup> Tr. 807-08.

<sup>144</sup> Tr. 1534-35.

79. At trial, both FM and SKF officials denied that the offer of the supply contract was contingent on the closing of APD or that the offer was inspired by a promise by SKF to close APD.<sup>145</sup>

80. On January 21, 1972, Russell of FM wrote to Koyo Seiko saying that FM's decision to discontinue production of 0" to 4" TRB at Shoemaker might make the joint venture impractical since FM now needed a source of a full line of automotive TRB.<sup>146</sup>

81. Despite the January 21, 1972 letter, planning between FM and Koyo Seiko for the joint venture continued for a full year.<sup>147</sup> On October 5, 1972, Koyo Seiko sent a cable to FM requesting a date for completion of all details respecting the joint venture. On October 6, 1972, [55] Koyo Seiko was told by FM that consideration of the joint venture must be placed in suspense because of a Federal Trade Commission investigation, apparently the investigation which led to the instant complaint. On December 14, 1972, the project was formally abandoned by FM.<sup>148</sup>

82. According to FM officials, the joint venture plan was dropped because they believed that no full-line supplier (SKF, for instance) would agree to sell slow-moving TRB unless the more profitable high-volume part numbers were included in the package.<sup>149</sup>

#### Consolidation of FM-SKF "Arrangement"

83. On the basis of additional negotiations during a meeting on January 11, 1972 of FM and SKF officials, proposed written agreements were submitted by FM to SKF.<sup>150</sup>

[56] 84. The first proposed agreement reduced to writing the understanding reached at the January 11, 1972 meeting between FM and SKF respecting their mutual efforts to transfer the APD accounts to FM.<sup>151</sup>

85. The second of the proposed agreements covered the terms, prices, and quantities of TRB to be purchased by FM from SKF. The agreement contemplated that SKF would produce the 100 highest volume items while the 300 low-volume TRB were to be produced by AB SKF in England, Italy, Germany, and other areas. The agreement

<sup>145</sup> Tr. 798-95, 1482, 1485, 2172-73, 2349-50, 2481.

<sup>146</sup> CX's 208A-B; Tr. 2132-33.

<sup>147</sup> As late as August 25, 1972, FM briefed Koyo Seiko representatives on the project and outlined the division of responsibilities between the joint venture partners, noting, however, that "there are still many points to be ironed out." CX's 209A-B; Tr. 2134. On September 1, 1972 Koyo Seiko sent FM a draft joint venture agreement which followed the format of an earlier FM draft. CX's 210A-212B.

<sup>148</sup> CX's 213-214B. In October, 1975, Koyo Seiko opened a manufacturing plant in Orangeburg, South Carolina which finishes and assembles high-volume 0" to 4" TRB from parts imported from Japan. Tr. 832-34.

<sup>149</sup> Tr. 2134-37. Note, however, that SKF continues to supply high-volume TRB despite other arrangements having been made by FM for the "fillers." See Finding 96.

<sup>150</sup> CX's 48A-L; Tr. 2340, 2480-81.

<sup>151</sup> CX's 48B-D.

also covered the purchase of certain fast moving ball bearing part numbers by FM from SKF.<sup>152</sup>

86. Neither of the proposed written agreements was executed by SKF<sup>153</sup> but as of February 10, 1972, FM believed [57] an agreement had been reached with SKF for the joint solicitation of the APD accounts by FM and SKF.<sup>154</sup>

87. Beginning in February 1972, FM and SKF engaged in a joint effort to transfer the APD business to FM.<sup>155</sup>

88. On May 16, 1972, FM sent a blanket purchase order to SKF for its then existing requirements of 0"-4" TRB.<sup>156</sup>

[58] 89. The relationship between FM and SKF remained on a purchase to purchase order basis from May 1972 until December 1974.<sup>157</sup>

90. The value of bearings purchased by FM from SKF pursuant to the arrangement is shown in Table 3.

TABLE 3: BEARINGS PURCHASED BY FM FROM SKF 1972-1975  
(Dollars)

	TRB		Bearings From Nice	Total
	From Tyson	From AB SKF		
1972	1,181	297	2,873	4,521
1973	742	1,405	2,314	4,564
1974	2,780	1,876	2,408	7,780
1975	5,538	2,926	1,263	9,736 <sup>158</sup>

Sources: CX's 254R-O *in camera*

### Problems in the SKF-FM Arrangement

<sup>152</sup> CX's 48E-L; Tr. 2480-81.

<sup>153</sup> Tr. 2481. Webster of FM testified as follows:

Q. Were either of those agreements accepted by SKF?

A. Not to the extent they were signed and returned, no. Tr. 2340.

The formality of signing aside, it is obvious that the terms of the contracts were accepted by both sides. See Tr. 2347, 2480-81.

<sup>154</sup> CX 266; Tr. 2341. As early as January 27, 1972, Potter of FM requested that SKF submit a list of APD customers and their annual purchases by product group. CX's 250Z - 137-38 (No. 551). Detailed information respecting the APD accounts as well as data on the performance of each APD salesman were provided by SKF to FM by February 1972. CX's 250Z - 139 (Nos. 557-58), 250Z - 149 (No. 561).

<sup>155</sup> CX's 50, 54A-B, 55A-56a, 60A-W, 61, 63A-64, 67A-68, 70-72D, 75A-C, 116, 118-26, 123-31, 133, 135-39, 250Z-105 (No. 442), 250Z-139-41 (Nos. 557-67), 250Z-153 (No. 607); Tr. 2341-42, 2422. There were 367 APD accounts whose 1971 purchases of bearings from SKF totaled \$3,384,513. CX 250Z-139 (No. 557). As part of the shutdown of APD, FM purchased APD's inventory and retained some of the APD sales force. CX 47C; Tr. 2342. See CX 117 for draft press release which indicates that internally SKF viewed the arrangement as a complete transfer of the APD operation to FM. That FM was consulted about all aspects of the end of APD is further shown by the meeting held on August 22, 1972, in which SKF and FM discussed the closing down of the SKF field warehouses servicing the APD division. CX 250Z-139 (No. 556).

<sup>156</sup> RFX's 167A-J.

<sup>157</sup> Tr. 2481-82.

<sup>158</sup> Discrepancies between parts and total in Table 3 apparently due to purchases of bearings other than TRB or ball bearings. See, e.g., CX 254U (No. 164) *in camera*.

91. Both before and after the signing of the formal contract in 1974, FM found AB SKF to be an unreliable supplier. Parts supplied from AB SKF's subsidiaries in Europe were delivered late, if at all. While most of the TRB subject to the arrangement were produced by SKF's Tyson [59] Division, the production of the AB SKF's foreign plants was important for purposes of maintaining a reasonably complete line. In FM's view, SKF reneged on assurances of its ability to supply FM with necessary bearing parts and shipped parts which were not ordered, resulting in costly delays and the use of unnecessary warehouse space. As a consequence, FM experienced difficulty in meeting its customers' demands which, in turn, resulted in serious customer dissatisfaction.<sup>159</sup>

92. Because of the unreliability of AB SKF as a supplier, almost from the inception of the "arrangement," FM has considered alternative sources of supply although the arrangement clearly contemplated a requirements contract.<sup>160</sup> For various business reasons none of the [60] few possible alternative "outside" suppliers of TRB have been acceptable to FM.<sup>161</sup>

93. In the fall of 1974, SKF and FM discussed the execution of a written buy-sell agreement. These discussions resulted in the execution on December 17, 1974, of a nonexclusive supply agreement which contained the following extended "term":

The initial term of this Agreement shall be from January 1, 1975 to December 31, 1979. Either party may terminate this Agreement as of December 31, 1979 by [61] giving written notice of termination at least thirty (30) days prior to December 31, 1975. If such notice is not given, the term of this Agreement shall be extended to December 31, 1980. Thereafter, the Agreement shall be extended annually for one year periods unless written notice of termination is given by either party at least 180 days prior to the end of the calendar year five years next preceding. This Agreement may be terminated as of any date by mutual consent of the parties.<sup>162</sup>

<sup>159</sup> CX 255D; RFX's 188A-B; Tr. 2174-79, 2351-52, 2484. The problems with AB SKF reached such proportions that FM's Russell went to AB SKF's plant in Luton, England to express his displeasure. Tr. 2177, 2352.

<sup>160</sup> CX 59A.

<sup>161</sup> FAG (FAG, Kugelfischer, Georg Shaefer & Co.) a large German anti-friction bearing manufacturer was contacted by FM in 1972 and 1973. Apparently, FAG was willing to supply some TRB but reevaluation of the Deutsche Mark had the effect of increasing prices to the point where negotiations broke down. CX's 267A, 338A-K *in camera*, 373; RFX 157 *in camera*; Tr. 1027.

Societe Nouvelle de Roulements, S.A. ("SNR") a French firm was contacted by FM in 1973. SNR declined to quote prices on 96 TRB part numbers due to fluctuating monetary conditions. CX 13U; RFX 170.

Negotiations in 1973 with American Koyo (U.S. subsidiary of Koyo Seiko) broke down over American Koyo's unwillingness to stamp FM's trademark on its products. RFX's 210A-D, 211.

NTN (NTN Toyo Bearing Manufacturing Co. Ltd.) a Japanese producer, could only supply four TRB numbers; besides FM's customers did not like the idea of finding a Japanese bearing in an FM box. CX 13R; RFX's 183A-87; Tr. 552-54. See, however, CX 356A for indication that "SKF arrangement" may have influenced outcome of negotiations with NTN.

<sup>162</sup> CX 30B.

94. Despite the signing of the formal contract, FM's problems with SKF have persisted. These problems relate to quality and delivery.<sup>163</sup> Thus, on May 27, 1975, Russell, by then the President of FM, notified Skinner, President of SKF, of FM's extreme displeasure with AB SKF's shipping performance. Russell indicated that FM currently was analyzing the feasibility of returning to the manufacture of 0" to 4" TRB or of withdrawing from the TRB automotive aftermarket entirely.<sup>164</sup>

[62] 95. Because of these difficulties with SKF, FM further reduced its aftermarket product line to 259 part numbers — the minimum necessary to remain in the replacement business.<sup>165</sup> Nevertheless, SKF could supply from its Tyson Division only 160 of these part numbers.<sup>166</sup> Therefore, FM renewed its attempts to purchase 0" to 4" TRB sources other than SKF. These attempts have concentrated on those slow-movers not readily available from SKF,<sup>167</sup> but FM has met with no success for various reasons.<sup>168</sup>

[63] 96. Since the relationship with SKF had not given FM a satisfactory source of supply, and efforts to develop alternatives had not been successful, on October 1, 1975, FM's Bearing Division prepared a study for management which investigated the possibility of FM's re-entry into the production of 0"-4" TRB, but limited to 99 slow-moving parts which SKF had proved to be incapable of supplying but which FM's aftermarket sales considered to be a necessary part of its line if FM was to remain an effective supplier to the TRB automotive aftermarket. The recommendation was accepted by FM's Board of Directors as necessary to protect FM's automotive aftermarket sales of ball bearings, engine bearings and oil seals. Accordingly, FM invested \$1.3 million in its Hamilton, Alabama plant to provide the necessary tooling to produce the 99 (subsequently expanded to 112) TRB part

<sup>163</sup> Tr. 2351-52.

<sup>164</sup> RFX's 189A-B; see also Tr. 2352 for other FM efforts to improve performance of AB SKF plants and CX's 855A-B for suggestion by SKF that foreign imports be eliminated.

<sup>165</sup> Tr. 2357, 2498-94.

<sup>166</sup> Tr. 2494.

<sup>167</sup> Tr. 2180, 2352-53, 2494.

<sup>168</sup> A March 1975 purchase order with L&S Bearing Co. of Oklahoma City, Oklahoma was cancelled when a quality audit revealed that the L&S bearings did not come up to FM's standards. CX's 13P, 269A-B, 271-75C; RFX's 171A-81; Tr. 2484-85.

Contact was made again with General Motors in 1975. In June 1975, General Motors agreed to supply 16 part numbers but on a one-time basis only. CX's 13Q, 255B, 357A, 364; RFX 191B; Tr. 1205, 1212, 1214-15.

In July 1975, Timken again rejected FM's offer to purchase a line of 0" to 4" TRB. Tr. 497, 2179-80.

American Koyo was asked in September 1975 to quote on 88 TRB part numbers not available from Tyson. While American Koyo replied that it was not able to offer FM quotations on all part numbers, it has supplied small quantities of TRB. CX's 254Z-18 (No. 282) *in camera*, 277A-B; RFX's 212A-B, 213A-B; Tr. 852, 866. Success with American Koyo may improve in the future if FM does not insist on the removal of the words "Koyo" and "Japan" from these bearings made by Koyo in Japan. CX's 360-61.

CX's 401-05 show an unsuccessful attempt by FM to source TRB from National Engineering Industries, Ltd. of Jaipur, India.

numbers. The balance of the line (about 150 part numbers) continues to be purchased from SKF.<sup>169</sup>

#### Effects of SKF's Withdrawal from TRB Automotive Aftermarket

97. With the close of APD, almost all (90 to 95 percent) of the former APD accounts were taken over by FM.<sup>170</sup>

98. FM's share of bearing sales to the automotive aftermarket increased substantially with the close of APD and the transfer of former APD accounts to FM. By 1973 FM had nearly 50 percent of the market, but in later years there was some erosion of its huge share.<sup>171</sup>

99. The state of competition in the auto aftermarket is such that a consulting group retained by FM reported as follows in 1976 on the 15-20 percent premium (over Timken's prices) charged by FM:

... since few warehouse distributors even knew of the 15-20 percent premium on 0-4" tapers, it is doubtful that price competition in this part of the line has been very extensive.<sup>172</sup>

[65] 100. The SKF-FM arrangement as embodied in the December 17, 1974 contract does not prevent SKF from selling through aftermarket channels other than FM and there is some evidence of exploratory conversations by SKF with other aftermarket distributors.<sup>173</sup> The record indicates, however, that realistically this could not be done since the Tyson facilities are barely able to service FM's needs, and, in fact, Tyson's Glasgow plant had to be expanded in 1971 just to meet FM's requirements.<sup>174</sup> Moreover, the record shows that operating under the arrangement with FM, SKF used very close to 100 percent of its TRB capacity in 1973 and 1974.<sup>175</sup> FM officials have said that they would only be concerned about a renewal of SKF aftermarket sales if it meant that SKF could not continue to provide adequate quantities of TRB to FM.<sup>176</sup> As matters now stand, SKF is not a competitor in the automotive aftermarket.<sup>177</sup>

[66] 101. In 1976, SKF purchased the assets of McQuay-Norris Manufacturing Co., a manufacturer and distributor of such automotive parts as engine sleeve bearings, pistons, piston rings, valve train

<sup>169</sup> CX's 13A-Z-6, 255D; RFX's 191A-H, 203A-C; Tr. 2180-84, 2352, 2355-57, 2476A, 2494-95.

<sup>170</sup> Tr. 2424. FM took on former APD accounts who were in direct competition with FM's own WD accounts. Tr. 2426.

<sup>171</sup> Findings 23, 24. See also CX 250Z-171 (No. 663a).

<sup>172</sup> RFX 214 (p. 40) *in camera*. See also Tr. 2190.

<sup>173</sup> Tr. 794, 1483.

<sup>174</sup> Tr. 1483, 2508.

<sup>175</sup> CX 250Z-34 (No. 187).

<sup>176</sup> Tr. 2516.

<sup>177</sup> CX's 250Z-171 (No. 660), 352G (No. 71).

components, chassis parts, transmission parts, water pumps, and air conditioning parts.<sup>178</sup> There is credible expert opinion that the McQuay-Norris product line is complimentary to the SKF bearings line, and that the McQuay-Norris sales force and distribution system may represent an opportunity for SKF to reenter the bearings auto aftermarket.<sup>179</sup>

### The Tyson Acquisition

102. SKF entered the United States TRB industry in 1955 when it acquired a controlling stock interest in Tyson Bearing Corporation ("Tyson"), a Delaware corporation which produced TRB at a plant located in Massillon, Ohio.<sup>180</sup> At the time of its acquisition of Tyson, SKF manufactured no TRB.<sup>181</sup>

[67] 103. In 1955 Tyson and SKF were engaged in commerce within the meaning of the Clayton and Federal Trade Commission Acts.<sup>182</sup>

### The Tapered Roller Bearings Market

104. There is no dispute between the parties, and the record fully supports the complaint allegation that the manufacture of TRB is a relevant market for the purpose of this proceeding which is distinct from markets consisting of other roller bearings or ball bearings.<sup>183</sup>

### TRB Concentration

105. At all times relevant to this case — that is, between 1955 to date — the manufacture of TRB in the United States has been highly concentrated.<sup>184</sup>

<sup>178</sup> Tr. 1513-14, 2365.

<sup>179</sup> Tr. 2523, 2785-86.

<sup>180</sup> Complaint and SKF Answer, ¶ 11; CX's 250Z-118 (Nos. 482-83), 250Z-184-85 (Nos. 690-91), 250Z-189 (Nos. 685-86).

<sup>181</sup> CX 421C (No. 17).

<sup>182</sup> Finding 14; CX's 16T, 27C-D.

<sup>183</sup> TRB manufacture is recognized in the Census of Manufacturers and other official United States government statistical compilations as a distinct manufacturing market. Separate technical standards for TRB have been established by industry-wide groups. TRB manufacture, which is much more difficult to accomplish than the production of ball bearings, requires the use of special machinery to control precisely the roller angles and surfaces. TRB is manufactured either in separate plants or on separate machines in plants which produce other bearings. The manufacturers of TRB are a small, well-defined group of producers who monitor each others' competitive activity. Within this well-defined group, TRB producers respond to competitive initiatives of each other, and do not respond to competition from producers of other bearings. The price of TRB is not sensitive to changes in the prices of other bearings, nor do the prices of other bearings respond to TRB prices. The unique characteristic of TRB — its ability to withstand thrust and radial load — has resulted in its use in low speed-high load applications, including various automotive applications such as the front wheel position. In contrast, ball bearings are used in applications in which dual direction load is not a crucial factor. Once a piece of equipment has been designed for TRB, a change to ball bearings or other forms of roller bearings is not feasible. CX's 2Z-6, 190H, 249C, 250D (No. 10a), 250Z-16-17 (Nos. 129-33), 250Z-26 (Nos. 153-59), 250Z-122 (Nos. 497-98), 250Z-143 (Nos. 590-91), 250Z-152-53 (Nos. 603-06), 250Z-155 (No. 613), 252B (No. 9), 252C (No. 19), 252E (No. 30), 257B, 352i (No. 90), 376B, 377B; Tr. 402-08, 408, 429-31, 522-24, 530, 533-34, 540, 767-68, 771, 812, 839-40, 843, 923-32, 1174-76, 1659.

<sup>184</sup> Findings 106-109.



106. TRB manufacturing has been dominated at all times by Timken which has an impressive array of advantages over both existing firms and any prospective entrants which include economies of scale, historical leadership in engineering and research, an integrated source of steel, a full-line of products, worldwide distribution and service facilities, and the ability to adopt flexible pricing policies including aggressive responses to price-cutting of other producers, particularly the Japanese importers.<sup>185</sup>

107. Complaint counsel have not proposed precise market shares for 1955, but the configuration of the TRB industry at that time is not in dispute.<sup>186</sup> Timken had [69] overwhelming dominance.<sup>187</sup> Its market share ranged between 60% to 80%. Tyson had about 2% of the market.<sup>188</sup> Other producers were Bower (now FM), Kaydon (now Keene), International Harvester, General Motors (New Departure-Hyatt Division), and Torrington.<sup>189</sup>

108. In the period 1971 to 1975, the value of shipments of TRB by United States producers and imports increased from about \$350 million to over \$500 million. Market shares during this period were as follows:  
[70]

TABLE 4: U.S. MARKET SHARES OF TRB PRODUCERS 1971-1975  
(PERCENT)

	1971	1972	1973	1974	1975
Timken	55.0	55.5	59.6	63.1	65.2 <sup>190</sup>
General Motors (NDH)	13.8	13.3	13.0	11.6	8.3
FM	12.6	13.3	8.6	5.2	5.7
Brenco	5.7	5.0	5.0	5.9	6.0
SKF	5.3	5.2	5.6	6.1	5.8
American Koyo	2.0	2.1	2.6	2.8	2.3
Torrington	1.7	1.4	1.5	1.7	2.1
NTN	0.7	0.8	0.8	1.2	1.3
International Harvester	2.2	2.2	1.9	1.4	1.2
L&S	0.4	0.4	0.3	0.4	0.6
NSK	0.3	0.7	0.8	0.4	0.3
Green	0.1	0.1	0.1	0.0	0.0
FAG	0.1	0.1	0.1	0.2	0.1
Federal Bearing	0.0	0.0	0.0	0.0	0.0

<sup>185</sup> CX's 190A-Z-1, 341C; RFX's 158V-W, Z-11, 197, 214 (p. 2-3) *in camera*; Tr. 420, 425, 781-83, 1101, 1139-40, 1345-50, 2319-20.

<sup>186</sup> 1955 universe figures are not available. Sales in 1954 were \$156,407,000. CX 14.

<sup>187</sup> Tr. 781.

<sup>188</sup> CX 421C (No. 15). Tyson's 1955 sales were \$2,950,000. Complaint and SKF Answer, ¶ 25.

<sup>189</sup> CX's 16R, 250Z-124 (No. 505); Tr. 441, 549-50, 892-93, 1488.

<sup>190</sup> Timken's TRB market share has been estimated at close to 70% in 1976, RSX 214 (p. 2) *in camera*, and at over 90% of non-captive 0" to 4" TRB production for OEM markets. Tr. 2319.

Sources: CX's 17, 180, 254Z-2-3 *in camera*, 335A *in camera*, 411A, 412, 413, 414A, 415A; RSX's 84B *in camera*, 91G *in camera*, 93D *in camera*, 95D *in camera*, 97E *in camera*, 98C *in camera*, 99C *in camera*, 105B *in camera*, 111D *in camera*, 113C *in camera*; RFX 155 *in camera*; Tr. 2518.

109. Between 1955-1975 effective market concentration may have been even higher than indicated in Finding 108 since General Motors' New Departure-Hyatt Division (NDH) manufactured [71] substantial quantities for captive rather than merchant market distribution, and International Harvester's production was mainly for captive use.<sup>191</sup>

#### Entry into TRB Market

110. The parties agree that entry into the manufacture of TRB is extremely difficult.<sup>192</sup>

[72] 111. Between 1954 and 1970, only two firms entered into TRB production in the United States. Brenco Incorporated entered domestic production in 1960 by developing and specializing in large bearings for railroad industry applications.<sup>193</sup> The Japanese producer Koyo Seiko established a United States affiliate, American Koyo, in 1965 to manufacture high-volume TRB in the United States from parts produced in Japan.<sup>194</sup>

#### [73] Tyson as a Failing Company

112. Within the constraints of attempting to reconstruct circumstances which existed more than 20 years ago, respondents have adequately met the requirements of the "failing company defense" in that they have demonstrated (1) that the bankruptcy of Tyson was

<sup>191</sup> CX's 16R, 190J, 335A *in camera*, 354 *in camera*; RFX 214 (p. 3-4) *in camera*; Tr. 444, 767, 796, 836-37, 885-86, 890-91, 2818.

<sup>192</sup> The absolute capital investment required to enter TRB manufacturing is enormous. About \$1.25 to \$1.50 of investment dollars are currently required to achieve a dollar of TRB sales. There are significant economies of scale in the production of TRB. The technical expertise required to manufacture TRB is complicated and costly to develop. TRB equipment is usually designed on a custom basis by the producer itself. The technology involved in designing equipment and producing TRB requires expertise in several disciplines including metallurgy, microgeometry, physics, chemistry, mechanical engineering, and electronics. Skilled workers, who must go through an extensive training program, are needed to produce TRB. In order to achieve customer acceptance a new entrant is subjected to a vigorous, long, and expensive testing period to assure that its quality is acceptable. For a new TRB entrant starting from scratch, it may require as long as 10 years to become viable. Even when established producers create new TRB facilities they need up to 5 years to move from the planning stage to production. The engineering and service capabilities of existing firms in the TRB market would have to be duplicated (a difficult proposition) in order to produce low-volume "specials" as required by TRB users. In addition, since TRB customers often do not allow extensive lead time to develop new tooling, large inventories must be maintained. Even if initial entry is achieved, the development of a firm into a full line producer, which is considered an advantage, is slow and expensive. CX's 249K-M, 50Z-25 (No. 156), 250Z-26-27 (Nos. 161-62), 250Z-33 (Nos. 182, 184), 250Z-38-39 (No. 201), 250Z-116 (Nos. 477-78), 52B (Nos. 10-11), 342, 343B, 348L (No. 134), 421A-D; RSX 32A; Tr. 424-25, 431-35, 438-40, 539-40 567-68, 771, 782-83, 97, 839-40, 843-45, 919-20, 1098-94, 1122, 1126-27, 1130, 1346, 1348-51, 1402, 1463-67, 1657-59, 2150-51, 2185, 2570, 383, 2702-04, 2710, 2712, 2817, 2819, 2835. With respect to the scale barrier, a foreign firm can produce and sell part of its production abroad and thereby achieve the lower production costs associated with large volume output. Tr. 2741.

<sup>193</sup> RSX 74A; Tr. 2672-88.

<sup>194</sup> Tr. 832-33.

imminent and the prospects of a possible reorganization of Tyson under either Chapter Ten or Chapter Eleven of the Bankruptcy Act were dim or nonexistent in 1955 and (2) other less anticompetitive acquirers were not available. Findings 113-122.<sup>195</sup>

113. Tyson, a Delaware corporation, was started in 1929 by one Frank Tyson, a former employee of Timken. Support in Tyson's early years came primarily from Russell Colgate of the toothpaste family. Later a large interest in the company was obtained by the Channing Corporation. By the end of 1954, substantially all the outstanding stock of Tyson was owned by the Channing Corporation and the Colgate family.<sup>196</sup>

[74] 114. Before the SKF acquisition, Tyson was a manufacturer of a cageless-type tapered roller bearing which was not regarded as a commercially acceptable alternative to Timken's cage-type bearing.<sup>197</sup> Forced to compete against Timken with a more expensive to produce and nonconventional product, Tyson had been discounting from the Timken's price.<sup>198</sup> Beginning in 1948 or 1949, Tyson began to convert to cage-type bearings. This conversion required a large expenditure of capital.<sup>199</sup>

115. In addition to its design problem, Tyson was handicapped by the fact that it offered a limited line of items.<sup>200</sup> Moreover, it had an inadequate plant which by 1955 was in poor condition.<sup>201</sup>

[75] 116. With the exception of a few profitable years (such as the period 1951-53 when it had military contracts during the Korean War) Tyson operated at a loss after World War II. In 1954, its operating loss was \$379,000.<sup>202</sup>

117. During the entire period of 1929 to 1954, Tyson tottered on the brink of financial collapse. The record shows the following:

(a) In 1935, financial problems led to reorganization of the company under § 7.7-B of the Bankruptcy Act.<sup>203</sup>

(b) In 1947, the president of Tyson recommended that the company be liquidated because of its financial condition.<sup>204</sup>

[76] (c) In the period 1948-1950, Tyson obtained loans from the Reconstruction Finance Corporation (RFC) in the amount of \$1,260,000. But the firm was unable to generate funds to meet its payments to RFC and other creditors. By June 1950, the situation

<sup>195</sup> See also Tr. 1429.

<sup>196</sup> CX's 250Z-105 (Nos. 443-44), 250Z-109 (Nos. 455-56), 308E, 309, 421A (Nos. 2, 6); Tr. 1430.

<sup>197</sup> CX's 307E, 308E, G, 421A-B (Nos. 3, 9); Tr. 780, 977-78, 1429-29A, 1459-60.

<sup>198</sup> Tr. 1429-29A, 1435, 1459.

<sup>199</sup> CX's 302A-B, 308A-C, 306B, 421B (No. 10).

<sup>200</sup> CX's 352H (No. 75), 421B (No. 9); Tr. 1466.

<sup>201</sup> Tr. 977-78, 1457-58.

<sup>202</sup> CX's 308E, F, 320A, 421B-C (Nos. 13-15); RSX 6N.

<sup>203</sup> CX 308E; RSX 6M. See CX's 303A-C.

<sup>204</sup> CX 421B (Nos. 7-8).

became so desperate that legal counsel recommended that the president of the company be empowered by the board to "take any course of action which . . . becomes advisable, including the closing down of the plant, consenting to foreclosure by the RFC, consenting to the appointment of a receiver of the mortgaged or unmortgaged assets or filing a petition in bankruptcy."<sup>205</sup> In January 1951, Tyson informed the RFC that it was unable to meet payments on the outstanding loans out of income.<sup>206</sup> Again in 1952, Tyson had insufficient cash to meet payments on loans.<sup>207</sup> On at least one occasion during this period, [77] Tyson was forced to borrow funds to meet its payroll. By Fall, 1953, the company had defaulted on a \$60,000 RFC loan secured by accounts receivable loan with the result that RFC impounded the accounts receivable. This action of the RFC deprived Tyson of sufficient cash to operate beyond October 1, 1953.<sup>208</sup> At a special meeting of the Board of Directors of Tyson on September 21, 1953, a representative of the RFC outlined the position of the agency in relation to the outstanding loan obligations of Tyson. Specifically, the RFC demanded cash payments on the loans outstanding by June 30, 1954 and recommended among other alternatives that the necessary cash be obtained by a merger or the sale of Tyson to a firm with sufficient resources to retire or substantially reduce the indebtedness to RFC.<sup>209</sup> Since the shareholders were unwilling to provide the additional capital to Tyson necessary to meet the RFC demand, immediate efforts were made to contact prospective acquirers. Efforts to obtain additional capital through an acquisition were unsuccessful and in July 1954, Tyson was forced to advise the RFC that it would be necessary to default on its monthly payments of the loan.<sup>210</sup> At the time of the acquisition, Tyson had [78] loans outstanding to the RFC in excess of \$1.7 million. Pledged to secure these loans were nearly all of the assets of Tyson including land, buildings, equipment, inventory, and an insurance policy on the life of the president of Tyson.<sup>211</sup>

118. By December 1954, Tyson was for all practical purposes bankrupt since its debt service requirements exceeded funds available by approximately \$280,000.<sup>212</sup>

119. Throughout its history of almost continuous financial peril, Tyson sought out potential acquirers. The record shows the following:

<sup>205</sup> RSX 16; see also CX's 310A-311C, 421B (Nos. 11-12); Tr. 1430-31, 1435.

<sup>206</sup> CX's 306A-F; see also RSX's 17-20.

<sup>207</sup> CX's 304A-G, 307A-G.

<sup>208</sup> RSX 23B; Tr. 1431. See also CX's 312A-314B.

<sup>209</sup> RSX's 23A-i.

<sup>210</sup> CX's 316A-C, 320A-321D; RSX's 25A-E.

<sup>211</sup> CX's 16G, H; RSX 30F.

<sup>212</sup> CX 27E; Tr. 1435, 1458-59. See also CX's 325A-B.

(a) In 1950, Chanselor and Lyon, a West Coast distributor of automotive parts declined an offer to consolidate.<sup>213</sup>

(b) During the 1950's Tyson approached Eaton Manufacturing Co., Torrington, Willys-Overland, Portsmouth Steel Company, Monroe Auto Equipment Co., Otis & Company, Louis Berkman Company, J.H. Whitney & Co., and Borg-Warner with acquisition proposals. All of these acquisition overtures were unsuccessful.<sup>214</sup>

[79] (c) In the early 1950's, Bower Roller Bearing Company (before Bower was acquired by FM) evaluated Tyson as a possible acquisition candidate and concluded that it was not interested because of Tyson's "atrocious" facilities and its unconventional product line.<sup>215</sup>

(d) A proposed merger with Nice in the early 1950's collapsed when Nice backed away from the deal.<sup>216</sup>

(e) In early 1955, Alexander Guterma, President of the Shawano Development Corporation made an offer to merge Tyson into Shawano. This deal fell through when it became apparent that because of Guterma's reputation in the business community, a merger with Shawano would not be acceptable to either the RFC or Tyson's management.<sup>217</sup>

(f) Guterma apart, the record indicates that Tyson was in such desperate financial straits that it would not back away from any possible acquisition.<sup>218</sup>

[80] 120. Seeking to alleviate its desperate financial condition, Tyson contacted SKF in January 1955 about a possible acquisition.<sup>219</sup>

121. The record shows that by the time of the SKF acquisition (March 1955) principal backers were unwilling to provide additional funds, banks would not extend loans, it was not possible to issue stock to obtain funds, and a series of other attempted acquisitions had proven to be unsuccessful.<sup>220</sup> But for the SKF acquisition, Tyson would have been forced into liquidation.<sup>221</sup>

122. Upon acquiring Tyson, SKF made arrangements for a bank loan which paid off the largest outstanding debts and made available working capital. SKF was the surety on the loan.<sup>222</sup>

### [81] SKF as a Potential Entrant

<sup>213</sup> CX's 305A, 315A; Tr. 1432-33.

<sup>214</sup> CX's 315A-B; RSX's 11A-B, 12, 14, 24A-B; Tr. 1432.

<sup>215</sup> Tr. 976-78.

<sup>216</sup> CX 421D (No. 22); Tr. 1433, 1574-75.

<sup>217</sup> RSX's 27, 28C, 29A-B; Tr. 1434.

<sup>218</sup> Tr. 1433.

<sup>219</sup> Tr. 1458-59.

<sup>220</sup> CX's 319A, 421C (No. 15); Tr. 1437-38.

<sup>221</sup> CX 421C (No. 19).

<sup>222</sup> CX's 16H, 308K; RSX 6X; Tr. 1458-59, 1523. The purchase price for most of the outstanding shares was \$1 million and SKF became the surety on a \$2 million loan obtained to pay off existing debt. Tr. 1522-23.

123. Since the Tyson acquisition was a "toe-hold" acquisition (Finding 107) of a failing company (Findings 113-122) whether or not SKF was a potential entrant in 1955 is irrelevant. If this were still an issue in this case, I would have concluded that there is adequate evidence that SKF with the aid of AB SKF was a potential entrant de novo or by toe-hold acquisition in 1955.<sup>223</sup> Complaint counsel, however, failed to prove that in 1955 SKF was one of the few [82] most likely actual entrants, or that SKF's existence on the fringe of the United States TRB market had any effects on that market. In any case, these considerations, too, are irrelevant for even if SKF were the most likely potential entrant and it could be inferred that by waiting in the wings it had a procompetitive effect by tempering Timken's [83] pricing decisions, the toe-hold acquisition of a failing company is not unlawful under any definition of the potentiality theory.

#### Federal Trade Commission Investigation of Tyson Acquisition

124. The Federal Trade Commission investigated the 1955 Tyson acquisition and informed SKF on July 2, 1956, that no action would be taken.<sup>224</sup> As part of the Commission's investigation of the SKF

<sup>223</sup> The record shows the following:

(a) It is advantageous for a bearing company to offer TRB, other forms of roller bearings, and ball bearings because customers prefer to deal with a full-line supplier who can meet their total bearings needs. CX's 27C-D, 250Z-73 (No. 328), 300B, 421D (No. 24); Tr. 535, 1097, 1130-31, 2069.

(b) SKF's 1955 product line included ball bearings as well as cylindrical and straight roller bearings which are product markets adjacent to TRB. The same sales force can be used to sell all bearings. CX's 27C, 250Z-32 (Nos. 179-80); Tr. 830, 845-46.

(c) Before the Tyson acquisition, SKF recognized that the lack of TRB was a significant gap in its product line. CX 16U.

(d) Before the acquisition of Tyson, SKF wanted to broaden its line by including the manufacture and sale of TRB. CX's 250Z-113 (No. 469), 250Z-114 (Nos. 470, 471), 250Z-126 (No. 511), 352B, C (Nos. 19, 29); Tr. 1489-90.

(e) At the time of the Tyson acquisition, SKF possessed technical skills, financial resources, a nationwide marketing and sales organization, and the ability to organize large scale bearing production. CX 352B (No. 17).

(f) SKF had available to it the resources and expertise of AB SKF which in 1954 was a major world-wide producer of TRB. While AB SKF's experience was in the production of through-hardened TRB, the development of case-hardened TRB expertise (the type of TRB favored in the U.S. market) was not beyond the reach of this giant multinational corporation, notwithstanding the costs involved. That there are problems in developing case-hardened technology, does not mean that the problems cannot be overcome by an organization of the size of AB SKF, especially when respondents already have in their employ experts who are fully conversant with the nature of the technical problems. Compare, for example, the generalized statements in the record about the difficulty of converting to case-hardened and the testimony relating to technological solutions to specific problems which clearly seem to be within the capability of a firm like AB SKF. Tr. 414, 542-44, 784, 798, 894-95, 897, 1021-22, 1095-97, 1111-13, 1399-1401, 1660-65, 2684. See also CX's 4A-2-17 for proof of the vast technological and research resources of AB SKF.

(g) Historically, SKF's parent AB SKF has followed a policy of seeking new TRB markets. Thus in the period from 1953 to 1971, AB SKF expanded through internal growth its world-wide production of TRB by either improving existing facilities or the construction of new TRB facilities in the Netherlands, Brazil, West Germany, Spain, Mexico, United Kingdom, India, South Africa, and Iran. CX's 250Z-67 (Nos. 303-06), 250Z-68 (Nos. 309-310), 250Z-70 (Nos. 314-16), 250Z-72-73 (Nos. 322-325), 250Z-74 (No. 329), 250Z-75 (No. 334), 250Z-76-77 (Nos. 336-342), 348G-J (Nos. 72-75, 78-79, 82-83, 85, 87, 91, 94, 98, 102-103, 105, 108-110).

<sup>224</sup> CX's 16A-V; RSX 4. See Tr. 1527 for proof of reliance by SKF on the Commission's clearance before making investments in Tyson. The Commission reserved the right to take action in the future if other evidence or subsequent developments warrant such action.

purchase of Nice (Finding 147), the Tyson acquisition was reinvestigated in 1960 and again no action was taken.<sup>225</sup>

125. Ten years after the Commission had indicated that it did not intend to challenge the Tyson acquisition, SKF constructed a new TRB facility in Glasgow, Kentucky in 1965. Since 1955, SKF has invested \$27 million in its Tyson division including construction of the Glasgow plant and remodeling of the Massillon facility.<sup>226</sup>

#### [84] The Nice Acquisition

126. In 1960, SKF acquired all the assets of Nice Ball Bearing Company ("Nice"), a division of the Channing Corporation, the same company which had previously owned a substantial interest in Tyson.<sup>227</sup>

127. At the time of the acquisition by SKF, Nice manufactured ball bearings at plants located in Philadelphia and Kulpsville (Lansdale), Pennsylvania.<sup>228</sup>

128. In 1960, both Nice and SKF were engaged in commerce within the meaning of the Clayton Act.<sup>229</sup>

#### The Ball Bearings Market

129. Complaint counsel argue that the 1960 acquisition of Nice by SKF occurred in a highly concentrated "all" ball bearing market,<sup>230</sup> and that this alleged horizontal [85] acquisition must be judged by the strict standards applied by the courts and the Commission to the elimination of actual competition.

130. The record shows that the alleged "all" ball bearing industry was concentrated between 1954-1972.

TABLE 5: FOUR AND EIGHT FIRM CONCENTRATION RATIOS FOR ALL BALL BEARINGS<sup>231</sup> (1954-1972)

	<i>4 Firm Concentration (Percent of shipments)</i>	<i>8 Firm Concentration (Percent of shipments)</i>
1954	71	85
1958	66	81
1963	63	79
1967	61	78
1972	57	72

Source: CX 3B.

<sup>225</sup> See RSX 59A.

<sup>226</sup> Tr. 784-85, 1462-64, 1524.

<sup>227</sup> Finding 113; Complaint and Answer of SKF, ¶ 11; CX's 250Z-156 (No. 616); RSX 59J; Tr. 1573.

<sup>228</sup> CX 250Z-71 (No. 320).

<sup>229</sup> Finding 14 and Complaint and Answer of SKF, ¶ 11.

<sup>230</sup> See Findings 130-31.

<sup>231</sup> The major bearings firms in the early 1960's were General Motors, Fafnir, Marlin Rockwell, Federal Bearing, Norma Hoffman, Hoover, FM, and Borden. CX's 250Z-157-58 (No. 620), 352G (No. 67); Tr. 594, 747, 913, 1083.

[86] 131. Between 1972 and 1975 market shares in the alleged "all" ball bearings market were as follows:

TABLE 6: MARKET SHARES IN 1972-1975 OF SELLERS IN AN ALL BALL BEARINGS MARKET (INCLUDING IMPORTS) (PERCENT)

	1972	1973	1974	1975
Fafnir	29.7	29.7	29.8	28.3
General Motors (NDH) <sup>232</sup>	-	-	-	-
Marlin Rockwell	17.3	17.1	17.5	18.0
SKF (including Nice Division)	17.0	15.1	14.9	15.6
FM	9.9	9.0	8.4	9.8
NSK	4.2	7.7	8.2	6.7
NTN	3.6	4.2	4.5	5.5
FAG	5.8	5.9	5.6	4.7
Federal Bearing Barden <sup>233</sup>	4.5	4.0	3.5	3.6
Koyo	2.6	2.6	2.6	2.1
Aetna	0.1	0.1	0.1	0.1
Torrington	0.4	0.4	0.5	0.6
George Miller	0.4	0.6	0.8	0.8
Green	0.7	0.6	0.6	0.4
L&S	0.6	0.5	0.5	0.4
Nachi	0.1	0.2	0.4	0.4
INA	0.0	0.1	0.2	0.1
International Harvester	3.2	2.0	2.0	2.7

Source: SKF's Confidential Requests for Admissions & Complaint Counsel's Response, ¶¶ 51-73; CX's 17, 180, 335A *in camera*, 349J-T *in camera*, 412, 413, 414A, 415A; RSX's 82B *in camera*, 84D *in camera*, 93D *in camera*, 95D *in camera*, 97E *in camera*, 98D-E *in camera*, 99D-E *in camera*, 101C *in camera*, 103G, i, K, M *in camera*, 105B *in camera*, 111D *in camera*, 114i *in camera*, 116B *in camera*.

[87] 132. Although market shares are not available for each producer in 1958, based upon uncontested universe figures, SKF had 8.3 percent of the alleged "all" bearings market and Nice had 2.2 percent.<sup>234</sup>

133. Respondent SKF, however, vigorously contests the existence of such an "all" bearing market<sup>235</sup> and claims instead that Nice was essentially a producer of non-precision, commercial grade, ground and

<sup>232</sup> General Motors did not report total ball bearing sales (Tr. 1186) but unquestionably General Motors (New Departure-Hyatt) was among the top four producers. CX 250Z-92 (No. 396); Tr. 747, 842. See also CX 254W (No. 179) *in camera*.

<sup>233</sup> Not available in usable form.

<sup>234</sup> The total value of shipments was \$309,727,000. CX 14. SKF had sales of \$25.7 million, Nice's sales were \$6.8 million. Complaint and SKF Answer, ¶ 27; CX's 32A-34D. 1960 sales of other bearing producers are not shown in the record with adequate precision to calculate each company's market share. See also Tr. 2837.

<sup>235</sup> Both sides agree and the record shows that miniature ball bearings having an OD of less than 9 mm are a market distinct from all other bearings for the following reasons: no positive cross-elasticity of demand, non-substitutability, separate customers and producers, unique manufacturing facilities, and industry recognition. CX's 28L, 250X-Z-1 (Nos. 71-79), 250Z-5-6 (No. 96), 250Z-85-86 (No. 373), 250Z-91 (No. 393), 250Z-93 (No. 397), 250Z-97

(Continued)



unground radial bearings of less than ABEC-1 quality while SKF in 1960 made bearings of [88] ABEC-1 or better quality which are known as precision bearings.<sup>236</sup> According to respondent SKF these quality distinctions led to application and customer distinctions with the result that Nice and SKF were not actual competitors in 1960.

134. While exact conditions in 1960 may be difficult to reconstruct, the burden nevertheless is on complaint counsel to prove the extent of actual competition between acquired and acquiring firms at the time of acquisition. Complaint counsel failed to sustain the burden: the record shows extremely limited competition between Nice and SKF in 1960.<sup>237</sup>

[89] 135. In 1960, SKF was engaged exclusively in the production of precision ball bearings of ABEC-1 quality or higher. It produced no bearings of less than ABEC-1 quality.<sup>238</sup>

136. Nice produced ground and unground commercial-grade bearings. Nice never produced bearings of ABEC-1 quality or better.<sup>239</sup>

137. Precision bearings of ABEC-1 standard or better are made of high-quality steel.<sup>240</sup> They are produced in metric dimensions.<sup>241</sup> They are standardized in design and are universally interchangeable.<sup>242</sup>

[90] 138. Commercial grade bearings made by Nice in 1960 were manufactured from a simple grade of carburizing steel.<sup>243</sup> With some exceptions Nice bearings were produced in inch sizes.<sup>244</sup> Between 1960 and the present, manufacturers of commercial grade ball bearings have deliberately not established industry standards since these bearings are manufactured mainly to meet the particular needs of specific customers.<sup>245</sup>

139. Precision bearings of ABEC-1 or better quality are usually manufactured on different equipment than commercial bearings and

(Nos. 411-16), 250Z-147-48 (Nos. 587-88), 250Z-149 (Nos. 594-95), 250Z-153-54 (Nos. 608-09), 250Z-155-56 (Nos. 614-15), 250Z-157 (Nos. 618-19), 250Z-159 (No. 624), 250Z-161-62 (No. 631), 252A (No. 7), 352J (Nos. 94-96); Tr. 850, 934-35, 1006-07, 1179-30, 2752, 2763, 2833.

<sup>236</sup> The Anti-Friction Bearing Manufacturers Association ("AFBMA") through its Annular Bearing Engineering Committee ("ABEC") has established certain quality precision standards recognized by both the industry and the government. These standards for radial bearings cover such elements as dimensions, tolerance or accuracy, and life prediction. Bearings meeting the standard of ABEC-1 or greater are known as precision bearings. Bearings not intended to meet ABEC standards are known as "commercial-grade" bearings. RSX's 59C-D; Tr. 748-50, 1639.

<sup>237</sup> Findings 135-146.

<sup>238</sup> Tr. 787, 1563, 1638. During a short period in the 1940's, SKF attempted to produce commercial-grade bearings but withdrew from that market because the venture was unsuccessful. Tr. 1483-84.

<sup>239</sup> Tr. 1108, 1557, 1656-57. Included in the Nice line were clutch throw out bearings for distribution to the auto aftermarket. CX's 36F, 352A (No. 8), 424A-Z-47. With the decline of the manual clutch and the concomitant drop in the need for throw out bearings, Nice lost a large part of its auto aftermarket business. Tr. 1566-67.

<sup>240</sup> Tr. 1642, 1646-49.

<sup>241</sup> Tr. 1562.

<sup>242</sup> Tr. 749-50, 1642-43, 1648-49.

<sup>243</sup> Tr. 1590. See also Tr. 1388.

<sup>244</sup> Tr. 1562, 1585.

<sup>245</sup> CX's 279B, 280B, 282B, 290B, 292B, 294B; Tr. 1561-62, 1639-40, 1642-43, 1649.

require a different level of skill to produce than commercial bearings.<sup>246</sup>

[91] 140. Precision bearings of ABEC-1 quality or better bearings are not generally interchangeable with commercial bearings. With rare exceptions, it is not possible to substitute less than ABEC-1 bearings in an application in which ABEC-1 or above are required. Besides, precision ball bearings are too expensive to use in applications where a precision bearing is not required. On the other hand, the buyer who has an application requiring an ABEC-1 bearing will not choose a less than ABEC-1 on the basis of price.<sup>247</sup>

141. Nice and SKF essentially sold to different customers in 1960. In general, the pattern of the bearing industry is that precision bearings of ABEC-1 quality or better are used in applications where load, speed, precision, and longevity requirements are severe. Commercial grade ball bearings are used wherever these requirements are less important.<sup>248</sup>

[92] 142. Complaint counsel introduced no evidence of actual cross-elasticity of demand between precision and commercial ball bearings in 1960.<sup>249</sup>

143. While entry into the bearings industry is generally difficult to achieve,<sup>250</sup> it is easier to enter the production of commercial grade bearings than precision bearing manufacture.<sup>251</sup>

[93] 144. Both Nice and SKF sold generator bearings to Ford Motor Co.<sup>252</sup> This is the only record proof of interchangeability of ABEC-1 bearings with less than ABEC-1. Sales of generator bearings to Ford by Nice represented between 1.92 percent in 1958 to 3.66 percent in 1960 of Nice's total sales.<sup>253</sup> In 1960, Ford switched from generators to alternators. Since alternators required a bearing designed to accommodate higher speeds, Nice could not meet Ford's requirements and lost the business.<sup>254</sup>

145. No witness was called by complaint counsel who identified

<sup>246</sup> Tr. 788-89, 1106, 1386-88, 1564, 1642-43, 1646-48, 1654-57, 2572-73.

<sup>247</sup> Tr. 1022, 1032, 1100, 1386-88, 1561-63, 1646.

<sup>248</sup> Tr. 787-89, 1022, 1100, 1386-88, 1557-58, 1563, 1648-49.

<sup>249</sup> Tr. 1592-93 merely indicates that at a hypothetically identical price, the prudent buyer would prefer ABEC-1 over commercial bearings.

<sup>250</sup> As in the case of TRB (Finding 110), entry barriers include scale economies, absolute capital requirements, the need to obtain and train highly skilled workers and technicians, long lead time, the need for custom-designed machinery, and the requirement that extensive research, engineering, and warehouse facilities be maintained. CX's 28P, 250G-H (Nos. 21-22), 250I-J (No. 28), 250M (No. 41b), 250N (Nos. 43b, 44b), 250"o" (No. 46b), 250Q (Nos. 51c, 52c), 250S (Nos. 56b, c), 250T (Nos. 60a, b, 61), 250V (No. 65b, c), 250W-X (Nos. 69, 70b, c), 250Z-10 (No. 110), 250Z-88 (Nos. 882-83), 250Z-90 (No. 390), 250Z-186 (Nos. 700-01), 250Z-191 (Nos. 703-04), 251B (No. 11), 252A (Nos. 3-4), 252B (Nos. 10, 11), 352H (Nos. 77, 78); Tr. 531-33, 587, 750-58, 761-64, 840, 1007-11, 1012-13, 1090-92, 1116, 2769-70, 2835.

<sup>251</sup> Tr. 789-90.

<sup>252</sup> Tr. 1564, 1586-88. This information was reported to the FTC in 1960. RSX 59Z-18. Both SKF and Nice were minor factors in the auto aftermarket in 1960. Tr. 2859.

<sup>253</sup> RSX 59Z-18.

<sup>254</sup> Tr. 1564-65.

Nice and SKF as competitors in 1960. To the contrary, all the testimony indicates that industry representatives, including officers of SKF and Nice, who [94] made precision bearings did not consider Nice a competitor, while those who made commercial bearings did not consider SKF a competitor.<sup>255</sup>

146. Because complaint counsel did not call any bearings users as witnesses, it is impossible to tell on this record whether the perceptions at trial of a few sellers (*i.e.*, Finding 145) are valid. There is evidence that at least in some applications commercial radial bearing sellers, with various degrees of success, have attempted to convince precision bearing users that commercial bearings are suitable.<sup>256</sup> The extent and result of such competition between Nice and SKF in 1960 is not shown on this record, except for the evidence relating to Ford.<sup>257</sup>

#### [95] Federal Trade Commission Investigation of Nice Acquisition

147. In 1961, the Federal Trade Commission investigated SKF's 1960 acquisition of Nice including the extent of competition between the two companies, and informed respondent SKF in 1963 that no action would be taken.<sup>258</sup>

148. On the basis of FTC clearance, between \$5 and \$6 million were invested in Nice by SKF between the period 1960 to date to construct new manufacturing facilities and to purchase new equipment.<sup>259</sup>

#### Nice Role in FM-SKF Arrangement

149. There is no evidence that Nice presently has any connection with the FM-SKF "arrangement". Nice previously sold clutch release bearings and kingpin thrust bearings to the automotive aftermarket and the arrangement contemplated that FM would purchase these bearings after the shutdown of APD.<sup>260</sup> Nice made no clutch release bearings after 1974 [96] and Nice no longer manufactures any products sold to the automotive aftermarket.<sup>261</sup>

#### AB SKF's Acquisitions of Foreign Bearings Manufacturers

150. Although complaint counsel offered into evidence no reliable

<sup>255</sup> Tr. 787-88, 913, 1022, 1107, 1565-66. The former President of Nice testified that it was the policy of his company to avoid head-to-head competition with producers of ABEC-1 or better bearings. Tr. 1562, 1583-84.

<sup>256</sup> CX's 92E, 278-299B, 390Z-20; Tr. 1584-85, 1593-94, 2565. See also Tr. 2761-62. CX's 92Z-1-26, 392Z-34-41 show that both SKF and Nice produced thrust bearings, but the SKF bearings had much higher speed and dynamic load ratings.

<sup>257</sup> Finding 144.

<sup>258</sup> RSX's 59A-Z-49, 60. The Commission reserved the right to take action in the future if warranted by the facts.

<sup>259</sup> Tr. 1523.

<sup>260</sup> Findings 69, 73, 78, 85, 90.

<sup>261</sup> Tr. 1566, 2518-19, 2525, 2838. The market for clutch release bearings and kingpin thrust bearings diminished with the development of automotive transmission and ball joint suspension. Tr. 1566-67.

international market share figures, the record shows generally that on a worldwide basis, the manufacture of TRB and ball bearings are highly concentrated industries, and have been concentrated during the entire period 1955 to the present.<sup>262</sup>

#### AB SKF's Acquisitions of Foreign TRB Producers

151. Between 1955 to the present the important TRB producers outside of the United States were Timken (U.S.), AB SKF (Swedish), RIV (Italian), SNR (French), FAG (German), and the Japanese firms — NTN, NSK, Koyo Seiko, and Nachi.<sup>263</sup> [97] Essentially, the same group of companies, with the exception of Timken, were the important international manufacturers of ball bearings.<sup>264</sup>

152. During the period 1950 to 1970, AB SKF made acquisitions of TRB producers located in France, Yugoslavia, Italy, Spain, Argentina, and Mexico.<sup>265</sup>

153. Between 1965 and 1968, AB SKF acquired all of the outstanding stock of Ets Rossi Freres, S.A. ("Rossi") a French company which manufactured small quantities of TRB for truck applications.<sup>266</sup> Under AB SKF's ownership Rossi's total sales of TRB have grown from \$612,000 in 1965 to over \$2,700,000 in 1974.<sup>267</sup>

154. Prior to the AB SKF acquisition, Rossi made no sales to United States customers.<sup>268</sup>

[98] 155. There is no record proof that prior to the AB SKF acquisition, Rossi had any interest, capability, or intent to enter the United States TRB market. Nor was any proof presented that Rossi was ever perceived by any firm in the United States TRB market as a potential competitor, either through exports from abroad or by the creation of production facilities in the United States.

156. On October 1, 1969, AB SKF entered into a joint venture with the Sarajevo, Yugoslavia firm, Preduzece Udruzena Metalna Industrija ("UNIS"), which produced TRB. As of 1972, AB SKF had a 23 percent interest in this Yugoslavia joint venture which is known as "UTL".<sup>269</sup>

157. Prior to the formation of the joint venture, there were no imports into the United States of TRB manufactured in Yugoslavia.<sup>270</sup>

<sup>262</sup> CX 250Z-86 (No. 376c); Tr. 534, 549-50, 1011-12, 1083-85, 1501.

<sup>263</sup> RAX 256; Tr. 444-45, 549-51, 766-67, 837-39, 893, 897.

<sup>264</sup> Tr. 534, 1012, 1083-85.

<sup>265</sup> Findings 153-169.

<sup>266</sup> CX's 250Z-48-49 (Nos. 238-40). The products manufactured by Rossi have changed little since 1965. CX 250Z-49 (No. 242).

<sup>267</sup> CX's 253Z-Z-2 (Nos. 41-44).

<sup>268</sup> CX 350B *in camera*.

<sup>269</sup> CX's 250Z-78-79 (No. 347C, 349C).

<sup>270</sup> RAX's 252, 253B.

158. There is no record proof that AB SKF's Yugoslavia joint-venture partner, UNIS, ever had any intent, capability or interest to enter the United States TRB market. Nor was any proof presented that UNIS was perceived by any firm in [99] the United States market as a potential competitor, either through exports from abroad or by the creation of production facilities in the United States.

159. In 1969, AB SKF obtained an interest in a Mexican firm which produced TRB.<sup>271</sup> There is no proof that this firm ever sold TRB in the United States prior to 1969 and United States government statistics show no imports of TRB from Mexico in 1969.<sup>272</sup>

160. There is no proof that this Mexican firm had any interest, capability or intent to enter the United States TRB market. Nor was any proof presented that the Mexican TRB producer acquired by AB SKF was perceived by any United States firm as a potential competitor in any form.

161. In 1965, AB SKF acquired a controlling interest in RIV Officine di Villar Perosa S.A. ("RIV"), an important Italian producer of TRB and ball bearings.<sup>273</sup>

[100] 162. At the time of the acquisition, RIV had total worldwide sales of \$72 million which included \$15.9 million in exports or approximately 22 percent of its total sales.<sup>274</sup> While from time to time RIV had substantial export sales elsewhere,<sup>275</sup> its shipments to the United States were never significant.<sup>276</sup> Thus, from 1965 to 1974 RIV's total United States sales (TRB and ball bearings) were as follows:

TABLE 7: RIV SALES TO UNITED STATES (1965-74) (Dollars)

1965	695,662
1966	755,952
1967	387,250
1968	366,466
1969	313,858
1970	185,496
1971	126,525
1972	695,180
1973	1,244,910
1974	1,413,300

Source: CX's 253Z-7-8 (No. 54) *in camera*.

<sup>271</sup> CX 250Z-77 (No. 343c).

<sup>272</sup> RAX's 252, 253B.

<sup>273</sup> Complaint and AB SKF Answer, ¶ 6; CX 250Z-184 (No. 689).

<sup>274</sup> CX 253Z-5 (No. 50) *in camera*.

<sup>275</sup> CX's 250Z-56 (No. 263c), 348D (No. 32), 393A-395D; RAX's 262A-B; Tr. 1268-69.

<sup>276</sup> RIV's share of the U.S. market in 1969 was too small to be measured. In 1960, its U.S. market share was .017%. RAX 262A.

[101] 163. By 1974 RIV's total sales, including exports, had grown to \$217.3 million.<sup>277</sup>

164. The only record proof respecting the competitive significance of any of the foreign TRB companies acquired by AB SKF relates to RIV. The evidence, which mainly consists of the testimony during the defense case of Dr. Augustino Canonica, former head of RIV, was in no way rebutted by complaint counsel, and shows the following:

(a) The Agnelli family, which controlled both FIAT and RIV prior to 1965, was primarily concerned with RIV's ability to supply FIAT's requirements, rather than participation in the export trade.<sup>278</sup>

(b) RIV's costs for producing bearings prior to 1965 were greater than the prices it charged in the United States. Productivity of RIV workers was low and while wage costs were lower than those in the United States, this did not offset lower productivity.<sup>279</sup>

[102] (c) During the period 1959-65, the Italian economy was booming, creating a more than adequate internal demand for RIV bearings in Italy.<sup>280</sup>

(d) RIV's pre-acquisition attempt to penetrate the United States market failed. The United States operation, which consisted of a sales office and an inventory in Chicago, was unprofitable and was closed in 1964 prior to the AB SKF acquisition.<sup>281</sup>

(e) RIV's ability to sell in the United States may have been hampered by its production of through-hardened TRB instead of the case-hardened products preferred by OEM accounts.<sup>282</sup>

(f) The high rate of inflation in Italy since 1965 has had the effect of discouraging exports. Moreover, beginning in the late 1960's to the present, Italy has had political and economic unrest, as well as long periods of labor-management strife. These conditions are not conducive to the creation of the stable business atmosphere necessary to establish a foreign firm as a dependable source.<sup>283</sup>

[103] 165. There is no evidence that RIV was perceived in 1965 as a potential entrant into the United States TRB market, either through exports from abroad or by the creation of facilities in the United States. To the contrary, all of the evidence affirmatively indicates that RIV was not so perceived.<sup>284</sup>

166. As part of the RIV acquisition in 1965, AB SKF acquired a

<sup>277</sup> CX's 253Z-6 (No. 52) *in camera*.

<sup>278</sup> Tr. 1251, 1254-56, 1269, 1302-04, 1318-20.

<sup>279</sup> RAX 261; Tr. 1257-59, 1288-89, 1327, 1332-33. See also Tr. 2821-23.

<sup>280</sup> RAX 263; Tr. 1269, 1274-76.

<sup>281</sup> Tr. 1276-80, 1291.

<sup>282</sup> Tr. 1277, 1325. See, however, Finding 174.

<sup>283</sup> CX 4N; Tr. 575, 1327. See also Tr. 2821.

<sup>284</sup> Tr. 573-75, 1012.

TRB manufacturing facility in Argentina and a 50 percent interest in SA Fabrica de Rodamientos RAS ("RSA")<sup>285</sup> a Spanish manufacturer of ball bearings and TRB, as well as ownerships of Commercial de Rodamientos RSA ("RODSAR"), a Spanish sales company which dealt in bearings.<sup>286</sup> Through a process of consolidation of SKF's Spanish interests, RSA and RODSAR were eventually formed into SKF Espanola SA in which AB SKF has a 50% interest and the Spanish government has a 50% interest.<sup>287</sup> Contrary to the allegation in Complaint Paragraph 34, there is no proof that SKF has acquired "four Spanish bearings companies." [104]

167. RSA made no sales to United States customers prior to 1965.<sup>288</sup> There is no evidence that RODSAR made sales to United States customers in 1965.

168. There is no evidence that RIV's Argentinian subsidiary made sales to United States customers prior to 1965.

169. There is no record proof that RIV's Argentinian subsidiary, or its Spanish affiliates, RSA or RODSAR, or SKF Espanola had any interest, capability or intent to enter the United States TRB market prior to the AB SKF acquisitions. Nor was any proof presented that any of the companies acquired by AB SKF in Argentina or Spain were perceived by any firm in the United States bearings market as potential competitors.

170. While the record is almost completely blank with respect to the impact of AB SKF's foreign affiliates on the United States TRB market, there is ample evidence about the Japanese companies which were *not* acquired by AB SKF. The record shows that imports of TRB into the United States [105] have grown during the period 1955 to present due mainly to the aggressive pricing policies of the Japanese producers:

TABLE 8: TRB IMPORTS INTO THE UNITED STATES FROM JAPAN  
(1970-74) AS PERCENT OF TOTAL FOREIGN IMPORTS<sup>289</sup>

	(Percent of \$)	(Percent of lbs.)
1970	79	94
1971	82	92
1972	85	93
1973	78	91
1974	80	90

Source: RAX 257.

<sup>285</sup> CX 250Z-51 (No. 251c).

<sup>286</sup> CX 250Z-52 (No. 253c).

<sup>287</sup> CX 250Z-52 (No. 253c).

<sup>288</sup> CX 350B *in camera*. In 1975, SKF Espanola sold \$29,660 worth of ball bearings and \$14,190 worth of TRB to U.S. customers. CX's 253R-S (Nos. 28-29) *in camera*.

<sup>289</sup> Japanese share of ball bearing imports was slightly less than the TRB figures: 1970-70.6%, 1971-70.7%, 1972-69%, 1973-65%, 1974-66%; RAX's 255A-E; see also CX 28Q.

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171. The success of the Japanese importers is due to the following factors:

(a) Within Japan, economies of scale are achieved since each of the four Japanese bearings firms produces high volume items, medium volume bearings are typically produced by two or three companies, and only one firm is engaged in the production of any given low volume bearing.<sup>290</sup>

[106] (b) Post World War II production facilities in Japan incorporate the most advanced engineering developments. The productive facilities of the Japanese are the equal of any in the world.<sup>291</sup>

(c) Wage rates are lower in Japan than in the United States.<sup>292</sup>

(d) The Japanese firms have an export policy which concentrates on selling a few high volume items (for example, front and rear wheel passenger car TRB) at low prices. According to the Treasury Department Japanese firms have sold bearings at prices which are 15 to 50 percent below domestic prices and by a 3-2 vote the Tariff Commission found that the Japanese firms have injured the domestic TRB industry by reason of sales at less than fair market value.<sup>293</sup>

[107] 172. Even the success of the Japanese firms is confined to OEM sales. There is no evidence that any foreign exporter has ever been successful as a supplier to the United States auto aftermarket, and the requirements of the domestic market create for all practical purposes an insurmountable barrier to export competition.<sup>294</sup>

173. The only other foreign producer which has made even a limited impact on the United States TRB market as an exporter is the German company, FAG. However, officials of the American affiliate of FAG described the following factors as limiting the ability of FAG to make a more substantial impact on the United States OEM markets.

(a) The pricing practices of the Japanese and the overall domination of Timken.<sup>295</sup>

(b) The unfavorable rate of exchange of currency which exists between the United States and Germany.<sup>296</sup>

<sup>290</sup> RSX's 76A-78P; RAX 256; Tr. 1020-21, 2826.

<sup>291</sup> Tr. 1379, 2826.

<sup>292</sup> CX 28R.

<sup>293</sup> RSX's 39A-D; RAX's 258A-W, 259. One of the Tariff Commission dissenters noted "that whatever injury which might be alleged by the smaller domestic producers was due more to their competitive disadvantage against the dominant producer than it was to sales at LFTV [less than fair value]." RAX 258W. Timken, which in 1974 had about 90% of the 0" to 4" TRB sales, prepared the statistical data in support of the claim of injury from "dumping". RFX's 158A-Z-27.

<sup>294</sup> Finding 25.

<sup>295</sup> CX 346 *in camera*; Tr. 1019-21, 1024, 1345-46, 1348-49.

<sup>296</sup> Tr. 1342-43.



[108] (c) The cost of duty, insurance, and freight.<sup>297</sup>

174. An additional influence which may impact unfavorably on European exporters is the fact that European manufacturers produce through-hardened TRB instead of case-hardened TRB which is common in the United States.<sup>298</sup> The most that the record will allow on this point is that United States [109] OEM manufacturers have preferred case-hardened TRB,<sup>299</sup> but there is no convincing evidence that case-hardened TRB is required for the auto aftermarket<sup>300</sup> or that conversion from through-hardened to case-hardened is a process which is so difficult as to be beyond the financial or technological capability of large multinational firms.<sup>301</sup> In general, respondents claim far too much for the case-hardened-through-hardened distinction as a barrier to entry by European firms. Thus respondents have never reconciled the inconsistency of complaining, on the one hand, to the United States Tariff Commission about the adverse impact of Japanese imports (made from both through-hardened and case-hardened steel)<sup>302</sup> while, on the other hand, they tell the United States Federal Trade Commission that through-hardened TRB cannot be sold in the United States market. [110]

175. As indicated in Findings 164, 173 and 174, the success of the Japanese in the OEM market does not prove that other foreign producers will necessarily succeed. But by the same token the failure up to this point of European TRB producers to make an impact on the American market does not establish the inevitable failure of any future attempts. The conditions described in Findings 164, 173, and 174 are not of such an order that changes in the internal policies of countries or companies or in the conditions of the export trade may not produce different results. The most that can be claimed on the basis of

<sup>297</sup> Tr. 1344, 1407-08. Respondents obviously claim too much on this point since none of these factors seemed to have deterred the Japanese. Besides, bearings are small parts which do not carry high duty, insurance, or freight costs. CX's 249J-K, 250Z-24-25 (Nos. 153-54); Tr. 853-54.

<sup>298</sup> Case-hardened TRB (Commission Physical Ex. C), which are traditionally preferred by United States OEM buyers, are produced by a two-step metallurgical process in which carbon is injected into the surface. This produces a hard outer surface and a softer inner core which is said to dissipate "spalls" or cracks. European produced through-hardened TRB (Commission Physical Ex. B) are of uniform consistency since the carbon is not injected in a separate process. Through-hardened TRB are thought to be superior in the sense that the uniform interior allows for some grinding error. Tr. 413-17. There is no evidence of any price distinctions based upon the case-hardened - through-hardened difference (See CX 352A (No. 5); Tr. 418), nor is there any evidence that actual experience with through-hardened in the U.S. has been unfavorable. CX 190K, 249H.

<sup>299</sup> Tr. 779, 1021, 1098-99, 1277, 1344, 1452, 2536, 2845. But see CX 190M for evidence that some OEM users do not require case-hardening.

<sup>300</sup> See Tr. 2845. The FM-SKF arrangement includes the importation of through-hardened TRB from European plants of AB SKF. Tr. 809-10, 2526. FM has received no complaint about through-hardened TRB. Tr. 2531. See also Tr. 1452.

<sup>301</sup> See Finding 123, Note 223 (f). A separate problem may exist because of the European use of metric sizes (Tr. 467, 1325, 1344), but this particular problem is bound to diminish as American firms adopt metric measurements. See Tr. 466, 1407. In addition, the record shows that the most popular TRB are produced worldwide on a completely interchangeable basis. Tr. 2289.

<sup>302</sup> CX 249H; RFX's 158A-Z-27.

current experience is that European producers may not be able to compete in the United States on the basis of foreign imports alone.<sup>303</sup> There are, however, other possibly successful forms of European entry including joint ventures in the U.S. or investment in new manufacturing facilities here.<sup>304</sup>

176. From 1972 to the filing of the complaint in 1975, bearings imported by SKF from companies acquired by AB SKF, like RIV, have not played the major role in supplying FM's automotive aftermarket needs. The principal foreign source of supply of bearings sold to FM was the United Kingdom plant of AB SKF at Luton, England, which was built by a [111] company formed by AB SKF in 1911.<sup>305</sup> Presently, with exception of a few Volkswagen parts, FM no longer purchases foreign-made bearings from AB SKF.<sup>306</sup>

#### AB SKF's Acquisitions of Foreign Ball Bearings Producers

177. In the period 1955 to 1974, AB SKF acquired interests in ball bearing producers located in Australia,<sup>307</sup> [112] West Germany,<sup>308</sup> France,<sup>309</sup> and Yugoslavia.<sup>310</sup> There is no proof that any of these companies ever exported bearings to the United States prior to the AB SKF acquisitions or had any interest, capability, or intent to enter any United States bearings market. Nor was any proof presented that any of these companies was ever perceived as a potential entrant into any United States markets, either through exports from abroad or by the creation of production facilities in the United States. [113]

<sup>303</sup> Tr. 785, 1024.

<sup>304</sup> Tr. 1340A, 1353, 1402.

<sup>305</sup> Tr. 2175, 2479.

<sup>306</sup> Tr. 2483.

<sup>307</sup> The United Bearing Corporation, Pty. Ltd. ("UBCO"), Echuca, Australia plant was built by the Australian government during World War II. AB SKF acquired a 55% interest in 1960. This was expanded to a 100% interest in 1974 when the name of the company was changed to SKF Australia (manufacturing) Pty. Ltd. The company makes single row deep groove ball bearings. Sales have grown from \$811,680 in 1960 to \$5,741,462 in 1974. Practically all exports are to New Zealand and South Africa. The company has never sold bearings in the United States. Contrary to the allegations of Complaint Paragraph 34, there is no proof that UBCO ever manufactured TRB. CX's 250Z-46-48 (Nos. 228-37), 253X (No. 37) *in camera*, 350B *in camera*.

<sup>308</sup> In 1960, AB SKF acquired from one Hans H. Baumgarten a bearings plant and machinery located at Etzenhofen, W. Germany. Its sales at that time were \$985,911. In 1974, sales had grown to \$3,756,151. The company, which produced a limited series of deep groove ball bearings, has never had sales to the United States. CX's 250Z-59-61 (Nos. 273-81), 350A *in camera*.

<sup>309</sup> Compagnie Generale du Roulement was acquired (a 99.7% interest) between 1969 and 1972. It has concentrated on commercial-type plastic ring bearings for special applications. Its sales have grown from \$1,411,992 to \$4,811,518. Prior to 1969, it made no sales to the United States. In 1975, it received an order valued at \$104,000 from a United States firm for a special bearing. CX's 250Z-50-51 (Nos. 245-50), 350A *in camera*.

<sup>310</sup> In 1969, AB SKF acquired a small interest (expanded to 28% in 1972) in Industrija Kotrljajuch Lezaja, Beograd, Yugoslavia. This company produced ball bearings in the range of 32-110 mm and had sales of approximately \$5 million in 1971. United States government statistics show no imports from Yugoslavia of ball bearings during the period 1969-1971. CX's 22H-i, 23H-i, 250Z-80 (Nos. 352-53), 253Z-20-21 (No. 78) *in camera*.

## III

## DISCUSSION

## The FM-SKF "Arrangement"

The complaint in this case ranges far and wide, but there is no question that the central issue is the so-called "arrangement" between FM and SKF. According to the record, the arrangement developed as follows:

Because of declining profits brought about by its inability to compete in TRB sales to various OEM markets, FM management decided to shut down its Detroit plants which manufactured 0" to 4" TRB.<sup>311</sup> Although it decided to drop the manufacture of 0" to 4", FM wanted to continue to sell a reasonably full line of 0" to 4" TRB to the auto aftermarket. FM was by far the largest seller of all bearings to the auto aftermarket, and it shared with Timken market domination over the distribution of TRB to the automotive warehouse distributors. Moreover, FM management believed that it needed TRB in its bearings line in order not to jeopardize its profitable sale of products other than bearings.<sup>312</sup>

After the decisions were made to close down its Detroit plants and to continue aftermarket distribution of TRB, FM executives explored various alternative sources of supply. [114] One possible source of supply, Timken, flatly refused to sell.<sup>313</sup> Still another, General Motors' New Departure-Hyatt Division, refused to commit itself to FM as a regular supplier.<sup>314</sup> Several other ways of obtaining a supply of TRB were considered by FM including a joint venture with the Japanese manufacturer Koyo Seiko, but at all times FM's options were limited because of the concentrated nature of the TRB industry in the United States and abroad.<sup>315</sup>

Between March 1971 and December 1972, FM actively pursued two potential avenues of supply — (1) the joint venture with Koyo Seiko for a limited number of high-volume TRB to be assembled in the United States from components imported from Japan or purchased in the United States, and (2) a supply arrangement with SKF.<sup>316</sup> During the FM-SKF negotiations over a supply agreement these two competitors discussed the problems and future of SKF's own aftermarket division, APD, which had a history of poor earnings — in only one year

<sup>311</sup> Findings 27-35, 39-40.

<sup>312</sup> Findings 36-38.

<sup>313</sup> Finding 50.

<sup>314</sup> Finding 50.

<sup>315</sup> Findings 48, 108, 150.

<sup>316</sup> Findings 47-82.

since 1965 (1971 the very year when the arrangement occurred) — did it make a profit.<sup>317</sup> Despite [115] APD's unimpressive performance before 1971, it was the third-ranking firm in the distribution of bearings to the auto aftermarket.<sup>318</sup> Moreover, APD had a few large accounts which not only purchased bearings but were also a potential source of new business to a company like FM which sold automotive products other than bearings. The attractiveness of this business is cited in FM documents which reveal generally that during the negotiations with SKF, FM was simultaneously contemplating both the beginning of an FM-SKF supply arrangement *and* the additional sales to be had with the end of APD.<sup>319</sup> The nature of the negotiations is intimated in a memorandum written about the November 3, 1971 meeting which indicates that at this meeting these two competitors discussed the prospect of SKF supplying the bearings which were to be produced by the Koyo Seiko joint venture as well as the possibility that "SKF goes out of APD."<sup>320</sup>

Finally, on November 24, 1971, FM offered to designate SKF as the supplier of a full range of automotive TRB as well as certain automotive bearings. This was the first time that FM actually offered SKF the high volume items [116] which were to be produced by the Koyo Seiko joint venture. It was also at the November 24 meeting that SKF told FM that APD would be closed.<sup>321</sup>

Both FM and SKF officials testified during the hearings herein that the full line supply arrangement was neither contingent on the closing of APD, nor was the offer of the supply contract inspired by a promise by SKF to close APD.<sup>322</sup> SKF officials testified that APD was closed because higher profits could be realized by selling through FM.<sup>323</sup> But the same officials conceded that notwithstanding its poor performance prior to 1971 APD would not have been closed but for the fact that SKF was designated as the full-line supplier to FM.<sup>324</sup> Moreover, an FM official acknowledged that he was aware of the connection made by SKF between the full line supply contract and the closing of APD.<sup>325</sup> And, [117] most importantly, there is no question whatsoever that the closing of APD was openly considered in the negotiations between the two firms.<sup>326</sup>

As outlined thus far, it is apparent that with respect to at least one

<sup>317</sup> Findings 41-46.

<sup>318</sup> Finding 23.

<sup>319</sup> Finding 59.

<sup>320</sup> Finding 69.

<sup>321</sup> Findings 71-73.

<sup>322</sup> Finding 79.

<sup>323</sup> Finding 78.

<sup>324</sup> Finding 77.

<sup>325</sup> Finding 72.

<sup>326</sup> Findings 63, 69, 72, 76.

crucial decision made by FM — the closing of the Detroit plant — no inference of agreement between SKF and FM is even remotely possible. The record shows overwhelmingly that FM would have closed its Detroit TRB plants no matter what SKF did with APD. There is simply no proof that FM's decision to shut down Shoemaker and Hart was based on anything but independent and legitimate business considerations which are well documented in complaint counsel's own exhibits.

As for the closing of APD, *and* the designation of SKF as a full line supplier, *and* the termination of the FM-Koyo Seiko joint venture, I infer from the record facts cited above that there was an agreement between FM and SKF about all three events. This inference is drawn from evidence showing (1) that the condition and future of APD was discussed in the context of the supply negotiations; (2) APD would not have been closed, notwithstanding its poor performance, unless a satisfactory supply arrangement had been reached with FM for the high volume items; (3) at the November 3 meeting FM and SKF recognized that the Koyo Seiko high-volume [118] TRB was "critical to the arrangement" and they discussed the possibility of sourcing the high-volume TRB with SKF *and* closing down APD; and (4) at the November 24 meeting FM designated SKF as the full line supplier (thus for all practical purposes ending the prospects of the joint venture) *and* SKF told FM that APD would be closed. In addition, as I indicated earlier, there is evidence that FM officials recognized that SKF linked the closing of APD with a contract for the high-volume items. Finally, internal FM documents show that the closing of APD was part of FM's assessment of the desirability of the supply arrangement with SKF. It follows inescapably from these facts that the closing of APD as well as the future of FM as a producer (whether through a joint venture with Koyo Seiko or otherwise) were decisions arrived at by an understanding between competitors.

As it happens, the arrangement is one of those rare instances in which the elements of the agreement were reduced to writing: two contracts were drawn up by FM (one for supply, the other for SKF's cooperation in transferring the APD accounts) but neither was signed by SKF.<sup>327</sup> That the agreement was not expressly incorporated in a signed contract is, of course, of no moment in establishing [119] an unlawful conspiracy. *Norfolk Monument Co., Inc. v. Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700 (1969); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 142 (1948); *American Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946). The entire record ineluctably points to

<sup>327</sup> Findings 83-86.

such an agreement and the courts have had no difficulty in inferring a "meeting of minds" or "mutual understanding" from circumstances which have been less compelling than the documents and behavior present in this case.<sup>328</sup>

Respondents, of course, argue that it is improper to draw any inference that an agreement existed since it is claimed that each firm had valid reasons independently for (1) selecting SKF as the full line supplier, (2) not going forward with the joint venture, and (3) closing APD. Under this rationale it was just fortuitous that these allegedly [120] independent reasons were discussed as possibilities on November 3 and just happened to coalesce on November 24 at a meeting between the two firms in which SKF told FM that it had come to a decision to close APD and for the first time FM offered SKF an opportunity to supply the high-volume TRB which were supposed to be included in the joint venture with Koyo Seiko.

Contrary to the position urged by respondents, the trier of the facts is not required to ignore the singular coincidence of the November 3 and November 24 events as well as all the other facts pointing toward an agreement, simply because there may have been independent reasons for each event. To take an example: one such possibility of independent decision making is that the joint venture was terminated not as a result of the conspiracy but because FM officials came to the realization that in order to obtain a full range of 0" to 4" TRB it would be necessary to offer SKF the high-volume items, too. But then again if FM's ultimate decision had been made in a different environment — one, for instance, which divorced the supply contract from a discussion of the closing of APD — FM could have reached a different result, say a decision to go forward with the joint venture, construct a new plant for assembling high-volume TRB, and produce the low-volume items at its own Hamilton plant. Besides, the very statement of the "independent" reason for ending the joint venture — that [121] a firm like SKF would not be a party to a full-line contract unless high-volume items were included — is not inconsistent with the conclusion which I draw from the record that there was an understanding between these competitors about all the conditions for granting SKF such a full-line contract, including the closing of APD in the very year (1971) when it first showed a profit.

That the choice actually made — a supply agreement with SKF and

<sup>328</sup> See, e.g., *Interstate Circuit Inc. v. United States*, 306 U.S. 208 (1939) (inference of agreement drawn from the nature of the proposals made to raise prices and from the manner in which the proposals were made); *Esco Corp. v. United States*, 340 F.2d 1007 (9th Cir. 1965) (agreement inferred when trade discounts were reduced by competitors following a meeting in which largest firm announced its plans to reduce discounts); *Continental Baking Co. v. United States*, 281 F.2d 137 (6th Cir. 1960) (agreement inferred from meetings followed by price increase although participants denied that formal agreement had been reached).

no joint venture — may have been rational at the time (although later it proved to be a mistake) is not relevant. Nor is it particularly relevant that SKF has made more profits operating as a supplier to FM than it did prior to 1971 from APD. Obviously, the decisions of all rational businessmen (including price-fixers) are consistent with their own self-interest, but neither the Commission nor the courts have said in *A&P*<sup>329</sup> or elsewhere that the business rationalizations for conduct can be used to explain away direct proof of an illegal agreement. See, e.g., *United States v. Masonite Corp.*, 316 U.S. 265, 276 (1942). What the Commission held in *A&P* was that strained inferences of agreement are improper when there exist plausible independent reasons for the conduct. This does [122] not mean that strained inferences of independent conduct are to prevail over clear proof of collusive decision-making.

In short, the crucial factor in this case is not whether the decisions of respondents can conceivably be justified as profit-maximizing or rational, but rather how they are made. *Nash v. United States*, 229 U.S. 373, 378 (1912). The record shows convincingly that they were made through a process of negotiation between competitors which included an understanding that APD would be closed if a full-line contract were granted. Once the decision-making process of competitors includes a joint calculation and mutual commitments, the assumption of the antitrust laws is that the results are not inevitably the same as independent decisions. To the contrary, self-serving “arrangements” between competitors are condemned for the very reason that this is a form of private regulation which is contrary to our basic belief that the competitive market should control decision-making. *Northern Pacific Railroad Co. v. United States*, 356 U.S. 1, 4-5 (1958); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 396-98 (1927). Certainly the government had no burden to show that not only was APD eliminated but also that the joint venture with Koyo Seiko would have gone forward or FM would have expanded its own TRB facilities but for the conspiracy. It is enough that the record shows that in their discussions respondents considered all three events (i.e., end of APD, end of joint [123] venture, and full-line supply contract) as interrelated acts and the negotiations produced an understanding which, at one and the same time, closed APD, gave SKF the full-line contract, and put an end to the joint venture.

For competitors to agree in such a manner about their participation at any level of competition is a conspiracy to allocate markets and illegal per se. *White Motor Co. v. United States*, 327 U.S. 253 (1963);

<sup>329</sup> *The Great Atlantic and Pacific Tea Co., Inc.*, Dkt. 8866, 87 F.T.C. 962, *aff'd as to Robinson-Patman Count*, 557 F.2d 971 (2d Cir. 1977).

*United States v. Timken Roller Bearing Co.*, 341 U.S. 593 (1951); *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899); *United States v. Consolidated Laundries Corp.*, 291 F.2d 563 (2d Cir. 1961); *United States v. General Dyestuff Corp.*, 57 F. Supp. 642 (S.D.N.Y. 1944); *Johnson v. Joseph Schlitz Brewing Co.*, 33 F. Supp. 176 (E.D. Tenn.) *aff'd*, 123 F.2d 1016 (6th Cir. 1941). No showing of effects is necessary. Nor is it a defense that prices may not be perfectly fixed at the distribution level because FM's aftermarket division must still compete against Timken, and more importantly, against other firms which offer a full line of automotive parts including bearings. FM's dominant position as a distributor of bearings to the auto aftermarket is manifest. Entry by foreign firms into aftermarket distribution is for all practical purposes blockaded. Elimination of APD increased FM's market share to near the 50% level, and FM may already have effective control over the pricing [124] of bearings in the aftermarket.<sup>330</sup> Thus in the aftermarket distribution of TRB, in which FM's market share even exceeds Timken's, the record shows that because FM offered a "package" of automotive items it was able to charge a substantial premium over the price charged by a single-line firm like Timken.

But even if FM does not have the power to fix the prices of bearings in the aftermarket, an agreement eliminating one of the few remaining competitors violates Section 5 of the Federal Trade Commission Act. A market does not have to be perfectly allocated nor prices firmly fixed before the Commission may eliminate an arrangement which at the very least violates the policy of the antitrust [125] laws<sup>331</sup> and is an incipient violation of the antitrust laws.<sup>332</sup> Reliance, however, on the more flexible Section 5 rubric of "unfairness" is unnecessary and probably improper in this case.<sup>333</sup> The "arrangement"

<sup>330</sup> While the record (Finding 22) shows that distribution to the independent auto aftermarket meets the definitional criteria of the merger and monopolization cases, see, e.g., *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), both sides make too much of the market definition problem. If the practice involves a restraint, such as an agreement to close APD, the courts and the Commission take as the market the "field" of business at which the action was directed. It is assumed that the "field" sufficiently describes a market, for otherwise what would be the point of an agreement to allocate. See *Washington Crab. Ass'n*, 66 F.T.C. 45, 119 (1964).

<sup>331</sup> *Atlantic Refining Co. v. FTC*, 381 U.S. 357 (1965); *FTC v. Motion Picture Advertising Service Co.*, 344 U.S. 392 (1953).

<sup>332</sup> *Fashion Originators Guild of America, Inc. v. FTC*, 312 U.S. 457 (1941); *FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966).

<sup>333</sup> As a fall-back position to their arguments for the applicability of *per se* concepts of market and customer allocation, complaint counsel say that the FM-SKF arrangement should also be examined under the *S&H* concept of an "unfair practice." *Sperry & Hutchinson Co. v. FTC*, 405 U.S. 233 (1972). Complaint counsel, however, have never identified the "practice" for which *S&H* is being invoked. If a nonconspiratorial decision had been made by SKF to drop out of the auto aftermarket it would be no more an actionable "practice" than the non-conspiratorial closing by FM of its Detroit plants, although the latter decision may very well have had some adverse effects, not the least of which was to eliminate one of Timken's few United States TRB competitors. Those adverse effects notwithstanding, complaint counsel now concede that they "do not contest FM's decision to close the Detroit facilities." Complaint Counsel's Reply To Respondents' Proposed Findings of Fact and Conclusion of Law, p. 14.

Nor is the transfer of APD accounts to FM an "acquisition," as complaint counsel urge, and subject to the strict prohibitions of the horizontal merger law. While I have no difficulty with the notion that Section 5 may apply to the acquisition of intangible assets (See, e.g., *Columbia Broadcasting System, Inc. v. FTC*, 414 F.2d 974 (1969), *cert. denied*,



was a conspiratorial [126] scheme to allocate markets. It is a violation of Section 1 of the Sherman Act<sup>334</sup> and hence violates Section 5 of the Federal Trade Commission Act.<sup>335</sup>

#### The Relief

As I will note later in this discussion, complaint counsel have advanced theories of relief based on divestiture which I do not accept. Short of divestiture, however, the government is entitled to whatever relief will rid the bearings industry of the effects of this illegal conspiracy. See *United States v. Ford Motor Co.*, 405 U.S. 562, 575 (1972); *FTC v. National Lead Co.*, 352 U.S. 419, 431 (1957). I believe this can be accomplished by terminating all dealings between respondent firms and thereby creating incentives [127] conducive to the restoration of competition. One year after the date of a final order, the contract signed on December 14, 1974 should be cancelled, and thereafter SKF and AB SKF should be prohibited from supplying any 0" to 4" TRB to FM.<sup>336</sup>

With all dealings between the conspirators at an end, SKF may be encouraged to reenter the auto aftermarket since it will need an outlet for its TRB. There is evidence that after 1976 SKF acquired a firm (McQuay-Norris) which produces automotive products which are complimentary to bearings and there is expert opinion that reentry by SKF is now feasible.<sup>337</sup> While SKF cannot be compelled to reenter the auto aftermarket, it can at least be compelled to make a decision about its role without the assistance of FM which already happens to control nearly 50% of the market. Regrettably, there is no feasible way of returning the former APD accounts to SKF beyond creating conditions which may encourage SKF to compete for them. These non-respondent WD's may be opposed to being forcibly handed over to SKF, and their future [128] is best left to the market even though they were arbitrarily allocated to FM as part of a conspiracy.

One final point on the question of relief: FM argues that the effects of a termination of the FM-SKF supply arrangement may be seriously anticompetitive since if FM does not develop either internally or externally a supply of TRB for its WD's, the beneficiary may be

<sup>334</sup> 397 U.S. 907 (1970)), the concept of "assets" cannot embrace every new customer or group of customers obtained by a firm. No matter what the market share of a company may be, surely the anti-merger laws were never intended to prevent a company from obtaining new business, and but for the conspiracy between FM and SKF, the "acquisition" by FM of APD accounts would be no more unlawful than Timken's "acquisition" of FM's OEM accounts upon the closing of the Detroit plants.

<sup>335</sup> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. 1 (1970 & Supp. 1975).

<sup>336</sup> Section 5 minimally registers all violations of the Sherman Act. *FTC v. Cement Institute*, 333 U.S. 683 (1948).

<sup>337</sup> The one year time limit is more than adequate. FM has indicated that 180 days is a realistic time period to obtain a supplier should SKF no longer be able to sell to FM. CX 79A.

<sup>338</sup> Finding 101.

Timken which has always dominated TRB manufacturing. It may turn out that the beneficiary is a rejuvenated APD which may take SKF's bearings as well as SKF's newly acquired line of auto products, and challenge FM's entire auto aftermarket business. In any event, the parade of horrors depicted by FM is not convincing. As matters now stand in the bearings aftermarket, FM (with the elimination of APD) has consolidated a huge share of the auto aftermarket market which it has been able to exploit by charging supra-competitive prices.<sup>338</sup> It is hard to imagine how a worse result could ensue if the tidy FM-SKF "arrangement" is annulled. Certainly respondents have presented no proof in support of the notion that a further cartelization of the bearings industry may somehow be desirable as a counter-balance to Timken's [129] overall market share. Furthermore, FM made a convincing showing that it needs TRB to maintain its high profits on other auto products. Unhindered by its conspiratorial agreement with SKF, FM can review the present-day feasibility of either looking elsewhere for bearings, or forming a new joint venture, or expanding its own facilities in order to meet this perceived need.<sup>339</sup>

#### Liability of AB SKF

The order just described should run against AB SKF to insure strict compliance. I reach this conclusion despite the fact that the evidence on day-to-day control by AB SKF over SKF is inconclusive, and both respondents and complaint counsel claim too much from the record on the question of AB SKF's general policy respecting control. On the one hand, [130] AB SKF relies heavily on the so-called "voting trust agreement" as proof of SKF's isolation from the foreign parent. But respondents have not explained how the trust agreement, which simply vests trustees with power to vote the AB SKF-owned SKF common stock, accomplishes anything beyond the separation of legal and equitable ownership. Thus the voting trust agreement does not even instruct the voting trustees to vote the stock in such a way that the corporate boundaries of parent and subsidiary are kept separated. Since the voting trustees are undoubtedly well aware that the voting trust agreement is extended at AB SKF's pleasure, the trust agree-

<sup>338</sup> Findings 97-99. See also CX 255D which shows that FM is able to charge these high prices despite the poor job it does as a supplier of TRB to the aftermarket.

<sup>339</sup> The Board Chairman of FM (Russell) testified that "without a more detailed study of the effect on any of our other product lines" he would recommend against the investment of some \$20 million to produce a line of 0" to 4" comparable to Tyson's. Tr. 2185. A more detailed study may indeed produce a different result and may even lower the estimated cost or lead to a new joint venture partner. It is noteworthy that a pre-conspiratorial calculation of the efficiency of a joint venture had earlier led Russell to the conclusion that such an undertaking would result in economies of scale and low costs. See Finding 53. Moreover, since FM is now producing low-volume TRB at its Hamilton plant, it may want to reconsider the feasibility of importing low-cost high-volume TRB from Japan (See CX 340) and dropping some of its earlier demands on Japanese producers. See Note 168.

ment hardly establishes the trustees' independence, and the record does not reveal exactly what patterns the trustees have followed in their voting. For instance, we do not know whether the trustees have voted in favor of management selected by AB SKF and, as a matter of fact, we know nothing about AB SKF's role in the selection of SKF management.<sup>340</sup>

Complaint counsel, on the other hand, set great store to a reference in one exhibit to AB SKF's policy of "geocentric" control. But nowhere is this policy fleshed out, and all we have are some fragments relating to (1) certain ancient loans, (2) the fact that AB SKF supplies steel and on occasion expertise to SKF, and (3) advice which AB SKF gave SKF about [131] the "Nadella Affair," an obscure incident not involving any issue germane to this case. As for acquisitions which *are* involved in this case — the Tyson and Nice acquisitions by SKF and the foreign acquisitions by AB SKF — there is no showing that either SKF or AB SKF played any role in each other's acquisition decisions beyond a passing reference to a visit paid by AB SKF officials to the Tyson plant before the acquisition.<sup>341</sup>

While the evidence relating to general control by AB SKF over SKF is not convincing for either respondents' or the government's point of view, the proof respecting AB SKF's participation in the conspiracy is a different matter entirely. Thus the record shows that negotiations preceding FM and SKF's market allocation contemplated that AB SKF would supply the low-volume (*i.e.*, full-line items) since SKF's own line was limited.<sup>342</sup> This point is crucial since it is inconceivable that a subsidiary could bind a parent's production without the parent knowing all the premises of the underlying arrangement, including the direct relationship [132] between the closing of APD, a division of an AB SKF subsidiary, and the full-line supply contract which still other divisions of AB SKF were expected to fill.

That the role of the AB SKF subsidiaries was not merely incidental to the conspiracy is shown by (1) the importance attached to AB SKF in the FM-SKF negotiations and (2) the reaction by FM to the failure of certain AB SKF subsidiaries, particularly Luton, to meet its supply responsibilities. As it happens, the role of AB SKF was so vital that FM officials took it upon themselves to visit the Luton works in England in an attempt to improve performance.<sup>343</sup> Moreover, FM's decision to produce certain TRB at its Hamilton plant was brought about by the

<sup>340</sup> Findings 15-16.

<sup>341</sup> Finding 16.

<sup>342</sup> Findings 52, 74, 85, 91, 92, 94.

<sup>343</sup> Finding 91.

failure of AB SKF's foreign subsidiaries to deliver as originally planned.<sup>344</sup>

From the facts recited above, it is plain that AB SKF must have known about the market allocation before the arrangement was consummated. In addition, since SKF and FM were dependent upon the production of the European plants, AB SKF could have at the very least, withdrawn its support for the agreement, and more importantly, it could have put a stop to the illegal arrangement altogether. In short, "voting [133] trust agreement" and "geocentric policy" aside, in the case of the arrangement AB SKF had the power to veto SKF's participation in the conspiracy by simply not supplying the bearings. By supplying the bearings AB SKF ratified the agreement, and made it possible. Indeed the facts described above point conclusively to direct involvement of AB SKF in the conspiracy and theories of vicarious liability may be superfluous. In any event, it is settled law that if the parent has latent power to halt the illegal practices of its subsidiary, and instead even tacitly approves, the parent is liable. *P.F. Collier & Son Corporation v. FTC*, 427 F.2d 261 (6th Cir. 1970) *cert. denied*, 400 U.S. 926 (1970); *Beneficial Corp.*, 86 F.T.C. 119 (1975). *P.F. Collier* is especially pertinent since the Sixth Circuit affirmed the Commission's conclusion on the liability of the parent on two grounds — actual control and tacit approval. After first reaching the conclusion that the parent dominated and controlled the acts of its subsidiaries, the court went on to say:

In the alternative, however, the law is clear that where a parent possesses latent power, through interlocking directorates, for example, to direct the policy of its subsidiary, where it knows of and tacitly approves the use by its subsidiary of deceptive practices in commerce, and where it fails to exercise its influence to curb the illegal trade practices, [134] active participation by it in the affairs of the subsidiary need not be proved to hold the parent vicariously responsible. Under these circumstances, complicity will be presumed.<sup>345</sup>

*P.F. Collier* is not limited, as respondents claim, to instances in which the parent has intentionally and systematically erected shadow subsidiaries for the purpose of defrauding the consuming public. *Jim Walter Corp.*, 3 Trade Reg. Rep. ¶ 21,379, FTC Dkt. 8986 (Dec. 20, 1977) [90 F.T.C. 671]. Nor, as *P.F. Collier* makes plain, is the Commission bound by common law rules relating to "piercing the corporate veil." 427 F.2d at 267. Besides, in this case it is respondent AB SKF who is using the corporate veil for the purpose of concealing its own very direct involvement in a conspiracy.

That an order should run to AB SKF is not only appropriate but

<sup>344</sup> Findings 94, 95.

<sup>345</sup> 427 F.2d at 270.

necessary. The order seeks to prevent purchases and sales between FM and SKF as well as between FM and AB SKF. Given the fact that AB SKF has already shown some proclivity for ignoring the United States antitrust laws,<sup>346</sup> I would [135] not leave open any avenue for evasion.<sup>347</sup>

While I have concluded that the FM-SKF "arrangement" is an illegal market allocation, there is no proof that the challenged acquisitions, either domestic or foreign, have any logical connection with the proven conspiracy or are illegal for valid reasons independent of the FM-SKF arrangement. [136]

#### The Tyson Acquisition

According to complaint counsel, the 1955 acquisition of Tyson by SKF may not have been illegal when it occurred, but it became illegal when SKF entered into the 1971 conspiracy with FM. While it is true that Tyson (with the aid of AB SKF's foreign affiliates) supplied the TRB which was at the heart of the FM-SKF arrangement, the nexus between the conspiracy and the acquisition has never been satisfactorily explained. Complaint counsel seem to be suggesting that if Firm A and Firm B fix prices, and the record shows that B was acquired some 20 years before the price-fix, then the later-day price-fixing makes the acquisition more questionable than it would have been if only the usual structural criteria are considered. Under this theory acquired companies are placed on perpetual parole to be revoked at any time and no matter how slight the connection between the act of acquiring and the subsequent acts of misconduct.

This sort of extreme, attenuated construction of the merger law finds no support in the cases. As it happens, complaint counsel's economic expert more or less conceded that the government had its eye on Tyson not so much because the acquisition was illegal at *any* time but in order to accomplish what it regarded as effective relief in undoing [137] the FM-SKF agreement.<sup>348</sup> Apparently, the government believes that the best remedy in this case would be to create a new

<sup>346</sup> See *United States v. Timken Roller Bearing Co.*, 88 F. Supp. 284 (N.D. Ohio), *aff'd*, 341 U.S. 593 (1951).

<sup>347</sup> The presence in the United States of SKF gives the Commission adequate means of assuring compliance by the parent. W. FUGATE, *FOREIGN COMMERCE AND THE ANTITRUST LAWS* § 3.9 (2d ed. 1973). As for the argument that the laws of European countries like France "requires sales to all comers" (Proposed Findings of Facts, Conclusions of Law and Main Brief of AB SKF, p. 69), there is nothing in the French statute which mandates sales to antitrust violators in the United States. To the contrary, there is a specific exemption in the statute for those cases in which the sale of goods is forbidden by law or regulation. See Ordinance No. 45-1483 (June 30, 1945) amended by Article 37-1a. 3 CCH Common Mkt. Rep., ¶ 23,023. Besides, French statute is an expression of internal policy intended to prevent resale price maintenance in France and is in no way inconsistent with a valid decree aimed at ending an antitrust violation in the United States. C. EDWARDS, *TRADE REGULATION OVERSEAS* 21 (1966). In any event, there is no evidence that any French affiliate of AB SKF is a viable source of supply of TRB to FM. See, *e.g.*, Findings 153-155.

<sup>348</sup> Tr. 2786-98.

TRB company (one combined with Nice, see discussion below), the assumption being that a divested Tyson and Nice would manufacture and distribute TRB to the automotive aftermarket (including FM) and thus restore the full complement of competitors which existed in the automotive aftermarket prior to the FM-SKF arrangement. Actually, it is quite clear that what the government really wants out of this case is the creation of additional TRB competition in the auto aftermarket beyond that which existed in the pre-FM-SKF arrangement days. This additional competition would come about by (1) the creation of a new company in the form of a divested SKF-Nice which would sell to FM and others and (2) the reentry of SKF, on its own, with a new facility to replace the loss of divested Tyson and Nice and then its possible subsequent reappearance in the bearings aftermarket.<sup>349</sup> While I do not disagree with the notion that in tightly concentrated markets the addition of a new competitor is desirable, complaint counsel [138] seem to have lost sight of the fact that an economist's "wish list" does not determine the outcome of antitrust litigation — first, there must be a showing of a connection between the violation and the proposed remedy, and in this case there is none.

Apart from its "contribution" to the FM-SKF conspiracy, complaint counsel do not strenuously attack the 1955 Tyson acquisition. There are ample reasons for such restraint. All that the record will allow on the acquisition as of 1955, or for that matter as of 1977, is the following:

1. The TRB market was highly concentrated in 1955 and 1977. Entry into TRB manufacturing is difficult.<sup>350</sup>

2. SKF (either on its own or with the assistance of AB SKF) was one of the few likely potential entrants, de novo or by "toehold" acquisition into the United States TRB market but complaint counsel failed to prove that in 1955 SKF was perceived as a potential entrant and that such perception in fact tempered behavior in the TRB market.<sup>351</sup>

[139] 3. Prior to the SKF acquisition, Tyson was an expiring homunculus, hanging on by its finger nails in the TRB industry. It made a product of limited application which was not competitive with Timken's TRB. It was in desperate financial straits. It had exhausted a list of potential acquirers. And for all practical purposes it was awaiting bankruptcy.<sup>352</sup>

The Federal Trade Commission investigated the SKF-Tyson acquisition and informed SKF that no action would be taken.<sup>353</sup> Not a

<sup>349</sup> Tr. 2790-91, 2807-08.

<sup>350</sup> Findings 105-111.

<sup>351</sup> Finding 123. *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602 (1974).

<sup>352</sup> Findings 112-122.

<sup>353</sup> Finding 124.

scintilla of evidence was presented during this case indicating that the Commission's earlier judgment was in error. Relying on the Commission's 1955 clearance, substantial sums were invested by SKF in the acquired company, including the construction of a new plant.<sup>354</sup> If the legality of the acquisitions as of 1955 were still a serious issue in this [140] case, I would have concluded that the SKF purchase in 1955 was justified as a pro-competitive "toehold"<sup>355</sup> acquisition of a failing company.<sup>356</sup>

#### The Nice Acquisition

The 1960 acquisition of Nice by SKF is challenged in the complaint as an independent violation of Section 7, as well as part of the "mix" involving the FM-SKF arrangement, the Tyson acquisition, and the foreign acquisitions. Since the record does not show that Nice contributed anything to the supply of automotive bearings destined for FM after 1975, its connection with the "arrangement" is peripheral at best. If there is any connection, it would seem to lie again in the area of relief. Because the government is convinced that the only viable relief for the illegal "arrangement" is to form a new bearing company, the most likely candidate (in addition, of course, to Tyson) is *any* other bearing company that was acquired by SKF and is, therefore, conceivably subject to the traditional Section 7 relief of divestiture.<sup>357</sup> Nice nicely fills the bill [141] although the Commission cleared this acquisition, too, when it took place in 1960. As in the case of Tyson, not a single fact was uncovered which indicates that the earlier determination by the FTC was in error. The facts are:

The ball bearings market was concentrated in 1960, but exact market shares are unknown. SKF apparently had about eight percent of the market and Nice had about two percent. Entry into the bearing industry is difficult.<sup>358</sup>

The direct pre-acquisition competitive overlap between SKF and Nice was slight. SKF manufactured precision ball bearings while Nice made non-precision commercial-grade ball bearings.<sup>359</sup> While it is possible that all bearings constitute a relevant market, complaint counsel have not adequately reconstructed the bearings industry as it existed in 1960 to the point where an informed market definition decision can be made.<sup>360</sup>

<sup>354</sup> Finding 125.

<sup>355</sup> *Bendix Corporation*, 77 F.T.C. 731, vacated, *The Bendix Corp. v. FTC*, 450 F.2d 534 (6th Cir. 1971); *The Budd Co.*, 86 F.T.C. 518 (1975).

<sup>356</sup> *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969); *International Shoe Co. v. FTC*, 280 U.S. 291 (1930).

<sup>357</sup> Tr. 2804-05.

<sup>358</sup> Findings 129-132, 143.

<sup>359</sup> Findings 133-145.

<sup>360</sup> Finding 146.

[142] With the go ahead from the FTC, SKF invested substantial sums in Nice and it is today what it was in 1960, an important, successful bearing company.<sup>361</sup>

On the facts cited above, it is arguable that under the strict standards of the horizontal merger cases, the 1960 acquisition is at least questionable and if the government had presented a more thorough picture of the 1960 bearings market it could conceivably be successfully challenged. There are, however, extenuating circumstances. Although the doctrine of equitable estoppel usually does not apply to the sovereign,<sup>362</sup> *S&H* at least intimates that the Commission must be equitable. Hence commonplace fairness alone would seem to dictate that the Commission not challenge the Nice acquisition unless there are especially compelling reasons for doing so which were not apparent in 1960. Even [143] the cases which have not applied the estoppel doctrine, such as *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947), suggest that although an agency may indeed change its mind, it should at least be required to show that its earlier decision was based on incomplete or erroneous facts, and that an overriding public interest requires a change in a position taken earlier. Here, there is not a single fact which was developed during the hearings which was not known to the FTC staff in 1960 when the Commission gave its go-ahead and respondent invested substantial sums in improving Nice.

As for *United States v. duPont & Co. (General Motors)*, 353 U.S. 586 (1957), which is heavily relied upon by complaint counsel, this case merely allows the government to challenge an acquisition when the effects become apparent. The Supreme Court held that:

The Government may proceed at any time that an acquisition may be said with reasonable probability to contain a threat that it may lead to a restraint of commerce or tend to create a monopoly of a line of commerce.<sup>363</sup>

This was said in the context of a stock acquisition in 1917 which had not been approved by the government, and which was challenged 30 years later when it became clear that stock ownership was being used by duPont to secure General Motors' auto finishes and fabrics business. A horizontal merger, such as the case at hand, presents very different considerations. Here the central issue is the degree of actual [144] competition which existed between the acquiring and acquired firms. Since the firms no longer compete the only relevant time for resolving

<sup>361</sup> Findings 147-148.

<sup>362</sup> Davis, *Administrative Law* §§ 17.01-17.03 (1970) discerns a trend in the opposite direction. See also *United States v. Georgia-Pacific Co.*, 421 F.2d 92 (9th Cir. 1970); *Shell Oil Co. v. Kleppe*, 426 F. Supp. 894 (D. Colo. 1977). In *United States v. American Greetings Corp.*, 168 F. Supp. 45, *aff'd*, 272 F.2d 945 (6th Cir. 1959), the estoppel doctrine was not applied, but failure of the FTC's officers and employees to speak out against a known order violation were circumstances to be considered in ascertaining the amount of the civil penalty.

<sup>363</sup> 353 U.S. at 597.



*that* issue is the period just prior to the acquisition. Certainly (as this record shows), the state of actual competition between acquired and acquiring firms is not likely to be answered with any more clarity with the passage of time. Furthermore, unlike *duPont (General Motors)* this is not a case in which the anticompetitive effects of the acquisition have only slowly surfaced as the leverage derived from stock ownership is applied over many years. Complaint counsel have not cited a single fact which makes this acquisition any more or less anticompetitive in 1978 than it was in 1960. It is being challenged now solely for the purpose of putting together a new bearing company as a form of relief for events ("the arrangement") which took place twelve years after the acquisition and which had no causal connection with the acquisition.

#### Foreign Acquisitions by AB SKF

In contrast to the Nice acquisition which raises a question as to when the sovereign should be held to the same standards as other litigants, the AB SKF foreign acquisitions involve the issue of the very power of the [145] sovereign — namely, under what conditions can the antitrust laws of the United States be invoked to challenge acquisitions outside of the territorial limits of the United States. We do not reach the more intriguing legal aspects of this issue, however, because (a) the Swedish respondent has agreed to submit to the in personam jurisdiction of the Federal Trade Commission for purposes of this case and (b) even if the subject matter — foreign acquisitions by a foreigner — is judged in this case by the *same* standards as would apply to any domestic acquisitions, the government has no case. Note the following points:

1. Some of the mechanical facts alleged in the complaint respecting certain foreign acquisitions are simply dead wrong. Thus contrary to the allegations in Complaint ¶ 34, four Spanish companies had not been acquired and the Australian company (UBCO) manufactured no TRB.<sup>364</sup>

2. None of the foreign companies acquired by AB SKF was ever a significant exporter to the United States.<sup>365</sup>

- [146] 3. There is no evidence that any of the companies acquired by AB SKF were perceived as potential entrants into the United States by anyone, or that their prior existence (independent of AB SKF) affected the American bearings market, or that their acquisition insulated or entrenched the competitive position of SKF or FM in any United States bearing market in any way whatsoever, or that they had

<sup>364</sup> Findings 166, 177.

<sup>365</sup> Findings 154, 157, 159, 162, 167, 168, 177.

any real connection with the FM-SKF "arrangement" which took place six years *after* the only significant merger, the acquisition of RIV.<sup>366</sup>

Quite apart from these gaping holes in the record, the charges in the complaint respecting AB SKF's foreign acquisitions raise difficult questions of conflict between antitrust policy and international law which may have required the use of unique legal standards in order to reconcile considerations of competition, conflicts of law, and comity.<sup>367</sup> This is illustrated by *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976) which involved a conspiracy [147] in Honduras that allegedly affected lumber imports into the United States. The Ninth Circuit's discussion of the extraterritorial application of U.S. antitrust laws, which would limit their use only to those situations involving substantial adverse effects, may apply with equal or greater force to foreign acquisitions since ordinarily an elaborate showing of actual effects is not required in a conspiracy case. The court, in reversing a summary decision, adopted the following tripartite analysis:

We conclude, then, that the problem should be approached in three parts: Does the alleged restraint affect, or was it intended to affect, the foreign commerce of the United States? Is it of such a type and magnitude so as to be cognizable as a violation of the Sherman Act? As a matter of international comity and fairness, should the extraterritorial jurisdiction of the United States be asserted to cover it?<sup>368</sup>

[148] It is at least arguable under *Timberlane* that the potential competition theory should not be applied to acquisitions by foreign firms of companies outside of the United States, and that the extraterritorial reach of Section 7 should be confined to horizontal cases in which substantial actual competition in the United States is at stake. We reach none of the deeper policy implications of *Timberlane*, however, because on the facts of this case there was such a total failure of proof that under any standard of antitrust law applicable to a domestic acquisition, including the "potentiality" doctrine, the foreign

<sup>366</sup> Findings 155, 158, 160, 164, 165, 169, 176, 177.

<sup>367</sup> The conflicts problem may arise, for example, in those circumstances in which foreign acquisitions were cleared by Common Market authorities. Several of the AB SKF acquisitions in Europe fall within this category. Of course, none of these problems apply to the participation, directly or indirectly, of a foreign corporation in a restraint of trade in the United States, such as a conspiracy to allocate U.S. markets. Once *in personam* jurisdiction is obtained (here, conceded) the full array of United States antitrust law applies to acts committed in the United States. *United States v. Scoophony Corp. of America*, 333 U.S. 795 (1948).

<sup>368</sup> 549 F.2d at 615. *Timberlane* is consistent with earlier statements of extraterritorial jurisdiction. In *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) (Hand, J.) acts committed outside of the United States were said to be within the subject matter jurisdiction of the courts under the Sherman Act "if they were intended to affect [foreign commerce] and did affect [it]." 148 F.2d at 444. See also RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 18(b) (1965) (a nation may adjudicate under its own laws controversies that arise from external conduct producing a significant effect inside its territories). Cf. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909) (territorial and comity principles were applied to limit jurisdiction in case in which there was no proof of effect on U.S. commerce and act complained of had been committed by the foreign sovereign itself).

acquisitions of AB SKF do not even come close to being anticompetitive.

## IV

## CONCLUSIONS

1. The Federal Trade Commission has jurisdiction over respondents and the subject matter of this complaint relating to the Tyson and Nice acquisitions and the arrangement between FM and SKF. Because there is no proof that the AB SKF foreign acquisitions had anticompetitive effects in the United States (and thus the first two steps of the tripartite analysis of *Timberlane* are not satisfied) I conclude that the Commission lacks jurisdiction to challenge these foreign acquisitions by a foreign firm. [149]

2. There was a total failure of proof that the SKF acquisition of Tyson was anticompetitive when it occurred or that the Commission's judgment in giving its clearance to this toe-hold acquisition of a failing company in 1955 was in error.

3. There was a total failure of proof that the all bearing market is an economically viable market or that the Commission's judgment in giving its approval to the Nice acquisition in 1963 was in error.

4. There was a total failure of proof that the bearings acquisitions made by AB SKF outside the United States had any effect whatsoever on any United States market.

5. The FM-SKF arrangement was a conspiratorial agreement to allocate markets in the United States. The act took place in commerce and affected commerce within the meaning of the Federal Trade Commission Act. This conspiracy constitutes an unfair method of competition, and an unfair act and practice in violation of Section 5 of the Federal Trade Commission Act (U.S.C. Title 15, Section 45).

Accordingly, the following order should be issued: [150]

## ORDER

## I

## PREFACE

This order shall be binding on Federal-Mogul Corporation, SKF Industries, Inc., and Aktiebolaget SKF; their subsidiaries, any concern controlled by a respondent, including joint ventures; their successors and assigns, and their officers, agents, representatives, and employees.

Opinion

94 F.T.C.

## II

*It is ordered,* That respondent Federal-Mogul Corporation shall not purchase from, and respondent SKF Industries, Inc. and respondent Aktiebolaget SKF shall not furnish and sell to respondent Federal-Mogul Corporation, tapered roller bearings having an outside diameter of zero to four inches after the contract and other agreements identified in Paragraph III below, are cancelled.

## III

*It is further ordered,* That the agreement signed by SKF Industries, Inc. and Federal-Mogul Corporation on December 17, 1974, and any similar arrangements between SKF Industries, Inc. and Federal-Mogul Corporation shall be cancelled effective one year from the date this order shall become final. [151]

## IV

*It is further ordered,* That each respondent shall notify all persons having sales and policy responsibilities in its organization of the terms of the order and publish same in at least two major trade journals or periodicals twice annually for each of two years from the effective date of this order.

## V

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

## VI

*It is further ordered,* That within sixty (60) days after the effective date of this order, each respondent shall file with the Federal Trade Commission a written report setting forth in detail the manner and form of its compliance with this order.

## OPINION OF THE COMMISSION

BY CLANTON, *Commissioner*:

This case principally concerns an arrangement among the respondent corporations which, it is alleged, constitutes an illegal allocation

of markets. The peculiar facts of the case are susceptible to analysis under several different antitrust rubrics. Respondents contend that the arrangement in question is merely a slightly embellished vertical supply contract, the effects of which upon competition, if any, must be measured by the rule of reason standard and thereby be declared lawful. Complaint counsel, however, argue that the arrangement constitutes a *per se* unlawful market division.

Administrative Law Judge Morton Needelman ("the ALJ") found that respondents Federal-Mogul Corp. ("FM") and SKF Industries, Inc. ("SKF") had agreed to a conspiratorial scheme to allocate markets within the United States. He held that the challenged arrangement constituted a violation of Section 1 of the Sherman Act, 15 U.S.C. 1 (1976), and therefore of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45 (1976). He determined that [2] the appropriate relief was to compel SKF and its parent company to cease dealing with FM within one year. The ALJ dismissed a series of other charges, which had alleged that several acquisitions by respondents SKF and its parent Aktiebolaget SKF ("AB SKF") were either unlawful or were part of a pattern of unlawful conduct.

Both complaint counsel and respondents have appealed from the ALJ's determinations. After establishing the setting, we will first consider complaint counsel's appeal.<sup>1</sup>

## I

## BACKGROUND

## A. The Parties

FM, a Michigan corporation, manufactures and distributes in the United States a range of automotive products, including ball bearings and some tapered roller bearings ("TRB"). (IDF 1, 4) AB SKF, a Swedish corporation, is the world's largest bearings producer and one

<sup>1</sup> The following abbreviations are used in this opinion:

ID	- Initial Decision, Page No.
IDF	- Initial Decision, Finding No.
CX	- Complaint Counsel Exhibit No.
RSX	- Respondent SKF Exhibit No.
RAX	- Respondent AB SKF Exhibit No.
RFX	- Respondent FM Exhibit No.
Tr.	- Transcript of Testimony, Page No.
TROA	- Transcript of Oral Argument, Page No.
CAPB	- Complaint Counsel's Appeal Brief, Page No.
RSAPB	- Respondent SKF's Appeal Brief, Page No.
RFAPB	- Respondent FM's Appeal Brief, Page No.
CAB	- Complaint Counsel's Answering Brief, Page No.
RSAB	- Respondent SKF's Answering Brief, Page No.
RSRB	- Respondent SKF's Reply Brief, Page No.
RFRB	- Respondent FM's Reply Brief, Page No.

of the world's three largest producers of TRB. (IDF 7) SKF, a Delaware corporation, is beneficially owned by AB SKF under the terms of a voting trust agreement. (IDF 10, 15) Since 1955, SKF has manufactured and sold bearings, including TRB, in the United States. (IDF 11, 14) In 1972, however, SKF shut down its Automotive Products Division subsidiary ("APD"), which, in competition with FM, had distributed bearings and other automotive products to "warehouse dealers" who resold those products in the U.S. automotive aftermarket. (IDF 44, 87 & n.155) The circumstances surrounding the termination of APD are among those central to the disposition of respondents' appeal.

#### B. The Products

Many kinds of bearings are sold in the U.S. aftermarket, including ball bearings, cylindrical, needle, and spherical roller bearings, and TRB. (IDF 21; Tr. 2752) Each type of [3] bearing has a distinct vehicular or non-vehicular application, although all bearings are used to absorb loads and reduce friction between rotating machine parts.

TRB manufacture is sophisticated, expensive, and requires special machinery. (ID 67 n.183) TRB have unique performance characteristics and are not sensitive to price changes among other types of bearings. (*Id.*) Once a product has been designed to require use of TRB, another type of bearing cannot be substituted without effecting basic design changes, an expensive and infrequently undertaken process. (*Id.*) Ninety percent of the TRB used in passenger car automotive applications are in the 0" to 4" outer diameter range. (IDF 21; Tr. 1347, 2863)

The ALJ found, and we agree, that the manufacture of TRB, and the distribution of bearings generally, including TRB, to the U.S. independent automotive aftermarket are distinct, relevant lines of commerce.<sup>2</sup> (IDF 20-22, 104) Each of these markets is highly concentrated, and barriers to new entry in each are substantial. (IDF 23, 24, 25, 105, 110) It is undisputed that the proper geographic market in each instance is the United States as a whole. (IDF 19) In 1971, FM had the largest share of the distribution market, holding 36%, while SKF ranked third with 8%.<sup>3</sup> (IDF 23) The ALJ did not find that the record established the existence of an overall "all ball bearings" market, including both precision and commercial grade ball bearings. (ID 141)

<sup>2</sup> This latter market should be distinguished from the sale of bearings to automobile manufacturers for use as original equipment in new vehicles. This so-called OEM market, as distinguished from the market for replacement bearings, is not directly pertinent to the instant case. The OEM market for TRB is dominated by The Timken Co., the largest U.S. manufacturer of such bearings. (IDF 30 & n.62, 108; CX 190H) The ALJ also found, and respondents do not challenge his conclusion on appeal, that sales of replacement bearings to the independent automotive aftermarket were properly distinguished from sales of replacement bearings to the "OE (original equipment) service market," the sole purchasers in which are car dealers franchised by the automakers. (IDF 22)

<sup>3</sup> With respect to distribution to the independent automotive aftermarket of TRB specifically, the Initial Decision indicates that FM was responsible for 48% of all sales and SKF for 5%. (IDF 24)

### C. Contentions of Counsel Supporting the Complaint

Complaint counsel charge that since 1955, acting alone or in concert, respondents have engaged in a pattern of anticompetitive conduct which has reduced competition in three U.S. bearings markets: manufacture and sale of TRB, manufacture and sale of ball bearings, and distribution of bearings generally, including TRB, to the independent automotive aftermarket. [4]

As elements of this pattern, complaint counsel challenge two domestic acquisitions by SKF, that of Tyson Bearing Corp. ("Tyson"), a manufacturer of TRB, in 1955, and that of Nice Ball Bearing Company ("Nice"), a manufacturer of ball bearings, in 1960. Complaint counsel also contest a series of acquisitions by AB SKF of TRB and ball bearing manufacturers located outside the United States, the purpose or effect of which, supposedly, was to insulate SKF from foreign competition, both actual and potential. Finally, and most importantly, complaint counsel attack an "arrangement," allegedly consummated in early 1972, between FM and SKF. Pursuant thereto, SKF purportedly agreed that it would continue to manufacture automotive bearings, including TRB, but would withdraw from the distribution of all bearings to the aftermarket and would attempt to transfer its distribution accounts to FM. FM, in turn, allegedly agreed to continue to distribute bearings to the aftermarket, but to cease manufacture of 0"-4" TRB and to source its product needs from SKF. (Complaint, Paragraphs 15, 16, 17, 34 & 35) In furtherance of the arrangement, FM allegedly terminated discussions concerning a proposed manufacturing joint venture with a Japanese concern ("Koyo Seiko") and forebore from reentering the manufacturing sector for 0"-4" TRB on its own. Through this alleged division of markets, competition between FM and SKF was eliminated at both the manufacturing and distribution levels.<sup>4</sup>

Elements of this "plan of anticompetitive behavior" (CAB 7) are challenged both individually and as a part of an overall scheme. (Complaint, Paragraphs 34, 35)

### D. Respondents' Defenses

<sup>4</sup> In their post-trial brief, complaint counsel explicitly raised for the first time the contention that FM's agreement to service the aftermarket accounts of SKF's distribution subsidiary constituted an unlawful acquisition under Section 5 of the FTC Act. No violation of Section 7 of the Clayton Act was alleged. The theory was premised principally upon the claim that FM unlawfully "acquired" intangible assets from SKF. See *United States v. Columbia Pictures Corp.*, 189 F. Supp. 153, 182 & n.4 (S.D.N.Y. 1960); *Farm Journal, Inc.*, 53 F.T.C. 26, 48-49 (1956). While the market share and concentration data arguably could have supported such a theory, but see ID 125 n.383, we think it wisest not to consider this allegation. At best, the complaint and trial dealt with an acquisition theory only ambiguously, by addressing competitive issues that are also relevant to a Clayton Act Section 7 (or related FTC Act Section 5) charge. In view of this circumstance and of our disposition of respondents' appeal, we refrain from reaching this issue.

Respondents contend principally that the 1955 acquisition of Tyson by SKF was a toehold acquisition by a new entrant of a failing company and was therefore lawful; and that the 1960 acquisition of Nice was lawful, because Nice and SKF were not actual competitors in any market. Respondents also contend, and the ALJ found, that there was a failure of proof with respect to any anticompetitive effects manifested in the United States as a result of AB SKF's overseas acquisitions. [5]

With respect to the allegations concerning the 1972 FM-SKF "arrangement," respondents contend principally that proof of an agreement was insufficient and that even if the Commission finds an agreement, its legality must be measured against a rule of reason standard, under which it should be adjudged to be lawful.

#### E. The ALJ's Findings

The ALJ separately considered each element of respondents' alleged course of conduct and concluded that no unlawful pattern had been established. He did, however, find a distinct law violation springing from the FM-SKF "arrangement." Because we concur generally in the findings of fact made by the ALJ and because those findings are set out in detail in the Initial Decision, we will simply relate certain of the more central findings in connection with our discussion of the merits of the case.

## II

### COMPLAINT COUNSEL'S APPEAL

The record shows the following with respect to the facts underlying complaint counsel's appeal:

#### A. Tyson Acquisition

Tyson Bearing Corp., before its acquisition by SKF, had manufactured a cageless-type TRB, which was not a suitable commercial alternative to the cage-type TRB manufactured by the dominant firm in the industry, Timken Roller Bearing Co. (now known as "The Timken Co."). (IDF 114) As a result, Tyson had suffered a significant competitive disadvantage. Its conversion process to cage-type bearings, once undertaken, was expensive and sorely depleted Tyson's already scarce capital. (IDF 114; CX 421B) Tyson was also handicapped by the fact that it offered only a limited line of products. (IDF 115; CX 352H; Tr. 1466)

Tyson had a lengthy history of operating losses, and repeatedly



teetered on the brink of collapse. (IDF 116, 117) From 1948 to 1950 the company borrowed heavily from the Reconstruction Finance Corporation ("RFC"), but it was unable to make payments on these loans on a timely basis. (IDF 117) After several defaults, RFC, which had a security interest in virtually all the assets of the company, demanded that Tyson be sold or merged into another firm with assets adequate to retire or substantially reduce the indebtedness to RFC. (IDF 117; CX 16G, H; RSX 30F; RSX 23A-I) By December 1954, Tyson had made sale or merger overtures to a dozen companies and had been rebuffed by each. (IDF 119, CX 315A-B; RSX 11A-B, 12, 24A-B; Tr. 1432) By the time it approached SKF, any other form of debt or equity financing was foreclosed. (IDF 121; CX 421C (No. 15); Tr. 1437-38) SKF agreed to acquire Tyson, which then had about 2% of the market for TRB production, in March 1955. (CX 421C (No. 15)) Federal Trade Commission approval of [6] the acquisition was sought, and the Commission informed SKF in 1956 that no action would be taken. (IDF 124; CX 16A-V; RSX 4) Thereafter, SKF remodeled Tyson's existing factory and constructed a new facility in 1965. (IDF 125) Since 1955, SKF has invested \$27 million in its Tyson division. (Tr. 1462-64, 1524)

Complaint counsel no longer challenge the Tyson acquisition independently, but concede that it was lawful when consummated. Rather, they argue that the acquisition was part of a pattern of conduct, including the foreign acquisitions by AB SKF of TRB producers and the alleged market division agreement between SKF and FM, which unlawfully restricted competition in violation of Section 5 of the FTC Act.

#### B. Nice Acquisition

In 1960, SKF acquired Nice Ball Bearing Company, which manufactured ball bearings at plants located in Pennsylvania. (IDF 126-127) In an "all ball bearing" market, as alleged by complaint counsel, SKF's pre-acquisition market share, measured by shipment volume, was 8.3% and that of Nice was 2.2%. (IDF 132) Four-firm concentration in this "market" in 1958 was 66%, and eight-firm concentration was 81%. (IDF 130; CX 3B) At the time of the acquisition concentration, though still high, was trending downward. (*Id.*) In 1961, the Federal Trade Commission investigated the Nice acquisition and re-investigated the Tyson acquisition. (IDF 124, 147; RSX 59A-Z-49, 60) It informed SKF in 1963 that no action would be taken with respect to either unless subsequent developments so warranted. (RSX 60) Thereafter SKF invested \$5-\$6 million in Nice to construct new facilities and purchase new equipment. (IDF 148; Tr. 1528)

SKF contests the existence of an "all ball bearing" market. It claims

that in 1960 Nice produced non-precision, commercial grade bearings of less than ABEC-1 quality, while SKF made only precision bearings of ABEC-1 or better quality.<sup>5</sup> According to SKF, its bearings and those manufactured by Nice were not realistically interchangeable for end use and were purchased by distinct customers for distinct applications.<sup>6</sup> SKF also contends that re-examination of both the Tyson and Nice acquisitions is barred by the doctrines of laches and estoppel. [7]

The issues with respect to the Nice acquisition are principally two: whether SKF and Nice were competitors in an "all ball bearings" market and, if so, whether the acquisition substantially lessened competition in that market. Complaint counsel also raise separately the issue of whether a distinct Section 5 violation was made out by reason of a combination of the Nice acquisition with AB SKF's subsequent acquisitions of foreign ball bearing manufacturers constituting a "systematic course of conduct . . . to eliminate actual and potential competition in the United States ball bearing market . . . ." (CAPB 42)

### C. AB SKF's Acquisitions of Foreign Bearings Manufacturers

During the last 30 years, AB SKF has acquired a large number of TRB manufacturers that were located outside of the United States and that exported little or no TRB to the United States. (IDF 152-169) Complaint counsel allege that these acquisitions, even if not distinct violations of § 5 of the FTC Act, are part of a pattern of AB SKF conduct that has had an adverse impact on the domestic bearings market by eliminating foreign firms that otherwise could have competed against SKF's Tyson division by exporting TRB to the U.S. market. By eliminating this potential competition, AB SKF allegedly insulated SKF's position in the U.S. market. A precisely analogous claim is made with respect to AB SKF's acquisitions of a lesser number of foreign ball bearings manufacturers following SKF's acquisition of Nice. (IDF 177)

Between 1950 and 1970, AB SKF acquired TRB producers located in France, Yugoslavia, Italy, Spain, Argentina, and Mexico. (IDF 152) Prior to their acquisition by AB SKF, none of the acquirees, save for the Italian firm, had ever exported any TRB to the United States. (IDF 154, 157, 159, 162, 167, 168) With respect to each, the ALJ found that these firms lacked the interest, capability and intent to enter the

<sup>5</sup> Bearings range in increasing quality from unground, to ground, to ABEC-1 to ABEC-9.

<sup>6</sup> Generally, better quality bearings can be substituted for and can perform the functions of poorer bearings, but the opposite is untrue. Hence, SKF contends that Nice realistically could not have and, in fact, did not compete for the same accounts as did SKF in 1960.

U.S. market or to become a viable factor in that market. (IDF 155, 158, 160, 169) Similarly, with respect to each, the ALJ found that no proof was presented that the acquired firms were perceived by any domestic firms as potential competitors in any form. (*Id.*; IDF 165) The same conclusions were reached with respect to the acquired ball bearings firms. (IDF 177)

The Italian firm ("RIV"), which previously had maintained a U.S. sales office, did export a modest amount of TRB to the United States prior to its acquisition by AB SKF in 1965. (IDF 164; RAX 262A; Tr. 1276-80, 1291) Such exports, which increased between 1965 and 1974, exceeded pre-acquisition levels, but amounted to less than one percent of RIV's sales in both 1965 and 1974. (IDF 162, 163; CX 253Z-5 (No. 50) *in camera*, 253Z-6 (No. 52) *in camera*, 253Z-7-8 (No. 54) *in camera*) The ALJ found that AB SKF had not squelched RIV's latent export potential, but that RIV held no promise of ever becoming a major factor in the U.S. market, and that there was no evidence that any domestic producer perceived it as a potential entrant into the U.S. on a meaningful scale. (IDF 165)

Generally, bearings imported by SKF from companies acquired by AB SKF, including RIV, have not played a major role in [8] supplying FM's needs under the SKF-FM arrangement.<sup>7</sup> (IDF 176) Thus, even given an assured buyer, SKF apparently has not found it economically sound to import any substantial volume of TRB from the foreign companies acquired by AB SKF.

#### D. Disposition of Complaint Counsel's Appeal

We are persuaded that complaint counsel's contentions, though imaginative, are without merit.<sup>8</sup>

As complaint counsel seem to recognize, the Tyson acquisition, when viewed independently, is not susceptible to any serious legal attack. Even under the most stringent application of the failing company doctrine, Tyson qualified at the time of its 1955 acquisition as a failing company. The firm was on the brink of bankruptcy, had a negative

<sup>7</sup> The principal foreign source of bearings sold to FM, until such imports were terminated after 1975, was the United Kingdom plant of AB SKF at Luton, England, which was built by a company formed by AB SKF in 1911. RIV was a significant source of bearings sold to FM only in 1973. (CX 253B-H *in camera*)

<sup>8</sup> We reach the merits of complaint counsel's appeal because we disagree with respondents that any aspect of this appeal is necessarily barred by the doctrines of estoppel and laches. It is well established that the doctrine of equitable estoppel does not apply against the government, e.g., *Utah Power & Light Co. v. United States*, 243 U.S. 389, 408-409 (1917), and in any event, the "clearances" given to SKF to proceed with the Tyson and Nice acquisitions were properly qualified, and did not bar future action by the Commission.

It is equally clear that laches is not a defense to an action brought by the government in the public interest. *Times-Picayune v. United States*, 345 U.S. 594, 623-624 (1953); *United States v. Firestone Tire & Rubber Co.*, 374 F. Supp. 431, 433 (N.D. Ohio 1974). The parties disagree sharply about the proper interpretation of *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 597-598 (1957), but it is at least clear from that case that the government may challenge a merger at whatever time its anticompetitive effects become apparent. Thus, we do not believe that laches flatly bars a challenge to these acquisitions.

cash flow, had pledged virtually all of its assets, had no remaining debt or equity opportunities to raise cash, and had been rebuffed by a dozen other companies which it had approached in the hope that one would acquire it. Moreover, even apart from any failing company defense, the acquisition of Tyson, with a 2% market share, by a potential entrant into the U.S. TRB market clearly constituted a legitimate toehold acquisition. Indeed, putting aside the question of other effects resulting from the subsequent foreign acquisitions by AB SKF and the SKF-FM arrangement, it can be argued that the acquisition had a potentially beneficial impact by injecting a significant competitive stimulus into the U.S. TRB market. In fact, following the acquisition, Tyson's share of the aftermarket for TRB rose from 2% to 6% and that market did not become further concentrated. [9]

At issue, then, is whether the Tyson acquisition served as the springboard for SKF's parent, AB SKF, not only to enter the U.S. market but to take further steps to insulate and enhance its market position by systematically buying up potential foreign entrants. Ultimately, complaint counsel assert, the anticompetitive effects of these practices were clearly manifested in the dealings between SKF and FM. By cutting off access to other possible sources of supply, it is contended that SKF was in a position to negotiate the kind of arrangement it did with FM. Before addressing this issue, however, we will first discuss the separate legal implications of the Nice acquisition and then turn to the similar questions raised by the acquisitions of foreign ball bearings and TRB firms.

With respect to the Nice acquisition, which complaint counsel do independently challenge, much ink is spilled by counsel debating the accuracy of Judge Needelman's conclusion that SKF and Nice were not actual competitors in 1960 because separate product markets existed for commercial grade and ABEC-1 or better ball bearings. Counsel have submitted lengthy dissertations on the meaning of quality and on the interchangeability of use among different quality ball bearings.<sup>9</sup> After reviewing the evidence, we believe that while SKF and Nice competed principally in different submarkets, both firms also were

<sup>9</sup> We are left feeling something like the author of *Zen and the Art of Motorcycle Maintenance* (Bantam Books 1976), Robert M. Firsig, who wrote, at p. 178:

Quality . . . you know what it is, yet you don't know what it is. But that's self-contradictory. But some things are better than others, that is, they have more quality. But when you try to say what the quality is, apart from the things that have it, it all goes poof! There's nothing to talk about. But if you can't say what Quality is, how do you know what it is, or how do you know that it even exists? If no one knows what it is, then for all practical purposes it doesn't exist at all. But for all practical purposes it really does exist. \* \* \* Obviously some things are better than others . . . but what's the "betterness"? . . . So round and round you go, spinning mental wheels and nowhere finding anyplace to get traction. What the hell is Quality? What is it?

We express no opinion on whether Mr. Firsig would have gotten better traction had he employed bearings of ABEC-1 or better quality when spinning his mental wheels.

part of a broad overall ball bearings market, in which all ball bearings may be arrayed along a continuous spectrum of quality. *Cf. Coca-Cola Bottling Co. of New York*, Dkt. 8992, issued Jan. 23, 1979, 3 Trade Reg. Rep. (CCH) ¶21,514 [93 F.T.C. 110]. [10]

SKF's position may be summarized as follows: Better quality bearings (made of better materials or ground and polished with greater precision) can almost always be substituted for lesser precision bearings of the same dimension, but the reverse is not true. Rational businessmen, however, will not and do not use a higher quality (and more expensive) bearing if a lesser quality bearing is adequate for the job. For all practical purposes, therefore, Nice (which made only lesser precision bearings) was ordinarily foreclosed from competing with SKF for customers, since SKF's customers were compelled to use only high quality bearings (which SKF made to the exclusion of all others). While the record does show some potential overlap for end use between SKF's and Nice's bearings in the marginal range of quality near ABEC-1, and while Nice did make efforts to convince Ford Motor Co. and possibly others that its lower quality bearings could satisfactorily be substituted for the ABEC-1 bearings then used by those companies, SKF and Nice were not substantial, direct competitors.

We agree with SKF that the record shows that in 1960 SKF and Nice generally sold different quality bearings (Tr. 787) to different customers<sup>10</sup> for different applications.<sup>11</sup> We also agree that there is little evidence of significant cross-elasticity of demand or price sensitivity among most precision and commercial ball bearings. On the contrary, distinct prices, which are a function of quality and specialized use, generally seem to prevail. Finally, precision and commercial bearings typically are manufactured on different (albeit similar) equipment, and manufacture of the former requires a greater level of skill than does manufacture of the latter.

Complaint counsel contend vigorously that this evidence does no more than establish that SKF and Nice competed principally in different submarkets of an overall "ball bearings" market. They assert that all ball bearings serve the same general functions, irrespective of the quality of any given product. *Cf. Liggett & Myers Inc.*, 87 F.T.C. 1074 (1976), *aff'd*, 567 F.2d 1273 (4th Cir. 1977) (Both premium and economy dog food fulfilled same essential purpose and were part of a broad, overall dog food market). Complaint counsel allege also that the existence of a spectrum of quality and prices does not negate the fact

<sup>10</sup> Ford Motor Company, which bought generator bearings from both SKF and Nice, is the only common customer revealed by the record. (IDF 144, 146; Tr. 1564-65)

<sup>11</sup> Precision bearings of ABEC-1 quality or better are used in applications where load, speed, precision and longevity requirements are severe. Commercial grade bearings are used wherever these requirements are less important. (IDF 141)

of competition among some firms in the overall market, including SKF and Nice. See, e.g., *Brown Shoe Co. v. United States*, [11] 370 U.S. 294, 326 (1962); *United States v. Phillipsburg National Bank*, 399 U.S. 350, 360 (1970) (“[S]ubmarkets are not a basis for the disregard of a broader line of commerce that has economic significance”). They contend that while bearings at different ends of the quality spectrum do not compete with one another, bearings at adjacent levels of precision may compete, even if they are not necessarily interchangeable for use in a given application that requires the better quality bearing. (Tr. 2762, 2764) The record shows that Nice, for example, made strenuous efforts to persuade ABEC-1 users to switch to commercial grade bearings, contending that ABEC bearings were frequently “over engineered” for their common, less severe needs. (CX 278B, 280B, 298B; Tr. 1592-94). And while Nice’s success in this exercise was somewhat limited, other commercial grade ball bearings manufacturers also found opportunities to induce product substitutions. (CX 390Z-26-29; Tr. 1387, 2557-61, 2564-65). Complaint counsel assert too that SKF, which manufactured a line of ABEC-1 bearings, monitored the market for sales of bearings of below ABEC-1 quality, and that Nice, in turn, before its acquisition, closely monitored sales of ABEC-1 standard bearings, including those of SKF. Complaint counsel contend, therefore, that the manufacture and sale of all ball bearings is a market “sufficiently inclusive to be meaningful in terms of trade realities.” *United States v. Philadelphia National Bank*, 374 U.S. 321, 357 (1963), citing *Crown Zellerbach Corp. v. FTC*, 296 F.2d 800, 811 (9th Cir. 1961), cert. denied, 370 U.S. 937 (1962).

We believe, on balance, that the record supports the existence of an overall “ball bearings” market.<sup>12</sup> In particular, the overlap or potential interchangeability of use of SKF and Nice ball bearings in the range of quality near ABEC-1 suggests the existence of a spectrum of ball bearings products reposing within a broad market. Cf. *United States v. Continental Can Co.*, 378 U.S. 441 (1964). Because this market is so fragmented, however, a finding that the Nice acquisition was unlawful would have to be predicated upon statistical or non-statistical evidence of anticompetitive effect in this overall market that is rather more compelling than in the ordinary case, where substantial cross-elasticity of demand, interchangeability of use, or production flexibility may be presumed to exist. Such evidence, however, is rather meager. The statistical market shares (8.3% for SKF and 2.2% for Nice), while held sufficiently great in the two cases principally relied upon by complaint counsel (CAPB 42-43), *United States v. Von’s Grocery Co.*, 384 U.S. 270

<sup>12</sup> All parties agree that such a market should, in any event, exclude so-called miniature bearings.

(1966); *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966), are, nonetheless, not high and in this case do not reflect substantial, direct competition between SKF and Nice in the sale of ball bearings. The only concentration trend data in the record is post-acquisition, and it reveals a significant decrease in both 4-firm and 8-firm concentration in this weak, overall market in the years following [12] the merger.<sup>13</sup> Thus, absent compelling evidence pointing to subsequent anticompetitive developments or effects associated with the acquisition, to which we turn next, we will not disturb the merger.

With respect to AB SKF's acquisitions of foreign ball bearings and TRB manufacturers, it should be noted at the outset that the theory of the complaint, while imaginative, might be more convincing had SKF, which allegedly was to be insulated from foreign competition, held a more dominant position in the U.S. market. The prospect of a foreign parent systematically acquiring foreign potential entrants in order to protect its subsidiary's monopoly profits in the U.S. market is rational only if that subsidiary has substantial domestic market power. But SKF's market share of TRB production has never exceeded 6.1% (IDF 108), and, though higher, its market share of the "all ball bearings" market has hovered at about 15% in recent years (IDF 131). In neither case is it seriously contended that SKF has the power to influence substantially the market price of these products. It ranks no higher than fourth in either market. By contrast, it is universally conceded that in the market for TRB manufacture both domestic respondents herein labor in the shadow of a giant domestic roller bearings concern, The Timken Co., which, the ALJ found, has "overwhelming dominance" in the domestic market for TRB production (ID 68-71). Indeed, at the time of AB SKF's earliest challenged acquisitions in the 1950's, when it is alleged to have embarked upon a scheme to "insulate" SKF from competition, Timken's domestic TRB production market share ranged between 60% and 80%. (IDF 107) In 1971, Timken's TRB market share was 55%; by 1976, it approached 70% (ID 70 & n.190).

More importantly, no satisfactory competitive nexus has been shown by complaint counsel between the AB SKF acquisitions and either the Tyson or Nice acquisitions. The record simply fails to reveal any linkage or special market factors connecting these widely scattered events from which a reasonable inference of anticompetitive purpose or effect could be drawn. Each of the acquisitions, when analyzed separately, exhibits few characteristics suggesting any significant competitive impact in the U.S. market. Many of the firms acquired

<sup>13</sup> Four-firm and 8-firm concentrations fell from 66% to 57%, and 81% to 72%, respectively, between 1958 and 1972 (IDF 130; CX 3B), notwithstanding the allegedly anticompetitive acquisitions of foreign ball bearings manufacturers by AB SKF during this same time period. SKF's market share, however, did increase after the merger to roughly 15%.

were relatively small and demonstrated no real capability or potential for penetrating the U.S. market. In addition, some of the acquisitions were, in fact, joint ventures or acquisitions of new minority interests. Even RIV, probably the most significant of the acquired firms, showed no likely potential for entry into the domestic [13] market in a substantial way. Though it did ship some bearings to the U.S. prior to being purchased by AB SKF, and later supplied some TRB to FM after the SKF-FM arrangement was consummated, these exports constituted only a tiny fraction of RIV's business. Moreover, as we have noted previously (*see* note 7 *supra* and accompanying text), RIV supplied FM to any degree only on a temporary basis. Thus, but for the fact of these limited exports, there is no persuasive evidence that the firm could reasonably have been expected to become a viable presence in the U.S. market.

Likewise, the record provides little clue about the combined effect of AB SKF's acquisitions. While the cumulative impact of many such acquisitions could injure domestic competition to such an extent as to violate Section 5, inadequate proof was offered. We simply cannot discern from this record any adverse synergistic effects from the multiple acquisitions that would warrant finding liability. For example, there is no proof that FM, or any other domestic bearings distributor, could have feasibly turned to some combination of these foreign firms to procure its needs. Nor is it clear that these firms could otherwise have effected significant entry into the U.S. market through some joint endeavor or less anticompetitive acquisition.

In short, we must agree with the conclusion reached by the ALJ that:

There is no evidence that any of the companies acquired by AB SKF were perceived as potential entrants into the United States by anyone, or that their prior existence (independent of AB SKF) affected the American bearings market, or that their acquisition insulated or entrenched the competitive position of SKF or FM in any United States bearing market in any way whatsoever, or that they had any real connection with the FM-SKF "arrangement" which took place six years *after* the only significant merger, the acquisition of RIV. (ID 146) (Emphasis in original)

Because of the failure of proof, complaint counsel's appeal is dismissed.

### III

#### RESPONDENTS' APPEAL

##### A. Statement of Facts



In 1971 FM, which had total sales of \$270 million, manufactured TRB at two plants located in Michigan and one [14] in Illinois. (IDF 1, 2) The latter plant, which is still open, is of little significance in this case, since it produces only straight roller bearings and TRB with an outer diameter of 8" or more. (IDF 3) The two Michigan plants, however, manufactured TRB of 0" to 4" outer diameter, and these facilities had suffered sharply declining profits from 1964 to 1970. (IDF 28, 31)

A consulting firm had advised FM in 1970 that it should withdraw from both production and distribution of 0"-4" TRB. (IDF 32, 33) In the spring and summer of 1971, FM decided to close the Michigan facilities, but to remain in the TRB business as a distributor to the aftermarket, procuring its supply needs elsewhere. (IDF 35) FM feared that withdrawal from TRB distribution would have an adverse impact on its sales of other products, since its customers, so-called warehouse distributors, preferred to obtain a full line of products from a single supplier. (IDF 36, 38) Following a board of directors meeting, FM announced in October 1971, that the Michigan facilities would be shut down.<sup>14</sup> (IDF 39)

In anticipation of the board decision to close the Michigan plants, FM had begun exploring alternative sources of TRB as early as February 1971. (IDF 47) Discussions with NDH, a division of General Motors, were unfruitful, because NDH produced TRB primarily for General Motors' captive use and lacked adequate capacity to service FM's needs also. (IDF 50; Tr. 1203-04, 2156-57) The Timken Co. simply refused to sell TRB to FM, although it had ample capacity; upon the advice of counsel it asserted a right to refuse to deal. (Tr. 496-497, 2154-56) Other domestic and foreign bearings firms apparently were also unable to fill FM's product requirements.

Two possibilities remained, other than continuing production at the Michigan plants. First, a Japanese company, Koyo Seiko, which was an actual potential entrant into the U.S. [15] market,<sup>15</sup> was interested in a proposed joint venture to manufacture certain fast-moving, high volume TRB. (IDF 48, 53) Second, FM could try to source some or all of its TRB needs from SKF. (IDF 52)

SKF was well situated to respond to an overture from FM. In addition to its Tyson facilities in the U.S., which at that time lacked sufficient capacity to meet FM's requirements, it theoretically could

<sup>14</sup> The two plants in fact operated until June 1973 and March 1974, respectively. Prior to shutdown, FM manufactured an "all-time" (five-year) inventory of 200 slow moving, low volume 0"-4" TRB part numbers. (CX 107; Tr. 2338, 2470-71)

<sup>15</sup> After the joint venture discussions with FM terminated, Koyo Seiko in fact made a *de novo* entry into the U.S. manufacturing market, opening a facility in South Carolina, which assembles 0"-4" TRB from parts imported from Japan. (ID 55 n. 48)

call upon its parent's overseas capacity, since AB SKF was one of the three largest TRB producers in the world.<sup>16</sup>

Simultaneous discussions with Koyo Seiko and SKF began in May 1971 (IDF 52, 53), and over the next several months the advantages and limitations of dealing with each became apparent. Koyo Seiko could agree to the assembly of only seven out of thirty high volume TRB part numbers (ID 40 n.98), meaning that even if (as appeared likely) the joint venture could result in the lowest cost to FM for these items (see IDF 53; Tr. 2127-28), the problem of sourcing the other parts would remain, and it would be difficult to find a manufacturer willing to supply those parts while foregoing production and sale to FM of the more profitable, higher volume items. (Tr. 2135-37) SKF, on the other hand, offered the prospect of a full line of supply, albeit perhaps at a higher price. (IDF 52 & n.97, 62, 74) It was also apparent that SKF would be dependent in part upon an overseas source if it was to fulfill all of FM's TRB requirements. (IDF 52 & n.97, 74) FM did not initially offer SKF the opportunity to supply a full TRB line, including the seven high volume numbers. (IDF 71; Tr. 2475; CX 103, 264A) [16]

During a September 1971 meeting between SKF and FM concerning TRB supply, principals of the two corporations also discussed the future of SKF's distribution subsidiary, APD. (IDF 63; Tr. 2161-69) APD offered but a single line of products, bearings, for distribution to the automotive aftermarket. (IDF 42) APD's line included clutch release bearings, front wheel ball bearings, needle and cylindrical roller bearings, and TRB. (*Id.*) Its 1971 sales volume was \$4.5 million. (IDF 43) APD and FM's aftermarket distribution division were competitors in the sale of bearings to the automotive aftermarket. (IDF 44; Tr. 2405, 2421)

APD had lost money each year from 1965 through 1970, principally because of its limited product line. (IDF 45; RSX 80A) In 1971, however, APD was profitable, having gradually expanded shipments and decreased its relative costs. (See CX 45B)

At the September meeting, SKF and FM considered the possibility of FM taking over APD's accounts and integrating them into its distribution business. (IDF 63; CX 263; Tr. 807) Shortly thereafter, SKF officials commissioned a study which showed that, depending upon the terms to be negotiated, it might be more profitable to SKF if FM took over APD's accounts than if APD remained a part of SKF. (IDF 65; Tr. 774-775) As it happened, FM had already considered internally the possibility of taking over the APD accounts as part of an

<sup>16</sup> The president of SKF testified that he relied upon his ability to obtain the necessary TRB from AB SKF's overseas subsidiaries when he negotiated the arrangement with FM. (Tr. 806, 809) The limits of SKF's domestic TRB line were also well-known to FM since, prior to culmination of the arrangement in 1972, FM had supplied TRB to SKF for sale by its APD subsidiary to the aftermarket. (Tr. 1469)

overall deal with SKF. (IDF 59; ID 118; CX 261C) FM apparently perceived this as a "plus" (CX 261C), albeit a marginal one, of concluding a deal with SKF, rather than with Koyo Seiko. Nonetheless, FM officials continued to meet with their counterparts at Koyo Seiko during the fall of 1971 and, having earlier signed a letter of intent (see CX 206A-D), they informed Koyo Seiko that the joint venture was still being considered. (IDF 66; Tr. 2131-32)

Meetings with SKF became more frequent and intense following FM's October 27, 1971 announcement of its decision to shut down its Michigan TRB plants. SKF may have perceived that the announcement had weakened FM's bargaining position by eliminating one of its options. (IDF 68; Tr. 2328; RSAPB 15) FM, for its part, vigorously contends that after the announcement SKF was in a position virtually to dictate the terms of any SKF-FM transaction. (RFAPB 12-13) In late November, FM offered for the first time to buy from SKF all of its requirements for TRB, including those high-volume items which would have been covered by the joint venture with Koyo Seiko. (IDF 71; Tr. 2330, 2334, 2475) SKF then agreed to discuss further the specifics of APD's product line. (IDF 72) An FM officer testified that he felt that SKF's improved attitude toward disposing of APD was a function of FM's willingness to source the full line of its TRB needs with SKF. (Tr. 2334)

As an overall agreement neared, SKF, perhaps sensing FM's vulnerability, demanded that as a part of the arrangement it become FM's aftermarket source of automotive ball and clutch throw out bearings, notwithstanding that FM itself already manufactured the same bearings. (IDF 73 & n.133; CX 35Z-6-7, 51A; Tr. 807-808) FM acceded to the demand, apparently accepting SKF's rationale that it needed to have an outlet for these bearings in order to be able to close APD. (IDF 73) Once the total [17] supply understanding was reached, SKF's closing of APD followed automatically. SKF contends that the termination of APD was a unilateral decision which required no acquiescence by FM. It concedes, however, that only the full-line supply agreement with FM made possible the closing of APD. (IDF 72, 73, 77)

In January 1972, the two competitors reached final agreement. (IDF 75; CX 47A-E; Tr. 1481, 2172, 2339-40, 2479-81) Nominally, only two formal contracts were prepared: a buy-sell supply agreement between SKF and FM and an undertaking between SKF and FM to fill the requirements of APD's customers through FM. (IDF 84-85; CX 48B-D, 48E-L; Tr. 2480-81) Even these contracts, in fact, were not signed by

both parties. (IDF 86; Tr. 2481, 2340) Immediately thereafter, however, SKF closed APD and began to shuttle all of its accounts over to FM.<sup>17</sup> (IDF 87) And, within the same year, FM also formally cancelled the joint venture with Koyo Seiko.<sup>18</sup> (IDF 81; CX 213-214B)

#### B. Holdings of the ALJ

On the basis of the above evidence, the ALJ concluded that an agreement had in fact been reached between FM and SKF, encompassing (1) FM's termination of the Koyo Seiko joint venture agreement, (2) a full line of supply by SKF to FM, and (3) SKF's termination of APD and removal of its accounts to FM. (ID 117) He held that such an agreement among competitors constituted a *per se* illegal allocation of markets. (ID 123)

The ALJ also held AB SKF liable, noting as a predicate that both FM and SKF had understood from the outset that AB SKF would supply many of the needed parts to SKF for resale to FM. (ID 131-132; IDF 52, 74, 85, 91, 92, 94) The law judge found that AB SKF thereafter unlawfully ratified and participated in the illegal allocation and that, contrary to its contentions (which he found to be "inconceivable"), AB SKF also had advance knowledge of the agreement. (ID 131-133) Finally, he noted that AB SKF had [18] at no time exercised its latent power to terminate the arrangement by refusing to supply further parts.<sup>19</sup> (ID 132-133)

As relief, the ALJ ordered that the supply contract be cancelled and that SKF and AB SKF cease all sales of TRB to FM within one year; the order banning such sales extends in perpetuity.<sup>20</sup> [19]

<sup>17</sup> FM in fact received 90-95% of APD's former business (IDF 97), although each APD customer was, of course, free to go elsewhere.

<sup>18</sup> Respondents dispute the ALJ's finding that FM discussed with SKF the proposed joint venture with Koyo Seiko. They contend that the documentary evidence upon which the ALJ relied may be satisfactorily explained by another, innocent means. Because we do not believe that the existence of such discussions between FM and SKF is a necessary condition precedent to the result we reach in this case, we do not arbitrate this particular disagreement.

<sup>19</sup> The ALJ rejected, however, one of the grounds for liability asserted by complaint counsel, *viz.*, that AB SKF employed "geocentric" control of its far flung international empire, including SKF; he found the evidence with respect to control to be "inconclusive." (ID 129)

<sup>20</sup> In order to describe the nature of the arrangement more fully and to place the issue of relief in proper perspective, some elaboration of post-agreement events is necessary.

Although the parties nowhere explicitly delineated their agreement as one of exclusive dealing, it was in fact FM's practice to purchase its requirements of TRB from SKF under blanket purchase orders, the first of which was issued in May 1972.

On December 17, 1974, a formal, non-exclusive supply agreement, which is presently extant, was executed by SKF and FM. This contract was prompted in part by FM's dissatisfaction with AB SKF as a supplier. Parts to be supplied by AB SKF's European subsidiaries had been delivered late or not at all, and FM's customers grumbled as their orders were, in turn, filled late. The situation deteriorated to the point that an FM officer visited AB SKF's plant in Luton, England, to register personally his displeasure.

The formal contract was not a panacea, and in 1975 FM considered either reentering 0"-4" TRB manufacturing or withdrawing from TRB distribution. It cast about without success for a supplier to replace AB SKF, since overseas shipments had remained unreliable. After exhausting all prospects, FM decided in late 1975 to reenter 0"-4" TRB production for the limited purpose of supplanting the slow-moving, low volume parts which AB SKF had supplied. An Alabama plant, which manufactured 4"-8" TRB, was retooled for this purpose and began producing low volume 0"-4"

(Continued)

### C. Contentions of the Respondents on Appeal

Respondents SKF and FM (1) dispute the ALJ's conclusion that the supply agreement and the closing of APD were interdependent parts of a package agreement, and (2) contend that even if there was such an overall agreement, it was not unlawful under the rule of reason standard.

With respect to respondents' first argument, FM in particular stresses the testimony of its own officials and those of SKF to the effect that the closing of APD was not a *quid pro quo* for the execution of a full line supply agreement, nor was FM's offer of a full line inspired by an SKF promise to close APD. FM contends that this testimony was uncontradicted and that the ALJ had to rely upon documentary evidence and inference to reach a contrary conclusion. The ALJ, it is argued, also impermissibly relied on inference when he chose to disbelieve SKF testimony to the effect that APD was closed simply because higher profits could be realized by selling a full line through FM.

FM and SKF also ask us to overturn the inference of a package agreement because, they say, the facts demonstrate that there was no need for such an agreement. Respondents insist that once the full line SKF-FM supply contract had been negotiated, the decision to close APD (and transfer its accounts to FM) followed as a "natural consequence" (RSAPB 18) of the supply agreement. SKF, it is contended, simply made a rational business decision to close down an historically unprofitable subsidiary in light of changed circumstances. For its part, FM's cancellation of the joint venture with Koyo Seiko is alleged to have been an equally rational business response, since it had secured a full line supplier.

Even if the Commission concludes that there was an overall agreement, respondents assert error in the ALJ's conclusion that that agreement constituted a *per se* illegal conspiracy to allocate markets. Respondents prefer to characterize the agreement as basically one of vertical dealing, which must be analyzed under the rule of reason and, given the record in this case, found not to be an unreasonable restraint of trade.

FM, in particular, claims that it had desired no more than a simple

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TRB in 1977. The balance of the TRB line, including all the high volume parts, continues to be purchased by FM from SKF. Operating under the arrangement with FM, SKF's domestic TRB plants, which were expanded to meet FM's needs, have operated at close to 100 percent capacity and have supplied FM exclusively.

In 1976, SKF purchased the assets of a manufacturer and distributor of automotive parts ("McQuay-Norris"). McQuay-Norris' product line does not include bearings, but it may be complementary to the SKF bearings line. The McQuay-Norris sales force and distribution system, the ALJ found, may represent a vehicle for SKF to reenter the business of distribution of bearings to the auto aftermarket.

TRB supply contract, but that it was practically coerced into acceding to SKF's broader demands if it wanted to obtain a source of 0"-4" TRB. Accordingly, says FM, it agreed to buy ball and clutch throw out bearings from SKF, even though it didn't need them, and agreed to take APD, a perennial money loser, off of SKF's hands, even though it only barely wanted APD's business. (TROA 30-31) Its overriding objective, FM says, was to gain a secure source of supply for the 48% of the TRB distribution business it already had; picking up an additional 5% (APD's) share would be at most a secondary objective. (RFAPB 10) The antitrust laws, FM argues, cannot reasonably operate to compel a company like FM to reject the demands of a company like SKF, and thereby risk the loss of the only available source of product. (RFRB 8) Because FM views the agreement as in essence [20] an embellished vertical supply contract, it argues that the rule of reason must apply, and that under the circumstances, its conduct cannot be declared unreasonable or unlawful. (TROA 31-34)

SKF protests, too, that if rule of reason analysis were applied, it would be evident that SKF was motivated by legitimate business concerns and not by anticompetitive designs. APD was closed, SKF says, because it had been unprofitable and became expendable. To prove the point, SKF alleges that APD's 1971 profit was merely an accounting fluke; it contends that it made more money from the arrangement with FM than it ever did from APD. (RSAPB 9, 25-26) While SKF concedes that it assisted in the transfer of accounts to FM, it says that it did so primarily (1) to protect customer goodwill, *i.e.*, businesses which had purchased SKF bearings from APD could continue to get the same bearings from FM, without interruption of supply, and (2) to insure the collectibility of certain marginal warehouse distributors' accounts payable to SKF. (RSRB 10) Also, of course (though unstated by SKF), as a result of sending APD's business to FM, and given its new full line supply arrangement with FM, SKF could continue to make the manufacturing level profit on that 5% of the TRB distribution market which APD had controlled, as well as on the ball and clutch throw out bearings that had previously been sold through APD.

Finally, AB SKF appeals from the ALJ's determination to hold it liable. AB SKF puts as much distance as possible between itself and SKF, downplaying evidence proffered by complaint counsel of its "geocentric" control of SKF and emphasizing the ALJ's finding that the evidence, on balance, was "inconclusive" with respect to control. It protests strongly that proof of its advance knowledge of the FM-SKF

arrangement was insufficient, and complains that the ALJ relied on inference to find the contrary.<sup>21</sup>

#### D. Disposition of Respondents' Appeals

##### 1. The "Arrangement"

We infer from the record that there was an overall agreement between SKF and FM, at least insofar as the two companies assented to a full line supply contract and the termination of APD and transfer of its accounts. Indeed, we find this conclusion to be inescapable, given the intense discussions in November, 1971, during which both topics were discussed, and given the written form of agreements drafted and exchanged on January 27, 1972. Any doubt as to the connection between these events is dispelled by the facts that: (1) FM, by letter to SKF of January 13, 1972, [21] "confirm[ed] our mutual understanding," an understanding which, that letter makes clear, encompassed the closing of APD and removal of its accounts to FM<sup>22</sup> as well as the full line supply agreement for FM's bearings requirements; and (2) the two formal agreements of January 27, 1972, were drafted and considered in concert by the parties and, indeed, sent by FM to SKF for execution under the same cover. Also, the companies concede, as they must, that the two agreements were inextricably intertwined, and were negotiated and agreed upon simultaneously. In light of the history of the developments in this case, any further express statement of the interdependency of these events is unnecessary. *Norfolk Monument Co., Inc. v. Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700, 704 (1969); *American Tobacco Co. v. United States*, 328 U.S. 781, 809-810 (1946); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226-227 (1939). Respondents' contentions that the events were simply a "natural consequence" of each other (RSAPB 18),<sup>23</sup> or that they were merely akin to "the toppling of dominoes" (RFAPB 28), cannot be credited. The courts have not hesitated to infer an agreement on the basis of evidence considerably more slender than that found here, notwithstanding exculpatory, self-serving testimony. See *United States v. United States Gypsum Co.*, 333 U.S. 364, 395-396 (1948); *Milgram v.*

<sup>21</sup> The ALJ had inferred advance knowledge because, he said, it was inconceivable that SKF could have purported to bind AB SKF's production without the latter company's concurrence. (ID 131-132)

<sup>22</sup> FM's argument, RFAPB 21 n.2, that the letter should be construed merely as FM's acknowledgment of SKF's unilateral intention to close APD cannot be sustained. Had SKF done no more than terminate APD's existence, such an inference might be permissible, but, as FM must concede, the letter also confirms that "you [SKF] . . . have asked us [FM] to supply your present customers," CX 47C, an undertaking which plainly contemplates a broader agreement between FM and SKF.

<sup>23</sup> This argument is among the unluckiest that SKF could have advanced in any event, having been rejected almost *in haec verba* by the Supreme Court forty years ago. *Interstate Circuit, Inc. v. United States*, *supra* at 227; and see *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600, 612 (1914) (inferring unlawful conspiracy to accomplish that which followed as a "natural consequence").

*Loew's, Inc.*, 192 F.2d 579 (3d Cir. 1951), *cert. denied*, 343 U.S. 929 (1952); *United States v. National City Lines, Inc.*, 186 F.2d 562, 570-571 (7th Cir.), *cert. denied*, 341 U.S. 916 (1951).

We find SKF's arguments about the circumstances surrounding the closing of APD to be especially unconvincing. Contrary to the assertion of SKF's counsel, the record does not establish that APD's 1971 profit was an accounting fluke, attributable only to diminished inventory on hand at year end. The diminution in value of the inventory, using SKF's own figures (RSX 80A, 80C; RSAPB 9), amounts to no more than a fraction of the difference between APD's 1970 losses and 1971 profits. SKF's allegedly independent reason for shutting down APD thus lacks force. [22]

Even if one assumes (contrary to the evidence; see IDF 46, CX 45B) that APD was destined for red ink in perpetuity, it would not follow that as a "natural consequence" of the supply agreement SKF would shuttle APD's accounts over to FM. Under this circumstance, it would have made more sense to shut down APD altogether and terminate its accounts as soon as legally possible. SKF may have had significantly more bargaining power than FM, but it is illogical to assume that SKF would have utilized that power to compel FM to absorb losses in perpetuity, when both parties could have saved money simply by shutting down operations. Evidently (and FM's internal documents establish the point; see CX 259A, 261C), FM, at least, believed that it had something to gain by acquiring APD's accounts. FM evidently hoped that integration of APD's limited line into FM's broader business would enable the former APD accounts to be profitably served after all and would "open the door" to several new customers, including one of the largest purchasers of bearings among warehouse distributors. (See IDF 56, 59 & n.110; CX 259A, 261C; Tr. 2343-44) Viewed from this perspective, and given APD's 1971 profit, the parties' actual conduct makes more sense. This conclusion is further strengthened by SKF's insistence that FM agree to purchase ball and clutch throw out bearings, despite the fact that FM already produced these products. By allocating the distribution market so as to service all of APD's former customers out of FM, each party to the arrangement could gain by doing exclusively what it did most profitably, *i.e.*, SKF manufacturing, and FM distributing.

Finally, the ALJ found that FM's cancellation of the joint venture with Koyo Seiko was an express part of the overall agreement. The evidence suggests that FM, at least, made a conscious decision in November 1971, to throw over the joint venture as the price of dealing with SKF, which apparently insisted upon a full line supply agreement, including the TRB to be manufactured by the joint venture. (IDF 70-



71; ID 117-118) But, as indicated above, we need not determine whether the decision to cancel the joint venture with Koyo Seiko was specifically agreed to by both FM and SKF. Indeed, were it necessary to our disposition, we might be justified in finding that, whether by forsaking Koyo Seiko or otherwise, FM effectively agreed with SKF, as one part of the overall package, that it would forebear from reentering significant production of 0"-4" TRB.<sup>24</sup> This decision, otherwise wholly lawful, [23] should not be divorced from the circumstances in which it was made; the question of the existence of a conspiracy must be examined by considering all the pertinent facts as a whole, not broken down into distinct parts. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 698-699 (1962); *United States v. Patten*, 226 U.S. 525, 544 (1913). Nonetheless, we will refrain from inferring a conspiracy at the manufacturing level and will analyze the legality of this arrangement by focusing on its effects in the distribution market.

## 2. The Standard of Liability

The ALJ concluded that the agreement between SKF and FM constituted a *per se* unlawful horizontal allocation of markets. Accordingly, he did not analyze the reasonableness of the resulting restraints. We agree, on balance, that a *per se* approach is proper, but the nature of the challenged arrangement complicates this question.

Courts have frequently recognized that a given set of facts may be susceptible to analysis under numerous different antitrust rubrics. *See, e.g., Dougherty v. Continental Oil Co.*, 579 F.2d 954 (5th Cir. 1978). Even the seemingly straightforward determination of whether a restraint is principally horizontal or vertical may be troublesome. *See United States v. Sealy, Inc.*, 388 U.S. 350 (1967); *United States v. General Motors Corp.*, 384 U.S. 127 (1966); *Dougherty v. Continental Oil Co.*, *supra* at 958-959 ("Entities in a seemingly vertical relationship may be deemed capable of horizontal restraints if they are actual or potential competitors.") The question is one of signal importance, for the proper characterization can suggest much about the competitive and legal significance of the restraint, including whether application of a *per se* or rule of reason standard is appropriate.

The parties' contentions plainly frame the issue. Respondents assert

<sup>24</sup> Under the terms of the formal TRB supply contract agreed to by FM and SKF in December 1974, FM's assurance is effectively given for a rolling five-year period, five years being the minimum notice necessary for cancellation. (CX 80B; RSAPB 32) By effectively agreeing not to reenter production, FM forfeited the exercise of any restraining influence over price which, in a highly concentrated market, could have followed had the industry perceived FM as a potential (re)entrant. Although FM later undertook to produce certain slow moving, low volume 0"-4" TRB at its Alabama plant, due to dissatisfaction with SKF's overseas supply, *n.20 supra*, that action did not fundamentally change the character of the transaction. SKF continues to supply FM exclusively and FM purchases the bulk of its needs from SKF. It is clear that neither party has any intention of backing away from the arrangement.

vigorously that the challenged arrangement is one of vertical dealing and that as a non-price restraint it must, therefore, be tested against the rule of reason standard. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). They urge that we should be guided in particular by a line of exclusive dealing cases, including *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970) and *Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126 (2d Cir.), *cert. denied*, 439 U.S. 946, 99 S. Ct. 340 (1978), which have found the termination of one dealer in favor of an exclusive supply arrangement with another not to be inimical to the antitrust laws in the absence of an anticompetitive effect or design. Relying on this line of cases, SKF argues that “[t]he nature of [its] relationship with FM is one of supplier and customer entered into as a result of arms-length discussions . . . [T]he most that can be said about the arrangement is that FM has been given an exclusive distributorship for the sale of SKF bearings to the automotive aftermarket. It is quite clear that such an exclusive arrangement is not a *per se* violation of Section 1.” (RSAPB 22) [24]

By contrast, complaint counsel urge that respondents’ conduct amounts to a *per se* illegal horizontal allocation of markets, relying on such authorities as *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899), and *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1953). For the most part, these cases and others cited by complaint counsel are classic instances of horizontal competitors agreeing to stay out of one another’s sales territories in order to restrict supply and, therefore, limit competition in given geographic markets. Such cases may also be characterized by additional egregious anticompetitive conduct among the companies concerned, including price-fixing (*Addyston Pipe & Steel Co. v. United States, supra*; *Timken Roller Bearing Co. v. United States, supra*), and pooling of patents and exchange of technical information (*United States v. National Lead Co.*, 332 U.S. 319 (1947)).

The ALJ agreed with complaint counsel that the market division cases most closely describe respondents’ conduct. (ID 123) He concluded, after a recitation of the facts, that, “[f]or competitors to agree in such a manner about their participation at any level of competition is a conspiracy to allocate markets and illegal *per se*. [cits] . . . No showing of effects is necessary.” (*Id.*)

While the arrangement among the respondents has vertical as well as horizontal elements, we are not persuaded that the rule of reason is applicable. Cases using the rule of reason to analyze the merits of suits brought by terminated distributors are surely plentiful, and respondents cite a number of them including *Seagram*, *Oreck*, and *Ace Beer*

*Distributors, Inc. v. Kohn, Inc.*, 318 F.2d 283 (6th Cir.), *cert. denied*, 375 U.S. 922 (1963),<sup>25</sup> but these authorities addressed strictly limited, vertical conduct for which legitimate business justifications might be advanced. A great deal more than an exclusive dealing contract is in controversy here. FM and SKF were direct horizontal competitors in the markets for distribution of bearings and manufacture of TRB at the moment of consummation of their supply contract (although FM had independently announced plans to withdraw from the TRB manufacturing market), a salient feature without parallel in any of the cases cited by respondents.<sup>26</sup> And as a part of their arrangement, SKF, in exchange for a full line supply contract, shut down APD and exercised its best efforts to transfer [25] that subsidiary's accounts to FM. This agreement to transfer existing customers from one horizontal competitor to another also is without parallel in any of the cases relied upon by respondents.

On the other hand, complaint counsel's contentions relate to a factual context that differs somewhat from more traditional market allocation cases. In cases such as *Timken Roller Bearing Co., supra*, and *National Lead Co., supra*, horizontal competitors actually divided or allocated geographic territories among themselves, *i.e.*, each continued to operate within the relevant product market following the agreement. The geographic allocation assured each competitor a relatively fixed percentage of the total universe of business in that product market which the competitors shared. The instant case does not fit comfortably within this classic mode, because here the product market (distribution of bearings) has been "allocated" with 100% of the shared total going to FM and 0% to SKF. Also, of course, not all competitors in the market are parties to this division. As a result of the allocation, one of two vertically integrated horizontal competitors has abandoned a market to the other and entered into what amounts to a mutual exclusive dealing arrangement to fulfill the function it formerly performed itself.

Nevertheless, despite the unique characteristics of this arrangement and the absence of precedent squarely on point, it does not follow that *per se* treatment is inappropriate. In light of the facts that respondents were direct horizontal competitors in the distribution market at the time of their agreement, that one of these competitors, SKF, was eliminated from the distribution market and its accounts expressly

<sup>25</sup> *But see Cernuto, Inc. v. United Cabinet Corp.*, No. 78-1872 (3d Cir. March 16, 1979).

<sup>26</sup> In *Oreck, supra*, the court refused to infer the existence of a horizontal conspiracy between a manufacturer and a very large distributor as a part of a challenged vertical arrangement. 579 F.2d at 131. But the court's rejection of plaintiff's claim that the manufacturer and distributor effectively operated on the same level of the distributive chain can be of little assistance to the instant respondents, for it is clear beyond peradventure that FM and SKF were direct horizontal competitors at the time of their agreement.

allocated to FM, and that SKF (by reason of the requirements contract) effectively was precluded from reentering the distribution market (*see note 20 supra*), we believe that their conduct is most fairly judged to be a *per se* violation of the antitrust laws. As we shall show more fully below, the overall course of dealing here, while containing elements ordinarily weighed individually under the rule of reason, is most closely analogous to market division and customer allocation, practices held in other cases to constitute *per se* violations.

It is true that even the horizontal aspects of the arrangement, when viewed separately, could be susceptible to analysis under other than a *per se* standard. Thus, for example, if FM's assumption of the APD accounts were analyzed as an acquisition, as complaint counsel alternatively contend (*see note 4 supra*), well established principles would require that the rule of reason be applied. And notwithstanding that such a substantial acquisition by the number one firm in a highly concentrated market would raise a heavy presumption of illegality, respondents nonetheless would be afforded an opportunity to advance rule of reason defenses in rebuttal. Inasmuch as SKF in fact terminated distribution of bearings to the aftermarket following the agreement with FM, an [26] argument could be advanced (although respondents apparently disagree (RSAB 19)) that this element of the arrangement was, in effect, an acquisition of intangibles.

Similarly, the vertical full line supply agreement, *in vacuo*, could qualify for rule of reason examination. As noted above, respondents have pressed this argument and have proffered evidence intended to suggest a legitimate justification for the agreement, one not springing from an anticompetitive design.

We are not persuaded, however, that the transaction, in the aggregate, warrants such indulgence. After completing the arrangement, respondents had effectively restructured a portion of the bearings industry in an anticompetitive manner. To begin with, the agreement eliminated one competitor, SKF (APD), and transferred nearly all of its accounts to another competitor, FM. Further, because of the overall arrangement between the parties, including the supply agreement, FM could be reasonably assured that it would not face competition from its former competitor's parent, at least in the foreseeable future. Similarly, that parent could be assured of continuing to make the manufacturing level profit on sales to its subsidiary's former customers, an eventuality that would not have transpired had those customers purchased bearings from a different firm. (See ID 115-117) In short, FM became SKF's distribution arm to the aftermarket and, because of the total understanding with SKF, it was effectively insulated from any further competition, actual or potential,

from its former competitor. SKF, in turn, was assured a substantial share of the manufacturing business, enhanced in value by the likelihood that FM would be the distributor to APD's former customers and by FM's agreement to purchase its requirements from SKF. The upshot was, in essence, an agreement between the firms not to compete in the domestic distribution of bearings. The reasonable inference to be drawn from this arrangement is that it had the probable effect (and purpose) of restraining competition rather than promoting it. This type of arrangement, we believe, is so plainly anticompetitive in its nature and necessary effect that no elaborate study of the industry is needed to establish its illegality. See *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978); *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958).

Any contract between such competitors affecting price or output is inherently suspect and may not be saved, we believe, by the fact that the effect of the agreement, after implementation, was to create a strictly vertical relationship between the parties. To analyze the exclusive dealing agreement *in vacuo*, as respondents urge, would be to ignore the competitive impact of the total arrangement, which encompassed a market division scheme and an allocation of customers inuring to the benefit of both parties. It is well established that agreements alleged to create a restraint of trade should be examined as a whole, and not merely be broken down into distinct parts. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, *supra* at 698-699. [27]

The overall arrangement between the parties closely approximates those in related cases that have been held to be *per se* illegal. Thus, under a long line of decisions beginning with *Addyston Pipe*, *supra*, and culminating with *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972), the Supreme Court has condemned horizontal market allocations as violations of the Sherman Act. In none of those Supreme Court cases did competitors agree to divide the product market in the 100%/0% manner utilized in this case, but in none of those cases was there a composite of facts affording competitors an incentive to do so, and we do not believe the distinction is dispositive. We think it is the fact of a market allocation agreement between horizontal competitors, rather than the specific terms of the division agreed upon, which led the Court to find *per se* violations.

This conclusion finds support in the case of *United States v. American Smelting and Refining Co.*, 182 F. Supp. 834, 859-860 (S.D.N.Y. 1960) in which an arrangement, with parallels to this case, was struck down under *Addyston Pipe*, notwithstanding that the market division was accomplished through an agreement creating a

vertical relationship between the competitors. In that case two competitors had divided the national market in lead (east and west of the 95th meridian) by agreeing that one would thereafter be the exclusive sales agent for the other in the territory that was reserved for the first. Thus, one seller had left a significant portion of the market (accounting for about 80% of lead consumption) by agreement with a competitor in favor of an arrangement whereby it continued to sell its product, but only through a vertical relationship with its former competitor rather than directly. The formerly shared sales market in the East became divided 100%/0%. As a result, in that part of the market some actual competition was lost, potential competition was foreclosed, and the parties altered their relationship from one that was horizontal to one that was primarily vertical.

In *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 120 (3d Cir. 1975), the court held that a hotel franchisor, which also owned and operated hotels under the franchised name, had engaged in unlawful conduct by reason of a number of distinct agreements with its franchisees, the combined effect of which was to allocate markets. A ban on defendant's franchisees operating any other nonfranchised hotels, coupled with defendant's practice of permitting only company-owned inns to be established in specified cities, restraints which might otherwise have been evaluated under the rule of reason, were held to be *per se* unlawful when considered in the aggregate because the overall effect was a market allocation in the specific cities. 521 F.2d at 1253-54.<sup>27</sup> [28] The instant case is, if anything, more pernicious than *American Motor Inns*, since, as in *American Smelting*, the market division here operated to eliminate actual competition, whereas the *American Motor Inns* allocation was primarily prophylactic and was used by the defendant to eliminate the threat of potential competition.

The fact that SKF and FM together controlled less than all of the distribution market for bearings at the time of their arrangement does not create a defense either, for it is clear that absolute power to control market price or output is not a requisite to a finding of illegality in these circumstances. To be sure, the anticompetitive effects of an industrywide market division, or cartel, may be greater than they are in this case, where the agreement involved only two of the top four firms in the market, including the leading firm. Yet, it is clear that the Supreme Court has not drawn the *per se* line to proscribe only industrywide agreements or agreements among industry members having collective market power. While cases such as *National Lead*,

<sup>27</sup> Defendant urged that the restraints agreed to by its franchisees operated vertically and should have been judged against the rule of reason, but the court found that defendant competed horizontally with its franchisees in the hotel market generally and that the restraints were therefore horizontal. *Id.* at 1242-44, 1254.

*Timken* and *Addyston Pipe* involved arrangements among all or a significant portion of the industry members, other cases such as *Topco* and *Sealy* involved groups of firms with far smaller combined shares of the overall market. Less than the entire industry conspired to divide markets in *American Smelting*, though the two firms involved were leading producers of lead, and considerably less than the entire market participated in the arrangements struck down in *American Motor Inns*. In so doing, the courts have properly focused on the likelihood that such agreements, as a class, will result in net harm to competition, rather than attempting to weigh the competitive tradeoffs in each case.<sup>28</sup>

A related argument is that our disposition of this case takes insufficient account of the efficiencies realized by FM and SKF as a result of their arrangement. Some efficiencies may, of course, result from almost any market allocation scheme as the courts have recognized in uniformly rejecting this proffered justification for horizontal market or customer allocations. [29] Geographic market division can eliminate cross hauling and thus save expenses. Product market allocation may allow each competitor to concentrate on the specialized production at which it is most efficient. But these are efficiencies that a competitive market is likely to force upon a firm in the long run in any event. More importantly, the means of achieving these efficiencies in this case—agreement between horizontal competitors—is competitively dangerous. Even if substantial efficiencies might conceivably result from a given agreement of this type, it seems fair to presume, without analyzing each arrangement, that the anticompetitive effects are likely to outweigh the benefits in most instances. Indeed, as noted above, precisely this judgment has already been made by the courts with respect to the market division and customer allocation characteristics of respondents' plan. See also *United States v. Consolidated Laundries Corp.*, 291 F.2d 563, 574-575 (2d Cir. 1961) (customer allocation *per se* illegal); *United States v. Cadillac Overall Supply Co.*, 568 F.2d 1078, 1087-90 (5th Cir. 1978).

Thus, while the arrangement here involves the complete removal of one horizontal competitor from the market, rather than the more typical division of ongoing business among competitors, we believe the analogy to customer allocation and market division cases is sound. Though SKF withdrew from distributing TRB and other bearings in

<sup>28</sup> In reaching our decision here, it should be noted, as the Supreme Court has recognized, that some scrutiny short of a full-blown rule of reason analysis may be required to determine whether application of an existing *per se* rule is appropriate in a particular case. *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 99 S. Ct. 1551, 1562, n. 33 (1979). As previous market allocation cases indicate, proscribed conduct does not invariably follow a fixed pattern. Rather, the cases have parallels because of the overall character of the conduct. We believe such parallels can be found in the pending matter.

the U.S. market, that withdrawal was part of an overall understanding with FM whereby SKF would serve as the exclusive supplier to its former competitor. In essence, then, the arrangement had much the same effect as a more traditional market division, though on a slightly different scale, since SKF not only stopped competing with FM at the distribution level but also agreed to refrain from doing so on an ongoing basis, at least for the length of the supply contract.

We hold, therefore, that respondents have violated Section 5 of the FTC Act based upon application of Sherman Act Section 1 principles.<sup>29</sup>

As a postscript, we cannot accede to FM's argument that even if it was a party to an otherwise unlawful agreement, the degree of compulsion or economic coercion to which it was subjected somehow relieves it of liability. We are not unsympathetic to FM's plight, although we believe it to have been overstated, but the authorities are clear that alleged coercion is not a defense to a *per se* antitrust violation. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 161 (1948); *Calnetics Corp. v. Volkswagen of America, Inc.*, 532 F.2d 674, 682 (9th Cir.), *cert. denied*, 429 U.S. 940 (1976); *Otto Milk Co. v. United Dairy Farmers Cooperative Ass'n*, 261 F. Supp. 381, 385 (W.D. Pa. 1966), *aff'd*, 246 F.2d 368, 375 (9th Cir.), *cert. denied*, 355 U.S. 835 [30] (1967). The law does not impose an obligation upon FM to "slit its own throat," as that company contends, but the cited cases suggest there is a duty to resist unlawful, ancillary proposals advanced as the price of dealing by a supplier with substantial market power. Had FM, after independently quitting manufacturing, simply substituted SKF as an exclusive supplier (*cf.* RFAPB 27), it would be open to FM in an antitrust context to demonstrate the reasonableness of its contract and the efficiencies realized thereby. But by expanding its overall agreement with SKF to accomplish a great deal more, whether it was coerced or did so by design,<sup>30</sup> FM became a party to a *per se* unlawful agreement.

### 3. Liability of AB SKF

Although the ALJ could not find that AB SKF exercised day-to-day control over SKF, he found it "inconceivable" that AB SKF could not have had advance knowledge of the SKF-FM arrangement, since the negotiations proceeded on the assumption that AB SKF would supply some of FM's TRB requirements. Relying on this and other evidence

<sup>29</sup> Because of our holding, we do not reach and express no opinion on whether that conduct standing alone also constitutes an independent, non-derivative violation of Section 5 of the FTC Act as an unfair method of competition, an alternative ground for affirmation urged by complaint counsel. (See CAB 22)

<sup>30</sup> At least one FM officer, whose responsibilities placed him in competition with APD, had designs upon that SKF subsidiary from the start of negotiations. He viewed a takeover of APD's accounts as a "definite plus," and enthusiastically supported that course. (See IDF 56, 59; CX 259A, 261C)



that FM officials later traveled to Europe to discuss supply problems they were having with AB SKF, the law judge concluded that the parent was directly involved in the conspiracy. Alternatively, the ALJ determined that liability should attach on the grounds that AB SKF, while having latent power to halt the illegal practices of its subsidiary, instead at least tacitly approved those practices, citing *P.F. Collier & Son Corp. v. FTC*, 427 F.2d 261, 770 (6th Cir.), *cert. denied*, 408 U.S. 926 (1970); *Beneficial Corp.*, 86 F.T.C. 119, 159 (1975), *aff'd in part and rev'd in part on other grounds*, 542 F.2d 611 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977).

AB SKF contests these holdings, claiming that the evidence is insufficient to show that it had knowledge of the arrangement. The parent contends such knowledge cannot be inferred from mere delivery of TRB by its European subsidiaries to FM. In any event, AB SKF argues, its subsidiaries, including SKF, enjoy considerable organizational autonomy and any knowledge of the arrangement attributable to those entities cannot be imputed to AB SKF. Finally, AB SKF raises a number of procedural and due process objections to the entry of an order against it and suggests that the ALJ's remedy can be adequately enforced simply by precluding FM from purchasing TRB from AB SKF.

While the record is clear that both SKF and FM contemplated that access to AB SKF's European production would be a necessary part of the arrangement, we find it unnecessary to resolve the issue of parent liability in this instance.<sup>31</sup> Irrespective of [31] whether liability should be imposed, we agree with AB SKF that effective relief can be obtained without binding AB SKF. Thus, the order we issue, which is discussed more fully below, restricts FM's purchases of 0"-4" TRB from both SKF and AB SKF.

#### IV

#### RELIEF

The ALJ, correctly holding that complaint counsel were entitled "to whatever relief will rid the bearings industry of the effects of this illegal conspiracy" (ID 126), directed that the respondents terminate dealings with each other within one year. He also specifically prohibited SKF and AB SKF from supplying any 0"-4" TRB to FM following the expiration of this one year period. The purpose of this order was twofold: (1) to require FM to procure its bearings requirements from another supplier, or form a manufacturing joint

<sup>31</sup> In view of our disposition of the liability issue, we do not reach AB SKF's contentions concerning alleged procedural irregularities.

venture, or reenter production on its own (ID 129); and (2) to encourage SKF to reenter the business of distributing bearings to the auto aftermarket as a means of providing the necessary outlet for its TRB. (ID 127) The ALJ evidently hoped that these markets could thereby be restored to their pre-conspiracy status.

While we agree that the illegal arrangement, as modified in 1974, should be terminated, we are not persuaded that all business dealings between SKF and FM should be terminated as abruptly or completely as ordered by the law judge. Of course, any order in this case should give SKF every incentive to reenter the bearings distribution business. McQuay-Norris, the parts distributor acquired by SKF in 1976, may indeed be a reentry vehicle, but it will be bucking entrenched competition from The Timken Co. and FM. The long-run prospects for McQuay-Norris' success in such a venture (and thus for increased competition) may be enhanced if SKF is not compelled to dump all of Tyson's output (which supplies the requirements of the leading firm in the auto aftermarket) on the market at once. We think an order allowing the parties to contract on a yearly basis and phasing down supply of TRB to FM by SKF somewhat more gradually will provide sufficient incentive to SKF to find a way to bring its TRB to market. In addition, we will permit SKF to continue to supply up to 25% of FM's needs, a limitation which will remain in force for 10 years.<sup>32</sup>

[32] This approach is also appropriate in view of FM's supply constraints. FM encountered difficulties in securing a reliable full line TRB supplier in the early 1970's because of the concentrated nature of the TRB production industry; there is no reason to believe that that situation has been materially ameliorated. (Tr. 1209-12) If, as FM argues, (1) Timken continues to refuse to supply any TRB to FM, and (2) NDH cannot supply TRB to FM because of a lack of capacity, then if we order (3) an immediate cut-off in dealings between FM and SKF, FM may be faced again with the unpalatable alternatives which it rejected a few years ago, *viz.*, a choice between unprofitable internal production, a speculative supply contract with a Japanese firm (which might supply less than all necessary items), or a combination of both. (Tr. 2185-89) Surely, FM, like SKF, is not entitled to avoid the consequences of its conduct, but to proscribe all dealings, when only a particular agreement has been found to be unlawful, does not necessarily enhance competition, especially within the context of this

<sup>32</sup> Our order also will be limited to the purchase of 0"-4" TRB for distribution in the United States, and it includes provisions clarifying the manner in which the purchase restrictions are to be calculated. For example, the order requires that any unsold inventories of TRB purchased by FM from SKF or AB SKF prior to the effective date of the order shall be included in the first year's allowable purchases. This provision would prevent circumvention of the order through stockpiling. Other provisions, such as the inclusion of indirect purchases by FM from SKF or AB SKF and the valuation of FM's in-house production of TRB at the lesser of cost or fair market value are designed to make sure that the purchase restrictions are not diluted.

market. FM argues, with some force, that a quickly imposed ban on all dealings with SKF may principally benefit Timken, the industry giant insofar as TRB production is concerned and a major factor in the distribution of TRB to the aftermarket, since Timken would be in a position to capitalize upon the resulting market dislocations to further increase its market shares.

Such concerns are not merely academic but are supported by record evidence of events in 1971-1972 following FM's announcement of the shutdown of its Michigan facilities, *viz.*, Timken moved quickly to replace FM as an OEM supplier to many accounts and significantly increased its overall TRB production market share. (See RFX 153A-B; Tr. 481; RFAPB 29-30) Moreover, Timken increased its share of TRB distribution to the independent auto aftermarket from 23% to 31% between 1973 and 1975. (IDF 24) As the ALJ found (ID 68-71), Timken enjoys "overwhelming dominance" in domestic TRB production, with its share of that market having increased from 55% to 70% between 1971 and 1976 (ID 70 & n.190). Even these percentages understate Timken's dominance, because they include NDH's production for captive distribution to General Motors. (IDF 109) Timken's market share of production of non-captive 0"-4" TRB for use as automotive original equipment exceeded 90% in 1976 (ID 70 n.190) There is also record evidence that Timken's share of TRB sales to the industrial aftermarket exceeds 80%. (Tr. 2837)

On the other hand, Timken is not the dominant force in the distribution of all bearings to the independent auto aftermarket. As of 1975, it ranked third in that market with 11.2%, compared to FM's leading 44.8% market share. (IDF 23) Though Timken's share has been rising, the increase is attributable to its distribution of TRB, since that firm, unlike FM, does not distribute a broad line of bearings and other automotive [33] parts. In fact, as the ALJ found, FM's full line capability enabled it to charge a premium of as much as 15-20% over the price charged by Timken for 0"-4" TRB. (IDF 99) Thus, even though Timken has boosted its TRB distribution in recent years, FM is likely to remain a significant force in both the overall bearings distribution market and the TRB segment of that market, notwithstanding an order restricting its access to SKF supplies. In light of this situation, we believe our modified order adequately balances the need to redress the law violation with the need to take account of the unique market conditions existing in this industry.

Complaint counsel, while now supporting the ALJ's decision to impose a ban on all dealings, did not originally propose this disposition,

but instead recommended to the law judge an order limiting FM-SKF dealings, to be coupled with a divestiture of Tyson by SKF.<sup>33</sup> Complaint counsel did not propose any limits on dealings between a divested Tyson and FM. Similarly, FM has proposed to the Commission an alternate form of order which, though containing an unacceptable provision with respect to SKF making a "*bona fide*" attempt to reenter the distribution business, nonetheless propounds a gradual reduction of SKF-FM dealings in order to afford the market an opportunity to adjust to the new situation.<sup>34</sup> We find these proposals to be, in principle, preferable, since a gradual phasing-in of alternative arrangements reduces the likelihood of a sudden market dislocation, which could redound principally to Timken's benefit.

We are resolute in our determination (1) to end the conspiracy by which SKF and FM allocated a market to their mutual benefit and (2) to try to restore the market to some semblance of its pre-conspiracy status. Our adoption of an order less drastic than that proposed by the ALJ reflects our belief that the best way to achieve the second objective is by allowing the parties to continue some, albeit restricted, business dealings.

An appropriate order is appended.

#### FINAL ORDER

This matter having been heard by the Commission upon the appeals of complaint counsel and respondents from the Initial Decision, and upon briefs and oral argument in support thereof and in opposition thereto, and the Commission for the reasons stated in the accompanying Opinion having determined to sustain the Initial Decision with certain modifications:

*It is ordered*, That the initial decision of the administrative law judge, pages 1-151, as amended, be adopted as the Findings of Fact and Conclusions of Law of the Commission, except to the extent indicated in the accompanying Opinion. Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying Opinion.

*It is further ordered*, That the following order to cease and desist be, and it hereby is, entered:

<sup>33</sup> Divestiture is presently urged by complaint counsel only if the Commission grants their appeal.

<sup>34</sup> The specific diminution in dealing offered by FM is also unacceptable—and, indeed, somewhat disingenuous—because the reductions offered are expressed as a percentage of the number of part items to be purchased each year, not as a percentage of the dollar volume of dealing. Since relatively few parts account for the majority of sales, FM's proposed order would only marginally affect respondents.

## I

This order shall be binding on Federal-Mogul Corporation ("FM"), SKF Industries, Inc. ("SKF"), their subsidiaries or any person under the control of FM or SKF, their successors and assigns, and their officers, agents, representatives, and employees. [2]

## II

*It is ordered*, That the agreement signed by SKF and FM on December 17, 1974, and any similar arrangements between or among respondents, including the understandings reflected in the exchange of documents on January 27, 1972, shall be cancelled upon the date this order becomes final.

## III

With respect to tapered roller bearings ("TRB") having an outside diameter of zero to four inches, which are purchased, directly or indirectly, by FM from SKF, Aktiebolaget SKF ("AB SKF"), or any person under the control of SKF or AB SKF for distribution in the United States, *it is ordered*, That the following limitations shall apply during the 12-year period next following the date this order becomes final:

(i) The time period covered by any given purchase order or related agreement shall not exceed 12 months.

(ii) The aggregate dollar value of such purchases by FM during the first twelve months following the date this order becomes final shall not exceed 75% of the total dollar value of purchases of 0"-4" TRB by FM from all sources (including sources owned or controlled by FM). The allowable percentage under this subparagraph shall include any 0"-4" TRB purchased, but not sold, by FM from SKF, AB SKF, or any person under the control of SKF or AB SKF prior to the date this order becomes final.

(iii) The aggregate dollar value of such purchases by FM during the succeeding twelve months shall not exceed 50% of the total dollar value of purchases of 0"-4" TRB by FM from all sources (including sources owned or controlled by FM).

(iv) The aggregate dollar value of such purchases by FM during each of the ten succeeding twelve month periods shall not exceed 25% of the total dollar value of purchases of 0"-4" TRB by FM from all sources (including sources owned or controlled by FM).

(v) For purposes of subparagraphs (ii)-(iv), the value of purchases of 0"-4" TRB by FM from sources which it owns or controls shall be either the cost to FM or the fair market value, whichever is less.

For purposes of this paragraph, direct or indirect purchases by FM shall include (A) purchases of 0"-4" TRB manufactured by SKF, AB SKF, or any person under the control of SKF or AB SKF, and (B) purchases under an arrangement to which SKF, AB SKF, or any person under the control of SKF or AB SKF is a party or from a supplier in which SKF, AB SKF, or any person under the control of SKF or AB SKF has an interest.

## IV

*It is further ordered,* That each respondent shall notify all persons having sales and policy responsibilities in its organization of the terms of the order and publish same in at least two major trade journals or periodicals twice annually for each of two years from the effective date of this order. [3]

## V

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

## VI

*It is further ordered,* That within sixty (60) days after the effective date of this order, and within sixty (60) days after the end of each calendar year through and including 1992, each respondent shall file with the Federal Trade Commission a written report setting forth in detail the manner and form of its compliance with this order.