commerce, or manufacture for introduction into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product; or in connection with the manufacture for sale, sale, advertising, offering for sale, transportation or distribution of any fur product which is made in whole or in part of fur which has been shipped and received in commerce; or in connection with the introduction into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from falsely or deceptively invoicing any fur or fur product by:

1. Failing to furnish an invoice, as the term "invoice" is defined in the Fur Products Labeling Act, showing in words and figures plainly legible all the information required to be disclosed by each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.

2. Representing, directly or by implication, on an invoice that the fur contained in such fur or fur product is natural when such fur is pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

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

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IN THE MATTER OF

## A.B.C. FABRICS, INC., TRADING AS MAE FABRICS, ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE TEXTILE FIBER PRODUCTS IDENTIFICATION ACTS

*Docket C-1806. Complaint, Sept. 30, 1970—Decision, Sept. 30, 1970*

Consent order requiring Tampa, Fla., wholesalers and retailers of textile fiber products to cease misbranding their products and failing to keep required records.

### COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Textile Fiber Products Identification Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that A.B.C. Fabrics, Inc., a corporation, trading as Mae Fabrics, and Irving Cohen, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Textile Fiber Products Identification Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent A.B.C. Fabrics, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida. The respondent corporation maintains its home office at 1008 Franklin Street, Tampa, Florida, and operates four additional stores in St. Petersburg, Sarasota, Winter Haven and Daytona Beach, Florida. The corporation trades as Mae Fabrics.

Respondent Irving Cohen is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of the corporate respondent including those hereinafter referred to. The address of Irving Cohen is the same as that of the corporate respondent.

Respondents are engaged in business both as wholesalers and retailers of textile fiber products, namely fabrics.

PAR. 2. Respondents are now and for some time last past have been engaged in the introduction, delivery for introduction, sale, advertising, and offering for sale, in commerce, and in the transportation or causing to be transported in commerce, and the importation into the United States, of textile fiber products; and have sold, offered for sale, advertised, delivered, transported and caused to be transported, textile fiber products, which have been advertised or offered for sale in commerce; and have sold, offered for sale, advertised, delivered, transported and caused to be transported after shipment in commerce, textile fiber products, either in their original state or contained in other fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act.

PAR. 3. Certain of said textile fiber products were misbranded by respondents within the intent and meaning of Section 4(a) of the Textile Fiber Products Identification Act and the Rules and Regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled, invoiced, advertised or otherwise identified as to the name or amount of the constituent fibers contained therein.

Among such misbranded textile fiber products, but not limited thereto, were textile fiber products, namely fabrics, which contained substantially different amounts and types of fibers than as represented.

PAR. 4. Certain of said textile fiber products were misbranded by respondents in that they were not stamped, tagged, labeled, or otherwise identified as required under the provisions of Section 4(b) of the Textile Fiber Products Identification Act, and in the manner and form as prescribed by the Rules and Regulations promulgated under said Act.

Among such misbranded textile fiber products, but not limited thereto, were textile fiber products with labels which failed:

1. To disclose the true generic names of the fibers present.
2. To disclose the percentages of such fibers by weight.
3. To disclose the name, or other identification issued and registered by the Commission, of the manufacturer of the products or one or more persons subject to Section 3 with respect to such products.

PAR. 5. Certain of said textile fiber products were misbranded in violation of the Textile Fiber Products Identification Act in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder inasmuch as samples, swatches or specimens of textile fiber products subject to the aforesaid Act, which were used to promote or effect sales of such textile fiber products, were not labeled to show their respective fiber content and other information required by Section 4(b) of the Textile Fiber Products Identification Act and the Rules and Regulations promulgated thereunder in violation of Rule 21(a) of the aforesaid Rules and Regulations.

PAR. 6. Respondents have failed to maintain and preserve proper records showing the fiber content of their textile fiber products, in that said respondents substituted stamps, tags, labels, or other identification pursuant to Section 5(b) of the Textile Fiber Products Identification Act and failed to maintain and preserve such records as would show the information set forth on the stamps, tags, labels or other identification removed by them, together with the name or names of the person or persons from whom such textile fiber products were received, in violation of Section 6(b) of the Textile Fiber Products Identification Act.

PAR. 7. The acts and practices of respondents as set forth above were, and are, in violation of the Textile Fiber Products Identification Act and the Rules and Regulations promulgated thereunder, and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices, in commerce, under the Federal Trade Commission Act.

## Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Textiles and Furs proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act and the Textile Fiber Products Identification Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents 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 respondents 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 thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, 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 thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent A.B.C. Fabrics, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida. The respondent corporation maintains its home office at 1008 Franklin Street, Tampa, Florida, and operates four additional stores in St. Petersburg, Sarasota, Winter Haven, and Daytona Beach, Florida. The corporation trades as Mae Fabrics.

Respondent Irving Cohen is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of the corporate respondent including those hereinafter referred to. The address of Irving Cohen is the same as that of the corporate respondent.

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

### ORDER

*It is ordered*, That respondents A.B.C. Fabrics, Inc., a corporation, trading as Mae Fabrics, or under any other name or names, and its officers, and Irving Cohen, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, delivery for introduction, sale, advertising or offering for sale, in commerce, or the transportation or causing to be transported in commerce, or the importation into the United States, of any textile fiber product; or in connection with the sale, offering for sale, advertising, delivery, transportation or causing to be transported, of any textile fiber product which has been advertised or offered for sale in commerce; or in connection with the sale, offering for sale, advertising, delivery, transportation, or causing to be transported, after shipment in commerce, of any textile fiber product, whether in its original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act, do forthwith cease and desist from:

A. Misbranding such textile fiber products by:

1. Falsely or deceptively stamping, tagging, labeling, invoicing, advertising or otherwise identifying such products as to the name or amount of the constitutent fibers contained therein.

2. Failing to affix a stamp, tag, label, or other means of identification to each such textile fiber product showing in a clear, legible and conspicuous manner each element of information required to be disclosed by Section 4(b) of the Textile Fiber Products Identification Act.

3. Failing to affix labels to samples, swatches or specimens of textile fiber products used to promote or effect the sale of such textile fiber products showing in words and figures plainly legible all the information required to be disclosed by Section 4(b) of the Textile Fiber Products Identification Act.

B. Failing to maintain and preserve, as required by Section 6(b) of the Textile Fiber Products Identification Act, such records of the fiber content of textile fiber products as will show the information set forth on the stamps, tags, labels, or other identification removed by respondents, together with the name or names of the person or persons from whom such textile fiber products were received, when substituting stamps, tags, labels or other identification pursuant to Section 5(b) of the Textile Fiber Products Identification Act.

*It is further ordered*, That respondents notify the Commission at least 30 days prior to any 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.

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

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

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IN THE MATTER OF

## HENRY GOLD TRADING AS QUALITY CRAFTS OF ARLINGTON

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE TRUTH IN LENDING AND THE FEDERAL TRADE COMMISSION ACTS

*Docket C-1807. Complaint, Oct. 7, 1970—Decision, Oct. 7, 1970*

Consent order requiring an individual of Alexandria, Va., seller of crystal, flatware, china, and other merchandise at retail, to cease violating the Truth in Lending Act by failing to use on installment contracts the terms "cash price," "cash downpayment," "unpaid balance of cash price," "amount financed," "finance charge," "total payments," and "deferred payment price" as prescribed by Regulation Z of the Act; inducing customers to sign blank or partially completed promissory notes and failing to furnish a copy of the executed notes; failing to disclose to customers the right-to-cancel the sale within 3 days, on sales made in the home; and preserving credit customers' rights or defenses if their notes are turned over to third parties.

### COMPLAINT

Pursuant to the provisions of the Truth in Lending Act and the implementing regulation promulgated thereunder, and the Federal Trade Commission Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Henry Gold, an individual trading as Quality Crafts of Arlington, hereinafter referred to as respondent, has violated the provisions of said Acts and implementing regulation, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Henry Gold is an individual trading as Quality Crafts of Arlington, with his office and principal place of business located at 5513 Vine Street, Alexandria, Virginia.

PAR. 2. Respondent is now and for sometime last past has been engaged in the offering for sale, sale and distribution of crystal, flatware, china and other articles of merchandise at retail to the public.

COUNT I

Alleging violations of the Truth in Lending Act and the implementing regulations promulgated thereunder, and of the Federal Trade Commission Act, the allegations of Paragraphs One and Two hereof are incorporated by reference in Count I as if fully set forth verbatim.

PAR. 3. Since July 1, 1969, in the ordinary course and conduct of his business as aforesaid, respondent has regularly extended consumer credit as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, respondent, in the ordinary course and conduct of his business and in connection with his credit sales as "credit sale" is defined in Regulation Z, has caused and is causing customers to execute retail installment contracts, hereinafter referred to as "the contract." Respondent makes no other written disclosures in order to comply with the Truth in Lending Act.

By and through the use of the contract, respondent:

1. Fails to use the term "cash price," as defined in Section 226.2(i) of Regulation Z, to describe the price of the merchandise or services purchased, as required by Section 226.8(c)(1) of Regulation Z.

2. Fails to use the term "cash downpayment" to describe downpayments in money, as required by Section 226.8(c)(2) of Regulation Z.

3. Fails to use the term "unpaid balance of cash price" to describe the difference between the cash price and the cash downpayment, as required by Section 226.8(c)(3) of Regulation Z.

4. Fails to use the term "amount financed" to describe the amount of credit extended to the customer, as required by Section 226.8 (c)(7) of Regulation Z.

5. Fails to use the term "finance charge" to describe the total cost of credit, determined in accordance with Section 226.4 of Regulation Z, as required by Section 226.8(c)(8)(i) of Regulation Z.

6. In a number of instances fails to disclose the finance charge expressed as an annual percentage rate, as required by Section 226.8 (b)(2) of Regulation Z.

7. Fails to disclose the terms "finance charge" and "annual percentage rate" more conspicuously than other required terminology, as required by Section 226.6(a) of Regulation Z.

8. Fails to use the term "total of payments" to describe the sum of payments scheduled to repay the indebtedness, as required by Section 226.8(b)(3) of Regulation Z.

9. Fails to use the term "deferred payment price" to describe the sum of the cash price, other charges, and the finance charge, as required by Section 226.8(c)(8)(ii) of Regulation Z.

10. Fails to identify the method of computing any unearned portion of the finance charge in the event of prepayment of the obligation, as required by Section 226.8(b)(7) of Regulation Z.

11. Fails to disclose the date on which the finance charge begins to accrue, that date being different from the date of the transaction, as required by Section 226.8(b)(1) of Regulation Z.

PAR. 5. By and through the respondent's aforesaid failure to make the disclosures in the manner and form set forth in Paragraph Four hereof, respondent failed to comply with the requirements of Regulation Z, the implementing regulation of the Truth in Lending Act duly promulgated by the Board of Governors of the Federal Reserve System. Pursuant to Section 105 of that Act, such failure to comply constitutes a violation of the Truth in Lending Act, and pursuant to Section 108 thereof, respondent thereby violated the Federal Trade Commission Act.

COUNT II

Alleging violations of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One and Two hereof are incorporated by reference in Count II as if fully set forth verbatim.

PAR. 6. In the course and conduct of his business as aforesaid, respondent now causes, and for some time last past has caused, his said merchandise, when sold, to be shipped from his place of business in the State of Virginia to purchasers thereof located in the District of Columbia and in various other States of the United States, and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 7. In the course and conduct of his business as aforesaid, respondent, through door-to-door salesmen, is and for some time last past has been engaged in the following unfair and deceptive acts and practices.

In connection with the credit transactions involving respondent's retail installment contracts, more fully described in Count I hereinabove, respondent also induces his customers to execute blank promissory notes, the terms of which respondent completes at a later time. These promissory notes are in the amount of the customer's remaining indebtedness, the amount of the "total of payments" in his retail installment contract. Further, respondent fails to provide his customers with a copy of the executed promissory note at the time of consummation of the sale or at anytime thereafter.

PAR. 8. In the course and conduct of his aforesaid business, and at all times mentioned herein, respondent has been, and now is, in substantial competition, in commerce, with corporations, firms and individuals engaged in the sale of products of the same general kind and nature as those sold by respondent.

PAR. 9. The aforesaid acts and practices of respondent as alleged in Paragraph Seven 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 in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

## 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 Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act, the Truth in Lending Act and the implementing Regulation promulgated thereunder; and

The respondent 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 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 thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, 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 thirty (30) days, now in further conformity with the sion hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent is an individual trading as Quality Crafts of Arlington, with his office and principal place of business located at 5513 Vine Street, Alexandria, Virginia.

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

*It is ordered*, That respondent Henry Gold, an individual trading as Quality Crafts of Arlington, or trading or doing business under any other name or form of business, and respondent's agents, representatives and employees, directly or through any corporate or other device, in connection with the consumer credit sale of crystal, china, flatware, or any other merchandise or services, as "credit sale" is defined in Regulation Z (12 CFR Part 226) of the Truth in Lending Act (Public Law 90–321, 15 U.S.C. 1601 *et seq.*), do forthwith cease and desist from:

1. Failing to use the term "cash price," as defined in Section 226.2(i) of Regulation Z, to describe the price of the merchandise or services purchased, as required by Section 226.8(c)(1) of Regulation Z.

2. Failing to use the term "cash downpayment" to describe the downpayment in money, as required by Section 226.8(c)(2) of Regulation Z.

3. Failing to use the term "unpaid balance of cash price" to describe the difference between the cash price and the cash downpayment, as required by Section 226.8(c)(3) of Regulation Z.

4. Failing to use the term "amount financed" to describe the amount of credit extended, as required by Section 226.8(c)(7) of Regulation Z.

5. Failing to use the term "finance charge" to describe the total cost of credit determined in accordance with Section 226.4 of Regulation Z, as required by Section 226.8(c)(8)(i) of Regulation Z.

6. Failing to disclose the finance charge expressed as an annual percentage rate, computed in accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

7. Failing to disclose the terms "annual percentage rate" and "finance charge" more conspicuously than other required terminology, as required by Section 226.6(a) of Regulation Z.

8. Failing to use the term "total of payments" to describe the sum of payments scheduled to repay the indebtedness, as required by Section 226.8(b)(3) of Regulation Z.

9. Failing to use the term "deferred payment price" to describe the sum of the cash price, other charges, and the finance charge, as required by Section 226.8(c)(8)(ii) of Regulation Z.

10. Failing to identify the method of computing any unearned portion of the finance charge in the event of prepayment of an obligation, as required by Section 226.8(b)(7) of Regulation Z.

11. Failing to disclose the date on which the finance charge begins to accrue, when that date is different from the date of the transaction, as required by Section 226.8(b)(1) of Regulation Z.

12. Engaging in any credit sale without making all disclosures that are required to be made in connection with that credit sale in the manner and form prescribed by Sections 226.6 and 226.8 of Regulation Z.

*It is further ordered*, That Henry Gold, an individual trading as Quality Crafts of Arlington, or under any other name or names, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of crystal, china, flatware or any other merchandise or services, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Inducing or causing purchasers or prospective purchasers of respondent's merchandise to sign blank or partially completed promissory notes or any other contractual instruments.

2. Failing or refusing to provide purchasers of respondent's merchandise with a copy of the executed promissory note and any other document evidencing the purchaser's transaction or obligation at the time of execution by the purchaser.

3. Assigning, selling or otherwise transferring respondent's notes, contracts or other documents evidencing a purchaser's indebtedness, unless any rights or defenses which the purchaser has and may assert against respondent are preserved and may be asserted against any assignee or subsequent holder of such note, contract or other such documents evidencing the indebtedness.

4. Failing to include the following statement clearly and conspicuously on the face of any note, contract or other evidence of indebtedness executed by or on behalf of respondent's customers:

"*NOTICE*"

"Any holder of this instrument takes it subject to all rights and defenses which would be available to the purchaser in any action arising out of the contract or transaction which gave rise to the debt evidenced hereby, notwithstanding any contractual provisions or other agreement waiving said rights or defenses."

5. In connection with any sale made in the buyer's home,

(a) Contracting for any sale which shall become binding on the buyer prior to midnight of the third day, excluding Sundays and legal holidays, after the date of consummation of the transaction.

(b) Failing to disclose, orally prior to the time of sale, and in writing on any conditional sales contract, promissory note or other instrument executed by the buyer with such conspicuousness and clarity as likely to be observed and read by such buyer, that the buyer may rescind or cancel the sale by directing or mailing a notice of cancellation to respondent's address prior to midnight of the third day, excluding Sundays and legal holidays, after the date of the sale. Upon such cancellation the burden shall be on respondent to collect any goods left in buyer's home and to return any payments received from the buyer. Nothing contained in this right-to-cancel provision shall relieve buyers of the responsibility for taking reasonable care of the goods prior to cancellation and during a reasonable period following cancellation.

(c) Failing to provide a separate and clearly understandable form which the buyer may use as a notice of cancellation.

(d) Negotiating any conditional sales contract, promissory note, or other instrument of indebtedness to a finance company or other third party prior to midnight of the fifth day, excluding Sundays and legal holidays, after the date of execution by the buyer.

(e) *Provided, however*, That nothing contained in paragraph 5 of this order shall relieve respondent of any additional obligations respecting contracts made in the home required by Federal law or the law of the State in which the contract is made. When such obligations are inconsistent respondent can apply to the Commission for relief from this provision with respect to contracts executed in the state in which such different obligations are required. The Commission, upon proper showing, shall make such modifications as may be warranted in the premises.

*It is further ordered*, That respondent shall forthwith deliver a copy of this order to cease and desist to all present and future salesmen or other persons engaged in the sale of respondent's products or services, and shall secure from each such salesman or other person a signed statement acknowledging receipt of said order.

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

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

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IN THE MATTER OF

## PINROS AND GAR CORPORATION

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

*Docket C-1808. Complaint, Oct. 14, 1970—Decision, Oct. 14, 1970*

Consent order requiring a New York City importer and distributor of transistorized radios from foreign manufacturers to cease and desist from misrepresenting in any manner the number of transistors or other components in respondent's products or the functions of any such component.

### 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 Pinros and Gar Corporation, a corporation, hereinafter referred to as respondent, has engaged in acts and practices contrary to the Commission's Trade Regulation Rule relating to Deception as to Transistor Count in Radio Receiving Sets, Including Transceivers (16 CFR 414) and by this and other means has violated the provisions of the Federal Trade Commission 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 charge in that respect as follows:

PARAGRAPH 1. Respondent Pinros and Gar Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 862 Avenue of the Americas, New York, New York.

PAR. 2. Respondent is now, and for some time last past has been, engaged in importing transistorized radios from foreign manufacturers, buying transistorized radios from various suppliers and jobbers and distributing these radios to wholesale and retail purchasers for resale to the purchasing public.

PAR. 3. In the course and conduct of its business as aforesaid, respondent now causes, and for some time last past has caused its products to be imported into the United States or brought from various importers, suppliers and jobbers in the United States and, when sold, to be shipped from its place of business in the State of New York to purchasers thereof located in various other States of the United States, and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its business, respondent makes or transmits representations in promotional materials and on labels attached to or imprinted on the radios concerning the number of transistors contained in the radios exported as aforesaid and imported, bought and distributed by it in the United States in the manner above described.

PAR. 5. In the course and conduct of its business, respondent makes or transmits representations in promotional materials and on labels attached to or imprinted on the radios concerning the number of "Solid State" devices contained in the radios imported, bought and distributed by it and thereby represents, directly or by implication, that a particular set so described contains that number of transistors.

PAR. 6. In representing directly or indirectly the number of transistors or "Solid State" devices contained in its radios, respondent has transmitted transistor counts to its customers that have included in the count transistors that do not perform the recognized and customary functions of radio set transistors in the detection, amplification and reception of radio signals.

PAR. 7. On May 14, 1968, after due notice and hearing, the Commission promulgated its Trade Regulation Rule relating to Deception as to Transistor Count of Radio Receiving Sets, Including Transceivers (16 CFR 414), effective December 10, 1968. On the basis of its findings, as set out in the "Accompanying Statement of Basis and Purpose" of the said Trade Regulation Rule, the Commission determined that it constitutes an unfair method of competition and an unfair and deceptive act or practice to:

Represent, directly or by implication, that any radio set contains a specified number of transistors when one or more of such transistors: (1) are dummy transistors; (2) do not perform the recognized and customary functions of radio set transistors in the detection, amplification and reception of radio signals; or (3) are used in parallel or cascade applications which do not improve the performance capabilities of such sets in the reception, detection and amplification of radio signals.

PAR. 8. Notice is hereby given that the presentation of evidence in the course of a hearing in this proceeding may be required to dispose of the issues that may arise as a result of the allegations contained in Paragraphs One through Seven herein, and that if the issues presented as a result of the allegations contained in those Paragraphs should be resolved in substantiation of such allegations then the above Trade Regulation Rule is relevant to the alleged practices of the respondent. Therefore, the respondent is given further notice that it may present evidence, according to Section 1.12 (c) of the Commission's Procedures and Rules of Practice, to show that the above Trade Regulation Rule is not applicable to the alleged acts or practices of respondent. If the Commission should find that the above Rule is applicable to the alleged acts or practices of the respondent, then it will proceed to make its findings, conclusions, and final order in this proceeding on the basis of that Rule. A copy of the Rule and Accompanying Statement of Basis and Purpose, marked Appendix A,* is attached hereto and made a part of this pleading.

PAR. 9. The aforesaid methods of competition and acts and practices of respondent, as alleged in Paragraph Eight hereof, were and are contrary to the provisions and requirements of the Commission's Trade Regulation Rule relating to Deception as to Transistor Count of Radio Receiving Sets, Including Transceivers (16 CFR 414), and thereby constituted, and now constitute, unfair methods of competition in commerce and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

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* Appendix A was omitted in printing. Trade Regulation Rule relating to Deception as to Transistor Count in Radio Receiving Sets, Including Transceivers, effective December 10, 1968, appears in Title 16 of the Code of Federal Regulations Section 414.

## 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 Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent 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 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 thereafter 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 thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Pinros and Gar Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 862 Avenue of the Americas, New York, New York.

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

*It is ordered*, That respondent Pinros and Gar Corporation, a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the manufacturing, advertising, offering for sale, sale or distribution of radio receiving sets, including transceivers, or any other product, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, through the use of the terms transistor or "Solid State" or any other word or phrase

that any radio set contains a specified number of transistors when one or more such transistors: (1) are dummy transistors; (2) do not perform the recognized and customary functions of radio set transistors in the detection, amplification and reception of radio signals; or (3) are used in parallel or cascade applications which do not improve the performance capabilities of such sets in the reception, detection and amplification of radio signals: *Provided however*, That nothing herein shall be construced to prohibit in connection with a statement as to the actual transistor count (computed without inclusion of transistors which do not perform the functions of detection, amplification and reception of radio signals), a further statement to the effect that the sets in addition contain one or more transistors acting as diodes or performing auxiliary or other functions when such is the fact.

2. Misrepresenting, in any manner, the number of transistors or other components in respondent's products or the functions of any such component.

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

*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 this order.

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

By the Commission, with Commissioner Elman not participating.

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IN THE MATTER OF

## VOLTAIRE TIME, INC., DOING BUSINESS AS GERMINAL, ETC.

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

*Docket C-1809. Complaint, Oct. 16, 1970—Decision, Oct. 16, 1970*

Consent order requiring a New York City distributor of watches to cease misrepresenting that it operates a factory in Switzerland, that its prospective customers have been specially selected or that it intends to sell watches through stores in the United States, that its watches are in limited supply and will be sold in the future at higher prices, falsely misrepresenting savings available to purchasers, or that watches have been in continuous manufacture since 1848 or have been purchased by Americans in Europe, falsely guaranteeing the watches, and failing to disclose the true metal composition of the watches.

## 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 Voltaire Time, Inc., a corporation, doing business as Germinal and Germinal Voltaire, and Maurice Elk, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

Paragraph 1. Voltaire Time, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 630 Fifth Avenue, Rockefeller Center, New York, New York. Voltaire Time, Inc., does business under the names Germinal and Germinal Voltaire.

Respondent Maurice Elk is an individual and an officer of corporate respondent Voltaire Time, Inc. He formulates, directs and controls the acts and practices of said corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

Par. 2. Respondents are now, and for some time last past have been, engaged in advertising, offering for sale, sale and distribution of watches to the public.

Par. 3. In the course and conduct of their business as aforesaid, respondents now cause, and for some time last past have caused, their said products, when sold, to be shipped from their place of business in the State of New York to purchasers thereof located in various other States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Par. 4. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their products, the respondents have made, and are now making, numerous statements and representations in promotional material consisting of a form letter, brochure, price list and a combined questionnaire and order blank sent to the purchasing public, with respect to the foreign location of the company distributing said material, the selection of recipients of said mailings, the purpose thereof, the prices of the products offered, the savings to purchasers, the reputation of said products, their history and the length of time on the market, the advertised guarantee, and the precious metal composition of said products.

Typical and illustrative of said statements and representations, but not all inclusive thereof, are the following:

*The Letter:*

GERMINAL,
*Switzerland.*

Bonjour et salutations de la Suisse.

We are sending this letter to a select group of American business and professional people like yourself who have been recommended to us by an American research organization.

The courtesy we ask is that you read this letter and favor us with the answers to the enclosed questionnaire. In appreciation for your co-operation, we shall do our utmost to reward you for your kind help and assistance. (Please Read On)

Here in Neuchatel, the traditional home of fine watchmaking for more than 300 years, our master craftsmen produce the world famous Germinal-Voltaire watch. "One Of The World's Truly Fine Watches Since 1848." And here each year American travelers choose these famous watches to bring home as treasured gifts and exquisite samples of Swiss precision and beauty.

So, although many Americans wear our watches, they have never actually been sold in the U.S.A. But now after 117 years we are finally entering the American Market. Soon we hope many hundreds of fine stores in your great country will recommend these distinguished watches to their favored customers . . . and this is why we write to you.

As a person successful in the professions and commerce you can save us time and money in our marketing plans. We will be undertaking extensive advertising in America and we are most anxious to place our advertising where it will best be seen by people like yourself—would you help us by filling in and returning the enclosed questionnaire in the free envelope—it is a two minute favor that will be warmly appreciated.

We are also enclosing the brochure of the first selection of watches to be offered to the American market. In return for your participating interest we offer you to share in the shipment of these watches which is now in New York duty-paid.

Instead of the suggested retail prices at which these watches will be sold in the near future, you may select any watch of the collection and order it for just one-third of the price—you save two-thirds. This is our way of thanking you for your co-operation. You may select more than one watch if you wish, but no more than one of any style due to the limitation of this shipment.

Please fill in the questionnaire and mail to our New York office in the free envelope. On the back of the questionnaire is the invoice to order your reward at 2/3 OFF. We beg you not to delay or put off your reply. In the first place your immediate answers to our market questions is needed to complete our survey. Also the initial supply of watches forces us to limit this offer only to that quantity now in New York duty-paid.

Yours faithfully,

MAURICE ELQUE, *Secretaire.*

*The Brochure:*

One of the World's Truly Fine Watches Since 1848
Available soon in America—for the first time in 118 years
. . . It is guaranteed against defects in manufacture . . . .
Each watch is fitted with an unbreakable mainspring, guaranteed for life.

* * * * * * *

Shown here is our new, recently completed factory.

* * * * * * *

We welcome inspection of our plant and extend to you a warm and personal invitation to visit us when and if you come to Switzerland.

*The Price List:*

All Germinal Voltaire Watches Carry A Lifetime Written Service Guarantee*

| Style Number: | | Your Cost** |
|---|---|---|
| USA–100 | $ 75.00 | $25.00 |
| * * * * * | * | * |
| USA–217 | 270.00 | 90.00 |

* On all moving parts against breakage.

The Questionnaire:

QUESTIONNAIRE * Please fill out this questionnaire and mail it to our New York office in the postage-paid envelope provided.

1. What is your favorite newspaper?
   Name__________ From (city or town)__________
2. Which section of your newspaper do you turn to first? (Check the appropriate one.)
   News ☐ Financial ☐ Sports ☐
3. What are your two favorite magazines?__________
4. If you wished to purchase a fine watch, to which store in your community would you go?
   Name __________
   Location __________
5. *OPTIONAL __________
   Your Name __________
   Address __________
   City ______ State ______

PAR. 5. By and through the use of the above-quoted statements and representations, and others of similar import and meaning but not expressly set out herein the respondents have represented, and are now representing, directly or by implication, that:

1. The letter with enclosed printed material is a solicitation from a company named Germinal with factory and headquarters located in Switzerland and with United States offices located at 630 Fifth Avenue, New York, New York.

2. (a) The letter and the accompanying printed material are being sent to a select group of successful business and professional persons; (b) the purpose of the solicitation is to obtain advertising and marketing information for use in connection with the imminent offering for sale of Germinal-Voltaire watches through stores in the United States, and (c) in return for completing an enclosed questionnaire recipients are given the opportunity to share at a reduced price in a shipment of such watches from Switzerland which is now in New York, duty-paid.

3. The selling prices of the watches offered in respondents' letter and other promotional material are a reduced introductory offer of one-third of the prevailing prices at which said watches will immediately thereafter be sold only in stores in the United States, and that persons who buy now will save two-thirds of said prices.

4. The Germinal-Voltaire watches advertised by respondents

(a) Are world famous,

(b) Have been manufactured continuously since 1848,

(c) Have been previously purchased in Europe by Americans and

(d) Have never before been sold in the United States.

5. Through use of the statements "guaranteed against defects in manufacture," "unbreakable mainspring guaranteed for life" and "lifetime written service guarantee," that said watches are unconditionally guaranteed against manufacturing defects, that the mainspring is unconditionally guaranteed for the life of the purchaser, and that respondents will unconditionally service said watches without charge for the life of the purchaser.

PAR. 6. In truth and in fact:

1. The letter with enclosed printed matter is not a direct solicitation by a company named Germinal with headquarters and a factory located in Switzerland and with United States offices at 630 Fifth Avenue, New York, New York, but it is a solicitation by Voltaire Time, Inc., a New York corporation, with its office at said address which does not own or operate a factory wherein said watches are manufactured.

2. (a) The persons to whom said letters and accompanying printed material are sent are not a select group of successful business and professional persons; but are persons whose names were included in a general mailing list; (b) The purpose of said solicitation is not to obtain advertising and marketing information for use in connection with the imminent offering for sale of Germinal-Voltaire watches through stores in the United States; but for the purpose of then and there selling watches to recipients of such promotional material; and (c) The watches are not being sold at a reduced price, recipients are not being given a reduced price for completing

a questionnaire nor are the watches limited to one shipment from Switzerland or otherwise available only in limited supply. Said watches are being sold at their usual and customary prices and are from a stock of watches maintained by repeated shipments from Switzerland.

3. Respondents have been offering Germinal-Voltaire watches direct to the purchaser exclusively by mail in the manner above described at the same prices for more than the past two years and, therefore, the prevailing prices of said watches are not respondents' suggested retail prices at which they say they will be sold immediately thereafter only through stores in the United States; but the prices at which said watches are actually being sold, and therefore, the represented reductions in prices of said watches and the savings based thereon are a fabrication and a delusion. Nor has the representation that such watches will be sold through retail stores been borne out.

4. The Germinal-Voltaire watches advertised by respondents:

(a) Are not world famous. They are known only through respondents' promotional material whose distribution is confined to the United States,

(b) Have been manufactured only since 1965,

(c) Have not been previously sold in Europe, hence could not have been previously purchased there by Americans, and

(d) Have been sold in the United States since the respondents started their promotion by mail in 1965.

5. Respondents' advertised guarantees of watches, parts thereof or of service are not unconditional. Instead, they are subject to conditions, limitations and charges which are not set forth in the advertising and the "lifetime" referred to is that of the watch and not that of the purchaser or original user.

Therefore, the statements and representations as set forth in Paragraphs Four and Five hereof were, and are, false, misleading and deceptive.

Par. 7. Respondents' watches are in cases, the bezels of which have been treated or processed to simulate gold or gold alloy. Certain of the wristbands attached to respondents' watches have been likewise so treated or processed. Said watch cases are not marked to disclose clearly that the bezels are composed of base metal nor are the said wristbands so marked. The practice of respondents in offering for sale and selling watches with bezels and wristbands so treated or processed without clearly disclosing their true metal composition has the tendency and capacity to lead members of the purchasing public to believe that said bezels or said wristbands are composed of gold or gold alloy.

Therefore, respondents' failure to clearly disclose the true metal content of said watch parts or attachments is false, misleading and deceptive.

PAR. 8. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been, and now are, in substantial competition, in commerce, with corporations, firms and individuals in the sale of watches of the same general kind and nature as those sold by respondents.

PAR. 9. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' product by reason of said erroneous and mistaken belief.

PAR. 10. The aforesaid acts and practices of respondents, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

## DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents 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 agreement and having accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Voltaire Time, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 630 Fifth Avenue, Rockefeller Center, New York, New York. Voltaire Time, Inc., does business under the names Germinal and Germinal Voltaire.

Respondent Maurice Elk is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his address is the same as that of said corporation.

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

ORDER

*It is ordered*, That respondents Voltaire Time, Inc., a corporation, trading as Germinal or Germinal Voltaire or under any other name or names, and its officers, and Maurice Elk, individually, and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of watches or any other products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing directly or by implication:

(a) That respondents have business headquarters or a factory located in Switzerland with offices located in the United States; or

(b) That letters, advertising, or promotional or other printed material are distributed or caused to be distributed by a business based in Switzerland.

2. Misrepresenting, in any manner, the location or domicile of respondents' business or the source or origin of respondents' solicitation, advertisements, goods, products or services.

3. Representing, directly or by implication, that respondents own or operate a factory or manufacture the products offered for sale and sold by them.

4. Representing, directly or by implication, that persons to whom advertising, promotional or other material is sent or offers of sale are made are specially selected; or misrepresenting, in any manner, the class or category of persons to whom such material is sent or to whom offers are made.

5. Representing, directly or by implication, that the purpose of solicitations or inquiries is to obtain advertising or marketing information for use in connection with the offering for sale of

watches or other products through stores in the United States; or misrepresenting, in any manner, the intent or purpose for which any solicitation, survey or inquiry is made.

6. Representing, directly or by implication, that said products are to be offered in stores in the United States.

7. Representing, directly or by implication, that said watches or any other products are being offered at a reduced price in return for the recipient completing a questionnaire.

8. Representing, directly or by implication, that said watches or any other products are in limited supply or that the offer is limited or restricted as to time or in any other manner unless any represented limitation or restriction in fact existed and was in good faith imposed and adhered to.

9. Representing, directly or by implication, that any amount is the price at which watches or any other product will be sold at a future time unless said watches or other products were, within the represented future time, put on the market in substantial numbers and in good faith offered to the public at the represented prices, in the usual course of business, and for a substantial period of time.

10. Representing, directly or by implication, that any retail price for watches or any other product is a reduced price unless such price constitutes a significant reduction from an established selling price at which said watches or other products have been sold in substantial quantities by respondents at retail in the recent regular course of business.

11. Falsely representing, in any manner, that savings are available to purchasers or prospective purchasers of respondents' products or misrepresenting, in any manner, the amount of savings available to purchasers or prospective purchasers of respondents' products.

12. Representing, directly or by implication, that watches offered for sale and sold by respondents:

(a) Are world famous or,

(b) Have been manufactured continuously since 1848 or,

(c) Have been previously purchased by Americans in Europe or,

(d) Have never before been sold in the United States.

13. Misrepresenting, in any manner, the reputation of watches or products or the places where or the length of time during which they have been manufactured or sold.

14. Representing, directly or by implication, that watches or products or the services in connection therewith are guaranteed unless the extent and nature of the guarantee, the identity of

the guarantor and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed.

15. Offering for sale or selling watches, the cases or the attached wristbands of which are in whole or in part composed of base metal which has been treated with an electrolytically applied flashing or coating of precious metal of less than 1½/1000 of an inch over all exposed surfaces after completion of all finishing operations, without clearly and conspicuously disclosing respectively on both such cases and attached wristbands or parts that they are base metal which have been flashed or coated with a thin and unsubstantial coating.

16. Offering for sale or selling watches, the cases or the attached wristbands of which are in whole or in part composed of base metal which have been treated to simulate precious metal, without clearly and conspicuously disclosing on both such cases and wristbands the true respective metal composition of such cases, wristbands or parts thereof.

17. Misrepresenting, in any manner, the metal content or composition of any of respondents' products.

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

*It is further ordered*, That respondents 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.

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

By the Commission, with Commissioner Elman not participating.

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IN THE MATTER OF

## PRESSMAN TOY CORPORATION, Docket No. 7067
## EMPIRE PLASTIC CORPORATION, Docket No. 7069

DISMISSAL ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2(A) OF THE CLAYTON ACT

*Complaints, Feb. 20, 1958—Decision, Oct. 20, 1970*

Order reopening the proceedings against two New York City toy manufacturers, rescinding the Commission's orders to cease and desist, and dismissing the complaints against each.

## ORDER AND DECISION REOPENING PROCEEDINGS, RESCINDING ORDERS AND DISMISSING COMPLAINTS

The Commission having issued orders to cease and desist against respondent Pressman Toy Corporation on August 1, 1959 [56 F.T.C. 130], and against respondent Empire Plastic Corporation on July 7, 1958 [55 F.T.C. 103]; and having issued on August 7, 1970, its order to show cause why these proceedings should not be reopened for the purpose of rescinding its said orders to cease and desist and dismissing its complaints; and having served its said order to show cause upon the respondents; and

The Commission being of the opinion that the order to show cause raises no substantial issue of fact requiring resolution; and

The Commission for the reasons set forth in its order to show cause being of the opinion that the public interest will best be served by reopening the proceedings herein, rescinding its orders to cease and desist, and dismissing its complaints,

*It is ordered*, That these matters be, and they hereby are, reopened as to the respondents named herein.

*It is further ordered*, That the Commission's orders to cease and desist issued against Pressman Toy Corporation August 1, 1959 [56 F.T.C. 130], and against Empire Plastic Corporation July 7, 1958 [55 F.T.C. 103], be, and they hereby are, rescinded as to each respondent, and that the complaints as to such respondents be, and they hereby are, dismissed.

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IN THE MATTER OF

# WILLIAM A. JONES DOING BUSINESS AS ILLINOIS COLLECTION SERVICE

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

*Docket C-1810. Complaint, Oct. 20, 1970—Decision, Oct. 20, 1970*

Consent order requiring a Joliet, Ill., individual engaged in the business of operating a debt collection agency to cease using debt collection forms which simulates a government document or inaccurately states the rights of a creditor against a debtor, using any envelope which appears governmental or has a Washington, D.C., return address without indicating that it is not from the United States Government, threatening legal action, and threatening to contact delinquent's debtor's employer.

## 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 William A. Jones, an individual doing business as Illinois Collection Service, hereinafter 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 in that respect as follows:

Paragraph 1. Respondent William A. Jones is an individual doing business as Illinois Collection Service. The office and principal place of business of Illinois Collection Service is located at 24 West Van Buren Street, Joliet, Illinois.

Par. 2. Respondent is now, and for some time last past has been, engaged in the business of operating a debt collection agency.

Par. 3. Respondent solicits and receives accounts for collection from business and professional people. In the course and conduct of his business, respondent has engaged, and is now engaged, in commercial intercourse, in commerce, among and between various States of the United States, including the transmission and receipt of monies, checks, collection letters and forms, contracts, and other written instruments. In carrying out his aforesaid collection business, respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Par. 4. In the course and conduct of his business as aforesaid, respondent has transmitted and mailed, and has caused to be transmitted and mailed, to alleged delinquent debtors, various forms and other printed material.

Typical and illustrative of such forms and material, but not all inclusive thereof, are the following:

1. A printed form and a brown window envelope in which the form is mailed containing the following statements:

Final Demand for the Payment of Debt.

PAYMENT DEMAND
748 Washington Building
Washington, D.C.

NOTICE MAILED FROM WASHINGTON, D.C., BY PAYMENT DEMAND.

This Demand is made to give you a last opportunity to pay before action is taken on said claim.

The Form Enclosed Is Confidential. No One Else May Open.

Parts of the form are printed in Gothic style type and the form is similar in appearance to an official or governmental document. The brown window envelope, with a return address of 748 Washington Building, Washington, D.C., is similar in appearance to envelopes used by governmental agencies for official purposes.

2. The printed form described in subparagraph 1 of this Paragraph also contains the following statements:

Subject to the Laws of the

STATE OF ILLINOIS

A Creditor may request an Attorney-at-Law to attach Property such as Automobile, Jewelry, Boat, Live Stock, Crops, Machinery, House, Real Estate, Bank Account, Bank Vault, Stocks, Bonds and Earnings, Commission or Salary.

3. A printed form containing the following statements:

FINAL DEMAND BEFORE SUIT

You are hereby notified that we hold a claim against you in the name of the above plaintiff for the amount indicated, and unless payment or satisfactory arrangements are made within five days, suit will be instituted for collection of same.

IT WILL BE NECESSARY TO INFORM YOUR EMPLOYER, IF SATISFACTORY ARRANGEMENTS FOR THE PAYMENT OF THIS ACCOUNT ARE NOT MADE WITH THIS OFFICE *AT ONCE.*

4. A printed form containing the following statements:

PEREMPTORY DRAFT

VALUE RECEIVED

Demand is hereby made upon you for payment, on or before ______________ ______________ of the total sum, past due, shown on statement made a part of this Peremptory Draft.

You are hereby notified that in the event that this Draft is not honored within the time allowed, Statutory Process will be recommended to enforce payment, without further notice whatever being sent you.

PAR. 5. By and through the use of the statements and representations quoted under subparagraphs 1 and 3 of Paragraph Four, and others of similar import and meaning not specifically set forth herein, respondent represents, directly or by implication:

1. That "Payment Demand" is a bona fide organization authorized to effect collection of alleged delinquent accounts.

2. That "Payment Demand" is an agency of the U.S. Government or operates under the aegis of the U.S. Government.

3. That failure of an alleged delinquent debtor to remit money to respondent will result in the immediate institution of legal action to effect payment.

4. That failure of an alleged delinquent debtor to remit money to respondent will cause respondent to contact the debtor's employer in order to effect payment.

PAR. 6. In truth and in fact:

1. "Payment Demand" is not a bona fide organization authorized to effect collection of alleged delinquent accounts, but is merely a name placed on the forms by the supplier thereof.

2. "Payment Demand" is not an agency of the U.S. Government and does not operate under the aegis of the U.S. Government.

3. The failure of an alleged delinquent debtor to remit money to respondent does not always result in the immediate institution of legal action. On the contrary, legal proceedings are not generally used as a collection device.

4. The failure of an alleged delinquent debtor to remit money to respondent is not always followed by immediate employer contact. On the contrary, employer contact is not generally used as a collection device.

Therefore, the statements and representations as set forth in subparagraphs 1 and 3 of Paragraph Four and in Paragraph Five hereof, were, and are, false, misleading, and deceptive.

PAR. 7. By and through the use of the statements and representations quoted under subparagraph 2 of Paragraph Four, respondent misrepresents and inaccurately states the rights of creditors under applicable laws. The sole purpose of said statements and representations is to coerce and induce alleged delinquent debtors to remit money to respondent.

Therefore, the aforesaid acts and practices were, and are, unfair, misleading, and deceptive.

PAR. 8. By and through the use of the statements and representations quoted under subparagraph 4 of Paragraph Four, respondent represents that a debt collection form is a "draft" which the recipient thereof must "honor." Said form is not a draft and its sole purpose is to coerce and induce alleged delinquent debtors to remit money to respondent.

Therefore, the aforesaid acts and practices were, and are, unfair, misleading, and deceptive.

PAR. 9. In the course and conduct of his business as aforesaid, and at all times mentioned herein, respondent has been, and is now, in substantial competition, in commerce, with corporations, firms, and individuals engaged in the business of collecting alleged delinquent accounts.

PAR. 10. The use by respondent of the aforesaid false, misleading, and deceptive statements, representations, and practices 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 into the payment of alleged delinquent accounts by reason of said erroneous and mistaken belief.

PAR. 11. The aforesaid 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 in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

## 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 Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent 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 agreement is for settlement purposes only and does not constitute an admission by the respondent that the law has been violated as alleged in said complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter 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 having placed said agreement on the public record for a period of thirty (30) days, 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 William A. Jones is an individual doing business as Illinois Collection Service. The office and principal place of business of Illinois Collection Service is located at 24 West Van Buren Street, Joliet, Illinois.

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

*It is ordered*, That respondent William A. Jones, an individual doing business as Illinois Collection Service, or under any other name or names, and respondent's representatives, agents, and employees, directly or through any corporate or other device, in connection with the solicitation of accounts for collection or the collection of, or attempts to collect, alleged delinquent accounts or the obtaining of, or attempts to obtain, information concerning alleged delinquent debtors, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using any debt collection form or other material:

a. Which appears to be, or simulates, an official or governmental form or document;

b. Which bears the name "Payment Demand" or any other name which creates the false impresssion that a party other than respondent is attempting to collect an alleged debt;

c. Which misrepresents or inaccurately states the right of a creditor under State law to attach the real or personal property, income, wages, or other property of an alleged delinquent debtor;

d. Which contains a statement of the rights of a creditor to attach after judgment the real or personal property, income, wages, or other property of an alleged delinquent debtor without disclosing that judgment may not be entered against the debtor unless he has first had an opportunity to appear and defend himself in a court of law: *Provided, however*, That it shall be a defense hereunder for respondent to establish that a form containing a statement prohibited by this Paragraph (d) is sent only to debtors against whom final judgments have been obtained.

2. Using any envelope for debt collection purposes:

a. Which appears to be, or simulates, an official or governmental envelope;

b. Which purports to come from a party other than respondent;

c. Which contains a Washington, D.C., return address without disclosing in a prominent place, in clear language, and in type at least as large as the largest type used on

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said envelope, respondent's name and the fact that the enclosed forms do not come from the United States Government;

d. Which contains the statement "The Form Enclosed Is Confidential No One Else May Open" or any statement of similar import.

3. Representing directly or by implication, that legal action will be instituted against an alleged delinquent debtor unless such legal action will in fact be instituted as represented if the debtor fails to make payment or otherwise settle his account.

4. Representing, directly or by implication, that an alleged delinquent debtor's employer will be contacted unless such action will in fact be taken as represented if the debtor fails to make payment or otherwise settle his account.

5. Falsely representing that a form or notice used for debt collection purposes is a draft or similar instrument.

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

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## OKC CORP. AND OKLAHOMA LAND AND CATTLE COMPANY

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

*Docket 8802. Complaint, Oct. 17, 1969—Decision, Oct. 21, 1970*

Order requiring a Dallas, Tex., producer of portland cement, asphalts, premium and regular type gasolines, heating oils and various other petroleum products to divest in its entirety a large New Orleans, La., purchaser of cement and seller of ready mixed concrete, and not to acquire for the next 10 years without prior approval by the Federal Trade Commission any corporate (1) producer or seller of ready mixed concrete or concrete products within respondent's present or future marketing area for portland cement or (2) purchaser of more than 10,000 barrels of portland cement in any of the five years preceding the merger. The complaint against the second respondent was dismissed.

### COMPLAINT

The Federal Trade Commission having reason to believe that OKC Corp. ("OKC"), a corporation, acting in combination and concert with Oklahoma Land and Cattle Company ("Oklahoma"), a corporation, has acquired or is attempting to acquire control of Jahncke Service, Incorporated ("Jahncke"), by obtaining irrevocable proxies and by purchasing voting common stock of Jahncke; that OKC plans to acquire the entire business of Jahncke; that this acquisition violates Section 7 of the Clayton Act, as amended (15 U.S.C. § 18); and that this acquisition, the combination and concerted action on the part of OKC and Oklahoma and OKC's plan to acquire the entire business of Jahncke violate Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. § 45); and that a proceeding in respect thereof would be in the public interest, therefore, pursuant to Section 11 of the Clayton Act, as amended (15 U.S.C. § 21), and Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45) issues its complaint, stating its charges in that respect as follows:

## I. Definitions

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

a. "*Portland cement*"—Portland cement includes Types I through V of portland cement as specified by the American Society for Testing Materials. Neither masonry nor white cement is included.

b. "*Ready mixed concrete*"—Ready mixed concrete includes all portland cement concrete manufactured and delivered to a purchaser in a plastic and unhardened state. Ready mixed concrete includes central mixed concrete, shrink mixed concrete and transit mixed concrete.

c. "*Construction Aggregates*"—Construction aggregates are materials, particles or grains in prescribed gradation or size range such as sand, gravel, crushed stone and blast furnace slag.

d. "*Shells*"—Shells are oyster and/or clam shells commercially dredged and sold.

e. "*New Orleans area*"—consists of the Parishes of Jefferson, Orleans, St. Bernard and St. Tammany, Louisiana. This area corresponds to the Standard Metropolitan Statistical Area (SMSA) as defined by the Bureau of the Budget.

## II. Corporations Involved

A. *OKC Corp.*

2. OKC Corp. ("OKC") is a corporation organized and existing under the laws of the State of Delaware, with its principal office located at 1949 North Stemmons Freeway, Dallas, Texas. It was incorporated March 12, 1959, under the name Oklahoma Cement Company. The present name was adopted on January 30, 1967. Among

its incorporators were Kenneth S. Adams, Sr., the George A. Fuller Company, Inc., Central States Investment Company and Coastal States Gas Producing Company.

3. OKC's principal products are portland cement, asphalts, premium and regular type gasolines, heating oils and various other petroleum products. From a two (2) million barrel annual capacity plant located at Pryor, Oklahoma and terminals located at Woodward and Oklahoma City, Oklahoma, OKC manufactures and sells portland cement throughout northern Oklahoma, southwestern Kansas, southern Missouri, northern Texas and northern Arkansas. From a 1.7 million barrel annual capacity plant at New Orleans, Louisiana, operating as the Louisiana Cement Company Division of OKC, portland cement is manufactured and sold in eastern Texas, Louisiana, western Mississippi, western Florida and the southern Gulf Coast area. OKC's principal classes of customers for its portland cement are ready mixed concrete companies, oil well servicing companies and public works projects, and of these, ready mixed concrete companies purchase the largest amount of portland cement from each of OKC's plants.

4. For the fiscal year ending September 30, 1968, OKC's total production of portland cement amounted to 3,400,000 barrels. During this same fiscal year, OKC's portland cement producing plants operated at an average of 91 percent of rated capacity as compared with 85 percent of rated capacity during fiscal year 1967. Limestone deposits are owned and used by OKC's Pryor, Oklahoma plant as the basic raw material in the manufacture of portland cement. However, limestone is not available at OKC's New Orleans, Louisiana plant and shells are used to replace limestone as the basic raw material.

5. The New Orleans area is one of the principal markets for portland cement manufactured at OKC's New Orleans plant. Since it completed the New Orleans plant in July 1964, OKC has become the third largest supplier of portland cement to the New Orleans area. In 1968, this plant shipped 1,548,086 barrels of portland cement valued at $5,659,802. Of this total, 966,916 barrels or 62 percent, valued at $3,776,412 were shipped within the New Orleans area. Its 1968 shipments accounted for approximately 23 percent of the total shipments of portland cement made into this marketing area. OKC also purchases large amounts of shells for use as a basic raw material in the manufacture of portland cement at its New Orleans, Louisiana, plant. In 1968, OKC purchased 420,197 tons of shells valued at $653,514. Its 1968 purchases of shells amounted to approxi-

mately 7.5 percent of shells sold within 100 miles of New Orleans. OKC's largest supplier of shells is Jahncke.

6. A subsidiary of OKC, Okmulgee Refining Co., Inc., operates at Okmulgee, Oklahoma, a petroleum refinery, purchased from Phillips Petroleum Company ("Phillips") in 1966.

7. For the fiscal year ending September 30, 1968, OKC had net sales of $39,203,178 net income of $2,319,655, and total assets of $41,229,177.

8. At all times relevant herein, OKC was, and is now, a corporation engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act and the Clayton Act.

B. *Oklahoma Land and Cattle Company*

9. Oklahoma Land and Cattle Company ("Oklahoma"), chartered in 1960, is a corporation organized and existing under the laws of the State of Oklahoma with its principal office located in Bartlesville, Oklahoma. The company is engaged in the ranching business and owns and operates six large ranches which stock, breed and sell cattle. Oklahoma sells most of its cattle to livestock commission companies and meat packers in Kansas and Missouri. Oklahoma also owns, for investment, capital stock in some twelve publicly-traded corporations amounting in value to between $3,000,000 and $4,000,000. Such stock is purchased on the open market at market trading prices, and in all but one instance represents less than 2 percent of the outstanding shares of stock of each of the corporations in which Oklahoma has invested.

10. For the year ended December 31, 1968, Oklahoma had current assets of $3,041,746, current liabilities of $17,300 and total assets of $6,208,012. It had a consolidated net loss of $10,542 as a result of an operating loss of $295,824 (cattle) and a non-operating net income of $285,281 (stock investment).

11. Oklahoma is the sole, and wholly owned subsidiary of The Pipe Investment Company ("Pipe"), also of Bartlesville, Oklahoma. Both companies have the same president. Pipe, incorporated in the State of Texas on March 21, 1951, is primarily engaged in the real estate business in the States of Oklahoma, Texas, California and Florida, and owns oil properties in Texas and Oklahoma. It is through this company that the Kenneth S. Adams, Sr., family control Oklahoma.

12. At all times relevant herein, Oklahoma was, and is now, a corporation engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act and the Clayton Act.

C. *Jahncke Service, Incorporated*

13. Jahncke Service, Incorporated ("Jahncke"), is a corporation organized and existing under the laws of the State of Louisiana with its principal office located at 814 Howard Avenue, New Orleans, Louisiana.

14. Jahncke's business operations include marine hydraulic dredging, the dredging and sale of shells, the production and sale of construction aggregates, concrete pipe and other concrete products, building materials, and ready mixed concrete.

15. Jahncke has been engaged in the production and sale of ready mixed concrete in the New Orleans area for over thirty years, and operates seven ready mixed concrete plants in that area. It is the largest producer of ready mixed concrete in the New Orleans area having sold over 255,000 cubic yards of ready mixed concrete in 1968. During the same year it purchased over 400,000 barrels of portland cement from 6 suppliers, including OKC. Its portland cement consumption in 1968 amounted to 10 percent of the total shipments into the New Orleans area.

16. Jahncke is also one of the leading producers of construction aggregates in the New Orleans area, and is one of the leading producers of shells, a basic raw material used in the manufacture of portland cement. In 1968, it produced and sold approximately 1,444,000 cubic yards of shells and 784,988 tons of aggregates. Its 1968 sales of shells accounted for approximately 22 percent of the total sales of shells within 100 miles of New Orleans.

17. As well as purchasing portland cement in interstate commerce, Jahncke's shell and hydraulic dredging operations are carried out in the Gulf of Mexico and within and among various Gulf Coast States.

18. For the year ended December 31, 1968, Jahncke had net sales of $11,476,642, total revenues of $19,144,696 and net income of $177,-231. Current assets were $6,689,492 and current liabilities were $2,-008,287.

19. At all times revelant herein, Jahncke was, and is now, engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act and the Clayton Act.

D. *Relationship between OKC and Oklahoma*

20. Oklahoma and Kenneth S. Adams, Sr., have a close ownership and business relationship with OKC. Oklahoma is controlled through its parent company, The Pipe Investment Company, which in turn is controlled by the Kenneth S. Adams, Sr., family. Oklahoma di-

rectly owns 15,000 shares of OKC common stock. Kenneth S. Adams, Sr., was a founder of OKC and was a director of OKC from its founding in 1959 until he resigned in April 1967. Kenneth S. Adams, Sr., is a substantial stockholder in OKC. The Adams Trust, Central States Investment Company, organized for the benefit of Dorothy Glynn Adams, wife of Kenneth S. Adams, Sr., and their five children, holds a very substantial amount of OKC stock. Central States Investment Company also owned $1 million principal amount of OKC 5½ percent convertible debentures due January 1, 1978. Kenneth S. Adams, Jr., is also a substantial stockholder of OKC. Dorothy Glynn Adams is also a direct beneficial owner of OKC stock.

## III. Conspiracy and Acquisition

21. In September 1968, the board of directors of Jahncke voted against accepting a proposal of OKC to acquire Jahncke. Subsequent to September 1968, and continuing to the present time the said respondents hereinbefore named and described, and each of them, have by means of agreements and understandings, combined and conspired and have united in and pursued a planned common course of action, reaching beyond State boundaries, by various means and methods, between and among themselves and others not named herein, to acquire control of Jahncke, and thereby to hinder, restrain, suppress and eliminate competition in the production and sale of portland cement, shells, ready mixed concrete and construction aggregates.

22. Pursuant to, and in furtherance and effectuation of the aforesaid agreements, understandings and planned common course of action, respondents have engaged in and performed and are now engaging in and performing the following acts and practices among others:

(1) Officers and directors of OKC have directly, or indirectly through duly authorized agents and representatives, solicited shareholders of Jahncke for the purpose of purchasing Jahncke stock held by them or urging them to assign their Jahncke voting stock proxies to Oklahoma.

(2) Officers and directors of OKC have directly, or indirectly through duly authorized agents and representatives, negotiated agreements with various major shareholders of Jahncke whereby irrevocable voting stock proxies have been assigned to Oklahoma in consideration for future, but presently nonexisting, OKC debentures and unissued OKC common stock. Such agreements were executed by certain Jahncke shareholders in New Orleans, Louisiana and

thereafter sent to and executed by an officer of Oklahoma at Bartlesville, Oklahoma. OKC is not a signatory to such agreements.

(3) Officers and directors of OKC have directly, or indirectly through duly authorized agents and representatives, enlisted the aid of present and former shareholders of Jahncke and brokerage firms to arrange the purchase of Jahncke stock at premium prices. Such stock, when purchased, has been placed in the name of Oklahoma or a common representative for Oklahoma and OKC.

(4) Officers and directors of OKC have directly, or indirectly through duly authorized agents and representatives, advised a present officer of Jahncke that he would be retained in his current position, after control was obtained, only upon condition that he sell his holdings of Jahncke stock to, or grant proxies to, OKC and/or Oklahoma.

(5) OKC has directly, or indirectly provided funds for the purchase of Jahncke stock at excessive prices in furtherance of the continuing plan to acquire control of Jahncke.

(6) Oklahoma, which had a consolidated net loss for each of the calendar years 1967 and 1968, and which had hitherto owned less than two percent of the issued and outstanding stock of each corporation in which it had invested, obtained bank loans totaling over three million dollars, which together with other funds have been and are being used to purchase substantial amounts of Jahncke stock.

(7) Oklahoma, through its common representative with OKC, purchased several thousand shares of Jahncke stock for a price in excess of the market price for such stock, whereas it had consistently paid market prices for shares of stock of other corporations in which it has invested.

(8) Subsequent to the above acts and practices, OKC for the first time made public, by filing a prospectus with the Securities & Exchange Commission and by press releases and letters sent to Jahncke shareholders, its plan to acquire the business of Jahncke.

## IV. Nature of Trade and Commerce

### A. *Portland Cement*

23. Portland cement is a material which in the presence of water binds aggregates, such as sand and gravel, into concrete. Portland cement is an essential ingredient in the manufacture of concrete and it represents about 60 percent of the material cost and over one-third of the total cost of manufacturing, distributing and selling ready mixed concrete, the only form in which concrete is sold as a com-

modity. Finished portland cement is a perishable product if exposed to moisture. It is sold primarily in bulk, with a small portion sold in bags, and none being sold in barrels, the latter term simply representing the common unit of measure. It is a homogeneous product having little utility alone which is manufactured to standard and rigid specifications and, in general, the product of one plant is physically substitutable for the product of another.

24. The portland cement industry in the United States is substantial. In 1968, there were about 50 portland cement companies in the United States operating approximately 184 plants. Total shipments of portland cement in that year amounted to approximately 407 million barrels, valued at about $1.3 billion. There are no cement companies serving the entire United States, but the larger companies, through a network of geographically scattered plants, cover major portions of the country. The effective marketing area of a cement plant is geographically limited by high shipping costs in relation to product value. Markets for portland cement are therefore primarily local or regional rather than national in scope, and production plants are widely scattered to serve the available markets. Availability of raw materials, such as limestone or shells, is a significant factor in the location of portland cement plants.

25. Portland cement manufacturers sell their portland cement to consumers such as ready mixed concrete companies, concrete product manufacturers, contractors and building material dealers. On a national basis, approximately 60 percent of all portland cement is shipped to firms engaged in the production and sale of ready mixed concrete. However, in heavily populated metropolitan areas, the percentage of portland cement consumed by ready mixed concrete companies is generally higher. In general, portland cement consumers have not been integrated or affiliated with portland cement manufacturers. Each has operated independently on a vendor-vendee basis.

26. In recent years, there has been a significant trend of mergers and acquisitions by which ready mixed concrete companies in major metropolitan markets in various portions of the United States have become integrated with portland cement companies. Since 1959, there have been at least 40 such acquisitions.

27. Each vertical merger or acquisition which occurs in the portland cement industry potentially forecloses competing portland cement manufacturers from a segment of the market otherwise open to them and places great pressure on competing manufacturers likewise to acquire portland cement consumers in order to protect their

markets. Thus, each such vertical acquisition may form an integral part of a chain reaction of such acquisitions—contributing both to the share of the market already foreclosed, and to the impetus for further such acquisitions.

B. *Shells*

28. Shells dredged from the water bottoms surrounding New Orleans are a basic raw material used in the manufacture of portland cement in that area. Portland cement plants located in areas adjacent to the Gulf of Mexico are substantial consumers of shells. Other purchasers of shells include aluminum companies, road building and pipeline contractors, offshore drilling companies, asphalt producers and concrete producers.

29. There are only four principal producers and sellers of shells in the New Orleans area, including Jahncke. Competition in the sale of shells is based principally upon price. As in the portland cement industry, freight costs, which vary according to water, rail and truck transportation, and location of competitors, are important factors limiting the geographic area within which a shell producer is able to compete. Due to these factors and the unique locations of the product, shell producers in the New Orleans area generally do not market shells produced in this area further than an outer limit of one hundred miles from New Orleans.

30. The shell dredging industry surrounding New Orleans is substantial. It is characterized by high entry barriers from the standpoint of cost of entry and time required to procure the necessary, custom-made equipment.

31. Each vertical merger or acquisition which occurs in the shell dredging industry surrounding the New Orleans area potentially forecloses competing shell dredgers from a segment of the market otherwise open to them, and may cause great pressure on other shell consumers likewise to acquire shell producers in order to protect their sources of supply, or on other shell producers likewise to acquire shell consumers in order to protect their markets. Thus, each such vertical acquisition may form an integral part of a chain reaction of such acquisitions contributing both to the share of the market already foreclosed, and to the impetus for further such acquisitions.

C. *Ready Mixed Concrete*

32. Concrete is made by mixing portland cement, and sand and gravel, or other aggregate, with water so as to cause the cement to set and bind the entire mass into a hard product resembling stone. The characteristics of the finished product, particularly its strength, are affected by the proportion of cement used in the mixture.

33. Ready mixed concrete production constitutes a substantial, specialized manufacturing industry. There are over 4,000 establishments engaged in the production of ready mixed concrete in the United States which in 1967 produced approximately 167 million cubic yards of concrete valued in excess of $2 billion. Most ready mixed concrete producers are relatively small, single plant operators who compete in limited geographic areas, rarely reaching beyond a single metropolitan area. Size is usually determined by the number of plants operated rather than the size of a particular plant. The additional plants are strategically located so as to serve the various parts of the local area conveniently, quickly and economically.

34. The effective marketing area for the sale of ready mixed concrete is limited by such factors as the perishability of the product, time-placement requirements, licensing restrictions, transportation costs, delivery schedules and service requirements. Markets for ready mixed concrete are centered in metropolitan areas where the concentration of population and construction cause the greatest demand for this product.

D. *Construction Aggregates*

35. Construction aggregates are materials with which portland cement is combined in the presence of water to form concrete. They, like portland cement, are an essential ingredient in the manufacture of concrete and represent an appreciable amount, between 25 percent to 40 percent of the raw material costs of manufacture of ready mixed concrete. Aggregates are also used by themselves as bases and subbases for roads and as fill material in construction projects and are a basic construction raw material. Concrete producers are substantial consumers of aggregates. Other purchasers of construction aggregates include concrete product manufacturers, road building contractors and construction contractors.

36. Construction aggregate production constitutes a substantial, specialized industry. There are over 6,000 plants engaged in the production of construction aggregates in the United States which in 1967 produced approximately 1,400,000,000 tons of construction aggregates valued in excess of $1.7 billion.

37. Low value in relation to shipping costs generally prevents construction aggregates from being shipped over long distances. The effective marketing area for construction aggregates is also limited by the location of deposit sites, location of competitors and the location of areas of demand. Markets for construction aggregates are centered in metropolitan areas where the concentration of population and construction cause the greatest demand for aggregates. Jahncke

is one of the largest producers of construction aggregates in the New Orleans area, and although it sells such aggregates in a 22 parish area contiguous to New Orleans, at least 75 percent of its sales are made in the New Orleans area.

38. A merger or acquisition which occurs between a portland cement producer and a construction aggregates producer may create a decisive competitive advantage in the surviving company in competition with other non-aligned portland cement producers and/or construction aggregates producers. A merger or acquisition between a portland cement producer and a producer of construction aggregates, which is likewise a major producer of ready mixed concrete, would not only create the anticompetitive situations referred to in Paragraph 27 above, but may also impose an overwhelming competitive advantage over competing non-integrated ready mixed concrete companies, thereby compelling them to seek vertical acquisitions with other portland cement or construction aggregate producers.

V. Effects of the Conspiracy and Acquisition

39. The effects of the conspiracy and acquisition by respondents of the substantial amount of the voting proxies and common stock of Jahncke, and the plan to acquire the business of Jahncke may have the tendency to hinder, prevent and restrain competition, and both in themselves and by aggravating the trend of vertical mergers and acquisitions, may be substantially to lessen competition or to tend to create a monopoly in the manufacture and sale of (1) portland cement, (2) ready mixed concrete, (3) shells, and (4) construction aggregates in the United States as a whole and various parts thereof, including the New Orleans area, and the one hundred mile area within a radius of New Orleans, in the following ways, among others:

a. OKC's competitors have been and/or may be foreclosed from a substantial segment of the market for portland cement.

b. Jahncke's competitors have been and/or may be foreclosed from a substantial segment of the market for shells.

c. The ability of OKC's non-integrated competitors effectively to compete in the sale of portland cement, shells, construction aggregates and/or ready mixed concrete has been and/or may be substantially impaired.

d. The ability of Jahncke's non-integrated competitors effectively to compete in the sale of ready mixed concrete, and/or shells has been and/or may be substantially impaired.

e. Concentration in the production and sale of shells, already oligopolistic in nature, has been and/or may be increased.

f. The entry of new portland cement, shells, construction aggregates and/or ready mixed concrete competitors may have been and/or may be inhibited or prevented.

g. Present competitors in the sale of portland cement, shells, construction aggregates and/or ready mixed concrete have been and/or may be compelled to withdraw or diminish their competitive efforts.

h. OKC's and/or Jahncke's non-integrated competitors have been and/or may be pressured into making vertical mergers or acquisitions.

i. The production and sale of ready mixed concrete, usually a decentralized, locally controlled, small business industry, may become concentrated in the hands of a relatively few manufacturers of portland cement.

j. Jahncke's ability and viability to compete in the sale of construction aggregates, ready mixed concrete and shells has been and/or may be hindered, restrained or suppressed by dissatisfaction and uncertainty of employment by its key personnel, and/or by customer refusal to enter into contracts with a management which is and/or may be subject to abrupt change.

## VI. Violations Charged

40. OKC's and Oklahoma's acquisition of the voting proxies and shares of the common stock of Jahncke constitute a violation of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act.

41. OKC's plan to acquire the business of Jahncke and its acts and practices in connection therewith constitute a violation of Section 5 of the Federal Trade Commission Act.

42. The acts, practices and courses of conduct engaged in, followed and pursued by respondents, and the combination, conspiracy, agreement or common understanding entered into or reached between and among the respondents and others not parties hereto, and the acts and practices and methods, as hereinbefore alleged, are all singularly and collectively unfair and to the prejudice of the public policy as enunciated in the Clayton Act, as amended, specifically Section 7 thereof, because of their dangerous tendency and probability to cause or bring about the effects on competition and hindrances and restraints on trade and commerce as heretofore alleged, and thereby constitute unfair methods of competition and unfair acts and practices in commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended.

*Mr. Edward H. McGrail* and *Mr. Robert J. Fulgency* supporting the complaint.

*Sullivan & Cromwell*, New York, N.Y., by *Mr. John F. Arning*, *Mr. Robert G. Sugarman*, and *Mr. Charles P. Russ, III*, for respondent OKC Corp.; and

*Stone, Pigman, Walther, Wittmann & Hutchinson*, New Orleans, La., by *Mr. Ewell P. Walther, Jr.*, for respondent Oklahoma Land and Cattle Company.

## Initial Decision by Edward Creel, Hearing Examiner

SEPTEMBER 3, 1970

### PRELIMINARY STATEMENT

The Federal Trade Commission on October 17, 1969, issued its complaint in this proceeding charging that OKC Corp. (hereinafter referred to as "OKC"), a corporation, acting in combination and concert with Oklahoma Land and Cattle Company (hereinafter referred to as "Oklahoma"), a corporation, has acquired or is attempting to acquire control of Jahncke Service, Incorporated (hereinafter referred to as "Jahncke"), by obtaining irrevocable proxies and by purchasing voting common stock of Jahncke, that OKC plans to acquire the entire business of Jahncke; that the acquisition violates Section 7 of the Clayton Act, as amended (15 U.S.C. Sec. 18); and that the acquisition, the combination and concerted action on the part of OKC and Oklahoma, and OKC's plan to acquire the entire business of Jahncke violates Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. Sec. 45).

The complaint alleges that the acquisition and conspiracy may have serious anticompetitive effects in the production and sale of portland cement, ready-mixed concrete, shells, and construction aggregates. It is alleged that such effects may occur in the United States as a whole, and various parts thereof, including the New Orleans area, and the area within a 100 mile radius of New Orleans.

It is alleged that among the anticompetitive effects which may occur, are the following:

(1) OKC's competitors have been and/or may be foreclosed from a substantial segment of the market for portland cement; (2) Jahncke's competitors have been and/or may be foreclosed from a substantial segment of the market for shells; (3) The ability of OKC's nonintegrated competitors effectively to compete in the sale of portland cement, shells, construction aggregates and/or ready-mixed concrete has been and/or may be substantially impaired;

(4) The ability of Jahncke's nonintegrated competitors effectively to compete in the sale of ready-mixed concrete, and/or shells has been and/or may be substantially impaired; (5) Concentration in the production and sale of shells, already oligopolistic in nature, has been and/or may be increased; (6) The entry of new portland cement, shells, construction aggregates and/or ready-mixed concrete competitors may have been and/or may be inhibited or prevented; (7) Present competitors in the sale of portland cement, shells, construction aggregates and/or ready-mixed concrete have been and/or may be compelled to withdraw or diminish their competitive efforts; (8) OKC's and/or Jahncke's nonintegrated competitors have been and/or may be pressured into making vertical mergers or acquisitions; (9) The production and sale of ready-mixed concrete, usually a decentralized, locally controlled, small business industry, may become concentrated in the hands of a relatively few manufacturers of portland cement; (10) Jahncke's ability and viability to compete in the sale of construction aggregates, ready-mixed concrete and shells has been and/or may be hindered, restrained or suppressed by dissatisfaction and uncertainty of employment by its key personnel, and/or by customer refusal to enter into contracts with a management which is and/or may be subject to abrupt change.

Answers were filed by respondents on December 1 and 2, 1969, which denied violating the statutes as charged and denied most of the allegations of the complaint.

Five prehearing conferences were held in this matter between December 10, 1969, and May 15, 1970, at which general preliminary matters were resolved, including clarification of issues through explanation of allegations and additional admissions of allegations. Agreements were reached regarding various matters and exhibits were received in evidence. Respondents secured information from portland cement producers, shell producers, and limestone producers by using pretrial discovery procedures.

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

The allegations concerning aggregates were withdrawn by counsel supporting the complaint because Jahncke sold its major aggregates operation in October 1969.

Hearings in this matter began in New Orleans, Louisiana, on June 9, 1970, closed on July 27, 1970, in Washington, D.C. With the consent of the parties, official notice may be taken of "Economic Report on Mergers & Vertical Integration in the Cement Industry," a staff report to the Federal Trade Commission.

The abbreviations used herein are:

Comp.—Complaint.

Ans.—Answer to complaint.

CX—Commission Exhibit.

RX—Respondents Exhibit.

Tr.—Transcript of testimony and of prehearing conferences.

CPF—Counsel Supporting the Complaint's Proposed Findings, Conclusions, and Order. Numbers used are numbers of the proposed findings.

RPF—Respondents' Proposed Findings of Fact, Conclusions of Law and Order. Numbers used are numbers of proposed findings.

RB—Respondents' Brief. Numbers used are page numbers.

RRB—Respondents' Reply Brief and Exceptions. Numbers used are page numbers.

RRB-EX.—Exceptions (incorporated in and made a part of Respondents' Reply Brief. Numbers used are page numbers followed by the letter "a."

CRB—Counsel Supporting the Complaint's Reply to Respondents' Proposed Findings of Fact, Conclusions of Law and Brief. The numbers used are page numbers.

The terms defined in Paragraph 1 of the complaint have the same definition and meaning in this initial decision, unless otherwise noted.

This proceeding is before the hearing examiner for final consideration upon the complaint, answers, testimony and other evidence, and proposed findings of fact and conclusions filed by counsel for respondent and by counsel supporting the complaint. Consideration has been given to the proposed findings of fact and conclusions submitted by both parties, replies thereto, briefs and oral argument and all proposed findings of fact and conclusions not hereinafter specifically found or concluded are rejected as being inaccurate or as not being necessary or material, and the hearing examiner, having considered the entire record herein, makes the following findings of fact, and conclusions drawn therefrom, and issues the following order:

## FINDINGS OF FACT

### The Respondents

A. *OKC Corp.*

1. OKC Corp. is a Delaware corporation with its principal office located at 1949 North Stemmons Freeway, Dallas, Texas. It was incorporated March 12, 1959, under the name Oklahoma Cement Company. The present name was adopted on January 30, 1967. Among its

founders were Kenneth S. Adams, Sr., the George A. Fuller Company, Inc., Central States Investment Company and Coastal States Gas Producing Company. (Ans. par. 2; Tr. 9.)

2. OKC's principal products are portland cement, asphalts, premium and regular type gasolines, heating oils, and various other petroleum products. From a 2 million barrel annual capacity plant located at Pryor, Oklahoma, and terminals located at Woodward and Oklahoma City, Oklahoma, OKC manufactures and sells portland cement in all of Oklahoma except the southeast and southwest corners, southern Kansas, southern Missouri, northern Texas, the Texas Panhandle and northern Arkansas. From a 1.7 million barrel annual capacity plant at New Orleans, Louisiana, operating as the Louisiana Cement Company Division of OKC, portland cement is manufactured and sold in eastern Texas, Louisiana, western Mississippi, western Florida and the southern Gulf Coast area. OKC's principal classes of customers for its portland cement are ready mixed concrete companies, oil well servicing companies, public works projects, lumber yards and oil field pipe coating companies, and of these, the ready-mixed companies purchase the largest amount of portland cement from each of OKC's plants. (Ans. par. 3.)

3. For the fiscal year ending September 30, 1968, OKC's total production of portland cement amounted to 3,400,000 barrels. During that same fiscal year, OKC's portland cement producing plants operated at an average of 91% of rated capacity as compared with 85% of rated capacity during fiscal 1967. Limestone deposits are owned and used by OKC's Pryor, Oklahoma plant as a basic raw material in the manufacture of portland cement. OKC's New Orleans, Louisiana plant uses shell in place of limestone as a basic raw material. (Ans. par. 4.)

4. The New Orleans metropolitan area is one of the principal markets for portland cement manufactured at OKC's New Orleans plant. Since it completed the New Orleans plant in July 1964, OKC has become the third largest supplier of portland cement to the New Orleans area. In 1968, this plant shipped 1,548,086 barrels of portland cement valued at $5,659,802. Of this total, 966,916 barrels or 62%, valued at $3,776,412 were shipped within the New Orleans metropolitan area. Its 1968 shipments accounted for approximately 23% of the total shipments of portland cement made into this marketing area. OKC also purchases large amounts of shell for use as a basic raw material in the manufacture of portland cement at its New Orleans, Louisiana plant. In 1968, OKC purchased 420,197 tons of shell valued at $653,514. Its 1968 purchases of shell amounted to approximately 7% of shell sold within 100 miles of New Orleans.

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OKC's largest supplier of shell is Jahncke. (Ans. par. 5; CX 81, 82; RX 5, 6.)

5. OKC's consolidated net sales for fiscal 1968 totaled $39,203,178 of which $10,553,437 was derived from its cement operations, the remainder being derived from its wholly owned subsidiaries. OKC's consolidated net income for 1968 totaled $2,319,655 of which $1,649,-612 was derived from its cement operations, the remainder being derived from its wholly owned subsidiaries. In 1968, OKC had total assets of $41,229,177 of which $33,287,781 were attributable to its cement operations, the remainder attributable to its wholly owned subsidiaries. (Ans. par. 7.)

6. At all times relevant herein, OKC was, and is now, a corporation engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act and in the Clayton Act. (Ans. par. 8.)

B. *Oklahoma Land and Cattle Company*

7. Oklahoma Land and Cattle Company chartered in 1960, is a corporation organized and existing under the laws of the State of Oklahoma with its principal office located in Bartlesville, Oklahoma. The company is primarily engaged in the ranching business and owns and operates six large ranches which stock, breed, and sell cattle. (Ans. par. 9.) It is also engaged in the purchase and sale of securities. (Tr. 320–21.)

8. On December 31, 1968 (Tr. 30–31), Oklahoma owned 15,000 shares of OKC's common stock. Since then it has acquired an additional 36,405 shares of OKC's common stock and $3,044,800 in principal amounts of 8.5% subordinate debentures of OKC as a result of Oklahoma's having tendered its Jahncke common and preferred stock to OKC in exchange for these OKC securities, pursuant to OKC's May 14, 1969, exchange offer to all of the shareholders of Jahncke. (Ans. par. 9.)

9. Oklahoma also owns, for investment, capital stock in some 11 other publicly traded corporations amounting in value to between $3,000,000 and $4,000,000. Such stock is purchased on the open market at market trading prices and in all but one instance represents less than 2% of the outstanding shares of stock of each of the corporations in which Oklahoma has invested. (CX 26A–H; Tr. 28; Ans. par. 9.)

10. For the year ended December 31, 1968, Oklahoma had current assets of $3,041,746, current liabilities of $17,300 and total assets of $6,208,012. It had a consolidated net loss of $10,542 as a result of an operating loss of $295,824 (cattle) and a nonoperating net income of $285,281, which was earned by stock investments. (Ans. par. 10.)

11. Oklahoma is the sole and wholly owned subsidiary of the Pipe Investment Company (hereinafter referred to as "Pipe"), also of Bartlesville, Oklahoma. Both companies have the same president. Pipe, incorporated in the State of Texas on March 21, 1951, is primarily engaged in the real estate business in the States of Oklahoma, Texas, California and Florida, and owns oil properties in Texas and Oklahoma. All the outstanding stock of Pipe is owned by Dorothy Glynn Adams, Steven S. Adams and W. A. Hensley, as trustee for Kenneth G. Adams, Gary C. Adams and Stephanie L. Adams. (Ans. par. 11.)

12. At all times relevant herein, Oklahoma was, and is now, a corporation engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act and the Clayton Act. (CX 46A–G)

## The Acquired Corporation

A. *Jahncke Service, Incorporated*

13. Jahncke Service, Incorporated, is a corporation organized and existing under the laws of the State of Louisiana, with its principal office located at 814 Howard Avenue, New Orleans, Louisiana. (Ans. par. 13.)

14. Jahncke's business operations include marine hydraulic dredging, the dredging and sale of shell, the production and sale of construction aggregates, concrete pipe and other concrete products, building materials, and ready-mixed concrete. (Ans. par. 14.)

15. Jahncke has been engaged in the production and sale of ready-mixed concrete in the New Orleans area for over 30 years, and during 1967, it operated seven ready-mixed concrete plants in that area, and during 1968, five such plants. It is the largest producer of ready-mixed concrete in the New Orleans area, having sold over 255,000 cubic yards of ready-mixed concrete in 1968. During the same year, it purchased over 400,000 barrels of portland cement from six suppliers, including OKC. Its portland cement consumption in 1968 amounted to 10% of the total shipments into the New Orleans area. (Ans. par. 15; CX 58B–C, 57B, 85.)

16. Jahncke is also one of the leading producers of shell, a basic raw material used in the manufacture of portland cement, in the New Orleans area. In 1968, Jahncke produced and sold 1,572,622 cubic yards of shell. Its 1968 sales of shell accounted for approximately 23% of the total sales of shell within 100 miles of New Orleans. (Tr. 1007–08; CX 61A–B, 88A–99A.)

17. As well as purchasing portland cement in interstate commerce, Jahncke's shell and hydraulic dredging operations are carried out

in the Gulf of Mexico and within and among the various Gulf Coast states. (Ans. par. 17; CX 16A, 52; Tr. 410.)

18. For the year ended December 31, 1968, Jahncke had net sales of $11,476,642, total revenues of $19,144,696 and net income of $177,231. Current assets were $6,689,492, and current liabiilties were $2,008,287. (CX 53A–M.)

19. At all times relevant herein, Jahncke was, and is now, engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act and the Clayton Act. (Ans. par. 17, 19; CX 16A, 52; Tr. 410.)

20. In 1969 OKC Corp. acquired approximately 88% of the outstanding common stock and 100% of the preferred stock of Jahncke, and assumed control of Jahncke. (CX 105, p. 3.)

## The Combination and the Acquisition

### A. *OKC's Formal Proposal to Acquire Jahncke*

21. Prior to September 1968, Mr. Cloyce Box, chairman of the board of directors of OKC Corp., initiated discussion with Jahncke management for the acquisition of that company by OKC and requested that the OKC offer be presented to the Jahncke board of directors. Such formal proposal was presented by Mr. Box to the Jahncke board of directors at their meeting held on September 23, 1968. The proposal was made that OKC would acquire Jahncke on the basis of three shares of Jahncke stock in exchange for one share of OKC stock. (H. Jahncke, Sr., Tr. 388–89; CX 48D) Mr. Donald Baxter, executive vice president in charge of finance for OKC accompanied Mr. Box at this presentation to the Jahncke board of directors. (Tr. 389, 241.)

22. The offer by OKC was turned down by the Jahncke board of directors and reflected in the minutes of a meeting of the Jahncke board of directors. (CX 48D.) Mr. Herbert Jahncke, Sr., then president and chairman of the board of Jahncke, advised Mr. Box after this meeting that the Jahncke board of directors had turned down the OKC offer. (Tr. 390) Mr. Donald Baxter was also aware that the Jahncke board of directors had turned down the OKC offer. (Tr. 287.)

23. A month after the September 23, 1968, meeting of the Jahncke board of directors, Mr. Box made another proposal to Herbert Jahncke in private discussions. (Tr. 241, 391.) As near as Mr. Jahncke could recall, the subsequent proposal by Mr. Box would have guaranteed Jahncke stockholders a value of $15 per share in OKC stock. During these discussions, Mr. Jahncke pointed out to Mr. Box that the acquisition of Jahncke by OKC might be in viola-

tion of the laws within the jurisdiction of the Federal Trade Commission, but Mr. Box felt that this could be "cured" by divestiture of Jahncke's ready-mixed concrete business. This later proposal by Mr. Box was also turned down by Mr. Jahncke. (Tr. 391–92; CX 1, p. 13.)

24. After Jahncke had rejected the OKC offer (Tr. 290) there were constant off and on discussions between Mr. Box and Mr. Baxter of various other proposals to acquire Jahncke. (Tr. 287.) These discussions were of a confidential nature between "Cloyce and myself," and reflected in "confidential" memoranda. (Tr. 291; CX 7A–B, 8A–B.) The reason for the "confidential" memoranda was that "There is no point in us spreading information of a confidential nature throughout the company's files." (Tr. 291.) Although Mr. Box could not recall whether he had ever received any decision on OKC's offer to acquire Jahncke, his subsequent discussions with Mr. Jahncke as well as the memoranda, dated in December 1968, between Mr. Baxter and Mr. Box indicate that Mr. Box was well aware that OKC's offers had been turned down by Jahncke and showed OKC's continued determination to acquire Jahncke. (CX 7A–B; 8A–B; Tr. 243.)

B. *Close Relationship Between Mr. Box, Mr. Kenneth S. Adams, Sr., and OKC*

25. On January 2, 1969, several weeks after the last memorandum from Mr. Donald Baxter to Mr. Box in which was discussed further proposals for acquiring Jahncke (CX 8A–B), Mr. Box contacted Mr. Herbert Jahncke, Sr., to determine whether Mr. Jahncke would have any objections to having Mr. Kenneth S. Adams, Sr., as a stockholder of Jahncke, and he mentioned that Mr. Adams was possibly interested in purchasing the Jahncke stock held by the Ideal Basic Industries, Inc. (CX 48F–G.)

26. Mr. Kenneth S. Adams, Sr., was the former president and chairman of the board of directors of the Phillips Petroleum Company and retired as a director of that company on April 29, 1970. (Tr. 343.) He is a long standing business and personal friend of Mr. Box.

27. Mr. Adams was one of the founders of OKC (formerly known as the Oklahoma Cement Company) and was a director of that company from its inception in 1959 until 1967. Although Mr. Adams did not personally contribute any funds to the founding of OKC, a trust company, Central States Investment Company, set up for the benefit of his family, did initially purchase over 100,000 shares of OKC stock, ". . . the same proportion that the other individuals purchased at that respective time." (Ans. par. 20; Tr. 347–49.)

28. Central States Investment Company ("Central") is a corporation whose stock is owned by members of the Adams' family, and was organized to engage in the purchase of securities, office buildings, and land. It owns investments and securities of many different corporations, and other businesses that do not have listed stock. (Tr. 345) On May 4, 1964, OKC sold $1,000,000 of its 5½% Convertible Subordinated Debentures due January 1, 1978, to Central, which debentures are initially convertible into 66,666 shares of OKC common stock. (CX 19, p. 15.) These debentures are still held by Central in addition to 124,140 shares of OKC common stock. (Ans. par. 20.)

29. Pipe Investment Company is another Adams trust company established for the benefit of Mrs. Kenneth S. Adams, Sr., and her minor children, and organized to engage in the purchase of land and other corporate businesses and to invest funds to make a profit to build up an equity. (CX 46D; Tr. 344.) It does not own any stock in OKC but may have at one time. (Tr. 238.)

30. Central, Pipe, and Oklahoma all have the same president, William A. Hensley, and are all located in the same office building on the same floor in Bartlesville, Oklahoma. (Tr. 318.)

31. As well as Central and Oklahoma owning substantial amounts of stock in OKC, Mr. Kenneth S. Adams, Sr., three other Adams family trusts, and Kenneth S. Adams, Jr., also own stock in OKC. (Tr. 346; Ans. par. 20; CX 6.)

32. Mr. Kenneth S. Adams, Sr., as "a total entity" had substantial stock in OKC whether personally, his family or family trusts. It was all his interest. (Tr. 236–37.)

33. In October 1966, OKC purchased a petroleum refinery located near Okmulgee, Oklahoma, from Phillips Petroleum Company. Mr. Kenneth S. Adams, Sr., was then chairman of the board and chief finance officer of Phillips Petroleum Company, and was a director of Phillips Petroleum until April 1970. (Tr. 343; CX 1, pp. 32–33.)

34. Under an agreement dated June 27, 1967, among OKC, Bayou Refining Co., Inc., and Ada Oil Company, OKC arranged the financing for a refinery to be constructed by Bayou Refining Co., Inc., at Pasadena, Texas. (CX 1, p. 33.) Mr. K. S. Adams, Jr., owns Ada Oil Company, and Bayou Refining Co., Inc., is a subsidiary or affiliate of Ada. (Tr. 239.) Mr. Box was a director of Ada Oil Company as was another officer of OKC. (Tr. 380.)

35. The George A. Fuller Company, Inc., a general construction company, was also one of the founders, or organizers, of OKC. (Tr. 230.) Prior to the liquidation of this company, and its acquisition by B.C.L.M., Inc., in 1965, Oklahoma Land and Cattle Company held stock in this company and still does pending complete liquidation.

The former George A. Fuller Company Inc. is now known as Gafulco Company, Inc. (CX 26F; Tr. 233–34.)

36. In 1965, Mr. Box was one of the four organizers of B.C.L.M., Inc., who acquired the George A. Fuller Company, Inc. The initials of the company represented Mr. Box, Mr. Trammell Crow, Mr. Lawson, and Mr. Moore. (Tr. 233–34.) Mr. Box became vice president of the George A. Fuller Company, Inc., at that time, and in November 1966, he became chairman and chief executive officer of that company. He held this position as well as that of chairman of the board of OKC at the same time. (CX 1, pp. 37–38.) Both Central States Investment Company and the George A. Fuller Company, Inc., are substantial stockholders in OKC. (Ans. par. 20; CX 1, p. 41.) Other officers of OKC have alternately held various offices in the George A. Fuller Company, Inc. (CX 1, pp. 37–38, 6; Tr. 236.)

37. In December 1968, Jahncke entered into negotiations with the J. Ray McDermott & Co., Inc., for a merger between that company's subsidiary, Associated Pipe Line Contractors, Inc. (hereinafter referred to as "Associated"), and Jahncke. (Tr. 530.) It was the judgment and opinion of the then president of Jahncke, Herbert Jahncke, Sr., that such a merger would be beneficial to the Jahncke Company. (Tr. 395.)

38. The treasurer of Jahncke also considered this a beneficial merger for Jahncke. Jahncke's earnings were down, the earnings of the Associated were good, and the two companies would complement one another and enjoy considerable work. (Tr. 531.)

C. *Background to the Purchase of Jahncke Stock Held by Ideal Basic Industries, Inc.*

39. The Jahncke stock held by Ideal Basic Industries, Inc., was purchased by that company in 1965 from several members of the Jahncke family and represented approximately 23% of the outstanding voting common stock and over 36% of the preferred non-voting stock of Jahncke. (CX 26H, 35A, 37A; Tr. 559.)

40. Mr. Box testified that ". . . over the years" when Mr. Kenneth S. Adams, Sr., was on the board of directors of OKC, Mr. Box had tried to get "our company" interested in buying certain features of the Jahncke company. However, "Mr. Adams was not interested." (Tr. 246.)

41. On January 9, 1969, Mr. Adams contacted Mr. Herbert Jahncke, Sr., by telephone, and advised him of his interest in buying the Jahncke stock that was then held by the Ideal Basic Industries, Inc. (CX 48H.) Mr. Adams was aware of the fact that impending negotiations were being carried out between Jahncke and J. Ray

McDermott & Co., Inc., for a merger with Associated, prior to the time Mr. Adams purchased the Jahncke stock from Ideal Cement Company, and Mr. Jahncke had received ". . . . a verbal commitment from Adams prior to the time that he completed the purchase," that he would not oppose it. (CX 48I–J; Tr. 393.) The public announcement of the merger between Jahncke and Associated appeared in the January 17, 1969, issue of the Wall Street Journal. (CX 48I.) The purchase of the Jahncke stock held by Ideal Basic Industries, Inc., was also made on January 17, 1969. (CX 41A–B.)

42. Mr. Box was aware that if the merger between Jahncke and Associated was consummated that this would have prevented OKC from acquiring Jahncke. (Tr. 281.) Mr. Herbert Jahncke, Sr., was somewhat concerned over the possibility that Mr. Box might oppose the Jahncke merger with Associated because the dilution of Jahncke's stock would make it more difficult for OKC to consummate a merger with Jahncke. (CX 48I.)

43. Mr. Adams and Mr. Box sought detailed information from Mr. Herbert Jahncke, Sr., about the Jahncke-Associated merger. (CX 48I–J, H.) Mr. Jahncke advised Mr. Box that he could not provide the information sought inasmuch as he had been advised by his counsel not to divulge any information to any individual stockholder, that such information would have to be released to all stockholders at the same time. (CX 48N.) Mr. Adams expected special consideration and information, and ". . . he was not worried about any complaints to the SEC." (CX 48P.)

44. Although the Jahncke annual report for 1968 was not issued until after January 1969, the interim 6 months' report issued in August 1968, showed that Jahncke was in a loss position. (Tr. 529–30.) Prior to purchasing the Jahncke stock from Ideal Basic Industries, Inc., neither Mr. Adams nor Mr. Hensley, president of Oklahoma, requested any financial data on Jahncke, nor was Mr. Adams aware of the poor showing of Jahncke for the first 6 months of 1968. Neither had made or requested any study or analysis of Jahncke's financial position. (Tr. 325, 350–51.) As far as Mr. Adams was concerned his participation in recommending purchase of securities was not based on return in dividends, or price times earnings, ". . . it's been more on the prospects or the possibilities of the growth of the company that we have made investments in over a period of 20 years." (Tr. 349.) Generally speaking, Mr. Adams purchased securities on the recommendation of stock analysts, brokers, or their salesmen, and ideas of his own based on knowledge gained from contacts with financial people in the United States. (Tr. 350.)

45. Mr. Adams' knowledge of the intent of Ideal Cement Company

to sell the Jahncke stock came from a friend in the brokerage investment business who had heard that Ideal Cement Company was going to have to divest its stock in the Jahncke company in New Orleans. Mr. Adams' reaction to this news was "Gee, that's interesting. Is anything published on that?" The broker friend replied, "Well, I'm just telling you that that's the information that is available around Wall Street." (Tr. 357.)

46. Mr. Mayfield R. Shilling, president of Ideal Basic Industries, Inc., of which Ideal Cement Company is a division, testified that although his company had filed a report with the Federal Trade Commission under the requirements of the cement guidelines (Tr. 679), his company considered its ownership of Jahncke stock as an "investment," that his company had received no formal order from the Federal Trade Commission to divest itself of the stock it held in Jahncke, and that Ideal Basic Industries, Inc., had not advertised or indicated in any way that the Jahncke stock it held was for sale, in fact "We were not aware it [offer] was going to be made." (Tr. 673.) Mr. K. S. Adams had contacted the chairman of the board of Ideal Basic Industries, Inc., and asked him if he would be interested in selling the Jahncke stock held by that company. (Tr. 674.)

47. This common stock, as well as the preferred stock of Jahncke, was purchased by Oklahoma on January 17, 1969, although this was not reported to the Securities and Exchange Commission until February 26, 1969. (CX 41A–B.) Mr. Hensley was responsible for the purchasing of securities for Pipe, Central, and Oklahoma, but he was not too familiar with the Securities and Exchange Commission regulations regarding the purchasing of stock. (Tr. 322.) Mr. Hensley, president of Oklahoma, had nothing to do with the negotiations to purchase the Jahncke stock from Ideal Basic Industries, Inc., by Oklahoma, except for the conversations he had with Mr. Adams. (Tr. 323.) Mr. Adams contacted Mr. Hensley, told him the purchase of the Jahncke stock was "an excellent buy," and recommended that Mr. Hensley buy it through Oklahoma. It could have been purchased through one of the other Adams trust companies, but Mr. Adams said put it in Oklahoma. (Tr. 324.)

48. Mr. Adams arranged for four separate 6-month loans, totalling over $3 million dollars and personally guaranteed the payment of the funds. (CX 43B; Tr. 324–25.) Mr. Adams had to guarantee the notes because Oklahoma could not borrow this amount of money on its own. (Tr. 326.) Mr. Adams had guaranteed a lot of notes for the other Adams trust companies, but not one of this size. (Tr. 326, 333.)

49. Prior to the purchase of Jahncke stock on January 17, 1969,

Oklahoma had purchased many securities listed on the major stock exchanges. The amount held never accounted for as much as 2% of the outstanding shares of any particular company. (CX 26A–G, 46H–K.) The purchase of Jahncke stock, an obscure, over-the-counter stock, represented a departure from the stock-purchasing procedures of Oklahoma. Its original purchase of Jahncke stock from Ideal Basic Industries, Inc., represented approximately 23% of the outstanding common stock and over 36% of the outstanding preferred stock. By March 10, 1969, Oklahoma had increased its holdings of Jahncke common stock to 27.9% of the then outstanding shares. (CX 26H.)

50. Mr. Hensley was not aware of the pending Associated merger with Jahncke until January 18, 1969, when he read the January 17, 1969, issue of Wall Street Journal; (Tr. 327) although he had talked with Mr. Adams, and Mr. Adams was aware of the merger. (CX 48I–J; Tr. 393.) The minutes of the meeting of the OKC board of directors, held on January 23, 1969, shows that OKC,

> . . . was still considering Jahncke Services as a possible candidate for acquisition. (CX 121A.)

D. *Dallas, Texas, Meeting*

51. In January or February 1969, Mr. Edward "Bud" Jahncke, Sr., a cousin of Mr. Herbert Jahncke, Sr., a resident of New Orleans, Louisiana, and a major stockholder in Jahncke, telephoned Mr. Box in Dallas, Texas, to find out information concerning the Oklahoma Land and Cattle Company which had purchased such a large block of Jahncke stock. Mr. Box could have given him this information over the telephone, but Mr. Edward Jahncke, Sr., wanted to come to Dallas, Texas, to talk with him. (Tr. 251.)

52. Mr. Baxter testified that this meeting was instigated by Mr. Edward Jahncke, Sr., for the purpose of obtaining information on Oklahoma Land and Cattle Company since this company had just purchased a large block of Jahncke stock and he was very concerned about his holdings in Jahncke. (Tr. 293.) Mr. Baxter was aware of the "internal strife" between the two factions of the Jahncke family. (Tr. 294.)

53. Mr. Edward Jahncke, Sr., flew to Dallas, Texas, and met in the OKC offices with Mr. Box, Mr. Baxter, and the then president of OKC, Mr. D. W. Rentzel. (Tr. 377.) Mr. Rentzel recalled that Mr. Edward Jahncke's complaint was about the Jahncke company and that he had a number of differences of opinion with the management and particularly with his cousin, Mr. Herbert Jahncke. As Mr. Rentzel recalled, Mr. Edward Jahncke, Sr., ". . . indicated a great

deal of interest in OKC's taking an interest in it." (Tr. 377.) Mr. Edward Jahncke, Sr., suggested that a call be made to Mr. Charles R. Stevens in Fort Myers, Florida, because Mr. Stevens felt the same way about the Jahncke company as did Mr. Edward Jahncke, Sr., and Mr. Edward Jahncke, Sr., believed that Mr. Stevens would be interested in finding out about the new stockholder, Oklahoma. (Tr. 377–78, 294.)

54. Mr. Charles R. Stevens' wife was a sister of Mr. Herbert Jahncke, Sr., and held approximately 63,000 shares of common and over 1,200 shares of preferred stock of Jahncke. (Tr. 430.) Mr. Stevens, acting on behalf of his wife, had attempted to sell the Jahncke stock to Mr. Robert Radcliff, Southern Industries, Inc., Mobile, Alabama, in July or August 1968. Mr. Radcliff declined the purchase on the advice of his attorneys since it was felt that such acquisition would be questioned by the Federal Trade Commission. (CX 110A–B; Tr. 430.) Mrs. Stevens had met with her brother, Mr. Herbert Jahncke, Sr., in New Orleans, Louisiana, in December 1968, at which time she was advised of the intended merger between Jahncke and Associated. (Tr. 431; CX 110A.) She also learned that the policy of the company would be to discontinue dividends in the future and become a growth company. (Tr. 446.)

55. Mr. Stevens wished to sell the Jahncke stock because he had indications that the dividends would be discontinued, and he was seeking an investment which would provide a better, or equal, income to that which had been received from Jahncke, and an investment which would provide diversification. (Tr. 431, 446.)

56. Mr. Box telephoned Mr. Stevens from Dallas, Texas, on February 4, 1969, to advise him that Oklahoma had acquired a sizeable block of Jahncke stock and that Mr. Box was interested in arranging a discussion of the ". . . problems about to arise through the sale of a pipeline company by J. Ray McDermott to Jahncke Service." (Tr. 432.) During this telephone conversation, Mr. Stevens also talked with Mr. Edward Jahncke, Sr., who was in Mr. Box's office in Dallas, Texas, at that time, and who urged Mr. Stevens to meet with Mr. Box and himself in New Orleans on February 12, 1969. (Tr. 254, 377, 433.)

57. Although Mr. Edward Jahncke, Sr., flew to OKC's offices in Dallas, Texas, to obtain information concerning Oklahoma Land and Cattle Company, Mr. Box testified that the meeting to be held in New Orleans, Louisiana, on February 12, 1969, would be for the purpose of "evaluating" the Associated-Jahncke merger. (Tr. 253–54.) Mr. Baxter testified that a subsequent meeting was to be held to discuss Mr. Edward Jahncke's and Mr. Stevens' concern about the

new stockholder in Jahncke, Oklahoma Land and Cattle Company. (Tr. 294–95.)

E. *The New Orleans, Louisiana, Meeting*

58. On February 12, 1969, a meeting was held in the law offices of Mr. Ewell Walther, a member of the law firm of Stone, Pigman, Walther, Wittman & Hutchinson, 1200 Whitney Bank Building, New Orleans, Louisiana. (Tr. 433.) Mr. Walther had represented OKC in legal matters in the New Orleans area for a year or two prior to the meeting. (Tr. 255.) Present at this meeting were the following:

Mr. Cloyce Box, chairman of the board of OKC.
Mr. Del Rentzel, president of OKC.
Mr. Donald Baxter, financial vice president of OKC.
Mr. Ewell Walther, member of the law firm.
Mr. Saul Stone, member of the law firm.
Mr. Paul Pigman, member of the law firm.
Mr. Edward Jahncke, Sr., and his two sons, Edward Jahncke, Jr., and Barton Jahncke, New Orleans, Louisiana.
Mr. Charles R. Stevens, Fort Myers, Florida. (Tr. 255, 377–78, 433–34.)

59. Mr. Stevens testified that Messrs. Box, Baxter, and Rentzel represented OKC as well as Oklahoma; and Mr. Walther, who had represented OKC in legal matters in the New Orleans area, also represented both companies. (Tr. 434; CX 110A.) However, Mr. Hensley, president of Oklahoma, testified that Mr. Walther was not retained by his company until the time he received the letter of inquiry from the Federal Trade Commission. (Tr. 328.) The letter of inquiry from the Federal Trade Commission concerning this matter was dated March 4, 1969. (CX 23A–E.) Mr. Hensley also testified that Mr. Baxter was not representing Oklahoma,

He was representing OKC from the standpoint of joining together here. as I previously stated, but OKC was opposed to this Pipe Line transaction as they understood it. We were opposed to it as we understood it. What we were doing was trying to join forces and acquire enough stock to protect our interests. (Tr. 329.)

60. Mr. Hensley also stated that the purpose of the meeting was "to join together because not only was OKC opposed to the Pipe Line deal as they understood it, and, they had an interest in it, in Jahncke because of the relationship and certainly we were opposed to it as we understood it." (Tr. 328.)

61. Mr. Baxter testified that Mr. Walther, who was the attorney for OKC, represented Oklahoma at this meeting. (Tr. 295.) Mr. Box testified that he didn't think there was anyone at the meeting representing Oklahoma and didn't know who committed Oklahoma to any

agreement because he left before any agreement was reached. (Tr. 258–60.) However, Mr. Stevens testified that Messrs. Box, Baxter, and Rentzel were present throughout the whole discussion. (Tr. 435.)

62. Mr. Rentzel testified that the discussion at this meeting revolved around the possibility of OKC's interest in the acquisition of Jahncke, but primarily it was a recitation by the dissident stockholders of all of the things they thought had happened to them and how they had been mistreated by those in the Jahncke family who were operating the Jahncke company. (Tr. 378.)

63. Mr. Box's version of the meeting was that the patries discussed "a method of evaluating" the Associated merger with Jahncke, and that "OKC had a definite interest. My interest was selfish. I wanted to get an opportunity to compete with that deal [Associated]." (Tr. 255, 257.) Mr. Box was trying to get enough ammunition out of the Associated deal to see if he couldn't stimulate or improve "my deal" to the point to get Mr. Herbert Jahncke to accept it. (Tr. 261.)

64. In a signed affidavit by Mr. Stevens, dated March 15, 1969, he stated that at the February 12, 1969, meeting in the offices of Mr. Ewell Walther, in New Orleans, Louisiana,

> First. It was agreed that if OKC Corp. would make a minimum type tender offer for Jahncke stock we would accept it in the absence of a better offer. The minimum would be $17.50 per Jahncke share to be paid in an undetermined amount of OKC Corp. Common and Preferred Stock which would produce an income equal to that which had been paid in the recent past by Jahncke Common and Preferred Stock. . . .

Further,

> Mr. Box advised that such an offer would have to be conditioned on approval of 80% of the Jahncke shareholders so that a tax-free reorganization could take place. (CX 110B.)

To Mr. Stevens, this appeared to be a sound investment. (Tr. 437.)

65. According to Mr. Stevens, Messrs. Box, Rentzel, Baxter and Walthers ". . . represented Oklahoma Land and Cattle Co. as interested in preventing McDermott's acquisition of control of Jahncke and that they believed that by using the Jahncke stock acquired by Oklahoma Land and Cattle Co. as a nucleus it could prevent such acquisition and be also in a position to appoint new Directors." (CX 110A–B.)

66. In response to a question as to whether he was attempting to block the Jahncke-Associated merger, Mr. Box replied:

> A. I was, I would block anybody. When you try to make a business proposition you don't try to help the other fellow. You try to get your deal across. (Tr. 262.)

F. *Agreement Among the Stockholders*

67. The Language of a draft of OKC's Preliminary Prospectus concerning Jahncke, printed on February 8, 1969, and finally filed with the Security and Exchange Commission on March 11, 1969, shows that OKC was to be a party to the "Agreement Among Stockholders,"

_______________ holds the amounts of Jahncke Stock indicated above subject to an agreement with OKC under which ____________________________ had indicated its intent to accept the Exchange Offer. (CX 122I.)

This section was changed in a subsequent draft printed on February 22, 1969, to:

OKC has been advised that Oklahoma Land and Cattle Company and certain members of the Jahncke family, holding in the aggregate _______ shares of Jahncke Common Stock and _______ shares of Jahncke Preferred Stock, intend to accept the Exchange Offer. (CX 123K.)

68. The verbal agreement among stockholders reached at the meeting in Mr. Walther's office in New Orleans, Louisiana, on February 12, 1969, was further discussed with Mr. Walther and Mr. Baxter on February 13, 14, 15, 1969, reduced to writing and signed by Mr. Stevens and the other parties to the agreement on February 17, 1969, and at a later date by Mr. Hensley in Bartlesville, Oklahoma. (Tr. 328, 439; CX 110A–C.) At that time, the New Orleans parties turned over their irrevocable proxies to Mr. Walther for use by Oklahoma. (CX 28A–J.) Mr. Hensley did not participate in the negotiation relating to the agreement. Mr. Walther and Mr. Baxter "talked to these people." (Tr. 328.)

69. The signed document, which was entitled "Agreement," (CX 134A–M) dealt only with the OKC offer and did not contain Paragraph D4 concerning the opposition of the parties to the Jahncke-Associated merger. This was included in an amendment entitled "Supplemental Agreement." (CX 134M.) (See also CX 27, 28A, 29.) This "Agreement" and "Suppleemntal Agreement" were incorporated into one document entitled "Agreement Among Shareholders," (CX 30B) and was later signed by the New Orleans parties on March 10, 1969, and by Mr. Hensley in Bartlesville, Oklahoma for Oklahoma on March 17, 1969. (CX 30A–F.)

70. Part of the "Agreement Among Shareholders" deals with "Other Offer" as against the OKC offer. (CX 30H, I.) At that time there were no other offers for the acquisition of Jahncke except the pending merger with Associated. (Tr. 390–414.)

71. Another part of the "Agreement Among Shareholders" deals with a "First Refusal Option" in favor of Oklahoma, whereby the

other parties to the agreement gave Oklahoma first refusal option to acquire all of their shares of Jahncke stock. (CX 30J.) Mr. Hensley, president of Oklahoma, testified that Oklahoma did not have the funds to purchase this stock if offered, but that the company could have gotten the money, "We would have borrowed it." (Tr. 329–30.)

72. In signing the agreement, Mr. Stevens was interested in a sound investment ". . . in getting rid of the holdings of my wife and children of the Jahncke Common Stock" (CX 110A); "It [Jahncke stock] was a substantial holding, and I felt that my family would be better protected if it were diversified." (Tr. 431.) Mr. Stevens testified that he had information that dividends of Jahncke would be discontinued (Tr. 431, 446); that he was interested in an investment which would be equal to, or better than, that which he had been receiving from Jahncke (Tr. 431); that whatever proposition was put forth by OKC seemed to be a sound investment (Tr. 436–37); and that he considered the agreement as ". . . binding ourselves to accept an OKC offer in the absence of a better offer, and that offer to be based at $17.50 a share." (Tr. 439.)

73. For 3 days following this meeting, Mr. Stevens alternately discussed, ". . . the probability of OKC tender offer being in the neighborhood of $17.50 a share, composed of common and preferred stock. And it would be attempted to arrange in such a way that it would be a tax free transaction," with Mr. Baxter; and "The details of the agreement that we ultimately signed on Monday the 17th, binding ourselves to accept an OKC offer in the absence of a better offer, and that offer to be based at $17.50 a share" with Mr. Walther. (Tr. 439.) The agreement on the OKC tender offer reached at the February 12, 1969, meeting was reduced to writing and signed by Mr. Stevens on February 17, 1969. This agreement was then forwarded to Mr. W. A. Hensley, president of Oklahoma, for his signature. (CX 110B.)

74. As to the February 12, 1969, meeting (Tr. 438) and the "Agreement," Mr. Box alternately testified that he attended the meeting for 2 hours and left, that he understood an agreement had been reached,

> . . . that I subsequently saw. I did not know the nature of the agreement until later. (Tr. 256.)
>
> I never saw the agreement they had between themselves for several months, and I didn't even, it didn't even turn out the way we strated out with it. That was not the agreement they reached. (Tr. 259.)
>
> I never saw the agreement. I was not at the—I had nothing to do, never read the agreement to this good day. (Tr. 260.)
>
> I have never read such an agreement. I understand an agreement came out something different than that they agreed before. (Tr. 261.)

75. As Mr. Stevens' "Affidavit" of March 15, 1969, reflects, it was Mr. Box who advised the group of the offer, and

A week or 10 days after the February 17, 1969 visit to Mr. Walther's office, Mr. Box called me and advised that OKC might have difficulty in getting 80% Jahncke stockholder approval. However, OKC might consider another form of reorganization and would like to send Mr. Don Baxter to Fort Myers, Florida, to discuss it with me. (CX 110B.)

76. At the time of Mr. Baxter's visit to see Mr. Stevens in Florida, Mr. Baxter was working for OKC because he was preparing an S-1 Form for filing with the Securities and Exchange Commission and he didn't want to file the S-1 Form unless OKC was assured of gaining control of Jahncke. (Tr. 307.)

77. The drawing up of the agreement was a joint effort between Mr. Baxter and Mr. Walther,

. . . because we had to find out from the members of the Jahncke family what they were interested in and what they might be willing to accept, so it was really rather a joint effort in arriving at it. (Tr. 298.)

78. Prior to drawing up this agreement, OKC's board of directors were informed on January 23, 1969, that Jahncke was still a possible candidate for acquisition. (CX 121A.) The letter of inquiry sent to OKC from the Federal Trade Commission concerning this acquisition was dated March 4, 1969. (CX 5A–F.) OKC filed its "Preliminary Prospectus" with the Securities and Exchange Commission on March 11, 1969. (Tr. 309.) The approval of the data contained in this preliminary prospectus was not given by the OKC board of directors until a "Special Meeting" of the board of directors held on March 19, 1969, at the offices of George A. Fuller Company, Inc., New York, New York. (CX 121C–N.)

G. *Purchase and Solicitation of Jahncke Stock*

1. *Efforts by Mr. Box, Mr. Baxter and Mr. Walther to Acquire Jahncke Stock*

79. In January 1969, Mr. Box personally contacted the financial vice president of the State Mutual Assurance Company, Worcester, Massachusetts, seeking to purchase the stock warrants held by that company in Jahncke. At that time, the warrants were convertible to 89,989 shares of Jahncke common stock. (Tr. 249, 535.) The warrants were not purchased by Mr. Box because he believed the price excessive. (Tr. 250.)

80. An official of State Mutual Assurance Company advised Jahncke management at that time that Mr. Cloyce Box, of OKC Corp., had approached that company and attempted to purchase the Jahncke warrants which they held. (Tr. 535.) The company had

quoted Mr. Box a price of $1 million for the warrants. (Tr. 535.) After acquiring the warrants, they could be exercised for 89,989 shares of Jahncke common stock at an additional price of $1,060,000. (Tr. 535.) Another company later purchased these warrants for $900,000 and exercised them at the additional price. (Tr. 555–56.)

81. In January 1969, it came to Mr. Herbert Jancke's attention, from the stock transfer sheets of his company, that there was increased activity in the Jahncke stock. (Tr. 397–98.) He was aware that Oklahoma had purchased the Jahncke stock from Ideal Basic Industries, Inc., in January 1969, but Oklahoma had not requested that this stock be transferred to its name until March 1969. At the time the request was made by Oklahoma, it was noted by Mr. Herbert Jahncke that Oklahoma had purchased in the range of 16,000 additional shares of Jahncke voting common stock, ". . . it might have been more." (Tr. 398.) By March 10, 1969, Oklahoma had acquired 26,923 additional shares of Jahncke common stock. (CX 26H, 43B.)

82. The activity in Jahncke stock continued from January through February and March 1969, and ". . . the activity was such that the stock that was changing hands was being recorded in brokers' names of record, which appeared to be street names." (Tr. 534.)

83. After contacts by Mr. Box on January 2 and 21, 1969, and by Mr. Adams on January 9, 1969, Mr. Herbert Jahncke, Sr., had the impression that Mr. Box had instigated Mr. Adams into the buying program that went on for several weeks and, finally, into the purchase of the Jahncke stock from Ideal Basic Industries, Inc. It was Mr. Jahncke's opinion that Mr. Box ". . . would like to merge Jahncke into OKC and that this is what he has had in mind from the beginning. I am somewhat concerned over the possibility that he may oppose this acquisition of APL because of the dilution of Jahncke stock and the fact that it would make it more difficult to consummate the merger such as he had in mind." (CX 48K–L, P–Q.)

84. Mr. Hensley authorized Mr. Baxter to purchase Jahncke stock. Mr. Baxter, in turn, authorized Mr. Walther to make the purchases of Jahncke stock. (Tr. 298.) Commencing at 1:07 p.m., February 12, 1969, the day of the meeting in New Orleans, Louisiana, in Mr. Walther's office, Mr. Walther began purchasing Jahncke common stock (CX 38A, 113A), and continued purchasing Jahncke stock through March 11, 1969. (CX 38B–F, H–I, N, Z–2, Z–3.) The meeting in Mr. Walther's office was held at midday or early afternoon. (Tr. 438.) Stock purchased was purchased under the same account used by Mr. Walther at Merrill, Lynch, Pierce, Fenner & Smith, Inc., New Orleans, Louisiana. Based upon Mr. Walther's instructions, the

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stock purchased from Mr. Panzeca on March 7, 1969, was also placed in this account. (CX 112A, C.)

85. Mr. Walther wrote Merrill, Lynch, Pierce, Fenner & Smith on March 7, 1969, that he realized ". . . the current public market in Jahncke Service, Inc., is approximately 19 bid, offered at 20. I am willing to pay 25¼ plus ¼ commission for a block of 5,100 shares in a privately negotiated transaction." (CX 111.)

86. This stock was not transferred to the name of Oklahoma until sometime in March 1969. (Tr. 397–98.) The record date for stock that could be voted at the Jahncke stockholders annual meeting was March 14, 1969. (CX 1, p. 12.)

87. In soliciting Jahncke stock, Mr. Baxter visited Mr. Homer Kees, an investment banker and a partner in the firm of Ducournau & Kees, Whitney Bank Building, New Orleans, Louisiana, on two different occasions. On the first occasion, Mr. Baxter was accompanied by his attorney, Mr. Walther. (Tr. 573–74.) Mr. Baxter and Mr. Walther solicited Mr. Kees' aid in attempting to influence Mr. Frederick "Pete" Jahncke, son of Mr. Herbert Jahncke, Sr., to sell his stock in Jahncke for cash. (Tr. 573–74.) Mr. Baxter indicated that he would be willing to make a favorable price to Mr. Jahncke for his Jahncke stock. (Tr. 575.) At the second meeting, Mr. Baxter discussed obtaining Mr. Frederick Jahncke's stock in exchange for ". . . OKC securities." (Tr. 574.) On both occasions, Mr. Kees contacted Mr. Frederick Jahncke who made the judgment that he did not wish to sell for cash and did not want to make an exchange for OKC securities. (Tr. 574.)

88. Mr. Davis Lee Jahncke, a volunteer administrative assistant to the Episcopal Bishop of Louisiana, in New Orleans, Louisiana, and a cousin of Mr. Herbert Jahncke, Sr., divested himself of the stock he held in the Jahncke company by placing some of it in three trusts, and by selling the remainder to Ideal Basic Industries, Inc., in 1965. The trusts were irrevocable and administered by the National Bank of Commerce, New Orleans, Louisiana. (Tr. 557–59.)

89. In the latter part of 1968, he talked with the trustee of the trust funds because he was concerned about the continuing income in the form of dividends from the Jahncke stock. He understood after his visit with the trustee that a large portion of the Jahncke stock in the trust was sold. (Tr. 560.)

90. On February 21, 1969, Mr. Cloyce Box telephoned Mr. Davis Lee Jahncke. Mr. Box was anxious to know if Mr. Jahncke had any control over the Jahncke stock that was in the trust funds. Mr. Box was also anxious to have Mr. Jahncke use whatever persuasion he

had with the bank to vote the trust stock on behalf of OKC at the coming Jahncke stockholders meeting. Mr. Jahncke advised Mr. Box that they were irrevocable trusts, entirely controlled by the bank and that anything along the lines Mr. Box was suggesting would have to be discussed directly with the bank. (Tr. 561.)

91. During this telephone conversation, Mr. Box stated that he already had two very substantial Jahncke stockholders, Mrs. Charles R. Stevens and Mr. Edward Jahncke, Sr., ". . . in his pocket" and that ". . . they had just about gotten control of the company, there were just a few thousand shares short of control, and that that was why he was calling me in the first place, to find out about the shares of Jahncke in the trust." (Tr. 562–63.)

92. Mr. Box stated further that they were sure of getting control of Jahncke at the annual meeting and that ". . . it was his intention to vote all of these majority shares of stock in favor of a complete new slate of directors, that he had already lined up." Mr. Box had already decided who would be elected by them when they got control. (Tr. 563.) This same intention of Mr. Box was also expressed in one of the drafts of OKC's preliminary prospectuses printed on February 22, 1969. (CX 123K.)

93. Mr. Box solicited Mr. Davis Lee Jahncke's aid in contacting other members of the Jahncke family for their stock, specifically W. Grant Jahncke, who then held the position of vice president in the Jahncke company. (Tr. 564; CX 53M.)

He asked me to call him on the phone and the words that he used I would not say that I can exactly recall them, but he asked me to do was to call Grant and suggest to Grant that if Grant wanted his job to continue after they took over, he had better call, he would like to talk to Grant about his stock ownership. (Tr. 564.)

Mr. Davis Lee Jahncke met with Mr. W. Grant Jahncke and passed on Mr. Box's message and was told by him that he could not entertain such a proposition. (Tr. 564–65.) This answer was then passed on to Mr. Box. (Tr. 565.)

94. A few days after his telephone conversation with Mr. Box, Mr. Davis Lee Jahncke's sister-in-law, Loretta Jahncke, called him and asked him if he would come to her resident and talk with Mr. Donald Baxter. He met with Mr. Baxter who queried him on the Jahncke stock held in trust and received the same answer as was given Mr. Box. Mr. Baxter showed him a list of Jahncke stockholders and asked him if he knew any of the stockholders he might be persuasive with to see if they would sell their stock or give a proxy for their stock. (Tr. 565–66.) Neither Oklahoma nor OKC, nor any of their

officials, had requested a list of Jahncke stockholders from the Jahncke company. (Tr. 305, 309.) It was Mr. Jahncke's impression that in the solicitation of Jahncke stock and proxies, Mr. Box and Mr. Baxter were representing OKC. (Tr. 568.)

2. *Houston, Texas*

95. Mr. Carl C. Lavery, Houston Contracting Company, Houston, Texas, made his first purchase of Jahncke stock through a Houston broker on February 13, 1969, one day after the meeting in Mr. Walther's office in New Orleans, Louisiana. (CX 38L.) Houston Contracting Company is a pipeline construction company and a subsidiary of Sedco, Inc., an offshore oil drilling company. (Tr. 487–88.) Instructions to the stockbroker were, "Keep stock in street name" (CX 38L), "Hold stock in street name" (CX 38M), "Hold in street name." (CX 38–O, Q, R, S.)

96. Mr. Hensley, president of Oklahoma, was not personally acquainted with Mr. Lavery. (Tr. 330.) Mr. Lavery knew Mr. Hensley by name only. (Tr. 488.) Mr. Adams never heard of Mr. Lavery. (Tr. 356–57.) Mr. Box stated, "I have met him." (Tr. 270.) Mr. Lavery said his acquaintance with Mr. Box began in January 1969. (Tr. 493.)

97. Mr. Baxter testified that ". . . at some point after it had become public knowledge that OKC was going to make a tender offer, I started getting a great number of phone calls from various brokers and stockholders wanting to know if OKC was buying [Jahncke] stock." Such persons were advised by Mr. Baxter that OKC was ". . . not buying stock," but that Oklahoma had bought some and might be interested. He referred these inquiries to Mr. Hensley. (Tr. 298–99.) The first preliminary prospectus of OKC, announcing its tender offer, was filed with the Securities and Exchange Commission on March 11, 1969. (Tr. 309.)

98. Mr. Hensley testified that Mr. Baxter had a call from Mr. Lavery saying that Mr. Lavery had some offers from Jahncke stockholders to sell some of Jahncke's stock. Mr. Baxter phoned this information to Mr. Hensley who advised Mr. Baxter to tell Mr. Lavery to proceed with buying the Jahncke stock. (Tr. 330.)

99. Mr. Lavery testified that Mr. Baxter called him and asked him to ". . . give him some help for a friend of his, Oklahoma Land and Cattle." Mr. Lavery was asked to assist in purchasing Jahncke stock in the Houston area. (Tr. 489.) Mr. Lavery said, "Certainly I'll do it." (Tr. 490.) Mr. Baxter's instructions to Mr. Lavery were ". . . not to go above $16 a share," but Mr. Lavery stated that it

was necessary to go above $16 ". . . toward the end of the last purchases." (Tr. 490.) In fact, 5,000 shares of Jahncke stock was purchased on February 28, 1969, at $20 per share. (CX 38K.)

100. Mr. Lavery's instructions to the stockbroker were to keep the Jahncke stock purchased ". . . in street name. I didn't know whose name was going in until such time I was to be told or they were to be told." (Tr. 491.) It was Mr. Lavery's understanding that all of the Jahncke stock purchased in his name was placed in street names and later placed in Oklahoma Land and Cattle Company's name. (Tr. 492.)

101. All of Mr. Lavery's instructions came through Mr. Baxter (Tr. 492), and he had no other interest in the Jahncke stock ". . . other than to purchase it and deliver it as [he] was asked to do." (Tr. 493.) Mr. Lavery received no remuneration at all for these services. (Tr. 494.)

102. Mr. Lavery's purchases of Jahncke stock commenced on February 13, 1969, and continued through March 5, 1969, purchasing a total of 19,856 shares of Jahncke common stock for prices ranging from $15 per share on February 13, 1969, (CX 38L) to $20 per share on February 28, 1969, (CX 38K) for a total amount in excess of $340,000. (CX 38J–Z–1, Z–4.) Checks for the payment of the purchases of Jahncke stock were made out to Mr. Lavery and were sent to the broker in Houston. Mr. Lavery deposited the checks in his own personal bank account and then wrote a check on this account to the broker in his own name. (Tr. 495.)

103. In December 1969, Mr. Lavery purchased 24,136 shares of Jahncke common stock from C. A. Sporl & Company, Inc., New Orleans, Louisiana, in a cash transaction for $478,204.06. (Tr. 496, 520.) Mr. C. A. Sporl, Jr., didn't accept the OKC exchange offer because he didn't like it, and considered it ". . . passing out paper." (Tr. 517.) Mr. Lavery personally invested in the Jahncke stock purchased at this time because it looked to him like a good investment. Mr. Lavery still holds the Jahncke stock. (Tr. 494.)

3. *Philadelphia, Pennsylvania*

104. Mr. John G. Panzeca is an investor whose office is located on the same floor in the Whitney Bank Building, New Orleans, Louisiana, as the law firm of Mr. Ewell Walther. The latter is located in Room 1200, while Mr. Panzeca is located in Room 1222. (CX 37A; Tr. 472.) Mr. Panzeca purchased approximately 1,111 shares of Jahncke common stock in 1967. The majority of the stock he held in Jahncke was purchased in 1968, and he purchased 800 to 1,000

shares in 1969 because he thought it was a "good buy" at the time. (Tr. 473, 477–78.) This stock in Jahncke was purchased through several different stockbrokers in New Orleans, Louisiana, Ducournau & Kees; Kohlmeyer; and Schweickhart & Co. (Tr. 473.) Mr. Panzeca eventually sold 5,100 shares of Jahncke common stock on March 7, 1969. (Tr. 457; CX 111.)

105. Prior to the sale of the Jahncke stock which Mr. Panzeca held, he attempted to sell it through Mr. Kees of the brokerage firm of Decournau & Kees. Mr. Kees contacted the Jahncke company but it was not interested in the stock. He believed that trades in Jahncke stock at that time were going for $17.50 per share. (Tr. 572.) Mr. Panzeca was seeking $25 a share net. (Tr. 474–75.)

106. Failing to sell the stock through Mr. Kees, Mr. Panzeca, who had previously purchased his Jahncke stock through New Orleans brokers, decided to sell the stock through his son-in-law, a broker in Philadelphia, Pennsylvania, asking a price of $25 net. His son-in-law had been a broker since 1967, and Mr. Panzeca wished him to have the commission on the sale of the Jahncke stock. (Tr. 474–75.)

107. The sale of the Jahncke stock was made through the firm of Mr. Panzeca's son-in-law, Merrill, Lynch, Pierce, Fenner & Smith, Inc., Philadelphia, Pennsylvania, but the actual delivery of the stock certificates was to that firm's New Orleans office. The previous week the Jahncke stock had been selling for $18. (Tr. 474–75.)

108. Mr. Ewell Walther, who had been purchasing Jahncke stock in the name of Oklahoma (CX 38A–F, H, I, N, Z–2, Z–3; Tr. 451–53) was the purchaser of the Jahncke stock held by Mr. Panzeca. A check dated March 6, 1969, drawn on OKC's general account for $130,050 was issued to and deposited to Mr. Walther's account. (CX 116.) Mr. Walther then purchased a cashier's check, dated March 7, 1969, for the same amount from the Whitney National Bank of New Orleans which was given to Merrill, Lynch, Pierece, Fenner & Smith, Inc., New Orleans in payment for the 5,100 shares of Jahncke stock sold by Mr. Panzeca. (CX 117.)

109. Mr. Walther had given instructions to Merrill, Lynch, Pierce, Fenner & Smith, Inc., to register the Jahncke stock purchased by him in the name of Oklahoma Land and Cattle Company. (Tr. 452, 464.) Because Mr. Walther was ". . . paying above the current bid and offered price for the Jahncke Stock at the time," the legal department of Merrill, Lynch, Pierce, Fenner & Smith, Inc., required Mr. Walther to sign a letter showing that he was aware of the higher than market price he was paying for the Jahncke stock. (CX 111; Tr. 452.)

110. Jahncke stock had been purchased by Mr. Walther through Merrill, Lynch, Pierce, Fenner & Smith, Inc., New Orleans, on March 5, 1969, at a price of $18.75 per share (CX 38F), and Mr. Lavery in Houston, Texas, on the same date for $19.25. (CX 38Z-4.)

111. As to the purchase of the Jahncke stock from Mr. Panzeca, Mr. Box testified,

> A. Well, we thought it was a sort of controlled amount of stock on account of those people we thought would be favorable to OKC's offer that we had proposed. We thought it would be favorable. that that would be the swinging vote, that we have 50% or better." (Tr. 269.)

112. Mr. Baxter testified that a stockbroker from Philadelphia had called him two or three different times ". . . trying to get OKC to buy these 5,100 shares," but Mr. Baxter referred him to Mr. Hensley because the price was going to be quite high. Mr. Baxter was not going to make such a commitment for Oklahoma since the price was "out of line" with the going market. (Tr. 302.) Mr. Hensley was not willing to buy the stock at this price, but ". . . within just a few hours" Mr. Baxter became aware that the 5,100 shares could represent the "swing vote" in the company. Mr. Baxter had been working with the stockbrokers on buying Jahncke stock and had been following the amount of Jahncke stock acquired by Oklahoma. (Tr. 302.)

Mr. Baxter also testified that,

> At the time we bought the 5,100 shares it appeared to me that with that block of stock and stock that Bud Jahncke and Bob Stevens and Oklahoma Land and Cattle Company owned, that if all of that stock were to vote in favor of the OKC tender offer that we would be successful in the 51% tender offer. (Tr. 301.)

113. OKC paid $25 a share and this was higher than the "going price" at that time. (Tr. 302.) Through March 3, 1969, Oklahoma had borrowed a total of $3,037,350. (CX 43B.) As of March 4, 1969, Oklahoma had expended $3,081,263 for the purchase of Jahncke stock. (CX 26H.) The cost of the Jahncke stock purchased from Mr. Panzeca was $130,050. (CX 119.)

4. *New Orleans, Louisiana*

114. Mr. Saul Stone is an attorney-at-law and is a partner, as is Mr. Ewell Walther, in the law firm of Stone, Pigman, Walther, Wittmann & Hutchinson, New Orleans. (Tr. 682.) Mr. Stone has a wholly owned corporation, Madison Investments, Inc., which owns an interest in a local motel, owns other real estate, and has loaned some of its accumulated cash to various borrowers, ". . . and that

has been the most if not all of the transactions that Madison Investments has engaged in." (Tr. 682, 685.)

115. Mr. Stone has other numerous accounts in his name with either Merrill, Lynch, Pierece, Fenner & Smith, Inc., or other brokers, as well as accounts in the names of his children, his wife, and his mother-in-law, whose portfolios include assets ". . . in excess of seven figures." (Tr. 688.) However, Mr. Stone does not look at financial reports of companies in which he purchases stock, he talks with stockbrokers, and might occasionally read about a stock and "get interested in purchasing it." (Tr. 689–90.)

116. Through Madison Investments, Inc., Mr. Stone first purchased common stock of Jahncke on January 27, 1969. (CX 114A, 115A.) Orders for the purchase of such stock were placed with Merrill, Lynch, Pierce, Fenner & Smith, Inc., New Orleans, Louisiana, either on, or prior to, that date. (Tr. 683.) Mr. Stone was not aware of Jahncke's poor showing for the first 6 months of 1968, nor had he made any study of the Jahncke company prior to purchasing Jahncke stock. (Tr. 683.) However, he thought Jahncke would be "a good investment" (Tr. 685.) Mr. Stone purchased a total of 1,400 shares of Jahncke common stock by February 11, 1969. (Tr. 684; CX 115A–C.) These were the first and only purchases of stock Madison Investments, Inc., had made through this account for the entire year of 1969. (CX115A–B.) This stock was voted ". . . with the OKC Group" at the Jahncke stockholders meeting held in New Orleans, Louisiana, on April 22, 1969. (CX 49C.) Mr. Stone later exchanged his Jahncke stock for OKC stock. (Tr. 685.)

117. Mr. Stone was present at the meeting held in his law firm's offices on February 12, 1969, along with Mr. Box, Mr. Baxter and Mr. Ewell Walther. (Tr. 434.) Although Mr. Stone was not a member of the board of directors of OKC at the time of the meeting, or at the time he purchased the Jahncke stock, he later became a member of the board of directors of OKC. (CX 105, p. 34.)

118. Mr. Thomas E. Newton, Merrill, Lynch, Pierce, Fenner & Smith, Inc., New Orleans, was the account executive for Madison Investment, Inc. A Mr. Hardie was the account executive in the same office for Mr. Ewell P. Walther, Jr. (CX 64B; Tr. 461.) Mr. Newton testified that Mr. Walther was interested in Jahncke stock and, ". . . asked me if I could find stock that could be purchased he would be willing to buy it." Mr. Walther gave Mr. Newton several names that he could possibly contact. (Tr. 462.) However, Mr. Saul Stone was the person who authorized Mr. Newton to purchase Jahncke stock for Madison Investments, Inc. (Tr. 463.)

119. On February 25, 1969, Mrs. Loretta G. Jahncke, widow of Mr. Paul F. Jahncke, Jr., a former vice president of OKC, purchased Jahncke stock for Mr. Walther and had it placed in the name of Oklahoma. (CX 38E, F, G.) Stock was later voted by Mrs. Jahncke and her son Paul F. Jahncke, III, in favor of the OKC slate of directors proposed at the April 22, 1969, stockholders meeting of Jahncke. (CX 49C.) Prior to these purchases, Mrs. Jahncke did not own any stock in the Jahncke company. (Tr. 399.)

120. Mr. J. Edgar Monroe, Canal Assets, Inc., was contacted in mid-January 1969, by Mrs. Loretta Jahncke who sought to purchase the 2,000 shares of Jahncke stock held by Canal Assets, Inc. Mr. Monroe refused, saying that his Jahncke stock was already committed to the then Jahncke management. (Tr. 484.)

121. Mr. Paul F. Jahncke, III, purchased Jahncke common stock as early as January 29, 1969. (Tr. 508.) He had had discussions with an official of OKC with respect to obtaining stock and proxies of Jahncke. As a result of these discussions, he solicited proxies from five stockholders of Jahncke and voted them in favor of the slate of directors proposed by Mr. John F. Arning at the April 22, 1969, Jahncke stockholder meeting. (Tr. 481–82; CX 49C.) Mr. Arning is an attorney of record for OKC in the matter before the Commission.

122. Representatives of Merrill, Lynch, Pierce, Fenner & Smith, Inc., with Jahncke stockholder names provided by Mr. Walther contacted Mr. Paul E. Haygood in February 1969 seeking to purchase 1,500 shares of Jahncke stock held by him. (Tr. 480.)

123. February 24, 1969, Mr. Edward Jahncke, Jr., contacted Mr. C. A. Sporl, Jr., asking him if he were interested in selling the Jahncke stock held by Mr. Sporl's company. (Tr. 483.) Mr. Jahncke stated that his wife had come into an inheritance and she would like to purchase some of the Jahncke stock. Mr. Sporl refused, advising Mr. Jahncke that he could buy a better stock for investment. (Tr. 514–15.) Mr. Sporl was against the OKC take-over of the Jahncke company and his company had purchased additional stock to aid the Jahncke management in fighting off OKC. (Tr. 515.) Mr. Sporl's company sold its 24,136 shares of Jahncke common stock to Mr. Carl C. Lavery, Houston, Texas, in December 1969 for $478,204.06. (CX 49C; Tr. 520.) Mr. Sporl's company did not accept the OKC offer because it was ". . . sort of a paper deal, and we just didn't like it." (Tr. 517.)

124. On March 27, 1969, Mr. Douglas V. Freret, was contacted by Mr. Donald Baxter, who identified himself as an officer of OKC. Mr.

Baxter wished to purchase the Jahncke stock held by Mr. Freret's wife. (Tr. 485.)

H. *Jahncke Stockholders Meeting, April 22, 1969*

125. As of January 1, 1969, there were 654,040 outstanding shares of Jahncke common stock. By April 22, 1969, OKC and Oklahoma controlled stock and proxies for 325,537 shares, which would have given them control of Jahncke. (CX 49C–E.) On March 11, 1969, prior to the March 14, 1969, record date for stock to be voted at the Jahncke stockholders meeting, J. Ray McDermott & Co., Inc., obtained Jahncke warrants and converted them into 89,989 shares of Jahncke common stock. (Tr. 417–19, 555; CX 1, p. 12; 55C.) J. Ray McDermott & Co., Inc., had purchased the warrants and shares to aid Mr. Herbert Jahncke, Sr., retain control of his company. (Tr. 418.) As of March 14, 1969, there were outstanding 744,029 shares of Jahncke voting common stock. (CX 55B.) OKC and Oklahoma no longer had control of the outstanding common stock of Jahncke. (CX 49C.)

126. The original Jahncke stockholders meeting was to take place on April 8, 1969, but due to a preliminary injunction suit brought by the Stevens family, Mr. Edward Jahncke, Sr., and Oklahoma questioning the purchase of stock by J. Ray McDermott & Co., Inc., the meeting was delayed until April 22, 1969. (Tr. 419; CX 1, p. 13.) The Court ruled that the shares acquired by J. Ray McDermott & Co., Inc., were validly obtained and could be voted at the stockholders meeting for all corporate purposes but could not be voted in the consideration of the Associated-Jahncke merger. (Tr. 420; CX 1, p. 13.)

127. At the April 22, 1969, Jahncke stockholders meeting, Mr. John F. Arning, attorney for OKC, presented a slate of directors consisting of Messrs. Charles R. Stevens, Cloyce K. Box, Donald Baxter, John F. Arning, K. S. Adams, Sr., Edward Jahncke, Jr., William A. Hensley, H. H. Tormey, and J. H. Moss. (Tr. 400–01.) Of the 744,029 shares of Jahncke common stock outstanding at that time, 52% or 53% were voted for the incumbent management, 45% in favor of the OKC slate, and the remainder not voting. (Tr. 399, 401, 539; CX 49C–E.)

I. *Subsequent to the Jahncke Stockholders Meeting on April 22, 1969*

128. With OKC controlling 45% of the Jahncke stock, the Jahncke company encountered problems in the operation of its business, ". . . some of our customers were not inclined to enter into any long range

contracts with Jahncke because of their concern over the fact that they didn't know who would control the company." (Tr. 401.) In addition, the restraining order against OKC having expired, ". . . OKC is free to proceed with the completion of the Exchange Offer in accordance with its terms." (CX 1, p. 2.)

129. Plans were made by Jahncke to raise sufficient funds so that a proposal could be made to OKC to purchase its holdings in Jahncke. A program was diligently worked out by Jahncke to sell assets of the company to purchase the Jahncke stock. (Tr. 539–40.) As a result, Jahncke sold a substantial part of its sand and gravel operation, as well as the short-line railroad it owned. (Tr. 402–20, 540.)

130. Mr. Herbert Jahncke, Sr., testified that in negotiating for the purchase of Jahncke stock, "I had several conversations with Mr. Box to see if he was interested in disposing of it. I shouldn't say if he was interested, if Oklahoma Land and Cattle would be interested in disposing of any of their holdings. The response was in the negative." (Tr. 402.)

131. The reason that they were not interested was a question of price, "We couldn't arrive at what a fair price would be for the stock." Mr. Jahncke's offer to Mr. Box was, ". . . to buy him out at his cost and he said that this was not acceptable." (Tr. 402.)

132. Prior to the expiration date of OKC's Exchange Offer, September 30, 1969 (CX 1, p. 4), Oklahoma, the Charles R. Stevens family and Mr. Edward Jahncke, Sr., exchanged their Jahncke stock for OKC stock and debentures. (Tr. 541.) At that time, 46% of the Jahncke stock was held in the name of OKC. (Tr. 542.) The OKC stockholders meeting which formally approved the OKC offer for Jahncke stock was held in September 1969 and took only 20 minutes. (Tr. 273.)

J. *Control of Jahncke by OKC*

133. In early 1969, when Mr. Herbert Jahncke, Sr., first became aware that OKC was attempting to acquire control of his company, he wrote to certain members of the ready-mixed concrete industry informing them of this attempted take-over because it was his opinion that such a take-over was in violation of the guidelines issued by the Federal Trade Commission for the cement industry. (Tr. 424.) "We objected strenuously to OKC's one-sided effort to take over control of this Company." (Exhibit G, p. 2, Emergency Petition For Preliminary Injunction, FTC Pleadings Binder No. 8802–1–2.)

134. In a recapitulation of his struggle to retain control of his company, Mr. Jahncke stated in a letter to his employees on December 18, 1969,

However, OKC acquired approximately 45% of the stock of Jahncke Service and, regardless of whatever other factors might be involved, we had to recognize that they had become the principal shareholder of Jahncke Service. (Id.)

135. In the late fall of 1969, Mr. Herbert Jahncke, Sr., made the decision to accept OKC's Exchange Offer,

The fact that some members of the group that had been supporting me were getting concerned about the situation and felt that it should be brought to a conclusion.

In other words, what I am say[ing], I was concerned that I couldn't hold my family group of stockholders together in one unit. (Tr. 403.)

136. After the expiration of OKC's Exchange Offer, Mr. Box and Mr. Herbert Jahncke, Sr., conducted private negotiations for the exchange of his stock and the stock of his family (Tr. 273–74), and accepted the Exchange Offer. (Tr. 404.) The Exchange Offer was made on December 15, 1969, or immediately following (Tr. 541), at which time OKC acquired 88% or 89% of the Jahncke common stock. (Tr. 274.)

137. Mr. Herbert Jahncke, Sr., was replaced as operating president, and now holds only the position of chairman of the board. (Tr. 387.) Mr. W. Grant Jahncke, former vice president in charge of one of the operating departments, retains a position of vice president "In charge of public relations." (Tr. 1003.)

## The Products and Their Sale

### A. *Portland Cement*

138. Portland cement is a material that in the presence of water binds aggregates, such as sand and gravel, into a concrete—the most widely used building material in the world. Portland cement is an essential ingredient in the manufacture of concrete. It represents about 60% of the material cost and over 33% of the total cost of manufacturing, distributing, and selling ready-mixed concrete—the only form in which concrete is sold as a commodity. Finished portland cement is a perishable product if exposed to moisture. It is sold primarily in bulk, with a small portion sold in bags. None is sold in barrels—the latter term simply represents the common unit of measure. Portland cement is an homogeneous product that has little utility alone. It is manufactured to standard and rigid speci-

fications so that the portland cement produced in one plant is physically substitutable for the portland cement in another plant. (Ans. par. 23; CX 66C.)

139. Portland cement is divided into five categories by the American Society For Testing Materials (ASTM) designated Types I through Type V. This division is based on certain differences in the composition and characteristics of the various portland cements. Type I, general-purpose cement, and Type II, moderate-heat cement, are so similar that many companies make only one type that will meet the requirements of either. Type III, high-early-strength cement, is made by many producers for use where time cannot be allowed for Type I or Type II to develop strength. Types I, II, and III together constitute more than 97% of all the portland cement manufactured in the United States. (CX 71, p. 3; Tr. 605–06, 648, 664, 692.)

140. As used in these findings the term "portland cement" refers to grey portland cement including Types I through V as specified by the American Society For Testing Materials. Neither masonry cement nor white cement is included. Portland cement is one of the raw materials used in making masonry cement. White cement is a specialty cement which is used for architectural purposes, and is not normally used in the production of ready-mixed concrete. (Tr. 606, 1013; CX 71, p. 4.)

141. The portland cement industry in the United States is substantial. In 1968, there were about 50 portland cement companies in the United States operating approximately 188 plants. Total shipments of portland cement in that year amounted to approximately 397 million barrels, valued at about $1.3 billion. (CX 77, 73, pp. 1, 3.)

142. The portland cement industry in recent years has operated with substantial excess capacity. In 1967 and 1968, the percent of capacity utilized was 72.7% and 77.6%, respectively. (CX 72, 73.)

143. Portland cement as a product has a relatively low value a pound while at the same time being a heavy, bulky product. In 1967 and 1968, portland cement had an average value of $3.17 and $3.19, respectively, for a 376-pound barrel or less than a penny a pound. (CX 72, 73.)

144. The number of portland cement companies in the United States has been steadily declining. In recent years there have been a number of acquisitions of mergers in the cement industry. During the period of 1955 through 1968, there were about 30 acquisitions, most of the acquiring companies being cement producers. (CX

76A–C.) Only 15 new companies have entered the cement industry during the period 1957–1968. (CX 75.) There were 64 cement producers in the United States in 1950, as compared to 53 in 1969. (CX 77A–C.)

145. The cement industry is highly concentrated. In 1963, the 10 largest producing companies owned 57% of total U. S. cement capacity, and the 18 largest accounted for 79% of the national total capacity. (CX 71, p. 2.) The following tabulation indicates the concentration ratios in the cement industry:

*Percent of Value of Shipments Accounted For By:*

| | 4 largest companies | 8 largest companies | 20 largest companies |
|---|---|---|---|
| 1947 | 30 | 45 | 70 |
| 1958 | 32 | 50 | 78 |
| 1963 | 29 | 49 | 82 |

(CX 65J.)

146. Portland cement production is distributed throughout the United States. There are no cement companies serving the entire United States, but the larger companies, through a network of geographically scattered plants, cover major portions of the country. (CX 69, 70.)

147. Portland cement manufacturers sell their portland cement to consumers such as ready-mixed concrete companies, concrete product manufacturers, contractors, and building material dealers. On a national basis, approximately 60% of all portland cement is shipped to firms engaged in the production and sale of ready-mixed concrete. Ready-mixed concrete producers represent the largest and most important class of customers for portland cement companies. (CX 72, 73; Tr. 612, 631, 653, 698.)

148. Portland cement constitutes an appropriate product market for the purposes of this case and a relevant line of commerce within the meaning of Section 7 of the Clayton Act, as amended.

B. *Ready-Mixed Concrete*

149. Ready-mixed concrete is made by mixing portland cement, sand, gravel, and water so as to cause the cement to set and bind the entire mass into a hard product resembling stone. The characteristics of the finished product, and particularly its strength, are determined by the amount of portland cement used in the mixture. (Tr. 1012.)

150. Ready-mixed concrete is sold on a strength sack content basis, or pounds a square inch (PSI). The strength, or pounds a square inch, is based on the amount of portland cement used in the concrete, and the standards adhered to for determining the strength of ready-mixed concrete are those set by the American Society For Testing Materials (ASTM). For 2,500 PSI concrete, 5 sacks of portland cement are used; and for each increment of 500 PSI, an additional one-half sack of portland cement is used. Each one-half sack of portland cement that is added to the ready-mixed concrete increases the cubic-yard cost by 60 cents over the price of 2,500 PSI concrete. (Tr. 1013.)

151. All ready-mixed concrete companies have the capacity to produce all types of ready-mixed concrete according to the standard specifications of ASTM. Ready-mixed concrete is delivered to purchasers or construction sites in a plastic and unhardened state. "Ready-mixed concrete includes central mixed, transit mixed and shrink-mixed concrete." (Tr. 1013.)

152. The list price at which ready-mixed concrete is sold is uniform among the various ready-mix producers in the New Orleans area. However, most producers increase the charge over the list price if less than four cubic yards are purchased and decrease the price of a large volume of concrete is purchased. Also, the price charged per cubic yard of ready-mixed concrete generally increases if it is delivered beyond a certain distance. (Tr. 716, 721, 726, 748, 772–74, 802, 805, 807–08, 824, 838–39, 841–42, 854–56, 864–66, 875–76, 879, 892–96, 902–04, 913–17, 926–27, 947–48, 953.)

153. The ready-mixed concrete industry, while a relatively low-profit industry, is nevertheless a substantial industry. In 1963, there were 3,999 companies operating 4,621 establishments with shipments of ready-mixed concrete valued at $2.2 billion. In 1967, there were 4,767 ready-mixed concrete establishments with shipments valued at $2.6 billion. (CX 65K, 68, p. 1.)

154. On a national basis, the ready-mixed concrete industry is highly fragmented and is made up of many small firms. In 1958, and again in 1963, the four largest ready-mixed companies accounted for only 4% of the total industry shipments. The 50 largest companies during 1958 accounted for 21% of the total industry shipments and during 1963 accounted for 22% of total industry shipments. (CX65K.) Of the 4,767 establishments operating in 1967, only 1,152 of these had 20 or more employees. (CX 68, p. 1.) Prior to 1959, only five ready-mixed concrete producers had been

acquired by portland cement manufacturers; however, during the period 1959 through 1969, 79 ready-mixed cement producers were acquired by portland cement manufacturers. (CX 78A–D.)

155. The majority of the New Orleans area ready-mixed concrete producers are small, with single plant operations being the most common. Most of the New Orleans area ready-mixed concrete producers had sales during 1967 and 1968 of under 50,000 cubic yards. (CX 83.)

156. In the New Orleans area, sales of ready-mixed concrete by the top four firms amounted to approximately 57% and 58% in 1967 and 1968, respectively. (CX 83.)

157. Ready-mixed concrete producers generally obtain their portland cement requirements from more than one supplier. (CX 86–87.)

158. Construction contractors and subcontractors are the principal customers of ready-mixed concrete producers. These contractors use ready-mixed concrete in the construction of commercial buildings, residential structures, foundations and roads. (Tr. 725, 756, 807, 823, 841, 867, 879, 895, 903, 916, 928, 946, 954.)

159. Ready-mixed concrete constitutes an appropriate product market to be examined and a relevant line of commerce within the meaning of Section 7 of the Clayton Act, as amended.

C. *Shell*

160. Shell, as used in these findings, refers to either oyster or clam shell, or both, which are commercially dredged and sold. The business of dredging and selling shell is a significant industry in Gulf States and certain Atlantic Coast States. (CX 104, Tables IV and V.)

161. The shell along the Louisiana coast in sufficient abundance to be dredged for commercial use are oyster (*Crassostrea virginica*) and two common brackish water clams (*Rangia cuneata* and *Rangia flexuosa*. These shells are more commonly referred to as "clam shell" and "oyster or reef shell." (Tr. 789; CX 104, p. 2.)

162. Most of the clam shell dredged in Louisiana is removed from Lake Pontchartrain. (Tr. 969, 988; CX 104, p. 3.) Oyster reefs developed mainly along the Gulf Coast. As river deltas advanced and retreated, reef shell formed and was covered over by silt only to reform later. For this reason, layers of oyster shell may be deposited one above the other. (CX 104, pp. 2–3.)

163. Clam and oyster shell are removed from the water by dredge. The shell is first broken loose from the reef or raked from the lake bottoms and then sucked up into a large tube. Once removed from

the water the shell is washed, the mud and sand are discharged overboard and the shell put on barges. (Tr. 968–69, 991.)

164. When the shell industry began in 1913 in the State of Louisiana, only 300,000 cubic yards of shell were produced. Currently, approximately 10 million cubic yards are produced. Today, approximately one-half of the production is oyster shell and one-half clam shell. (CX 104, pp. 9, 23–24.) The shell industry in Louisiana is substantial. (CX 104, pp. 28, 31.) In 1968, sales of shell amounted to $30 million. (CX 104, p. 31.)

165. The shell industry in Louisiana is highly concentrated. In the New Orleans area, there are only four principal producers of shell, and these companies each possess a relatively equal share of the market. (CX 61A.)

166. The shell produced in the State of Louisiana has many uses. The most important are:

*Uses of Clam and Oyster Shell on a Percentage Basis*

| | |
|---|---|
| General Construction | 32.6% |
| Road Construction | 31.4% |
| Cement | 17.4% |
| Petroleum & Chemical | 11.0% |
| Lime | 6.8% |
| Glass | .4% |
| Agricultural Uses | .4% |

(CX 104, p. 23.)

167. Shell dredging in the State of Louisiana has been considered a distinct industry since it was started in 1913. (CX 104, p. 9.) The Louisiana Legislature has enacted statutes aimed specifically at the shell industry. These statutes deal with royalty payments and severance taxes. (CX 104, pp. 8–9.)

168. The Louisiana Wildlife and Fisheries Commission regulates, *inter alia*, the location from which shell is removed, the operation of the tug-boats, and the licensing of personnel aboard the boats. The fact the licenses are required on the boats used for shell operations is a distinguishing characteristic. (Tr. 971; CX 104, p. 19.)

169. Throughout a report on the history of shell dredging in Louisiana prepared by the Louisiana Wildlife and Fisheries Commission, the shell industry is compared only with that industry and its product in other states located on the Gulf of Mexico and along the Atlantic seaboard. (CX 104.)

170. Shell, which is available in unlimited amounts in the New Orleans area (CX 105, p. 27), has certain unique physical character-

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istics which enhance its use and distinguish it from all other products. It is light in weight in relation to its volume, and creates a firm but porous base through which water may flow freely. (Tr. 995.)

171. Because of its unique characteristics, shell does not compete with any other product for the following purposes:

(a) Landfill—Shell is used to replace the earth or to raise the level of a particular site. In swampy areas the use of shell allows pilings to be driven within a day after the shell is placed.

(b) Pipe Racks—A mound of shell, 2 feet high on which pipe is placed in order to keep it off the ground.

(c) Pipeline plugs—Shell is used to replace bank lines. The purpose is to preserve the flow of streams and the ecology in areas where a pipeline crosses a levee. The plug prevents the natural flow of water from eating away the bank around the pipe.

(d) Drilling Mats—Oil drilling rigs are placed on mats made of shell that have been leveled off. This gives the rig stability when drilling offshore.

(e) There are many other unique uses which shell has in marshy and offshore areas. Limestone is not used for the above purposes as it does not have the proper and necessary characteristics. (Tr. 972–74, 993–96; CX 89A–B, 91A–C.)

172. Shell producers, because of the specialized uses of shells, also have unique customers, that is, offshore drilling companies, pipeline companies, and petroleum companies. (CX 89B, 91B; Tr. 872–74, 993–95, 999.)

173. The dredging operation centers around the dredge. Oyster shell is broken loose from the reef by a cutter which extends on a shaft from the dredge. Once the shell is broken loose from the reef, it is sucked from the cutter blades into a large tube by a pump, in much the same manner that material is sucked into a vacuum cleaner. Clam shell does not require cutting blades since clam shell is buried in the lake bottom mud. A rake type device is attached to the end of a long submerged tube and, again, the clam shell is sucked up through the tube. Since the dredged shell is mixed with mud and sand, the mixture has to be washed to separate these elements. (Tr. 785–86, 968–69, 991.)

174. Dredges used for removing shell must have special adaptations, and are expensive, ranging in cost from $750,000 to $1 million, and taking approximately 6 months to build. (Tr. 409, 786, 969–70, 991–92.)

175. Once the shell is separated and cleaned, it is placed on

barges for transport to storage or to customers. The barges are moved about by tugboats. (Tr. 786, 970–71, 991–92.)

176. In addition to the above equipment, a spud barge is necessary to unload the barges at the job site. A spud barge is a barge on which a crane is attached. (Tr. 993.) Other items incidental to the successful operation of the shell business include draglines, dump trucks, radio systems, and miscellaneous equipment located at the landing sites. (Tr. 971, 992; CX 104, p. 31.) The capital necessary to purchase floating equipment for use in a shell operation was estimated to be \$4 to \$5 million. (Tr. 971.)

177. Because freight costs are prohibitive, limestone is not competitive with shell in southern Louisiana. (Tr. 985.) In order to be competitive with shell in the New Orleans area, limestone producers would have to secure special freight rates from the railroads. (Tr. 797–98.)

178. Limestone is not competitive with shell in this area because, in addition to the transportation cost, limestone in many cases cannot be substituted for shell. (Tr. 973–74, 985, 995–96.)

179. Shell is competitive with sand and gravel for some purposes, but because of freight cost, it is not competitive in the New Orleans area. There being no deposits of sand and gravel in the immediate New Orleans area, it must be brought in from Franklintown, Louisiana area which is approximately 90 miles distant. The sand and gravel that is brought into the New Orleans area is used in addition to shell in making ready-mixed concrete. (Tr. 974–75, 984, 993, 713, 891, 902, 913, 925.)

180. Shell is used as a base material for roads in ". . . our locale particularly where we have subsoil conditions that are primarily in the southern part of Louisiana, this particular material lends itself very well to the use in this application." (Tr. 972.) The shell used in road work must meet specifications set by the Louisiana Department of Highways. (RX 12A–K.)

181. The shell producers operating in the 100-mile radius of New Orleans, Louisiana, identified only other shell producers as their competitors. (CX 89A–B, 91A–B, 95; Tr. 965–66, 989, 1004.) In fact, Mr. W. Grant Jahncke, in a memo to Herbert G. Jahncke, Sr., not only identified Jahncke Service's competitors in shell sales as being the only other shell producers, but he distinguished these competitors from the Jahncke competitors in its aggregates business. At the time this memo was sent, Mr. W. Grant Jahncke was the manager in charge of Jahncke Service's sand, gravel and shell department. (CX 61A; Tr. 1003.) The New Orleans area shell pro-

ducers, that is, Jahncke, Radcliff, Ayers, and Louisiana Materials, all belong to and are the only members of the Louisiana Shell Producers Association. The purpose of this Association is to further develop the shell industry in Louisiana and to encourage favorable legislation regarding that industry. (Tr. 975–76, 999–1000, 1008–09.)

182. In summary, shell competes with limestone for some uses, such as in the manufacture of glass and cement, and in agriculture; however, it is not competitive for most uses in the 100-mile radius of New Orleans. (Tr. 983–85, 996; CX 104, p. 23.) Shell also competes in some instances with aggregates. (Tr. 972, 984; CX 104, p. 23.) In addition, shell has many uses for which neither aggregate nor limestone would be suitable substitutes.

183. Shell is a relevant product line of commerce within the meaning of Section 7 of the Clayton Act.

## Section of the Country

A. *Portland Cement.*

184. A portland cement plant's effective area of distribution is limited geographically because of the high shipping cost in relation to its low product value and bulkiness. Transportation costs not only limit the market area of the individual plant but prohibit profitable distribution from one area to another. Generally, most portland cement plants do not ship further than 200 or 300 miles from the plant. Exceptions exist in isolated areas, such as Montana, and areas where water transportation is available. (Tr. 606–07, 627, 649–50, 662, 692–94, 763; CX 71, p. 3, 1, p. 32.)

185. Portland cement is an homogenous product and, in general, the product of one plant is physically substitutable for the product of another. It is produced according to ASTM Specifications, which cement producers adhere to rigidly. Therefore, consumers will not pay more for it than the current market price in that area. (Tr. 593, 628–29, 605–06, 647–48, 664, 692; CX 211.) To be competitive in an area, a supplier of portland cement has to meet his competitor's lowest delivered price. The selling price of portland cement in any given area is usually established by those producers with plants located nearest the area. Producers shipping into the area must absorb all or part of the freight cost in order to be competitive in price. (Tr. 590–93, 605, 611, 652–53, 662, 697.)

186. Portland cement producers must provide prompt delivery service to be competitive. Service as a competitive weapon has re-

sulted in widespread and necessary use of distribution terminals and truck delivery whereby delivery can be made within a few hours after an order is placed. Most distribution terminals are located in or adjacent to a metropolitan area. The growing use of terminals illustrates the proposition that within the broad geographic reach of any cement plant there are separate and distinguishable submarkets. (Tr. 590–91, 607–08, 651, 663, 693–94; CX 69–70, 71, p. 13.) Distribution terminals are established to better service customers or to enter a new market. (Tr. 663.)

187. The availability of prompt delivery by truck allows the ready-mixed concrete producer to maintain smaller storage facilities and a smaller inventory and thereby reduce his investment. As a result, the effective competitors or practicable sources of supply in a given area are those companies that have plants or distribution terminals nearby and can furnish prompt service. (Tr. 590–91, 607–608, 651, 663, 693–94; CX 71, p. 13.)

188. The largest class of customers for portland cement, ready-mixed concrete companies, normally operates in only one area. Because of this, cement producers deal with different customers in their different marketing areas. (Tr. 653.)

189. Metropolitan areas are recognized by portland cement manufacturers as distinct focal points of portland cement consumption. "The more people living in an area, the more need for building highways and everything that uses it; therefore the greater the population concentration, the greater the cement usage." There is a direct relationship between an area's population and its cement consumption. (Tr. 364, 591–92, 605, 630, 611, 649, 653, 666, 692–96.)

190. Cement manufacturers consider ". . . the parishes which comprise the concentrated metropolitan part of New Orleans," as the New Orleans market area (Tr. 632, 608, 666; the ". . . New Orleans marketing area would be, as far as we are concerned, that area which looks to New Orleans for its livelihood, where your metropolitan mass is." (Tr. 696.)

191. Standard Metropolitan Statistical Areas are defined on the basis of such factors as population, labor force and the degree of economic and social integration between counties or parishes. (CX 103.) These are basically the same factors a cement manufacturer looks for when establishing a terminal or defining a focal point for consumption of a plant's production.

192. According to the 1960 Census, there are 231 metropolitan areas in the United States. The New Orleans area is the 28th largest metropolitan area in the nation. (CX 103.) This is the area that all cement suppliers consider as a focal point for consumption of port-

land cement. Since Jahncke purchased its portland cement in the New Orleans area, the effects of the acquisition will be most direct and immediate upon competition in that area.

193. The New Orleans Standard Metropolitan Statistical Area is a section of the country in which to examine the effects of the challenged acquisition on the portland cement line of commerce.

B. *Ready-Mixed Concrete*

194. The marketing area of a ready-mix concrete plant is limited to an area within a relatively short distance of the ready-mix plant. This is due principally to the nature of the product. Ready-mixed concrete tends to harden as soon as water is added to the raw materials. Other factors limiting a ready-mix concrete plant's area of distribution are: the cost of transportation; the product, which is perishable, must be installed or poured within a short period of time after mixing—certain federal and state regulations specify the length of time after the initial mixing within which ready-mixed concrete must be poured; and truck-licensing requirements. The distance at which New Orleans ready-mixed concrete operators limit their deliveries varies, but it averages approximately 17 miles from the plant site. (Tr. 405–06, 717–20, 749–51, 772–74, 803–04, 820–21, 838–39, 853–54, 864, 875–76, 892–94, 902–03, 913–15, 926–27, 946–47, 952–53.)

195. The majority of ready-mixed concrete producers are located in and around urban areas which are the centers of population and construction. (Tr. 668, 700.)

196. The larger ready-mixed concrete operators have more than one plant in order to better distribute their product throughout the metropolitan area. (Tr. 721–24, 753–55, 774–75, 821–22, 942–44.)

197. Ready-mixed concrete companies in the New Orleans area sell most of their concrete within the four specified parishes which comprise the New Orleans metropolitan area. (Tr. 724, 753–55, 774–75, 806, 821–22, 838, 840, 855, 877, 894, 903, 927, 942–44, 954.)

198. The ready-mixed concrete producers located in the New Orleans area, considered only ready-mixed concrete plants located in their area as competitors and indicated that two companies, located across Lake Ponchartrain from New Orleans were not competitors because they were not in their market. (Tr. 729–30, 758–59, 781–82, 810–11, 827–29, 844–45, 859–60, 870, 881–82, 898–98A, 907, 919, 930–31, 950–51, 957–58.)

199. At the time OKC acquired control of Jahncke Service, Incorporated, six of Jahncke's ready-mix concrete plants were located

within the New Orleans metropolitan area. An additional Jahncke ready-mixed concrete plant was located in Belle Chasse, Plaquemine Parish; however, this plant, which is adjacent to Jefferson Parish, sold 80% of its production in Jefferson Parish and only 20% of its production in Plaquemine Parish. (Tr. 943; CX 58A–B.)

200. The New Orleans metropolitan area, which is comprised of the Louisiana Parishes of Jefferson, Orleans, St. Bernard, and St. Tammany, is a section of the country in which to examine the effects of the challenged acquisition on the ready-mixed concrete line of commerce.

C. *Shell*

201. The effective marketing area of a shell producer is limited to the area in which he can economically distribute from his base of operations—the dredge, landing, and storage site. The price of shell is based on cost of dredging plus cost of transportation. The factors that limit the effective marketing area include the location of competitors' plants, the necessity of providing assured delivery to the customer, the high transportation cost, and the homogenous nature of the product for which customers will not ordinarily pay more than the prevailing market price. In order to be competitive in any area, the shell producer must meet the lowest delivered price of its competitors. This is often only accomplished by absorbing most, if not all, of the shipping costs. (Tr. 410–11, 549–50, 975, 982, 998–99, 1008; CX 22–0.)

202. Shell is a bulky product weighing approximately 1,750 pounds a cubic yard with the usual sales price of $2 to $2.25 a cubic yard. (Tr. 968, 978, 1002.) Under OKC's contract with Jahncke, OKC paid Jahncke $1.41 a cubic yard for shell. (CX 1, p. 31.)

203. In addition to the high cost of equipment needed to produce shell for commercial sale, the producer must pay a royalty to the Louisiana Wildlife and Fisheries Commission and a severance tax to the Louisiana Department of Revenue for each cubic yard of shell dredged. (CX 104, pp. 24–25.)

204. There are five major shell producers in the State of Louisiana. They are Ayers Materials Co., Inc.; Louisiana Materials Co., Inc.; Radcliff Materials, Inc.; Lake Charles Dredging and Towing Company, Inc.; and Jahncke Service, Incorporated. (CX 104, map 5, 89A, 91B, 95; Tr. 967, 981–82, 989–99, 1004.)

205. Lake Charles Dredging and Towing Company, Inc., which is located in Lafayette, Louisiana, does not consider itself a competitor in the relevant shell market area. Also, some of the com-

panies that do operate in the relevant shell market area do not consider Lake Charles Dredging and Towing Company, Inc., as a competitor. (CX 97, 95; Tr. 967, 981–83, 989–90.)

206. Sixty percent of Jahncke's shell production was sold in the Greater New Orleans trading area, and the remainder was sold within a 100-mile radius of New Orleans. (Tr. 1007–08.) Jahncke's area of distribution for shell is generally limited to approximately a 70-mile radius from New Orleans, but it does ship by rail to a distributor in Baton Rouge, Louisiana, who in turn, distributes the shell an additional 30 miles. This distributor accounts for approximately 5% of Jahncke's sales of shell. At one time Jahncke sold a small amount of shell to a distributor in Mobile, Alabama, but does not do so now. At the time it did ship to the distributor in Mobile, it was not a profitable business because of the shipping distance and Jahncke had to absorb transportation costs. (Tr. 548–50.)

207. Ayers Materials Co., Inc., ships the major portion of its production within the 100-mile radius of New Orleans. This company ships approximately 1% of its shell outside this radius but only when a regular customer is not able to pick up the shell in New Orleans. It is not profitable, and the company prefers not to do it, but does it for good will. (Tr. 997–98.)

208. Radcliff Materials, Inc., entered into the shell-dredging business by acquisition of existing companies which also included their dealer organizations for the sale of shell. The dealers are located as far west as Lake Charles, Louisiana. Radcliff distributes to them as well as an occasional buyer in southeastern Texas, in the Beaumont area. (Tr. 790.) Sales in the Beaumont area do not represent a great percentage of the total shell sales of this company. (Tr. 790.)

209. Radcliff produces shell from two locations in the State of Louisiana. One location is in the Atchafalaya Basin, approximately 100 miles from New Orleans, in the coastal waters off Louisiana. Reef, or oyster, shell is produced from this location. (Tr. 784–85.) The other location is Lake Pontchartrain and Lake Maurepas, which is considered a single location and from which clam shell is obtained. (Tr. 788–89.)

210. The New Orleans area shell producers limit their area of distribution because to the north of New Orleans they run into competition with aggregate producers, to the east and west they run into competition with other shell producers. (Tr. 982; CX61A, 89A, 95, 91A.)

211. Each of the shell companies operating in the New Orleans area named the same companies as their competitors. These same

companies are the only shell producers who are members of the Louisiana Shell Producers Association and they are the only shell producers soliciting and selling shell in the 100-mile radius area. (Tr. 546, 788, 967, 975–76, 989, 999, 1008; CX 61A, 89A–B, 91A–B.)

212. The area within a 100-mile radius from New Orleans is a "section of the country" in which to examine the effects of this acquisition on the shell line of commerce.

## Competitive Effects of the Acquisition

### A. *Portland Cement*

#### 1. *Sources of Supply*

213. The practicable sources of portland cement to the New Orleans area [1] are the portland cement companies whose freight absorption is not too great or which ship within the area from plants or terminals located in the New Orleans area. (Tr. 609, 632, 654, 666, 694–95; CX 13, 81.) The following seven companies competed in the sale of portland cement in the New Orleans area in 1967 and 1968:

1. OKC Corp.
2. Dundee Cement Co.
3. Ideal Cement Company
4. Alpha Portland Cement Co.
5. Lone Star Cement Corp.
6. Southern Cement Co.—Div. Martin Marietta Corp.
7. Texas Industries, Inc.

(CX 79.)

214. The total shipments of portland cement into the New Orleans area from all sources for the years 1967 and 1968, including shipments of OKC and Lone Star Cement Corp. (CX 81), were as follows:

| Year: | *Thousands of Barrels* |
|---|---|
| 1967 | 3,572 |
| 1968 | 3,778 |

#### (a) *Dundee Cement Co.*

215. The Dundee Cement Co. (hereinafter sometimes referred to as "Dundee") services the New Orleans area from a terminal that was built in New Orleans in 1967. It was necessary for Dundee to have a terminal in New Orleans in order to render the necessary delivery

[1] "New Orleans area" is used herein interchangeably with "New Orleans metropolitan area" and is comprised of Jefferson, Orleans, St. Bernard, and St. Tammany Parishes, Louisiana.

service to local customers by truck from the terminal. Nearly 100% of the terminal's shipments are to ready-mixed concrete producers. (Tr. 632, 638.)

216. Dundee ships portland cement by barge to the New Orleans terminal from its plant at Clarksville, Missouri, which was completed in 1967. That plant's total capacity is a little less than 7 million barrels. The plant also serves terminals in Minneapolis, Minnesota; Rock Island, Illinois; Chicago, Illinois; St. Louis, Missouri; Nashville, Tennessee; Vicksburg, Mississippi; Mobile, Alabama; and Houston, Texas. (Tr. 627.) These cities are focal points of portland cement demand in the area served by the Clarksville plant. (Tr. 630; CX 81.)

| Year | Shipment into New Orleans area in thousands of barrels | Market share |
|---|---|---|
| 1967 | 61 | 1.71% |
| 1968 | 106 | 2.81% |

(b) *Ideal Cement Company*

217. Ideal Cement Company (hereinafter sometimes referred to as "Ideal"), a division of Ideal Basic Industries, Inc., serves the New Orleans area "mostly" from a terminal located in New Orleans. (Tr. 665.) The New Orleans terminal is supplied from Ideal's Baton Rouge, Louisiana, plant.

218. In order for Ideal to compete effectively in the New Orleans area, it operates a terminal there to give customers service. (Tr. 663.) The New Orleans area is an important market for Ideal's Baton Rouge plant. (Tr. 666.)

219. Ideal's Baton Rouge plant's area of distribution is the southern two-thirds of Louisiana. The plant ships portland cement to New Orleans by barge. (Tr. 666, 677.)

220. Ideal is currently the largest supplier of portland cement to the New Orleans market. (CX 81.)

| Year | Shipment into New Orleans area in thousands of barrels | Market share |
|---|---|---|
| 1967 | 1,367 | 38.27% |
| 1968 | 1,198 | 31.71% |

(c) *Alpha Portland Cement Co.*

221. The Alpha Portland Cement Co. (hereinafter sometimes referred to as "Alpha") served the New Orleans area from a terminal it built in New Orleans in 1964. The purpose of the terminal was to serve, by truck, customers in the immediate area that could not be properly served if shipments were made from the plant. The terminal was built at the cost of $700,000 and has a capacity of 16,000 barrels of portland cement. (Tr. 607.)

222. The New Orleans terminal was supplied from Alpha's Orange, Texas, and Birmingham, Alabama, plants. The Orange plant, which became operational in 1967, has a capacity of 1.7 million barrels. Its geographical area of distribution is along the Gulf Coast from Houston, Texas, to Baton Rouge, Louisiana. Individual metropolitan areas such as Beaumont, Port Arthur, Orange, Houston, Baton Rouge, and New Orleans are the focal points of portland cement demand within the broader area served by the Orange plant. (Tr. 604–05; CX 81.)

| Year | Shipment into New Orleans area in thousands of barrels | Market share |
|---|---|---|
| 1967 | 203 | 5.68% |
| 1968 | 182 | 4.82% |

223. Alpha closed its New Orleans terminal in October 1969. The decision to close the terminal was made because Alpha felt it was foreclosed from selling in this market and because so many ready-mixed concrete dealers in the area were either owned or controlled by cement producers. (Tr. 608.)

(d) *Lone Star Cement Corp.*

224. The Lone Star Cement Corp. (hereinafter sometimes referred to as "Lone Star") services the New Orleans area from its plant located in that city. This plant was constructed about 50 years ago, has a present capacity of 2 million barrels. Its area of distribution includes all of the State of Louisiana and the lower part of the State of Mississippi. (Tr. 692.)

225. There are several focal points of portland cement demand within the New Orleans plant's broader area of distribution. These focal points were identified as New Orleans, Baton Rouge, Lafayette, and Gulfport. The New Orleans area is an important market for Lone Star, and Lone Star maintains a sales office and two salesmen there. (Tr. 692, 697; CX 81.)

| Year | Shipment into New Orleans area in thousands of barrels | Market share |
|---|---|---|
| 1967 | 1,123 | 31.44% |
| 1968 | 968 | 25.62% |

(e) *Southern Cement Co.*

226. Southern Cement Co. (hereinafter sometimes referred to as "Southern"), is a division of Martin-Marietta Corp. Southern services the New Orleans area from a terminal that was built in 1963. Prior to placing the terminal in New Orleans, Southern had not participated in the New Orleans portland cement market. (Tr. 651–52.)

227. Southern ships portland cement to the New Orleans terminal from its plant in Roberta, Alabama. The cement is transported in bulk via covered hopper railway cars. In addition to serving the New Orleans terminal, the Roberta plant supplies terminals in Meridian, Mississippi; Charlotte, North Carolina; Augusta, Georgia; Jacksonville and Tampa, Florida. (Tr. 650–51; CX 81.)

| Year | Shipment into New Orleans area in thousands of barrels | Market share |
|---|---|---|
| 1967 | 55 | 1.54% |
| 1968 | 34 | .90% |

(f) *Texas Industries, Inc.*

228. Texas Industries, Inc. (hereinafter sometimes referred to as "Texas Industries"), currently serves the New Orleans area through its Louisiana Industries division. All cement that Texas Industries ships into the New Orleans area goes through Louisiana Industries. Louisiana Industries operates a terminal in the New Orleans area that was built subsequent to 1960. (Tr. 591, 742.)

229. The New Orleans terminal is served from Texas Industries' only plant, located in Midlothian, Texas, near Dallas. (Tr. 588–89.) The plant has a rated capacity of 4,800,000 barrels a year. Texas Industries also operates terminals in the following cities: Houston,

Texas; Shreveport, Monroe, and Alexandria, Louisiana; Jackson and Tupelo, Mississippi; Memphis, Tennessee; and Denver, Colorado. All terminals are served by rail. (Tr. 589–91.)

230. Louisiana Industries operates a ready-mixed concrete facility in New Orleans under the same name. This company does not use its parent company's cement exclusively because the parent company tries to sell as much of its production as possible near its plant. It only ships to New Orleans, where a great deal of freight must be absorbed, when it needs the business. (Tr. 742, 763; CX 81.)

| Year | Shipment into New Orleans area in thousands of barrels | Market share |
|---|---|---|
| 1967 | 70 | 1.96% |
| 1968 | 323 | 8.55% |

2. *Market Structure*

231. The structure of the New Orleans area portland cement market was highly concentrated during the years 1967 and 1968. The market shares of the four largest sellers are shown in the following tabulation:

| | 2 largest companies | 3 largest companies | 4 largest companies |
|---|---|---|---|
| 1967 | | | |
| Ideal Cement Co. | 38.27% | 38.27% | 38.27% |
| Lone Star Cement Corp. | 31.44 | 31.44 | 31.44 |
| OKC Corp. | | 19.40 | 19.40 |
| Alpha Portland Cement Co. | | | 5.68 |
| Total | 69.71% | 89.11% | 94.79% |
| 1968 | | | |
| Ideal Cement Co. | 31.71% | 31.71% | 31.71% |
| Lone Star Cement Corp. | 25.62 | 25.62 | 25.62 |
| OKC Corp. | | 25.60 | 25.60 |
| Texas Industries, Inc. | | | 8.55 |
| Total | 57.33% | 82.93% | 91.48% |

(CX 82.)

232. As shown above, the concentration decreased slightly in 1968. One reason for this was that Texas Industries, which was not one of the three leading producers, increased its market share from 1.96% to 8.55%, thus reducing, in turn, the leading companies' shares. The basis for this increase was explained by an official of Texas Industries. He was asked why Louisiana Industries, a division of Texas Industries, which operates a ready-mixed concrete business in the New Orleans area, distributed its cement purchases among several companies in 1967 but not in 1968. He replied:

> You would have to know the basic distribution philosophy of Texas Industries of their cement plant, which means just like any other business, they are going to sell their cement the nearest distance to Dallas or Midlothian as possible. They are only going to ship to New Orleans . . . where they have to absorb a lot of freight, when they need the business. (Tr. 763.)

233. The total volume of portland cement shipments into the New Orleans area increased from 3,572,000 barrels in 1967 to 3,778,000 barrels in 1968. Most of the increase was accounted for by only two companies—Texas Industries and OKC Corp. (CX 81.)

234. In 1967, approximately 48% of total portland cement sales in the New Orleans area were to ready-mixed concrete producers, and in the following year sales to this class of customers were approximately 44%. This was well below the national average of nearly 60% in 1968. (CX 73, Table 16.) This was accounted for by the fact that in the New Orleans area, Ideal, the area's largest portland cement supplier, shipped approximately 30% of its area sales to one customer, which was not a ready-mixed concrete producer but was in the prestressed concrete business. (Tr. 667.) In addition, several oil well service companies located in the area purchased large volumes of portland cement. (Tr. 698; CX 15–16.)

235. During the years 1967 and 1968, Jahncke Service, Incorporated, one of the largest consumers of portland cement in the New Orleans area, accounted for 13.55% and 11.41%, respectively, of the total portland cement consumption in each of the two years. In 1967 and 1968, it was the largest consumer of portland cement among ready-mixed concrete firms, and accounted for 28.21% and 26.15%, respectively, of all purchases made by ready-mixed concrete firms as shown by the following tabulation:

| Year | Total shipments | Shipments to ready-mixed companies | Purchases by Jahncke | Jahncke purchases as percent of: | |
|---|---|---|---|---|---|
| | | | | Total shipments | Ready-mixed shipments |
| 1967 | 3,572 | 1,716 | 484 | 13.55 | 28.21 |
| 1968 | 3,778 | 1,648 | 431 | 11.41 | 26.15 |

(CX 81, 84, 85.)

236. During the period 1967-1968, Jahncke, as one of the largest consumers of portland cement in the New Orleans area, purchased portland cement from four different producers and white cement from the Trinity Division of the General Portland Cement Company. (CX 57B, 86, 87.) The portland cement shipments to Jahncke by company are shown by the following tabulation:

| Supplying company | 1967 | | 1968 | |
|---|---|---|---|---|
| | 1000 barrels | Percent of total | 1000 barrels | Percent of total |
| Alpha Portland Cement Co. | 69 | 14.20 | 50 | 11.60 |
| Ideal Cement Co. | 167 | 34.50 | 154 | 35.70 |
| Lone Star Cement Co. | 57 | 11.80 | 11 | 2.60 |
| OKC Corp. | 191 | 39.50 | 216 | 50.10 |
| Total | 484 | 100.00 | 431 | 100.00 |

237. OKC acquired the largest producer of ready-mixed concrete and one of the largest consumers of portland cement in the relevant New Orleans area market. This acquisition gave it the power to completely foreclose competing portland cement companies from a substantial portion of that market. (CX 84.)

238. Of the top ready-mixed concrete producers in the area, Jahncke was one of two independents left. The second largest producer, Jimco, Inc., is indebted to Lone Star and usually purchases from Lone Star. (CX 124A–U.) The third ranking company, Louisiana Industries, Inc., is a subsidiary of Texas Industries, Inc. The fifth ranking company, Ready-Mix Concrete, is in debt to OKC for nearly $300,000 and buys almost exclusively from OKC. Radcliff Materials, which supplies shell to Ideal Cement Co. to use as a source of raw material in the making of portland cement at Ideal's Baton Rouge plant, buys nearly all of its cement requirements from that company. These five ready-mixed concrete companies account for nearly 70% of all purchases of portland cement made by ready mixed concrete companies in the New Orleans area. (CX 124A–U; Tr. 887–88, 614–15, 633–35, 654–56, 780, 594, 741–42, 831–32.)

*Purchases of Portland Cement, in thousands of barrels, by ready-mixed concrete producers in the New Orleans area and the percent purchased by each to the total purchased by all producers for the years 1967–1968*

| Ready-mix company | 1967 | | 1968 | |
|---|---|---|---|---|
| | Cement purchases | Percent of total | Cement purchases | Percent of total |
| Carlo Ditta, Inc | 159 | 9.27 | 154 | 9.34 |
| Dixie Bldg. Mtls. Co., Inc | 34 | 1.98 | 32 | 1.94 |
| Dixie Concrete, Inc | 27 | 1.57 | 33 | 2.00 |
| Dowdy Concrete Co., Inc | | | 14 | 0.85 |
| Drake Concrete Co., Inc | 62 | 3.61 | 67 | 4.07 |
| Durock, Inc | 22 | 1.28 | 31 | 1.88 |
| Jacat Corp | 45 | 2.62 | 41 | 2.49 |
| Jimco, Inc | 267 | 15.56 | 258 | 15.66 |
| Lakeview Concrete, Inc | 52 | 3.03 | 22 | 1.33 |
| Louisiana Industries—Div. Texas Ind | 153 | 8.92 | 208 | 12.62 |
| Nash Mullikin Mtls., Inc | 38 | 2.21 | 15 | 0.91 |
| Owens & Son, Inc | 37 | 2.16 | 37 | 2.25 |
| Peter Judlin, Inc | 21 | 1.22 | 16 | 0.97 |
| P & W Concrete Co | | | 12 | 0.73 |
| Radcliff Mtls., Inc | 171 | 9.97 | 126 | 7.65 |
| Ready-Mix Concrete, Inc | 105 | 6.12 | 113 | 6.86 |
| Standard Mtls., Inc | 21 | 1.22 | 21 | 1.27 |
| Tiger Mix Concrete Co., Inc | 18 | 1.05 | 17 | 1.03 |
| Jahncke Service, Inc | 484 | 28.21 | 431 | 26.15 |
| Total | 1,716 | 100.00 | 1,648 | 100.00 |

(CX 84.)

239. There is evidence that the pressures created by the acquisition of Jahncke and the substantial foreclosure of the market resulting therefrom may cause competing portland cement producers to either withdraw from the market or to take similar action to protect their substantial investments in the market. (Tr. 382–83, 615, 671–72.)

240. One of the cement companies, Alpha, is opposed to vertical integration in the cement industry because ". . . it eliminates markets. We would like to be able to sell cement on the basis of salesmanship, not on the basis of owning our source of . . . outlets for cement." (Tr.617) The official of this company who had experience with vertical integration in other markets found that (1) . . . we were forced to go longer distances to market our cement to supplant the barrels that we had lost through acquisitions." (Tr. 616.)

241. In building its Orange, Texas, cement plant, Alpha counted on the New Orleans area as an essential market. (Tr. 611.) Foreclosure from selling to the three large ready-mix concrete companies in the New Orleans market, Radcliff because it sells shell to Ideal and in turn purchases Ideal cement; Louisiana Industries because it is integrated with Texas Industries; and loan agreements between Lone Star and Jimco, Inc. (CX 124A–U), influenced Alpha in withdrawing from the New Orleans market (Tr. 613–15) and the closing down of a terminal which had cost the company $700,000

to build in 1964. (Tr. 607.) The acquisition of Jahncke by OKC adds to this foreclosure and the prospects for a new company entering the New Orleans market would not be good. "We felt that we were precluded from selling to an extent in the New Orleans market, and the same would be true if any new company came in." (Tr. 615.)

242. At the time Dundee built its Clarksville, Missouri, plant, it had made studies to determine desirable markets for the consumption of cement. New Orleans was considered in this category. (Tr. 631.) With the acquisition of Jahncke by OKC, it is much less desirable, "Because of the fact that you basically are foreclosed from a substantial part of the market, in the Jahncke situation, and the others you inquired about one way or the other we are foreclosed from selling." (Tr. 634–35.) Jahncke, purchasing over 400,000 barrels of cement, represents a very substantial customer, a very substantial portion of the New Orleans market from which Dundee is foreclosed. (Tr. 635.) Dundee believes that selling ready-mixed concrete is a local business best understood and best run by local people. (Tr. 635.) An integrated cement company has an advantage over a nonintegrated producer because the integrated company has a ". . . guaranteed outlet for his product, which is economically attractive to a cement corporation which required large volumes of continuous production to be profitable." (Tr. 636.)

243. Dundee has experienced other situations in Memphis, Tennessee, and Kansas City, Missouri, where it was foreclosed "very substantially, if not entirely" because of vertical integration. (Tr. 636–37.)

244. Mr. Rentzel, the former president of OKC, is also against vertical integration between portland cement producers and ready-mixed concrete producers. He believes that a ready-mixed concrete company is the ". . . kind of a business that could be run by local people at a profit. . . . That in general, . . . [there is] not sufficient profit volume for a large company. . . ." (Tr. 383.) When Mr. Rentzel was employed by another cement producer, Martin Marietta, that company acquired a ready-mixed concrete company to prevent a competitor from acquiring it. If Martin Marietta had not done this, a "substantial disruption" would have taken place in the market. The acquired ready-mixed concrete company was eventually resold to the original owners. (Tr. 384.)

245. Mr. Shilling, president of Ideal Basic Industries, Inc., also testified that his company at one time purchased a ready-mixed concrete producer to avoid being foreclosed from that particular customer. (Tr. 671–72.) Ideal is against vertical integration be-

cause ". . . No. 1, we don't think we should be in competition with them [ready-mixed concrete companies]. And No. 2, we don't think we could offer any better product to the public than the local people could, and we don't think we could offer any better service. . . ." (Tr. 670–71.)

246. The acquisition of Jahncke may thus prevent the prospect of new entries into the New Orleans area portland cement market. (Tr. 615, 634–35, 657.)

247. The effect of the acquisition of the stock of Jahncke by OKC may be to substantially lessen competition in the sale of portland cement in the New Orleans area.

B. *Ready-Mixed Concrete*

1. *Market Structure*

248. During the period 1967–1968, the New Orleans area was served by 19 ready-mixed concrete firms. Jahncke, the leader, accounted for approximately 20% of the total sales of New Orleans area firms in each of those two years. The four leading firms, during this period, accounted for nearly 60% of the total sales by all New Orleans area ready-mixed concrete firms.*

249. Since 1968, three of the firms have gone out of business, Dixie Concrete, Inc.; Nash Mullikin Materials, Inc; and Tiger Concrete Co., Inc. Two of these companies, Lakeview Concrete, Inc., and P&W Concrete Co., are not considered competitors because they are on the other side of Lake Pontchartrain from New Orleans, which is outside "our market." (Tr. 827–28, 920; CX 105, p. 32; Tr. 882, 898, 930.)

2. *Market Conditions and Competitive Effects of the Acquisition*

250. Ready-mixed concrete companies obtain business by offering favorable prices, good service, and prompt delivery. Other factors being equal, purchasers of ready-mixed concrete will buy from the producer who offers the best price per cubic yard. (Tr. 725–26, 756–57, 778, 807, 823, 841, 856, 867, 879, 895, 904, 916, 928, 946, 956.) A reduction of 25 cents or 50 cents in the price of a cubic yard of concrete definitely makes a difference in obtaining a job. (Tr. 823.)

251. There is opinion testimony to the effect that the acquired ready-mixed concrete company could be used as a "dumping ground for cement." The profit would be coming back to the cement company because it is just operating at a break-even point on the ready-mixed concrete operation. The independent ready-mixed concrete

[*See chart on p. 1407 infra.]

*Sale of ready-mixed concrete, in thousands of cubic yards, by producers in the New Orleans area and the percent sold by each to the total sold by all producers for the years 1967–1968*

| Ready-mix company | 1967 (000) Cubic yards sales | 1967 Percent of total | 1968 (000) Cubic yards sales | 1968 Percent of total |
|---|---|---|---|---|
| Carlo Ditta, Inc. | 125 | 10.23% | 121 | 9.76% |
| Dixie Bldg. Mtls. Co., Inc. | 32 | 2.62 | 32 | 2.58 |
| Dixie Concrete, Inc. | 20 | 1.64 | 23 | 1.85 |
| Dowdy Concrete Co., Inc. | | | 14 | 1.13 |
| Drake Concrete Co., Inc. | 52 | 4.25 | 53 | 4.27 |
| Durock, Inc. | 18 | 1.47 | 31 | 2.50 |
| Jacat Corporation | 35 | 2.86 | 32 | 2.58 |
| Jimco, Inc. | 213 | 17.43 | 206 | 16.61 |
| Lakeview Concrete, Inc. | 38 | 3.11 | 18 | 1.45 |
| Louisiana Industries-Div. Texas Ind. | 104 | 8.51 | 155 | 12.50 |
| Nash Mullikin Mtls., Inc. | 30 | 2.46 | 12 | 0.97 |
| Owens & Son, Inc. | 37 | 3.03 | 37 | 2.98 |
| Peter Judlin, Inc. | 19 | 1.55 | 17 | 1.37 |
| P & W Concrete Co. | | | 10 | 0.81 |
| Radcliff Mtls., Inc. | 104 | 8.51 | 91 | 7.34 |
| Ready-Mix Concrete, Inc. | 92 | 7.53 | 101 | 8.15 |
| Standard Mtls., Inc. | 20 | 1.64 | 19 | 1.53 |
| Tiger Mix Concrete Co., Inc. | 31 | 2.54 | 31 | 2.50 |
| Jahncke Service, Inc. | 252 | 20.62 | 237 | 19.11 |
| Total | 1,222 | 100.00% | 1,240 | 100.00% |
| Top Four Companies | | | | |
| Jahncke Service, Inc. | 252 | 20.62% | | |
| Jimco, Inc. | 213 | 17.43 | | |
| Carlo Ditta, Inc. | 125 | 10.23 | | |
| Louisiana Industries-Div. Texas Ind. | 104 | 8.51 | | |
| Total | 694 | 56.79% | | |
| Total All Other Companies | 528 | 43.21% | | |
| Top Four Companies | | | | |
| Jahncke Service, Inc. | | | 237 | 19.11% |
| Jimco, Inc. | | | 206 | 16.61 |
| Louisiana Industries-Div. Texas Ind. | | | 155 | 12.50 |
| Carlo Ditta, Inc. | | | 121 | 9.76 |
| Total | | | 719 | 57.98% |
| Total All Other Companies | | | 521 | 42.02% |

(CX 83.)

company cannot operate at a break-even point; it must make a profit, and the ready-mixed concrete producer's receipt of a reduction in price for its portland cement would result in a corresponding reduction in that producer's total cost for producing ready-mixed concrete. Depending upon the size of such a reduction, the savings in the cost could be considerable. (Tr. 830–31, 871, 847.)

252. OKC's acquisition of Jahncke has caused at least one New Orleans area ready-mixed concrete company to consider affiliating with a portland cement company. (Tr. 959.) Another operator stated that since the acquisition of Jahncke by OKC, he would consider getting out of the ready-mixed concrete business entirely. (Tr. 861.)

253. OKC's acquisition of Jahncke may tend to substantially

lessen competition or tend to create a monopoly in the production and sale of ready-mixed concrete in the New Orleans area by conferring upon the acquired company a decisive competitive advantage over its nonintegrated competitors and by raising barriers to entry into the production and sale of ready-mixed concrete in the New Orleans area.

C. *Shell*

1. *Geographic Market*

254. The geographic market in which counsel supporting the complaint contend the shell acquisition should be judged is that area within a 100-mile radius of New Orleans. This is not an entirely satisfactory area from the standpoint of collecting statistics because one of the shell dredgers in the area sells a large portion of its shell beyond the area and because another one that dredges outside this area sells in it, but it is as realistic an area as any in which to appraise the probable effect on competition, and it is the area where the effect on competition would be expected to be the greatest.

255. The four companies operating in the area within 100 miles of New Orleans dredge the bulk of their shell from two locations, Lake Pontchartrain located near the city of New Orleans and the Atchafalaya Basin located in central Louisiana along the Gulf Coast. (Tr. 784–85, 966, 988, 1003–04.) The sales in cubic yards, made in the New Orleans area by these four companies are as follows:

| Company | 1967 | 1968 |
|---|---|---|
| Ayers Materials Co. | 1,178,196 | 1,257,883 |
| Jahncke Service, Inc. | 1,349,474 | 1,572,622 |
| Louisiana Materials, Inc. | 1,832,457 | 1,686,783 |
| Radcliff Materials, Inc. | 2,356,400 | 2,117,706 |
| Total | 6,716,527 | 6,634,994 |

These figures do not include the small amount of shell sold by Lake Charles Dredging and Towing Company, Inc., in Morgan City, Louisiana, which is barely within the 100-mile radius of New Orleans. (Tr. 981–82.) Jahncke's percentage of sales in this area was 20.09% in 1967, and 23.70% in 1968. (CX 89A, 91A, 95, 61A.)

2. *Effect on Competition*

256. OKC (formerly Oklahoma Cement Company) has always taken all its shell requirements from Jahncke and continues to do

so under a long-term supply contract which does not expire until 1974. (CX 22.)

257. Because OKC's shell purchases are made at a very low price (CX 22) the impact of the foreclosure of OKC's business on Jahncke's competitors may be measured in terms of dollar volume of sales. Because the low price at which shell is sold to industrial users, such as OKC and U.S. Gypsum, allows only a small profit margin, the foreclosure is not as significant to the other shell producers as it might otherwise be since they are not as anxious as they might ordinarily be to get the business. (Tr. 1133, 1001–02).

258. Assuming an average price of $2 a yard, which is close to the estimates given by the witnesses, the total dollar volume of sales in 1968 would be about $14 million. (Tr. 1134, 1020, 1002, 978.)

259. OKC's purchases amounted to $693,859 (492,091 cubic yards at $1.41) (CX 61B, 21Q), which amounts to a percentage of almost 5% of the total dollar volume of shell sold in the New Orleans area.

260. OKC's major competitors own or control their raw material supply and are thereby protected to a large extent against future price fluctuations and unavailability of raw material. (Tr. 695, 596, 638, 657, 677.)

261. OKC did not, prior to the acquisition, own its supply of raw material. (Tr. 1074.) Although it is mechanically feasible to do so, it would be very costly and difficult to procure limestone deposits for OKC's New Orleans plant. (Tr. 282–83, 1083–85.)

262. An official of Ayers Materials Co., Inc., testified that the acquisition will have no effect on his business because his company is not interested in serving industrial accounts like OKC. Even if OKC's business was available, Ayers Materials Co., Inc., would not be interested in it. (Tr. 1001–02.)

263. An official of Louisiana Materials Co., Inc., also testified that the acquisition will not affect his business in any appreciable amount. (Tr. 977.)

264. Opportunities exist to expand the market for shell to uses to which it is not now heavily put. These include road base material, such as sand and gravel and soil cement (RX 12–13; Tr. 1131, 1103, 984–85, 995) where shell is now used as a substitute. The prospects of replacing sand and gravel are especially good since the supply of sand and gravel is being depleted. (Tr. 1131.) These opportunities would also include using shell for the cattle and chicken feed business and the rubber, paint, and plastic business. (Tr. 1131.)

265. Since OKC has always bought all of its shell from Jahncke,

the acquisition will not increase Jahncke's sales and will, have no effect on concentration.

266. There is no evidence of any prior vertical integration in the shell business.

267. The leases under which the shell producers presently operate are exclusive. (CX 104.)

268. The Louisiana Wildlife and Fisheries Commission has the authority to extend the leases in their present form (CX 104, table following p. 8) and in its recent report has indicated that it favors the present leasing arrangement. (CX 104, p. 18.) It would appear, however, that if the demand for shell outgrows the production, additional competition is needed, or if for any other reason the Louisiana Wildlife and Fisheries Commission considered it to be desirable to lease rights to additional producers, they proceed to do so.

269. In the shell business, one dredger merely replaced another, and it appears the newcomer will be able to compete at least as effectively as the old.

270. It was not alleged nor was it contended that OKC was a potential competitor of Jahncke for shell business.

271. It was contended that the acquisition removed OKC as a buyer from a competitive market, gave OKC a cost advantage in the production of cement, and provided it with the capability and power to regulate the price of cement in the New Orleans market to the detriment and possible exclusion of its competitors. It is not believed that OKC's cost advantage is substantial or that as a result of the acquisition of Jahncke's shell business OKC has gained or is likely to gain the power to regulate the price of cement in this market.

272. In view of all the circumstances set forth in the above findings of fact, it is believed that the acquisition and retention of the shell business of Jahncke by OKC is not likely to have a substantial adverse effect on competition in the shell business, in the cement business, or in the ready-mixed concrete business.

## Discussion of Some Preliminary Conclusions and the Order

Many of the proposed findings of counsel supporting the complaint were either adopted in whole or in part in the above findings of fact or formed the basis for them. Most were those which respondents conceded were factually correct.

The respondents contend that the relevant section of the country in which this acquisition should be examined is the area to which

OKC's cement-producing competitors can turn to replace the business allegedly lost and that this area extends on the west to north Texas; on the north to Minneapolis, Minnesota; on the east to a line running through Chicago, Illinois, Nashville, Tennessee, and western Georgia; and on the south to the Gulf of Mexico. Respondents concede, however, that there is a definable submarket within this market area that can be measured and that is the area to which OKC's principal competitors, Ideal and Lone Star, can turn to replace the business allegedly lost by this acquisition. Respondents contend that this submarket is bounded on the west by the Texas-Louisiana line; on the north by a line running through certain Parishes in Louisiana and Mississippi; on the east by Escambia County, Florida; and on the south by the Gulf of Mexico.

The hearing examiner rejects this contention and concludes that the relevant market is the metropolitan New Orleans area, as found above and in reaching this conclusion, he has followed the precedents set by the Commission in several recent cases in this same industry. In these cases certain metropolitan markets, some of which were smaller than the one herein, were found to be the relevant geographic markets in which to appraise the probable effect of the acquisitions.

It is concluded herein that the position of counsel supporting the complaint that shell has sufficient peculiar characteristics and uses to constitute it a product line of commerce is sustained by the evidence. Shell is preferred for a few uses; whereas for other uses, the primary consideration is price, and either shell or another product is used. The factor that makes shell a separate market, or a submarket, if calcium carbonate is considered as the broad market, is the lack of availability of limestone in the area surrounding New Orleans where shell is sold. Little limestone is sold in this area because it must be brought from such distances that it is uneconomical for most uses. One cement producer, which owns limestone deposits in Alabama, ships limestone to New Orleans for use in its cement plant.

The findings of fact that relate to the effect of the acquisition of Jahncke's shell business are based upon the proposed findings of respondents, and many of them are adopted in whole or in part. It is believed that the evidence does not show the probability of adverse effects in any line of commerce resulting from the acquisition of the shell business.

It is also concluded herein that the evidence has sustained the charge in the complaint alleging violation of Section 5 of the Federal Trade Commission Act. It is clear that the two respondents acted in concert to obtain control of Jahncke. It is inconceivable to this hearing examiner that Oklahoma Land and Cattle Company or the Adams interest, which is considered to be the largest stockholder in OKC, were unaware of the efforts of OKC to acquire Jahncke or that the purchases of Jahncke stock by Oklahoma were not a part of this plan.

It may be that Mr. Adams had no agreement with Mr. Box regarding the purchase of the Jahncke stock owned by Ideal Basic Industries, Inc., but someone representing or acting for Oklahoma undoubtedly had knowledge of a plan by which Oklahoma and OKC would gain control of a majority of Jahncke common stock. It thus appears that the order to cease and desist should contain a prohibition relating to this charge. The motion of respondents to strike this charge that was made on the record and argued at some length on July 6, 1970 (Tr. 1023) is hereby specifically denied.

Jahncke was engaged in the marine hydraulic dredging business and in the sale of building materials, including concrete products. No showing was made that the acquisition of these businesses was likely to have any effect on any line of commerce. For this reason it appears OKC should not be required to divest the properties used in connection with such businesses.

In considering the divestiture order contained herein, the hearing examiner is convinced that the statement in *United States* v. *du Pont & Co.*, 366 U. S. 316, 327, contains a clear statement of the law which is applicable to this case. There the Court said:

> If the Court concludes that other measures will not be effective to redress a violation, and that complete divestiture is a necessary element of effective relief, the Government cannot be denied the latter remedy because economic hardship, however severe, may result. Economic hardship can influence choice only as among two or more effective remedies. If the remedy chosen is not effective, it will not be saved because an effective remedy would entail harsh consequences. This proposition is not novel; it is deeply rooted in antitrust law and has never been successfully challenged. The criteria were announced in one of the earliest cases. In *United States* v. *American Tobacco Co.*, 221 U.S. 106, 185 (1911), we said:
>
> "In considering the subject . . . three dominant influences must guide our action: 1. The duty of giving complete and efficacious effect to the prohibitions of the statute; 2, the accomplishing of this result with as little injury as possible to the interest of the general public; and, 3, a proper regard for the vast interests of private property which may have become vested in many persons as a result of the acquisition either by way of stock ownership or otherwise of interests in the stock or securities of the combination without any guilty knowledge or intent in any way to become actors or participants in the wrongs which we find to have inspired and dominated the combination from the beginning."

The Court concluded in that case that, despite the alleged hardship which would be involved, only dissolution of the combination would be effective, and therefore ordered dissolution. Plainly, if the relief is not effective, there is no occasion to consider the third criterion. (Footnote omitted.)

Also, as the Commission said in Union Carbide Corporation, 59 F.T.C. 614, 659:

The Act is violated if the forbidden effect or tendency occurs in any line of commerce. And once a violation has been found, the entire acquisition is subject to a divestment order. But total divestiture is not an automatic remedy which must be applied in all cases. The choice of remedies is the Commission's to be exercised with the goal of restoring and assuring the preservation of healthy competition in the relevant markets. Achieving this goal may on occasion require ordering divestment of facilities unrelated to the line of commerce affected by the acquisition as, for example, where the restoration of the acquired company as a healthy competitior requires that it be kept intact. That situation is not presented by this record. Visking will be an effective and strong competitor in the polyethylene film market although shorn of its sausage casing business.

Jahncke's successor, even if it has nothing more than a ready-mixed concrete business, will be a viable competitor and will begin with the largest share of the market. On the other side of the coin, it is not considered that the retention of the shell business by OKC will give it any undue advantage over its competitors, most of whom are multi-plant producers.

Since it is believed that in this case a divestiture of the ready-mixed concrete business of Jahncke will afford complete relief from the probable adverse effect of this acquisition, the order of divestiture is limited to the properties used in that portion of Jahncke's business.

The order prohibiting future acquisitions is not so limited because the acquisition of another shell business would probably affect competition adversely.

## CONCLUSIONS OF LAW

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

2. The combination and concerted action by OKC and Oklahoma to acquire the control of Jahncke violated Section 5 of the Federal Trade Commission Act, as amended.

3. The acquisition of the stock of Jahncke by OKC violated Section 7 of the Clayton Act, as amended.

ORDER

I

*It is ordered*, That respondents OKC Corp. and Oklahoma Land and Cattle Company, corporations, shall, within six (6) months after the effective date of this order, divest absolutely and in good faith to a purchaser approved by the Federal Trade Commission all of the ready-mixed concrete facilities, including land, vehicles, and all other equipment, together with all additions, replacements, and improvements thereto, that are the property of Jahncke Service, Incorporated, and that have been used in the production, sale, or transportation of ready-mixed concrete.

II

*It is further ordered*, That pending divestiture, respondents shall not make any changes in any of the plants, machinery, buildings, equipment, or other property of whatever description of Jahncke Service, Incorporated, that might impair their market value or their present capacity for the production, sale, and distribution of ready-mixed concrete.

III

*It is further ordered*, That none of the properties described in Paragraph I of this order, and required to be divested, be sold or transferred, directly or indirectly, to any person who is at the time of divestiture an officer, director, employee, or agent of, or under the control or direction of OKC Corp. or Oklahoma Land and Cattle Company, or any parent, subsidiary, or affiliated corporation of either respondent, or who owns or controls, directly or indirectly, more than one (1) percent of the outstanding shares of common stock of either of the respondent companies, or any of their parent, subsidiary, or affiliate companies.

As used in this order "person" shall include all members of the immediate families of the individuals specified and the corporation, partnerships, associations, and other legal entities as well as natural persons.

IV

*It is further ordered*, That commencing upon the date this order becomes final and continuing for a period of ten (10) years from and after the date of completing the divestiture required by this order, respondents shall cease and desist from acquiring, directly or indirectly, without prior approval of the Federal Trade Commission, the whole or any part of the share capital or assets of any corporation engaged in the production or sale of ready-mixed concrete or shell within respondent OKC Corp.'s present or future marketing area for portland cement or any acquisition of the whole or any part of the share capital or assets of any corporation that purchased in excess of 10,000 barrels of portland cement in any of the five (5) years preceding the merger.

V

*It is further ordered*, That respondents OKC Corp. and Oklahoma Land and Cattle Company, corporations, and their officers, directors, agents, representatives, employees, parents, subsidiaries, affiliates, successors, and assigns, directly or indirectly, or through any corporate or other device, do forthwith cease and desist from entering into, participating, continuing, cooperating in, or carrying out, or directing or instigating any planned common course of action, course of dealing, understanding, plan, combination, or conspiracy between and among themselves, or between any one or both of said respondents and another or others not parties hereto to acquire, directly or indirectly, the whole or any part of the share capital or other assets of any corporation engaged in the production or sale of ready-mixed concrete or shell.

VI

*It is further ordered*, That OKC Corp. and Oklahoma Land and Cattle Company shall, within sixty (60) days from the date this order becomes final and at such further time as the Commission may require, submit to the Commission written reports setting forth in detail the manner and form in which they intend to comply, are complying, or have complied with this order.

VII

*It is further ordered*, That respondents shall notify the Commission at least thirty (30) days prior to any proposed change which may affect compliance obligations arising out of this order, such as dissolution, assignment, or sale resulting in the emergence of a corporate successor, and that this order shall be binding on any such successor.

## Opinion of the Commission

OCTOBER 21, 1970

By Dixon, *Commissioner:*

On October 17, 1969, the Commission issued its complaint alleging that the acquisition of Jahncke Service, Incorporated (Jahncke), by

OKC Corp. (OKC) violated Section 7 of the Clayton Act, as amended. The complaint charged that the OKC-Jahncke union may lessen competition or tend to create a monopoly in the production and sale of portland cement, ready-mixed concrete, shell, and construction aggregates in the New Orleans area market, among others. The complaint also alleged that OKC and Oklahoma Land and Cattle Company (Oklahoma) transgressed Section 5 of the Federal Trade Commission Act in that the two firms conspired to acquire Jahncke.

Following unsuccessful attempts to negotiate a hold-separate protective agreement, pending outcome of the administrative proceeding, the Commission, on May 1, 1970, denied complaint counsel's motion seeking injunctive relief under the All Writs Act, 28 U. S. C. Sec. 1651 (a) (1964), in the Court of Appeals for the Fifth Circuit. But the Commission ordered respondents to notify it 60 days prior to consummation of the sale of Jahncke's ready-mix business. On June 1, 1970, OKC notified the Commission that it intended to sell the ready-mix facilities of Jahncke within a week's time. Thereupon the Commission, on June 16, 1970, directed its General Counsel to seek injunctive relief in the Court of Appeals for the Fifth Circuit to prevent OKC from disposing of any of the assets of Jahncke and from restructuring the company pending the final order of the Commission disposing of the adjudicative proceeding in this matter. The Court of Appeals, under the authority of the All Writs Act, granted the injunction for a period of 120 days from July 8, 1970.[1] The injunction restrains respondents from making any changes in the operation of Jahncke's business and from selling any of Jahncke's assets.

The administrative hearings in this matter commenced on June 9, 1970, and, on September 3, 1970, the hearing examiner filed his initial decision. He held that the acquisition violated Section 7 of the Clayton Act in the portland cement and ready-mixed concrete lines of commerce. He also held that respondents had conspired to acquire Jahncke and hence violated Section 5 of the Federal Trade Commission Act. The examiner dismissed the charge of illegality with respect to the shell line of commerce.[2] The matter is now before us on cross appeals of the parties from the initial decision.

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[1] *Federal Trade Commission* v. *OKC Corp. et al.*, 5 Trade Reg. Rep. ¶ 73,288 (5th Cir. 1970) [8 S.&D. 1220].

[2] Since Jahncke sold major portions of its aggregate operation in October of 1969, complaint counsel withdrew the allegations concerning this aspect of the case.

I

No dispute exists as to certain facts. They constitute the basis of the following summary:

OKC's business may generally be divided into production of portland cement and various petroleum products.[3] The latter are not relevant to this proceeding which is concerned solely with the cement phase of OKC's operations. The company operates two cement plants: one in Pryor, Oklahoma (with a 2,000,000 barrel capacity), and the other in New Orleans, Louisiana (with a 1,700,000 barrel capacity). The two plants, for the fiscal year ending September 30, 1968, produced 3,400,000 barrels. Lime, which is an essential ingredient in the manufacture of cement, is obtained for the Pryor plant from a company-owned limestone quarry near the site of the plant. As its source of lime, the New Orleans plant uses shell obtained from Jahncke.

OKC's net sales from all operations for its fiscal year 1968 totaled \$39,203,178; its net income was \$2,319,655, and its total assests were \$41,229,177. The cement operations' net sales for this period totaled \$10,553,437; its net income, \$1,649,612, and its assests (attributable to its cement operations), \$33,287,781.

On May 26, 1969, OKC made a public offer, to expire on September 30, 1969, to purchase all outstanding shares of Jahncke. By the time the offer expired, OKC had obtained about 46% of Jahncke's common stock, which came both from the Jahncke family and respondent Oklahoma.[4] After that date, OKC continued to purchase stock so that by December 15, 1969, it owned 88% of Jahncke's outstanding common stock.

For over 30 years Jahncke has been a ready-mixed concrete producer located in New Orleans. Its other businesses consist of marine hydraulic dredging, which has accounted for approximately 40% of its total revenues since the middle 1960's, and the production, sale and distribution of building and industrial materials. Included among the latter products are gravel, sand and shell. The sand and gravel are used for Jahncke's production of ready-mixed concrete; the shell is used in the production of cement. Its concrete operation

[3] OKC was originally incorporated under the name Oklahoma Cement Company and changed to its present name on January 30, 1967.

[4] On January 7, 1969, respondent Oklahoma purchased 23% of the outstanding voting common stock of Jahncke. By March 10, 1969, it increased its share of voting stock to 27.9%. In February of that year, Oklahoma's president purchased additional, undetermined shares of Jahncke.

consists of seven operating plants and 41 ready-mixed concrete trucks.

Jahncke's net sales for all operations totaled $11,476,642 for the calendar year 1968, its revenues were $19,144,696, with a net operating loss of $120,348 but with a net income of $177,231, accounted for by its sale of investment securities. Its current assets in 1968 totaled $6,689,492, and current liabilities, $2,008,287.

Oklahoma is primarily engaged in operating six ranches which breed, stock and sell cattle. The purchase and sale of securities comprise its other principal source of income. Its investment in capital stock amounts to between three million and four million dollars. The company's total current assests for the year ending December 31, 1968, was $3,046,746; its current liabilities $17,300; and its total assets, $6,208,012. Its net loss from all operations was $10,542. It is the sole and wholly owned subsidiary of Pipe Investment Company, which is engaged primarily in the real estate business in Oklahoma, Texas, California and Florida.

II

In their appeal from the initial decision, respondents first take issue with the examiner's delineation of the geographic market within which to test the competitive effects of the acquisition in the portland cement line. The examiner found, in this connection, that the relevant submarket was the New Orleans metropolitan area, an area coextensive with the New Orleans Standard Metropolitan Statistical Area (SMSA) established by the Bureau of the Census. This area consists of the Parishes of Jefferson, Orleans, St. Bernard and St. Tammany.

Respondents do not dispute the examiner's finding as to the existence of a relevant submarket but contend that this market should be extended to cover an area which would include the southern portion of Louisiana and Mississippi, the Pensacola area of Florida to the east, and the Louisiana-Texas border to the west. In arguing that the market should be so extended, respondents rely primarily on the following passage from the court's decision in *U.S. Steel Corp.* v. *Federal Trade Commission*, 426 F.2d 592, 596 (6th Cir. 1970):

> Since the primary impact of the instant acquisition falls upon the customer-supplier relationship between Certified [the acquired ready-mix firm]—which operates almost exclusively in the NYMA [the New York Metropolitan Area] —and its potential suppliers—to whom Certified can practically turn for portland cement, the geographic market can be no broader than the area in which Certified's potential suppliers can turn if they lose Certified's business.

On the basis of this language, respondents would define both the broader market and the submarket by looking exclusively to the geographic area to which portland cement producers which sell to Jahncke can ship their product.

Respondents have mistakenly concentrated on that part of the court's decision which referred only to the outer limits of the overall market and have ignored equally significant criteria applied by the court when affirming the Commission's conclusion that the New York metropolitan area constituted a relevant submarket. The court, in upholding the Commission, necessarily concluded that the area of effective competition is determined not only by the distribution patterns of the seller but also by reference to the area to which the purchasers can practically turn in order to satisfy their needs for a given product.

In defining the market by this application of these criteria, it is important to find what factors determine cement customers' choice of a supplier. The record shows that in selecting suppliers, purchasers of cement are not influenced by price cuts, since price reductions are generally met by competition, nor are they persuaded by the quality of cement, since cement is generally a homogeneous product. What is decisive is the proximity of the supplier to the customer, since prompt delivery is considered essential in the purchase of cement. To paraphrase the Court in *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 328 (1963), the factor of convenience will localize competition among sellers of cement as effectively as high transportation costs in other industries. It is not surprising therefore that principal suppliers of cement, with plants or terminals in the New Orleans market accounted, in 1967, for 80.6% of all shipments of cement to the New Orleans metropolitan area, and, in 1968, for 74.4% of all shipments. In this context, it should be emphasized that terminals perform the same economic function as cement plants.

The significance of the customer or demand side of the market was recognized in *United States* v. *Phillipsburg National Bank, et al.*, 399 U.S. 350, 363 (1970). There the Court listed "the location of its [the seller's] offices" as one of three factors, along with "the places from which it [the supplier] draws its business . . . and where it seeks business," to consider "in locating 'the market area in which the seller operates.' " [5] The Court noted that the two banks seeking to merge had their principal office in downtown Phillipsburg, to-

[5] To be sure, in some industries where market saturation is undertaken, this factor would not be helpful. Unquestionably that is not the case here.

gether with offices in the surrounding suburbs. The Court concluded that the downtown area constituted a relevant market, stating that "although the city is sufficiently small so that there is easy access to its downtown area where the banks have their main offices, the banks found it necessary to open branches in the suburbs because . . . that is 'where the customers are.' See also *Philadelphia Bank*, *supra*, at 358 n. 35." So too, in this matter, the terminals are clustered around New Orleans since that is "where the customers are" and where these customers are seeking to purchase their cement.

Particularly revealing in this regard is the operation of Ideal Cement Co., which has a plant in Baton Rouge, only 80 miles by barge from the New Orleans metropolitan area. Yet, substantially all of its considerable shipments into the New Orleans metropolitan area are made from its terminal located within New Orleans.

As found by the hearing examiner, the Standard Metropolitan Statistical Area of New Orleans is defined on the basis of such factors as population, labor force and degree of economic and social integration between and among the parishes in the New Orleans area—the same factors a cement manufacturer looks for when defining a focal point for consumption of a plant's production. This finding is in accord with our experience in the numerous other vertical mergers in the cement industry [6] and is amply supported by the record in the instant matter. Testimony of cement manufacturers which sell in the Gulf states, including that of a past president of OKC (Tr. 363, 364), leaves no doubt that suppliers of cement concentrate their sales efforts in the New Orleans area. Typical of this testimony is that of the vice president of marketing for Dundee Cement Company:

> Well you generally look for an area of substantial population. There is a relationship between cement consumption and population. . . . And you look at

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[6] *United States Steel Corp.* [1967–1970 Transfer Binder] Trade Reg. Rep. ¶ 18,626 (FTC 1968) [74 F.T.C. 1270]; *Ash Grove Cement Co.* [1967–1970 Transfer Binder] Trade Reg. Rep. ¶ 18,849 (FTC 1969); *Mississippi River Fuel Company* [1967–1970 Transfer Binder] Trade Reg. Rep. ¶ 18,801 (FTC 1969) [75 F.T.C. 813]; *Marquette Cement Manufacturing Co.* [1967–1970 Transfer Binder] Trade Reg. Rep. ¶ 18,657 [75 F.T.C. 32] and ¶ 18,888 (FTC 1969) [76 F.T.C. 361]; *Missouri Portland Cement Co.* [1967–1970 Transfer Binder] Trade Reg. Rep. ¶ 18,805 (FTC 1969); *National Portland Cement Co.* [1967–1970 Transfer Binder] Trade Reg. Rep. ¶ 17,908 (FTC 1967) [71 F.T.C. 395]; *Lone Star Cement Corp.* [1965–1967 Transfer Binder] Trade Reg. Rep. ¶ 17,581 (FTC 1966) [69 F.T.C. 927] and ¶ 17,823 (FTC 1967) [71 F.T.C. 35]; *Lehigh Portland Cement Co.* [1965–1967 Transfer Binder] Trade Reg. Rep. ¶ 17,489 (FTC 1966); *Ideal Cement Co.* [1965–1967 Transfer Binder] Trade Reg. Rep. ¶ 17,430, ¶ 17,546 (FTC 1966) [69 F.T.C. 762]; *Texas Industries, Inc.* [1965–1967 Transfer Binder] Trade Reg. Rep. ¶ 17,391 (FTC 1965) [68 F.T.C. 992]; *Permanente Cement Co.* [1965–1967 Transfer Binder] Trade Reg. Rep. ¶ 17,222 (FTC 1965) [67 F.T.C. 334]; *American Cement Corp.* [1963–1965 Transfer Binder] Trade Reg. Rep. ¶ 16,736 (FTC 1964) [64 F.T.C. 316].

the type of market to see if it's an area where a large amount of cement is consumed. (Tr. 630.)

In determining the geographic market, it is also important to consider where "the effect of the merger on competition will be direct and immediate. . . . [And] this depends upon 'the geographical structure of supplier-customer relations.' " *Philadelphia Bank, supra*, at 357. Clearly, the competitive effects of the OKC-Jahncke acquisition center in the New Orleans metropolitan area. As an example, the New Orleans area will support only a certain number of cement sellers. Any significant diminution in the available cement customers in the market may make the market less attractive to those already there (encouraging egress) and to any potential entrants. As a result, for ready-mix firms in New Orleans, fewer suppliers may be available to which they may practically turn. The occurrence of this adverse effect in New Orleans strongly indicates that it is a relevant geographic market. *United States* v. *Pabst Brewing Co.*, 384 U.S. 546, 549–50 (1966).[7]

III

Respondents also challenge the hearing examiner's holding that the effect of the acquisition may be substantially to lessen competition in both the cement and ready-mix lines of commerce. Their principal contention in this regard is that the degree of foreclosure resulting from the acquisition is insignificant. According to respondents, the foreclosure of OKC's cement competitors attributable to the acquisition was 4.2% in terms of total cement sales in 1967, and 3.4% in 1968. They further contend that this foreclosure effect becomes even less significant when considered in light of the absence of any previous foreclosure by vertical integration in this area.

There are three basic flaws in respondents' reasoning. First, it completely ignores the existence of a relevant submarket, *i.e.*, the New Orleans metropolitan area. In that market, the foreclosure, when measured by the sales to ready-mix firms, was 28.2% in 1967 and 26.25% in 1968. In terms of the total market for portland cement, the foreclosure amounted to 13.6% and 11.4% respectively in these two years. Hence, the foreclosure is of even greater dimensions than that demonstrated in *U.S. Steel* with respect to the New York metropolitan area submarket.

Secondly, even if we apply respondents' broader market concept, the foreclosure would fall well within the range of percentages held

[7] Respondents do not appeal from the examiner's finding that the New Orleans metropolitan area is the proper geographic market to measure the effects of the acquisition with respect to the production and sale of ready-mixed concrete.

to be unlawful in *U.S. Steel*. There the hearing examiner found that the purchases of the acquired ready-mix firm in the years 1962 through 1964 accounted for 1.8%, 2.1% and 1.7% of total portland cement purchases in the broader geographic market. These amounts are far smaller than those which respondents claim are insignificant here.

Thirdly, respondents' argument that there has been virtually no vertical integration in the New Orleans market is refuted by the record.[8] The examiner found in this connection that Louisiana Industries (with 8.9% and 12.6% of cement purchases in 1967 and 1968, respectively) is a subsidiary of Texas Industries, Inc., a cement producer with a terminal in the New Orleans market. Radcliff (with 9.7% of cement purchases in 1967, and 7.65% in 1968) admits to a reciprocal buying arrangement with Ideal Cement. Ideal purchases shell from Radcliff for its cement production, in turn, Radcliff purchases cement from Ideal for its ready-mix operation. Jimco, Inc. (with 15.56% of all cement purchases by ready-mix companies in 1967, and 15.66% in 1968) is indebted to Lone Star, and, as an apparent consequence of which, it purchases almost exclusively from that cement producer. Similarly, Ready Mix Concrete (with 6.12% of cement purchases, and 6.8%, in 1967 and 1968, respectively) is in debt to OKC and buys virtually all of its cement requirements from that company.

These companies, when Jahncke is included, account for nearly 70% of all portland cement purchases made by the ready-mix firms in the New Orleans area. We are mindful that the foreclosure attributable to the tying of these firms to cement producers is not, except in the case of Louisiana Industries and Jahncke, as lasting as that stemming from ownership. Still, in the instant situation the supplier and customer relationships are such that they tend to discourage entry and to encourage egress by firms not favorably situated in the market. As to the former, the vice president of marketing of Dundee Cement testified that these relationships have resulted in an effective foreclosure from sales to the ready-mix segment of the market:

Q. With the acquisition of Jahncke by OKC, would you consider the New Orleans market now a desirable market?

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[8] Respondents contend that the total market foreclosure in the New Orleans area of .59% in 1967 and 1.5% in 1968 is *de minimis* when contrasted to the prior vertical disclosure of 39.6% in *U.S. Steel*. This comparison between the total foreclosure in the two cases is misleading. Respondents' percentages of .59% and 1.5% represent the prior total foreclosure in the broader market area in the instant case, whereas the 39.6% figure refers to the prior total foreclosure in the much narrower submarket in the *U.S. Steel case*, and not to the broader market area found in that case.

A. Well, I think the way to answer that is, it is less desirable and certainly much less desirable for the acquisition.

Q. Why would that be?

A. Because of the fact that you basically are foreclosed from a substantial part of the market, in the Jahncke situation, and the others [Ready Mix, Jimco, Radcliff and Louisiana Industries] you inquired about one way or the other we are foreclosed from selling." (Tr. 634, 635.)

As to the effect of the collective foreclosure on egress from the market, there is the example of Alpha Cement Company, a cement producer which, in October 1969, withdrew from the New Orleans market, even though it had spent a considerable sum (*ie.*, $700,000 in 1964) in constructing a terminal in that city. In the words of its vice president and regional sales manager, "We felt that we were precluded from selling to an extent in the New Orleans market, and the same would be true if any new company came in." (Tr. 615.) This withdrawal occurred prior to OKC's acquisition of Jahncke and was the result of a developing trend toward vertical integration in the market—a trend which was greatly aggravated by the Jahncke acquisition. Moreover, it is manifest from testimony of cement suppliers that they will sell in a market only if they find that customers are not tied to individual suppliers. An illustration of such testimony is that of Mr. Chase of Dundee:

Q. Now sir, in your experience with Dundee, has your company come across any situations where it has been foreclosed from markets because of this vertical integration?

A. Yes, there are several examples that come to mind. Probably the best examples would be Memphis and Kansas City, where we are foreclosed there, very substantially, if not entirely. Houston is partially substantially closed market. New Orleans certainly is; in part Cincinnati would also fall in that category.

Q. Now Memphis and Kansas City, do you recall what your experience was with those two markets?

A. Those two markets, of course, were markets which we were not operating in. They were markets we investigated when we first conceived the Clarksville project. And because of their location they were very logical for us.

The easiest example, of course, is Memphis, because it's right on the river, economically very close to Clarksville, and would be a logical place for us to sell our product. But investigation proved that the chances of our selling any substantial amount of cement in Memphis were practically zero.

Q. Why was that, sir?

A. Because it is a market that was and to a major degree still is, but at that time it appeared to us that it was 100 per cent foreclosed, because of vertical integration. (Tr. 636, 637.)

Hence, contrary to respondents' assertion, we are satisfied that the record fully supports the examiner's findings as to the probable consequences of the challenged acquisition in the cement line of commerce.

IV

The hearing examiner held that the acquisition may result in a lessening of competition in the ready-mix line by conferring upon the acquired company a decisive competitive advantage over its non-integrated competitors and by raising barriers to entry into the production and sale of ready-mixed concrete in the New Orleans area. Respondents challenge this holding, claiming generally that no competitive advantages will accrue to the vertically integrated firm. This argument has been repeatedly made to, and rejected by, the Commission. Most recently, the court in *U.S. Steel*, 426 F. 2d at 603, disposed of this contention, as follows:

> This trend towards vertical integration has made it quite difficult for non-integrated firms to compete even apart from open-market foreclosure. A vertically integrated cement and ready-mix company has decisive cost advantages over non-integrated competitors. Cement manufacturers are burdened with high fixed costs, as well as significant marketing, shipping and distribution costs. Vertical integration creates a more assured level of plant utilization, an elimination of any significant sales and marketing expenses to one's own ready-mix subsidiary, and the ability to integrate the storage and distribution facilities of the cement and ready-mix company into a single urban terminal. All of these factors work to lower overall unit costs of integrated vis-a-vis non-integrated concerns.
>
> However, while unit costs might be used to lower the price of cement to customers generally, they also have the potential of being used as weapons of economic discipline.[20] This is particularly true when an industry is tending towards oligopoly. In such markets, the handful of leading vertically integrated firms do not engage in general price cutting. Price cuts are used as a more selective instrument: to punish an aggressive marketeer or price-cutter of cement; to woo away a crucial account of a non-integrated concern; or to maintain respective oligopoly shares. *United States* v. *Wilson Sporting Goods*, 288 F. Supp. 543, 556–557 (NDI11.1968). The "mixed threat and lure of reciprocal buying" was the potential anticompetitive device which condemned the acquisition of Gentry, Inc. by Consolidated Foods. *Federal Trade Commission* v. *Consolidated Foods, supra,* 380 U.S. at 593–595, 85 S.Ct. 1220, 14 L.Ed. 2d 95. Similarly, in the concentrating cement and concrete industries, the decisive cost factors of vertical integration create a "mixed threat and lure:" a "threat" insofar as the non-integrated firms must remain well-behaved or suffer the consequences; and a "lure" in that the well-behaved firms will not be subject to serious price-cutting. Such market conditions push the remaining non-integrated firms toward vertical integration. (426 F.2d at 603.)

[20] The unsupported possibility of lower prices can not immunize this acquisition. As the United States Supreme Court held in *FTC* v. *Procter & Gamble Co.*, "[p]ossible economies cannot be used as a defense to illegality." 386 U.S. 568 at 580, 87 S.Ct. 1224 at 1231, 18 L.Ed.2d 303.

We are satisfied from this authoritative ruling, and from our review of the record in this case, that the examiner's findings are factually and legally correct.

V

The principal argument made by counsel supporting the complaint in their appeal from the initial decision is addressed to the relief ordered by the hearing examiner. With respect to this aspect of the case, the hearing examiner concluded that the ready-mix unit of Jahncke, after being severed from the other Jahncke divisions, would be a viable competitor and would begin with the largest share of the market. He further concluded that a divestiture of the ready-mixed concrete division of Jahncke would afford complete relief from the probable adverse effect of the acquisition.

Complaint counsel maintain that the ready-mix business will remain viable only through the support of the remaining portions of Jahncke's business, and that complete divestiture is therefore necessary. They argue, in this connection, that the ready-mixed concrete business in New Orleans is marginal; that Jahncke's ready-mix business in particular has been unprofitable; that it has remained a viable competitor because it could depend upon the resources of the profitable portions of the Jahncke operation; and that the viability of Jahncke's ready-mix business will continue to depend upon the resources and revenues of its other operations. Respondents, on the other hand, dispute the factual basis of this contention.[9]

That part of the initial decision which deals with this important issue is not helpful. No findings are made to support the examiner's conclusions nor are we provided with the benefit of his reasoning by which he arrived at these conclusions.

The record shows that Jahncke has been an independent and successful New Orleans enterprise for almost 100 years. In addition to being the largest purchaser of cement and seller of ready-mixed concrete, it was engaged in lucrative marine hydraulic dredging and shell dredging, the manufacture of concrete products, such as concrete pipe, and the sale of building materials. (CX 51, 52 and 53.) There is no dispute that this broadly based operation was a strong com-

[9] Respondents also maintain that it is inconsistent to argue that the acquisition will probably give OKC an unfair economic advantage in the ready-mix business over its competitors, and at the same time to urge the Commission to reestablish Jahncke with the same advantages. The answer to this is, of course, that the advantages derived from the Jahncke-OKC union are likely to be substantially greater than those derived from control over dredging, shell and the other operations of Jahncke. Moreover, Section 7 of the amended Clayton Act is concerned with adverse competitive effects resulting from the acquisition and not from internal expansion.

petitive force in each of the various lines of its business, including the ready-mix line.

Despite the losses the company incurred in the sale of ready-mixed concrete in recent years, it remained the largest firm in the field, and apparently could maintain that position because of the availability of the revenues from its other operations which compensated for the reverses suffered by the ready-mix phase of its business. Respondents do not question that the Jahncke enterprise was a strong, viable organization, commanding substantial economic resources.

It is also apparent from the record that in recent years the ready-mix business in the New Orleans area has been a narrow-margin operation (Tr. 738, 736), and that Jahncke has sustained losses throughout this period. Indeed, the executive vice president of OKC, Mr. D. E. Baxter, testified that Jahncke's ready-mixed concrete business was a "loss operation." (Tr. 1068.) Mr. H.S.G. Verlander, a former treasurer and vice president of Jahncke, also gave testimony in this case and, on the basis of his long experience with the company, expressed the opinion that the ready-mix unit could not stand alone.

In contending that less than complete divestiture is required, respondents rely on the testimony of Mr. Robert D. Brown, president of Jahncke Service since the fall of 1969. Mr. Brown testified that in his opinion the ready-mix operation, if severed from the Jahncke organization, could be turned around and become a profitable operation. He testified first of all that the bookkeeping methods utilized by Jahncke exaggerated the losses sustained by its ready-mix business. Secondly, he stated that costs could be pared by reducing sales personnel, by improving maintenance of equipment, and by introducing other efficiencies in the operation of the business. Through these changes, he predicted cost savings of approximately $400,000 annually. (Tr. 1125–1128.)

In reviewing Mr. Brown's testimony, we note that he does not address himself to the root cause of the loss performance of Jahncke's ready-mix unit. The testimony of officials of the second and third largest ready-mix firms in the New Orleans market (Tr. 738, 765), as well as that of Mr. Herbert Jahncke, Sr. (Tr. 424), establishes beyond doubt that the source of the financial difficulties of members of this industry was the severely depressed price level of ready-mixed concrete in the New Orleans metropolitan area. Conditions were such that three ready-mix firms were forced to shut down their operations. Hence, it is clear from the record that the cure for Jahncke's problems is not a reorganization of the ready-mix unit, which is a speculative projection on the part of Mr. Brown, but an improvement of the conditions in the construction industry in the New Orleans metropolitan area. Moreover, we are not told whether the annual cost savings which Mr. Brown expects to realize would offset the losses suffered by Jahncke's ready-mix business.

From a review of the record we find that there is an insufficient basis for concluding that the ready-mix unit of Jahncke, if severed from the entire enterprise, could survive as a viable, independent competitive entity. And, if it could not, the competitive consequences of permitting the sale of the ready-mix unit by itself become quite obvious. In the cement line, we may be faced at some date in the future with the same foreclosure as that which would follow from OKC's retention of the ready-mix business. Whether the business may be forced to close, or whether it may enter into some arrangement with a cement supplier, a very substantial portion of the total market for portland cement may be foreclosed in the New Orleans area. If this would occur, the remaining open market would be of insufficient size to attract additional suppliers to the New Orleans market.[10] Thus the same entry-discouraging effects of the original acquisition may emerge at some future time.

In sum, we are convinced that competition would suffer from the elimination of Jahncke as an independent ready-mix producer in the New Orleans market. We know from the long history of this organization that it is capable of maintaining its independence in the ready-mix line if it remains unchanged. On the other hand, we are far from persuaded that this would be true if the ready-mix business would be severed from the remainder of the enterprise. Consequently, we cannot agree with the hearing examiner that the market structure would be adequately restored by divestiture of only the ready-mix unit. The holding that partial divestiture would afford complete relief is at best conjectural. It is therefore rejected.

Our conclusion that the entire Jahncke enterprise should be preserved is in keeping with one of the principal goals of Congress in enacting the Celler-Kefauver amendment to Section 7 of the Clayton Act. Congress emphasized at that time the importance of protecting independent local enterprises from being taken over by large interstate organizations. *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962); *United States* v. *Aluminum Co. of America*, 377 U.S. 271 (1964); *United States* v. *Von's Grocery Co.*, 384 U.S. 270 (1966).

[10] As we have described above, the second, third and fifth leading ready-mix firms in the New Orleans area are tied in one form or another to cement suppliers. Jahncke, on the other hand, is the only one of the top three with no financial arrangment with any cement supplier and so has been capable of maintaining its integrity as a truly independent, local enterprise.

VI

Two other issues have been presented in the appeals from the initial decision. Respondents have taken exception to the examiner's holding that there was a conspiracy between OKC and Oklahoma Land and Cattle Company to acquire Jahncke, and counsel supporting the complaint contest the examiner's finding that the acquisition of the shell portion of the Jahncke enterprise may not result in a substantial lessening of competition.

We agree with respondents that the conspiracy charge should be dismissed. In view of our disposition of the case, however, we do not reach the issue raised by counsel supporting the complaint. Because we order complete divestiture, a determination of the correctness of the examiner's holding as to the probable competitive consequences in the shell line of commerce is not necessary.

To the extent indicated herein, the appeal of counsel supporting the complaint is granted. With the exception of our ruling on the conspiracy issue, the appeal of respondents is denied. Our order providing for appropriate modification of the initial decision is issuing herewith.

Commissioner MacIntype did not participate. Commissioner Dennison did not participate for the reason oral argument was heard prior to his taking oath as Commissioner.

## Final Order

This matter having been heard by the Commission on cross-appeals of respondents and counsel supporting the complaint from the initial decision of the hearing examiner, filed September 3, 1970, holding that the complaint charging respondents with violation of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act had been sustained by the evidence and containing an order to cease and desist. The Commission has determined that the appeals of respondents and counsel supporting the complaint should be granted in part and denied in part, and that the findings of the hearing examiner should be adopted to the extent consistent with the opinion accompanying this order. Other findings of fact and conclusions of law made by the Commission are contained in that opinion. For the reasons therein stated, the Commission has determined that the order entered by the hearing examiner should be vacated and a new order issued by the Commission as its final order. Accordingly, I

*It is ordered*, That respondent, OKC Corp., a corporation, and its officers, directors, agents, representatives, employees, subsidiaries, affiliates, successors and assigns, within six (6) months from the date this order becomes final, divest, absolutely, subject to the prior approval of the Federal Trade Commission, all direct and indirect legal and equitable interest in the stock, share capital, rights and privileges, tangible or intangible, and any other form of ownership acquired by respondent, as a result of the acquisition of the stock of Jahncke Service, Incorporated.

II

*It is further ordered*, That pending divestiture, respondent shall not make any changes in the corporate structure, or in any of the plants, machinery, buildings, equipment or other property of whatever description of Jahncke Service, Incorporated, which might impair its present capacity for the production, sale and distribution of the business operations of Jahncke or their market value.

III

*It is further ordered*, That none of the stock, properties, rights and privileges, described in Paragraph I of this order and required to be divested, be sold or transferred, directly or indirectly, to any person who is at the time of divestiture an officer, director, employee, or agent of, or under the control or direction of OKC Corp., or any parent, subsidiary or affiliated corporation of respondent, or who owns or controls, directly or indirectly, more than one (1) percent of the outstanding shares of common stock of respondent or any of its parent, subsidiary or affiliate companies.

As used in this order "person" shall include all members of the immediate families of the individuals specified and corporations, partnerships, associations, and other legal entities as well as natural persons.

IV

*It is further ordered*, That commencing upon the date this order becomes final and continuing for a period of ten (10) years from and after the date of completing the divestiture required by this order, respondent shall cease and desist from acquiring, directly or indirectly, without prior approval of the Federal Trade Commission, the whole or any part of the share capital or other assets of any corporation engaged in the production or sale of ready-mixed concrete or concrete products within respondent's present or future marketing area for portland cement or which purchased in excess of 10,000 barrels of portland cement in any of the five (5) years preceding the merger.

*It is further ordered*, That the complaint be, and the same hereby is, dismissed as to respondent Oklahoma Land and Cattle Company.

*It is further ordered*, That the hearing examiner's initial decision, as modified, be, and it hereby is, adopted as the decision of the Commission.

*It is further ordered*, That respondent OKC Corp. shall, within sixty (60) days from the date of service of this order and every sixty (60) days thereafter until divestiture is fully effected, submit to the Commission a detailed written report of its actions, plans, and progress in complying with the divestiture provisions of this order, and fulfilling its objectives. All reports shall include, among other things that will be from time to time required, a summary of all contracts and negotiations with potential purchasers of the stock, assets, properties, rights or privileges to be divested under this order, the identity of all such potential purchasers, and copy of all written communications from and to such potential purchasers.

*It is further ordered*, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change which may affect compliance obligations arising out of this order, such as dissolution, assignment or sale resulting in the emergence of a corporate successor, and that this order shall be binding on any such successor.

Commissioner MacIntyre did not participate. Commissioner Dennison did not participate for the reason oral argument was heard prior to his taking oath as Commissioner.

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IN THE MATTER OF

## MURRAY GLICK DOING BUSINESS AS RAYNARD WATCH COMPANY

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

*Docket C-1811. Complaint, Oct. 21, 1970—Decision, Oct. 21, 1970*

Consent order requiring a New York City individual engaged in the watch repair business to cease misrepresenting that his repair work is fully guaranteed, that his charge includes insurance, making charges higher than the amounts specified in the guarantee, and placing in the hands of others means to deceive the consuming public.