

contained therein as the final order of the Commission with the modifications set forth below. Accordingly,

It is ordered, That the law judge's cease and desist order be modified so as to include respondents Mike McKeever, Sam Katz, George Edward Ommert, and Gerald Gautcher in all provisions and that the paragraph dismissing the complaint as to said respondents be stricken;

It is further ordered, That the paragraph requiring respondents to include in their advertisements an affirmative disclosure to the effect that they are subject to a Federal Trade Commission order in Docket 8937 be stricken without prejudice to the Commission's right to reopen this proceeding to consider reinstating of this requirement or other appropriate relief should the future conduct of any of these respondents warrant such action,

It is further ordered, That in all other respects the appeals of respondents and complaint counsel be denied.

IN THE MATTER OF

REDMAN INDUSTRIES, INC., ET AL.

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

Docket C-2640. Complaint, Mar. 3, 1975 - Decision, Mar. 3, 1975

Consent order requiring a Dallas, Tex., manufacturer of mobile homes, among other things to cease unfair and deceptive warranty practices through the establishment of a prompt and effective system to handle warranty-related problems. The order requires respondent to provide warranty repairs or services on still-unrepaired mobile homes manufactured between 1972 and 1974 and to provide future retail purchasers with relief by establishing and maintaining a regular and effective system to handle complaints and service. Under this system, all repairs must be complete within thirty days after notification to the respondent of defects. Where the defects affect safety or habitability of the mobile home, the repairs must be started within three business days and be expeditiously completed.

Appearances

For the Commission: *Walter E. Diercks, Robert Weinstock and Pamela B. Stuart.*

For the respondents: *Jerry L. Buchmeyer, Thompson, Knight, Simmons & Bullion, Dallas, Tex.*

Complaint

85 F.T.C.

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 Redman Industries, Inc., a corporation, and certain of its subsidiaries, (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. For the purposes of this complaint and the order attached hereto the term "mobile home" means a movable or portable dwelling over thirty two feet in body length and over eight feet in width, constructed to be towed on its own chassis and designed so as to be installed with or without a permanent foundation for human occupancy as a residence, which may include one or more components which can be retracted for towing purposes and subsequently expanded for additional capacity, or two or more units separately towable but designed to be joined into one integral unit. "Mobile home" as used herein includes the mobile home structure, including the plumbing, heating and electrical systems.

PAR. 2. Respondent Redman Industries, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at Redman Plaza East, 2550 Walnut Hill Lane, Dallas, Tex.

Respondent Redman Mobile Homes, Inc. is a wholly-owned subsidiary corporation of Redman Industries, Inc., organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at Redman Plaza East, 2550 Walnut Hill Lane, Dallas, Tex. Respondent Redman Industries, Inc., dominates, controls, condones, approves and derives pecuniary benefits from the acts and practices of Redman Mobile Homes, Inc.

Respondent Redman Western Corporation is a wholly-owned subsidiary corporation of Redman Mobile Homes, Inc., organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business located at Redman Plaza East, 2550 Walnut Hill Lane, Dallas, Tex. Respondents Redman Industries, Inc. and Redman Mobile Homes, Inc. dominate, control, condone and approve the acts and practices of Redman Western Corporation.

PAR. 3. Respondents are now and have been engaged in the design, manufacture, advertising, offering for sale, sale and distribution of

mobile homes to selected mobile home dealers. Manufacturing is accomplished in approximately 26 facilities controlled and operated by respondents, located in approximately 14 states.

PAR. 4. In the further course and conduct of their aforesaid business respondents are now and have been soliciting persons (individuals, partnerships and corporations) to become "authorized" dealers, and are also solicited by persons who desire to become "authorized" dealers. Respondents select certain of these persons as "authorized" dealers. In the normal course of business respondents sell and distribute the aforesaid homes only to these "authorized" dealers who then resell these products to the public. In the normal course of business the way in which the aforesaid homes are purchased new at retail unused by a first purchaser is through an "authorized" dealer.

PAR. 5. In the further course and conduct of their aforesaid business respondents place primary reliance on their "authorized" dealers to ascertain which of their aforesaid mobile homes contain defects which are subject to the aforesaid warranty, and to notify respondents of defects for which respondents assume responsibility. Respondents also place primary reliance on their "authorized" dealers to effect such repairs and services as are necessary to correct defects covered by the aforesaid warranty and to notify respondents of those defects covered by the aforesaid warranty which said dealers are unable or unwilling to fully correct, so that respondents may repair the aforesaid defects either directly with their own personnel or through the use of an independent service contractor.

PAR. 6. In the further course and conduct of their aforesaid business, respondents now cause and have caused, their mobile homes to be transported to "authorized" dealers located in various States of the United States and to be sold to retail purchasers by such dealers. Respondents therefore maintain and have maintained a substantial course of trade in said mobile homes in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 7. In the further course and conduct of their aforesaid business respondents are now, and have been, orally or in writing, directly or through their dealers and others, granting or disseminating certain warranties or certain statements concerning their warranties to each retail purchaser of their aforesaid mobile homes by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act.

(a) Each written warranty represents directly or by implication that respondents will fully correct and repair within a reasonable period of time all defects in the materials or workmanship in each of their aforesaid mobile homes which become evident within a twelve month or

ninety day period (depending on the character of the defect) subsequent to the date of their purchase at retail, except for certain specifically enumerated components, including but not limited to furniture and certain major appliances. Respondents' written warranty further represents that the aforesaid obligation is limited to repairing or replacing parts of their mobile homes which are returned to their nearest factory with transportation charges prepaid and which respondents shall determine to be defective, and that if it is impractical to send any part to the nearest factory, respondents shall have no liability for the labor cost involved in the repair or replacement but shall be liable solely for providing the necessary material for such repair or replacement.

Respondents' written warranty further purports to disclaim all other warranty rights which are imposed by force of law, including but not limited to the implied warranties of merchantability and fitness for a particular purpose, and represents directly or by implication that the aforesaid warranty sets forth the full extent of respondents' warranty obligations.

(b) Notwithstanding the foregoing, it is respondents' uniformly applied warranty policy that the aforesaid service and repair of defects covered by the written warranty will be provided at the mobile home site and that the return of the home, or the defective parts, as the case may be, with transportation charges prepaid is not a condition precedent to such performance.

PAR. 8. In the further course and conduct of their aforesaid business respondents have engaged in acts and practices which result in, and have resulted in, the failure to maintain an adequate, regular and effective system which assures that every retail purchaser of respondents' mobile homes in fact receives full service and repair of defects covered by the aforesaid warranty within a reasonable time.

Typical, but not inclusive of such acts and practices, are:

(a) The dissemination of a written warranty as described in Paragraph Seven which fails to disclose the true nature and extent of purchasers' warranty rights and those warranty obligations which respondents in fact undertake in the normal course of business, including but not limited to:

(1) the fact that pursuant to respondents' policies it is regarded as the "authorized" dealers' sole and complete responsibility, at least in the first instance, to perform repairs and service for certain classes of defects covered by the aforesaid warranty without compensation or reimbursement by respondents and without regular and effective action by respondents to determine whether such repairs and service are in fact fully performed within a reasonable time.

(2) the representation, made directly or by implication, that the aforesaid warranty is the sole legal warranty, that it legally excludes and disclaims all implied-in-law warranties, and that said warranty states the sole legal remedy available to the purchaser, when in truth and in fact under the applicable law of several states in which respondents' homes are sold at retail such exclusions, disclaimers or limitations are unenforceable.

(3) the representation, made directly or by implication, that as a condition precedent to securing full performance by respondents of their warranty obligations every party to whom the warranty is offered must complete properly and mail to respondents a certain owner's registration card at the time he or she purchases said mobile home, when in truth and in fact respondents' internal policy is to provide such performance irrespective of whether the card has been returned.

(4) the representation made directly or by implication that as a condition precedent to securing full performance by respondents of their warranty obligations every party to whom the warranty is offered must transport the defective part or if necessary the entire home to respondents' manufacturing plant, when in truth and in fact it is respondents' policy to provide such performance at the home site.

(b) the failure to scrutinize, adequately evaluate and assure that all prospective dealers, prior to their "authorization" as described in Paragraph Four are competent to perform warranty service or have made adequate arrangements for performing warranty service through independent contractors.

(c) the failure to scrutinize, adequately evaluate and assure that all "authorized" dealers, either directly or by action through independent contractors, notify respondents of the existence of claims initiated by retail purchasers for warranty service or for repair of defects covered by the aforesaid warranty.

(d) the failure to scrutinize, adequately evaluate and assure that all "authorized" dealers, either directly or by action through independent contractors, in fact fully perform and complete within a reasonable time all warranty service and repairs performed on behalf of respondents.

(e) the failure to establish and maintain an effective and regular mechanism for the prompt and fair resolution of mobile home consumer complaints and requests for service and repairs relating to respondents' warranty or warranty policies.

(f) the failure to scrutinize, adequately evaluate and assure that all prospective dealers, prior to their "authorization" as described in Paragraph Four, either directly or by action through independent contractors, are competent to perform a thorough inspection of a

mobile home prior to its tender to a retail customer to determine whether a home contains defects covered by the aforesaid warranty.

(g) the failure to scrutinize, adequately evaluate and assure that all "authorized" dealers, either directly or by action through independent contractors, actually perform or assure the performance of a thorough inspection of a mobile home prior to its tender to a retail customer to determine whether a home contains defects covered by the aforesaid warranty.

(h) the failure to scrutinize, adequately evaluate and assure that all prospective dealers, prior to their "authorization" as described in Paragraph Four, either directly or by action through independent contractors, are competent to perform the installation or "setup" of the aforesaid mobile homes at the homesite selected by the retail purchaser.

(i) the failure to scrutinize, adequately evaluate and assure that all "authorized" dealers, either directly or by action through independent contractors, actually and competently perform the installation or "setup" of the aforesaid mobile homes.

(j) the failure to maintain an adequate and expert factory service capability or to make other provisions adequate to assure the full performance within a reasonable time of the repair of defects covered by the aforesaid warranty which respondents' "authorized" dealers are unwilling or unable to perform.

The aforesaid failure to maintain a regular and effective system which assures the full performance within a reasonable time of service and repair of defects covered by the aforesaid warranty has the capacity or tendency to impede, delay or prevent the performance of said service and repairs for parties to whom the warranty is offered.

PAR. 9. By and through the aforesaid acts and practices respondents have been and are now:

(a) Disseminating a warranty which fails to fully and completely inform purchasers as to the actual protection offered by respondents.

(b) Failing to establish or maintain an effective or adequate system which assures that respondents will fully correct or repair all defects covered by the aforesaid warranty within a reasonable time.

The aforesaid acts and practices are deceptive and are in violation of Section 5 of the Federal Trade Commission Act.

PAR. 10. By such failure to maintain a regular and effective system which assures that every party to whom the warranty is provided will receive full performance within a reasonable time of the service and repair of defects covered by the aforesaid warranty respondents have been and now are engaged in unfair acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

PAR. 11. Through the individual and cumulative acts and practices set forth in Paragraph 8(a) respondents are now and have been disseminating and causing the dissemination of a written warranty which fails to fully and accurately describe the true nature and extent of the warranty rights of retail purchasers of respondents' mobile homes and those warranty obligations which in fact respondents undertake in the normal course of business. Thus respondents have failed to disclose material facts which if known to consumers:

(a) would be likely to affect their decision of whether to purchase one of respondents' mobile homes, and

(b) would enable retail purchasers to understand the true nature and extent of their warranty rights and to secure performance of such warranty service.

Therefore, the aforesaid failures to disclose material facts are deceptive and unfair and are 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 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 Consumer Protection 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 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 Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, 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 Redman Industries, Inc. is a corporation organized,

existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at Redman Plaza East, 2550 Walnut Hill Lane, Dallas, Tex.

2. Respondent Redman Mobile Homes, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at Redman Plaza East, 2550 Walnut Hill Lane, Dallas, Tex.

3. Respondent Redman Western Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at Redman Plaza East, 2550 Walnut Hill Lane, Dallas, Tex.

4. 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

1. *It is ordered*, That respondents shall within 90 days from the effective date of this order make a written inquiry of all known retail purchasers of respondents' mobile homes (except those specifically excluded below) built between July 1, 1972 and June 30, 1974, utilizing the form of letter shown in Appendix A attached hereto and made a part hereof which shall contain therein a self-addressed postage paid return envelope, and which shall be mailed to such purchasers by first class mail.

Known retail purchasers are defined as those first purchasers at retail of said mobile homes who communicate with respondents no later than 60 days after the effective date of this order and those first retail purchasers whose names and addresses (1) are contained in company "coach" or unit files and tire records (except that with respect to respondents' manufacturing plants which maintained for the period July 1, 1972 to June 30, 1974 separate files for warranty registration cards the names and addresses of known retail purchasers may be established from such separate files rather than by reference to "coach" or unit files), (2) are supplied by the Federal Trade Commission within 60 days of the effective date of this order or; (3) are supplied to respondents by respondents' past and current dealers in response to respondents' letter request for such information sent by first class mail, (which letters shall be sent no later than 30 days after the effective date of this order) utilizing the form of letter shown in Appendix B attached hereto and made a part hereof and which shall contain therein a self-addressed postage paid return envelope.

Notwithstanding the above, known retail purchasers shall not include:

- (a) local, State or Federal Governments or agencies thereof;
- (b) retail purchasers who are now or have been engaged in litigation with respondents involving their mobile home built by respondents during the two year period set forth hereinabove;
- (c) retail purchasers whose homes were sold to them on an "as is" basis;
- (d) retail purchasers who communicated directly with respondents' corporate headquarters or its attorneys concerning a problem or defect in such purchaser's mobile home, where there is a record indicating a resolution of the problem to the purchaser's satisfaction;
- (e) retail purchasers whose names are supplied by past or current dealers in response to respondents' written inquiries set forth hereinabove when such names are received by respondents from a dealer more than sixty days after respondents' inquiry was mailed to that dealer unless the purchaser or purchasers themselves communicate with respondents no later than 60 days after the effective date of this order, or the name or names of such purchaser or purchasers appear elsewhere in respondents' individual "coach" or unit files or tire records, (or where applicable, warranty registration card files) or were supplied to respondents by the Federal Trade Commission as set forth hereinabove;
- (f) retail purchasers who live outside the United States or who purchased mobile homes from dealers located outside the United States;
- (g) retail purchasers who are known to respondents to no longer own their mobile homes built by respondents.

2. *It is further ordered*, That respondents shall, directly or through their dealers or other third parties, repair or service within a reasonable time at the site of the home (in the normal course not to exceed ninety days from the date on which the letter to a given retail purchaser referred to in order Paragraph 1 is returned and received by respondents) all defects and malfunctions in mobile homes produced by respondents during the two year period referred to hereinabove which become known pursuant to order Paragraph 1 unless it is clear that a given defect or malfunction:

- (a) is a result of improper setup of the mobile home;
- (b) is a result of improper use or abuse of the mobile home;
- (c) did not arise or become evident within the term of the warranty;
- (d) was brought to respondents' attention by a retail purchaser more than sixty days after respondents mailed the written inquiry to such purchaser as provided hereinabove where the home was purchased by the first retail purchaser more than one year prior to the effective date of this order;

(e) is a minor cosmetic defect in a home purchased by the first retail purchaser more than one year prior to the effective date of this order.

3. *It is further ordered*, That respondents cease and desist from disseminating, or causing the dissemination of, offering or otherwise providing, in commerce, any express warranties to the retail purchasers of respondents' mobile homes unless respondents meet all of their obligations under such warranties within the time period standards set forth hereinbelow in order Paragraph 3(e) and establish and maintain a regular and effective system reasonably designed to assure that every purchaser of the aforesaid mobile homes will receive full performance by respondents, directly or by action through their dealers or other third parties, of all such warranty obligations within the said time period standards. This warranty performance system shall incorporate but not necessarily be limited to the following standards and terms:

(a) Respondents shall disseminate a warranty and associated documents which clearly and fully describe and effectively communicate to the first retail purchaser:

(1) the identity and address of the warrantor;

(2) the nature and extent of the warranty offered or otherwise provided;

(3) the remedies available to the purchaser under the warranty;

(4) the manner in which respondents intend to provide for performance of their warranty obligations, including disclosure of any delegation of warranty responsibility to third parties, *Provided, however*, That disclosure of said delegation must be accompanied by additional disclosure that such delegation in no way relieves respondents of the ultimate responsibility to fulfill all of respondents' warranty obligations;

(5) any and all requirements which must in fact be fulfilled by the purchaser as a condition precedent to securing performance by respondents of their warranty obligations;

(6) a uniform procedure to be followed by a purchaser in order to request performance by respondents of their warranty obligations;

(7) a uniform procedure available to the purchaser for a systematic review and disposition of complaints and disputes with respect to the performance of respondents' warranty obligations by respondents' manufacturing plants, subsidiaries, divisions, and other employees, or by respondents' dealers or other third parties.

(b) Respondents shall cease and desist from selling their mobile homes without any express or implied warranty, *i.e.*, "as is," or with any disclaimer of implied warranties or limitations or exclusion of liability under any warranty or disseminating or causing the dissemination of any statement or representation which represents, directly or by

implication, that respondents have disclaimed any express or implied warranty or limited or excluded any liability under any warranty unless respondents have a reasonable basis in the form of an opinion by legal counsel that said disclaimers, limitations and exclusions are enforceable under governing state law, and clear and conspicuous notice of said "as is" sale or other said disclaimer, limitation or exclusion is given to prospective retail purchasers of their mobile homes prior to the execution of the contract of retail purchase. A clear and conspicuous notice of an "as is" sale shall contain the following language:

NOTICE:

The manufacturer of this mobile home sells it "as is" and refuses to assume any responsibility for defects. The purchaser of this mobile home must accept it with all defects and take the entire risk, under contract law, as to its condition.

Provided however, That with respect to: (a) the "as is" sale of damaged, salvaged, demonstrator or repossessed mobile homes, (b) the sale of mobile homes where respondents disclaim or fail to grant an express warranty on appliances which are covered by a separate written warranty by a supplier or manufacturer other than respondents, and (c) the "as is" sale of mobile homes to local, State and Federal Governments or agencies thereof, the aforesaid opinion by legal counsel shall not be required.

(c) All of respondents' warranty service and repair obligations performed subsequent to the tender of the home to the retail purchaser shall be rendered by respondents, directly or through their dealers or other third parties, at the site of the mobile home.

(d) Where respondents delegate, assign, contract or otherwise rely on a continuing basis upon any dealers or any other persons not employees of respondents to:

(i) determine whether any mobile home manufactured by respondents contains defects which are within the scope of a warranty extended by respondents or otherwise requires remedial action pursuant to said warranty;

(ii) notify respondents of the existence of those circumstances enumerated in subparagraph (d)(i) above; or

(iii) perform any repairs or otherwise provide services in satisfaction of any warranty obligations incurred by respondents, respondents shall, beginning within 120 days of the effective date of this order, assure that if a dispute or disagreement should arise between respondents and one or more of said dealers or other third persons as to which of them is to incur any such duty, burden or responsibility with respect to warranty repairs and service or is to correct a malfunction related or alleged to relate to setup of the aforesaid mobile homes, any and all

necessary repairs or other corrective action will be expeditiously provided (in the normal course of business) in a manner consistent with this order, regardless of whether the said dispute or disagreement has been resolved. The "normal course of business" does not include:

(1) conditions under which abnormal demands are made upon service capabilities as a result of natural disasters, other acts of God or the government (including the effects of remedial action required of respondents as set forth in order Paragraphs 1 and 2, above), or any other event beyond the control of respondents and their dealers which places an unusually large demand upon service facilities;

(2) conditions resulting from disasters, strikes, acts of the government, instances of force majeure or other similar occurrences which are beyond the control of respondents and their dealers and which prevent respondents and their dealers from responding to service requests within the time periods stated hereinbelow;

(3) slight omissions or deviations from the terms of this order which are inadvertent, unintentional, and not due to bad faith of respondents;

(e)(1) Respondents shall, beginning within 120 days of the effective date of this order, directly or through their dealers or other third parties, commence, in the normal course of business as set forth in order Paragraph 3(d) above, all warranty service or repairs of defects giving rise to a condition which affects the safety of a mobile home or renders it substantially uninhabitable, as soon as possible but in no event later than three business days following receipt of notice of such defect by respondents from the retail purchaser, or two business days following notice of the determination made by respondents' dealer pursuant to order Paragraph 3(i)(3)(iii) below, and shall complete such service or repairs expeditiously.

(2) Respondents shall, except as set forth in order Paragraph 3(e)(1) above, beginning within 120 days of the effective date of this order, directly or through their dealers or other third parties, in the normal course of business, as set forth in order Paragraph 3(d) above: (a) respond to notice of the need for warranty service or repairs within a reasonable time not to exceed seven business days of receipt of said notice by respondents or their dealers and (b) complete said service or repairs within a reasonable time not to exceed thirty days following said receipt of notice.

(3) *Provided, however,* That in the event of a bona fide dispute between respondents or their dealers and a retail purchaser requiring resolution through the procedure established pursuant to order Paragraph 3(m) below, as to whether the defect(s) complained of by the retail purchaser are or are not covered by respondents' warranty, then: In the event it is determined that warranty service or repair is

required, which determination shall be made promptly, respondents shall be allowed, in the normal course of business as set forth in order Paragraph 3(d) above, from the date of notification of the dispute as set forth in this subparagraph (e)(3) no more than three business days in the case of defects referred to in subparagraph (e)(1) above to commence service or repair (such repairs to be completed expeditiously), and no more than thirty days in the case of defects referred to in subparagraph (e)(2) above to complete service or repair.

(f) Respondents shall, except as provided in order Paragraph 3(h) below, in the normal course of business as set forth in order Paragraph 3(d) above, beginning within 120 days of the effective date of this order, inspect at the home site, directly or through their dealers or other third parties, each mobile home prior to or at the time of tender of possession to the retail purchaser to assure that the home is being delivered to such purchaser free of all ascertainable defects and is properly setup, except for deficiencies which do not affect the home's safety or habitability, which shall be noted in the owner-dealer final delivery checklist (Appendix C), and which shall be then remedied in accordance with subparagraph (e)(2) above.

(g) Respondents shall, except as provided in order Paragraph 3(h) below, in the normal course of business as set forth in order Paragraph 3(d) above, beginning within 120 days of the effective date of this order, reinspect, directly or through their dealers or other third parties, each mobile home on or about sixty days after tender of possession to the retail purchaser to determine the existence of and to correct or arrange for the correction of any defects, covered by respondents' warranty, in the mobile home, or improper setup and problems arising therefrom.

Results of each of the inspections required in order Paragraphs 3(f) and 3(g) hereinabove will be documented in a report or reports which shall be required to be signed by respondents' dealer and if possible by the retail purchaser or said purchaser's representative, indicating agreement with the information set forth therein. The reports documenting the results of the aforesaid inspections shall be in the formats set forth in Appendices C and D attached hereto, or in formats substantially equivalent thereto.

(h) If the retail purchaser elects to provide for the setup of his mobile home himself, then in such cases the responsibility of respondents and their dealers for transportation, setup, inspection and reinspection, as set forth in subparagraphs (f) and (g) above, shall terminate with the delivery or tender of possession to the retail purchaser or his agent or representative.

(i) Where respondents delegate, assign, contract or otherwise rely on a continuing basis upon any dealers to perform the duties set forth in

order Paragraph 3(d) above, respondents shall enter into written contractual agreements with such dealers which:

(1) adequately and accurately describe the scope of those duties to be borne by said dealers as aforesaid, as well as the responsibility for properly setting up respondents' mobile homes;

(2) establish the duty of the dealer in the normal course of business as set forth in this order Paragraph 3(i) to provide respondents with the name and address of each retail purchaser and the date of each purchase;

(3) (i) establish the duty of the dealer in the normal course of business as set forth in this order Paragraph 3(i), to commence all warranty service, or repair of defects, giving rise to a condition which affects the safety of a mobile home or renders it substantially uninhabitable as soon as possible but in no event later than three business days following receipt by the dealer of notice of such defect or condition and to complete such service or repairs expeditiously;

(ii) establish the duty of the dealer in the normal course of business as set forth in this order Paragraph 3(i), to complete all other warranty service or repairs within a reasonable time, not to exceed thirty days following receipt by the dealer of notice of such condition;

(iii) set forth that the requirements of subparagraph (i)(3)(i) and (i)(3)(ii) above shall apply only to those cases in which the dealer responds to and completes the service or repairs himself. In those cases in which the dealer determines to rely upon respondents to perform or to complete service or repairs requested by retail purchasers under:

(a) subparagraph (i)(3)(i) above, such determination shall be made and communicated to respondents as soon as possible but in no event later than two business days after dealer's receipt of notice from the retail purchaser.

(b) subparagraph (i)(3)(ii) above, such determination shall be made and communicated to respondents as soon as possible but in no event later than five business days after the dealer's receipt of notice from the retail purchaser.

(4) establish the duty of the dealer in the normal course of business as set forth in this order Paragraph 3(i) to inspect each mobile home prior to or at the time of tender of possession to the retail purchaser as set forth in order Paragraph 3(f), except as provided in subparagraph (h) above, to assure that the home is being delivered to such purchaser free of all ascertainable defects and is properly set up, except for deficiencies which do not affect the home's safety or habitability which shall be noted in the owner-dealer final delivery checklist (Appendix C) and which shall then be remedied in accordance with subparagraph (i)(3)(ii) immediately above.

(5) establish the duty of the dealer in the normal course of business as set forth in this order Paragraph 3(i) except as provided in subparagraph (h) above to reinspect each mobile home on or about sixty days after tender of possession to the retail purchaser to determine the existence of and to correct or arrange for the correction of any defects in the mobile home covered by respondents' warranty or improper setup and problems arising therefrom;

(6) establish the duty of the dealer in the normal course of business as set forth in this order Paragraph 3(i) to provide respondents with reports which will document the results of the inspections set forth in (4) and (5) immediately above and which will be signed by respondents' dealer and if possible by the retail purchaser or said retail purchaser's representative indicating agreement with the information set forth therein;

(7) provide for a procedure which assures that if a dispute or disagreement should arise between respondents and one or more of said dealers as to which of them is to incur any such duty, burden or responsibility or is to correct an improper initial setup or a malfunction arising therefrom, any and all necessary repairs or other corrective action will be expeditiously provided, regardless of whether the said dispute or disagreement has been resolved;

(8) establish the duty of the dealer to maintain or contract for adequate service personnel and facilities;

(9) set forth service responsibilities in the event of termination of a dealer with respect to homes still under warranty or in the possession of the dealer and not yet sold to a retail purchaser at the time of termination;

(10) set forth the right of respondents to withdraw authorization from dealers failing to meet their responsibilities under the agreement.

Existing dealers authorized by respondents as of the effective date of this order shall execute such agreements (which agreements shall be immediately effective) within 180 days of the effective date of this order, or shall be terminated by respondents. Other dealers authorized by respondents later than the effective date of this order shall execute such agreements at the time of their authorization.

Such agreement shall be in the format set forth in Appendix E attached hereto or in a format substantially equivalent hereto.

The "normal course of business" as used in this order Paragraph 3(i) shall not include: (1) conditions under which abnormal demands are made upon service capabilities as a result of natural disasters, other acts of God or the government, or any other event beyond the control of the dealer which places an unusually large demand upon the dealer's service facilities; (2) conditions resulting from disasters, strikes, acts of

the government, instances of force majeure or other occurrences which are beyond the control of the dealer which prevent the dealer from responding to service requests within the time periods stated hereinabove; (3) slight omissions or deviations from the terms of this order subparagraph which are inadvertent, unintentional and not due to bad faith of the dealer.

(j) Respondents shall send a questionnaire (using the format set forth in Appendix F attached hereto or in a format substantially equivalent thereto) to all persons other than "as is" purchasers who after the effective date of this order purchase at retail respondents' mobile homes which inquires as to:

(1) the existence of any defects in said mobile homes covered by respondents' warranty or improper setup or problems arising therefrom;

(2) whether the retail purchaser notified anyone of such defects or setup problems, and if so who was notified and when did such notification take place;

(3) the identity of any person who sought to service such defects or setup problems;

(4) whether such defects or setup problems were fully repaired, the period of time required to effect such repairs, and the identity of the parties who accomplished such repairs;

(5) whether the retail purchaser is satisfied with the promptness and quality of the repair.

Such questionnaire in the form of a postage paid self-addressed post card or a letter containing a postage paid self-addressed envelope, shall be sent between sixty and ninety days subsequent to the tender of possession of the home to the retail purchaser.

(k) Where respondents delegate, assign, contract or otherwise rely on a continuing basis upon any dealer or any other persons not employees of respondents to perform any of the responsibilities or duties set forth in order Paragraph 3(d) hereinabove, respondents shall fully evaluate the level of expertise and physical and personnel resources of such dealers or other persons with respect to the ability to inspect, repair, service and setup all mobile homes manufactured by respondents prior to such delegation or reliance to assure that all said persons are capable of performing said responsibilities or have provided for such performance through a third party having such capability, in accordance with the standards set forth herein.

Respondents shall in addition regularly review and evaluate the manner in which such persons, directly or through another third party, perform the aforesaid responsibilities and maintain their service capabilities and shall withdraw said reliance and authorization from

persons failing to meet those responsibilities or the standards set forth herein.

(l) The direct administration of respondents' warranty service program at the corporate level and the responsibility for supervising and assuring implementation of the warranty service program shall, beginning within 120 days of the effective date of this order, be vested in only those corporate officials who have no direct responsibilities on a day-to-day basis for the sale of respondents' mobile homes. The person or persons to whom the responsibility for supervising and assuring the implementation of the program is delegated shall make periodic reports at least on a monthly basis to respondents' responsible officers which shall include current information concerning:

- (1) the current cost to respondents of warranty service;
- (2) the incidence and nature of frequently recurring defects;
- (3) those measures undertaken in response to reports of frequently recurring defects including but not limited to modification in production and design of respondents' mobile homes;

(4) analysis of the manner in which respondents' employees, dealers and other third parties are performing warranty and setup responsibilities.

(m) Respondents shall, beginning within 120 days of the effective date of this order, establish a uniform procedure for the systematic receipt and analysis and fair disposition of all complaints or disputes which may arise between the aforesaid retail purchasers of respondents' mobile homes and respondents or respondents' dealers or other third parties, regarding any alleged warranty obligations of respondents.

Such procedure shall incorporate but not necessarily be limited to:

(1) prompt evaluation and response by respondents to all complaints within a reasonable time not to exceed five business days after receipt by respondents;

(2) the designation of a single focal point within the corporation for the receipt of said complaints;

(3) an effective mechanism for the fair and impartial resolution of such disputes by corporate level personnel not responsible for sales on a day-to-day basis;

(4) an accurate and complete record keeping system regarding the nature and disposition of all such disputes and complaints received by respondents;

(5) periodic review and evaluation by respondents of the effectiveness of such procedures and correction of such procedures where necessary.

(n) Respondents shall, beginning within 120 days of the effective date of this order, maintain full and adequate records which disclose:

(1) the date of receipt, disposition and the date of disposition of each request for warranty service (including any refusal to accept a request and the reason for such refusal) received by respondents; and

(2) the results of the evaluation of service capacity provided for in order Paragraph 3(k) above.

4. *It is further ordered*, That respondents shall forthwith distribute a copy of this order to each of their operating divisions or manufacturing plants engaged in the manufacture, offering for sale, sale, and distribution of mobile homes.

5. *It is further ordered*, That respondents notify the Commission at least 30 days prior to any proposed change in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, or any other change in the corporations which may affect compliance obligations arising out of this order.

6. *It is further ordered*, That respondents shall, at intervals of 9, 18, and 24 months following the effective date 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. Such reports shall include but not be limited to the periodic reports submitted to respondents' responsible officers described in order Paragraph 3(l) above.

7. *It is further ordered*, That respondents shall furnish to the Commission nine months after the effective date of this order, a report which discloses the dates and manner in which dealers and retail purchasers were contacted pursuant to the procedures described in order Paragraph 1 above, and the dates and manner in which dealers and retail purchasers acted in response thereto and the dates and manner in which respondents acted in response to allegations by retail purchasers which purported to create an obligation on the part of respondents under the terms of order Paragraph 2 above. Respondents shall for a period of two years after the effective date of this order maintain records which are adequate to disclose respondents' compliance with order Paragraphs 1 and 2, in order that such records may be furnished by respondents to the Federal Trade Commission upon request.

8. *It is further ordered*, That respondents shall submit to the Federal Trade Commission for its review copies of any proposed substantial revisions in the questionnaire required pursuant to order Paragraph 3(j), the dealer agreement required pursuant to order Paragraph 3(i), and the warranty documents described in order

Paragraph 3(a), at least 60 days prior to the proposed effective date of any such revisions. Such submissions will be required for the three years following the effective date of this order.

APPENDIX A

(Date)

Dear Mobile Home Owner:

Thank you for purchasing one of Redman's family of mobile homes. Our homes are warranted to be free from defects in material and workmanship. Any repairs required by your warranty should have been performed in full by the dealer who sold you your home or, if this was not possible, by the factory which manufactured it. Through the following questionnaire, we are seeking to determine your experience with regard to service so that we may be sure you have received full performance of warranty obligations. Your response to the following questions will enable us to provide you with the warranty service to which you are entitled.

Please respond to the following questions and return this letter in the enclosed postage-paid envelope.

(1)(a) Have you experienced problems with your mobile home that you feel are covered by our warranty described above (check one) yes no

(1)(b) If the answer to (1)(a) is yes, please tell us *when* the problems occurred and describe them _____

(2) If you have experienced problems that you feel are covered by our warranty, please advise us of *whom* you contacted and *when* the contact was made.

(3)(a) If you contacted someone regarding a warranty problem, was the problem corrected (check one) yes no

(3)(b) If the answer to 3(a) was yes, please indicate *how long* it took to correct the problem, and *who* performed the repair: _____

3(c) If the answer to 3(a) was No, does the problem still exist (check one): ____ yes
_____ no

3(d) If the answer to 3(c) was Yes, please describe the current condition of the problem and any attempts at correction you have made: _____

4(a) If warranty service was provided, were you satisfied with (1) the promptness of repairs (check one) ____ yes ____ no (2) the quality and completeness of repairs (check one) ____ yes ____ no

4(b) If your answer to 4(a)(2) was No, does the problem which was the subject of warranty service still exist (check one): ____ yes ____ no

4(c) If your answer to 4(b) was yes, please explain and describe the current condition of the problem and any attempts at correction you have made: _____

5(a) Who performed the set-up or installation of your mobile home? (Name) (relationship) dealer, park operator, independent contractor, etc. (location)

5(b) Has there been any doubt or dispute as to whether a problem you have experienced with you mobile home was a problem covered by your warranty or due to improper set-up or installation (check one) ____ yes ____ no

5(c) If the answer to 5(b) was Yes, does the problem still exist (check one): ____ yes
_____ no

5(d) If the answer to 5(c) was Yes, please describe the current condition of the problem and any attempts you have made to get the problem corrected: _____

5(e) Are you satisfied with the manner in which your mobile home was set-up or installed (check one): ____ yes ____ no

(6) Please advise us of any suggestions that you might have that will enable us to increase the quality, utility, and value that we strive to build into our homes.

Note: Below is your name and address as they appear in our records, if there is need for a correction, please make it in the space provided. Also we ask that you supply us with your telephone number in the space provided as it will facilitate our reaching you to discuss any problems with our product or service that you have pointed out:

(Name of Customer) _____
(Street address) _____
(City, State, Zip) _____
telephone number (including area code): _____

We thank you for responding to the questions set forth above. Please return this letter to us in the enclosed postage paid envelope.

Sincerely,

APPENDIX B

Letters to Dealers Requesting Names and Addresses of Past Purchasers

Dear _____

Pursuant to an agreement with the *Federal Trade Commission*, Redman Industries is securing from each of its present and former dealers all names and addresses of retail purchasers of its mobiles homes built between July 1, 1972 and June 30, 1974, identified with Serial Numbers _____ through _____. Dealer submission of these names and addresses is necessary since warranty registration cards fail to provide the information for a substantial number of homes.

Please fill in the names and addresses of the retail purchasers of these units and serial numbers of the homes and return this letter in the postage paid envelope provided before _____, 1974, as called for by the above agreement.

Signed _____,
Plant General Manager

Serial Numbers	Names and Addresses
_____	_____
_____	_____
_____	_____

Decision and Order

REDMAN MOBILE HOMES, IN
Pre-Occupancy Check Out

Appendix C

Serial No. _____ Brand Name _____ Model No. _____

Dealer Name: _____

Address: _____

City: _____ State: _____ Zip: _____

Phone Number: A/C () _____

Date Unit Delivered to Retail Purchaser: _____

Retail Purchaser's Name: _____

Address: _____

City: _____ State: _____ Zip: _____

Phone Number: A/C () _____

The above Dealer and Retail Purchaser is to make an X in the respective blocks below, before all subjects and items (i.e. parts, systems, components, accessories or booklets in, attached to, incorporated into or related to this unit) to indicate and certify that each item or subject was appropriately covered, included, inspected and/or actually tested by this Dealer and as a result was found to perform, function, operate and/or serve as intended by its respective manufacturer, on or before the unit was delivered to the Retail Purchaser. For items listed but not in or on this unit, write N/A in blocks.

LP NATURAL GAS AND OIL SYSTEMS:

- | | | |
|--------------------------|--------------------------|--|
| Customer | Dealer | |
| <input type="checkbox"/> | <input type="checkbox"/> | After gas appliances are connected, unit's gas piping system must be pressure tested with all appliance burner valves closed. Such test will consist of pressurizing entire system not less than ten minutes (10 minutes) without showing any drop in pressure. The system was pressurized to not less than ten inches (10") nor more than fourteen inches (14") water column and appliance connections were tested for leakage with soapy water or bubble solution. Before beginning air pressure test, temperature of gas piping system and test air was equalized. NOTICE: Other type test may be required due to local code or a licensed gas representative to perform gas check. Note if applicable. |
| <input type="checkbox"/> | <input type="checkbox"/> | Before lighting furnace, make sure flue pipes were tight and in place. (Failure to do so can result in lethal furnace exhaust fumes not being properly vented.) |
| <input type="checkbox"/> | <input type="checkbox"/> | Furnace (Pilot and Burner) |
| <input type="checkbox"/> | <input type="checkbox"/> | Range (Pilot and Burner) |
| <input type="checkbox"/> | <input type="checkbox"/> | Water Heater (Pilot and Burner) |
| <input type="checkbox"/> | <input type="checkbox"/> | Gas Dryer |

WATER SYSTEMS:

- | | | |
|--------------------------|--------------------------|-----------------------------|
| <input type="checkbox"/> | <input type="checkbox"/> | Fresh Water Intake |
| <input type="checkbox"/> | <input type="checkbox"/> | Water Supply Lines |
| <input type="checkbox"/> | <input type="checkbox"/> | Faucets |
| <input type="checkbox"/> | <input type="checkbox"/> | Shower Over Bath |
| <input type="checkbox"/> | <input type="checkbox"/> | Traps |
| <input type="checkbox"/> | <input type="checkbox"/> | Gate Valve |
| <input type="checkbox"/> | <input type="checkbox"/> | Toilet Stool and Tank |
| <input type="checkbox"/> | <input type="checkbox"/> | Drain Cocks and Connections |
| <input type="checkbox"/> | <input type="checkbox"/> | Hot Water Heater |
| <input type="checkbox"/> | <input type="checkbox"/> | Separate Shower/Stall |

ELECTRICAL SYSTEMS:

- | | | |
|--------------------------|--------------------------|--|
| Customer | Dealer | |
| <input type="checkbox"/> | <input type="checkbox"/> | Panel Box properly labeled and fused |
| <input type="checkbox"/> | <input type="checkbox"/> | Circuit Breaker Box — 100 AMP, 150 AMP, 200 AMP. NOTE: Local code may require licensed electrician to run power to home. Note if applicable, include name of electrical company. |
| <input type="checkbox"/> | <input type="checkbox"/> | Electric Water Heater |
| <input type="checkbox"/> | <input type="checkbox"/> | Electric Range / Eye Level Oven Counter Top |
| <input type="checkbox"/> | <input type="checkbox"/> | Electric Dryer |
| <input type="checkbox"/> | <input type="checkbox"/> | Electric Furnace |
| <input type="checkbox"/> | <input type="checkbox"/> | Electric Washer |
| <input type="checkbox"/> | <input type="checkbox"/> | Air Conditioner |
| <input type="checkbox"/> | <input type="checkbox"/> | Refrigerator |
| <input type="checkbox"/> | <input type="checkbox"/> | Garbage Disposer |
| <input type="checkbox"/> | <input type="checkbox"/> | Dishwasher |
| <input type="checkbox"/> | <input type="checkbox"/> | Receptacles |
| <input type="checkbox"/> | <input type="checkbox"/> | Interior Fans |
| <input type="checkbox"/> | <input type="checkbox"/> | Interior Switches |
| <input type="checkbox"/> | <input type="checkbox"/> | Interior Lights |
| <input type="checkbox"/> | <input type="checkbox"/> | Furnace Thermostat |
| <input type="checkbox"/> | <input type="checkbox"/> | Exterior Receptacle |
| <input type="checkbox"/> | <input type="checkbox"/> | Exterior Lights |
| <input type="checkbox"/> | <input type="checkbox"/> | Compactor |

INTERIOR:

- | | | |
|--------------------------|--------------------------|-----------------------------|
| <input type="checkbox"/> | <input type="checkbox"/> | Smoke Detectors/Installed |
| <input type="checkbox"/> | <input type="checkbox"/> | Heat Registers |
| <input type="checkbox"/> | <input type="checkbox"/> | Wall Paneling |
| <input type="checkbox"/> | <input type="checkbox"/> | Ceilings |
| <input type="checkbox"/> | <input type="checkbox"/> | Beds and Mattresses |
| <input type="checkbox"/> | <input type="checkbox"/> | Loose Living Room Furniture |
| <input type="checkbox"/> | <input type="checkbox"/> | Dinette Furniture |
| <input type="checkbox"/> | <input type="checkbox"/> | Bedroom Furniture |
| <input type="checkbox"/> | <input type="checkbox"/> | Mirrors |

Customer Dealer

- | | | | | | | |
|--------------------------|--------------------------|--------------------------|--------------------------|--------------------------|--------------------------|--|
| <input type="checkbox"/> | <input type="checkbox"/> | Customer | <input type="checkbox"/> | <input type="checkbox"/> | Dealer | |
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | Tub or Shower Enclosure |
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | Light Globes and Shades |
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | Door Knobs, Latches, Hinges, Stricker Plates |
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | Cabinet Doors, Door Pulls, Latches, Hinges |
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | Closet Doors, Latches, Hinges, and Hardware and Adjustment of Such Explained |
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | Carpet, Linoleum |
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | Curtains |
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | Window Closings, Cranks, and Fitting |
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | Storm Windows |
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | Trim Mouldings |
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | Retail Purchaser was properly instructed on how to operate all of unit's appliances, features with operational and service manual for range, air conditioner, refrigerator, furnace, washer, dryer, dishwasher, disposal |

EXTERIOR:

- | | | | | | | | |
|--------------------------|--------------------------|--------------------------|--------------------------|--------------------------|--------------------------|--------------------------|---|
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | |
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | Drip Caps over Exterior Doors |
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | Entrance Door(s) lock and fit with all required keys |
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | All Window Screens |
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | Roof |
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | Exterior Metal |
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | Vents |
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | Shutters and Trim |
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | Coupler-Hitch Assembly |
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | Tires and Axles |
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | Copy of Owner's General Maintenance and Guide Booklet |
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | Copy of Dealer and Manufacturer Warranty |
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | Hurricane Tie Down Straps |
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | Egress Windows |
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | Crossover Systems—Double Wide |

The above pre-occupancy check out/inspection requirements and obligations have been performed by this Dealer and this unit is considered by the Dealer and Purchaser to be completely habitable, stable, and acceptable for delivery to the Retail Purchaser on this date.

Signature of Dealer or Authorized Representative _____ Date _____ Signature of Retail Purchaser _____ Date _____

Type or Print Full Name of Above Signee _____ Type or Print Full Name of Retail Purchaser _____

Signature of Witness _____ Date _____

DISTRIBUTION OF THREE PART FORM:
WHITE — Redman Copy
YELLOW — Retail Purchaser Copy
PINK — Dealer Copy

Decision and Order

85 F.T.C.

APPENDIX D

REDMAN MOBILE HOMES, INC.
Post-Occupancy Check Out

Serial No. _____ Brand Name _____ Model No. _____

Dealer's Name: _____

Address: _____

City: _____ State: _____ Zip: _____

Phone Number: A/C () _____

Date Unit Delivered to Retail Purchaser: _____

Date of Post-Occupancy Checkout: _____

Retail Purchaser's Name: _____

Address: _____

City: _____ State: _____ Zip: _____

Phone Number: A/C () _____

Customer Dealer

- | | | |
|--------------------------|--------------------------|---|
| <input type="checkbox"/> | <input type="checkbox"/> | Level (doors are not dragging, windows not binding) |
| <input type="checkbox"/> | <input type="checkbox"/> | Exterior Door Adjustment (doors not dragging, fits properly, flush and no wind around hinges) |
| <input type="checkbox"/> | <input type="checkbox"/> | Interior Door Adjustment (master bedroom, second and third bedrooms) |
| <input type="checkbox"/> | <input type="checkbox"/> | Water Connections (kitchen, bath, lavatories) |
| <input type="checkbox"/> | <input type="checkbox"/> | Plumbing Connections (commodes) |
| <input type="checkbox"/> | <input type="checkbox"/> | Customer fully understands how to properly light furnace for seasonal variation. |
| <input type="checkbox"/> | <input type="checkbox"/> | Moulding |
| <input type="checkbox"/> | <input type="checkbox"/> | Cabinet Door and Drawers checked for proper adjustments |
| <input type="checkbox"/> | <input type="checkbox"/> | Drain Lines (sewer connections) |
| <input type="checkbox"/> | <input type="checkbox"/> | Hot Water Heater |
| <input type="checkbox"/> | <input type="checkbox"/> | Roof |

Other _____

The above post-occupancy has been performed by the dealer or authorized representative and found to be satisfactory with the Retail Purchaser on this date.

Signature of Dealer/Authorized Representative _____ Date _____

Signature of Retail Purchaser _____ Date _____

Signature of Witness _____ Date _____

Distribution of THREE PART Form:
WHITE --- Redman Copy
YELLOW --- Retail Purchaser Copy
PINK --- Dealer Copy

APPENDIX E

*REDMAN MOBILE HOMES, INC.**Dealer Service Agreement*

_____ warrants that _____ (Dealer) had the facilities to properly check out, deliver, set up, and service (or has contracted with an established servicing agency approved by Redman Mobile Homes, Inc.) Redman homes. The Dealer agrees that it will:

1. Assume responsibility for properly setting up those Redman homes sold to retail purchasers, unless the retail purchaser elects to provide for the set up of the home himself.

2. Provide each retail purchaser with a copy of the Redman warranty before execution of the retail sale contract, and provide Redman with a completed warranty card stating the name and address of each retail purchaser and the date of purchase.

3.(a) Where a defect in a Redman home affects the safety of the home, or makes it substantially uninhabitable, commence warranty service as soon as possible in the normal course of business, but in no event later than three business days following receipt of notice of such defect, and complete such repairs expeditiously.

(b) Complete all warranty service, other than that specified in subparagraph 3(a) above, within a reasonable time in the normal course of business, not to exceed thirty days following receipt of the service request.

(c) The "normal course of business" shall not include conditions which place an unusually large demand upon service facilities, such as disasters, strikes, acts of God or of the government, instances of force majeure or other occurrence which are beyond the control of Dealer which prevent Dealer from responding to service requests within the time periods stated in subparagraphs 3(a) and 3(b) above.

4. Where a defect exists in a Redman home which is beyond Dealer's ability to repair or which Dealer will not repair within the time periods stated in subparagraphs 3(a) and 3(b) above, inform Redman of such defect no later than five business days after receipt of the service request, and if the defect affects the safety of the home, or makes it substantially uninhabitable, inform Redman of such defect no later than two business days after receipt of the service request.

5. Perform preoccupancy check out and make necessary adjustments and repairs as Per Redman Mobile Homes, Inc. preoccupancy check out which is attached hereto as Exhibit A, unless the retail purchaser elects to provide for the set up of the home himself. Dealer shall not knowingly deliver possession of a Redman home with any defect that affects the safety of the home or renders it substantially uninhabitable.

6. Perform the post-occupancy check-out and make necessary adjustments and repairs as per Redman Mobile Homes, Inc. post-occupancy check-out, which is attached hereto as Exhibit B, approximately sixty days after acceptance of the home by the retail purchaser, unless the retail purchaser elected to provide for the set up of the home himself.

7. Provide Redman with reports signed by Dealer (or other representative) and the retail purchaser, if possible, regarding the inspections set forth in paragraphs 5 and 6 above.

8. Where a defect or malfunction of a Redman home exists, and a dispute arises between Redman and Dealer as to whether Dealer will be reimbursed for the repair of such defect or malfunction, necessary repairs will be performed expeditiously by Dealer, as provided under Paragraph 3 above, with the dispute to be resolved subsequently.

9. Maintain or contract for service personnel and facilities which, in Redman's

reasonable judgment, are adequate to check out, deliver, set up, and service Redman Homes.

10. In the event of termination of the dealership, provide the same warranty service, as would otherwise be provided, on Redman homes still under warranty or no yet sold to retail purchasers.

Redman Mobile Homes, Inc., agrees that it will:

1. Pay to Dealer \$40.00 for a single-wide and \$50.00 for a double-wide within thirty days after receipt of preoccupancy check-out sheet signed by Dealer and signed and accepted by the retail purchaser, as outlined in paragraphs 5 and 7 above.

2. Pay Dealer \$60.00 for a single-wide and \$100.00 for a double-wide within thirty days after receipt of postoccupancy check-out sheet signed by Dealer and signed and accepted by the retail purchaser, as outlined in paragraphs 6 and 7 above.

3. Reimburse Dealer for all warranty service performed by Dealer under the standard Redman Mobile Homes, Inc., warranty, if Dealer requests and obtains prior authorization of such warranty service in accordance with Redman warranty service procedures. As used in this Agreement, "warranty service" includes the following items: (i) defective or broken rafters or side-wall studs; (ii) leaks in water lines in the floor; (iii) short circuits and open circuits in the walls; (iv) defects in the design of the mobile home; (v) breaks or defects in the mobile home chassis; (vi) major repairs to appliances, which will be the ultimate responsibility of Redman's appliance vendors; (vii) major manufacturing defects resulting in structural failure; (viii) other major manufacturing defects which do not result from delivery or set-up, which require the removal or application of interior or exterior wall, floor, or ceiling covering, or repairs to the chassis, of a character similar to those listed above. Dealer understands that it is to perform minor adjustments and repairs to Redman homes without reimbursement other than the payments provided in paragraphs 1 and 2 immediately above, and such minor adjustments and repairs shall be the sole responsibility of Dealer.

This Agreement applies only to homes delivered after the execution date of the Agreement. This Agreement may be terminated by either party giving thirty days' written notice; however, the commitments made by each party hereto will apply to all homes delivered prior to the termination of the Agreement. Dealer understands Redman's intention to terminate the Dealership upon failure to meet Dealer's responsibilities under this Agreement.

In witness whereof, the parties have duly executed this Agreement as of the date and year listed below.

REDMAN MOBILE HOMES, INC. DEALER: *(Name of Dealership)*

By Title: _____ By Title: _____

Witness _____ Witness _____

Date: _____ Date: _____

(Plant will Xerox copies and distribute as follows: Plant Dealer C.S.O. Credit Dept.)

APPENDIX F

Dear Homeowner:

For more than _____ years Redman Industries has manufactured quality, low cost mobile homes. Our records indicate that in _____ of _____ you purchased a Redman produced mobile home Serial No. _____.

Your home is warranted to be free from defects in material and workmanship for one year from the date of original purchase. If a defect comes to your attention during this time period, the dealer who sold you the home should be contacted. In most cases, he will

be able to correct the problem. If the dealer is unable to make the correction, he is required to notify the manufacturer who will then assist in resolving the matter.

In order for us to determine if you have been satisfied with your home, we request you respond to the following questions (if you need more space, please attach a separate page):

(1) Have you experienced any problems with your home that you feel are covered by our warranty or arise from the improper setup or installation of your home?

(2) If so, whom did you notify of these defects or setup problems (if any) and when did notification occur?

(3) Were these problems satisfactorily resolved?

(4) Do you have any suggestions that would be useful to us in improving our product for future customers?

It would be greatly appreciated if you would respond to the above questions and return this letter in the enclosed postage paid envelope.

We thank you in advance for your help in this matter.

Sincerely,

National Quality Assurance Manager

IN THE MATTER OF

LITTON INDUSTRIES, INC.

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

*Docket 8778. Decision, Mar. 13, 1973 - Modified Order, Mar. 4, 1975**

Order modifying an earlier order issued Mar. 13, 1973, 82 F.T.C. 793, 38 F.R. 8150, against a Beverly Hills, Calif., conglomerate corporation by rescinding the provision requiring respondent to divest itself of Triumph-Werke Nurnberg, A.G. and Adlerwerke, A.G. However, the 10-year moratorium against acquisitions in the office communications equipment field continues in effect.

Appearances

For the Commission: *Joseph J. O'Malley, Harold G. Munter, Laurence O. Masson and Lois E. Berge.*

For the respondent: *Theodore F. Craver, Beverly Hills, Calif., and Francis A. O'Brien, J. Wallace Adair, Ralph Gordon, Howrey, Simon, Baker & Murchison, Wash., D.C.*

* The Order Modifying Cease and Desist Order is reported as corrected by Order of Apr. 8, 1975, which strikes the sentence requiring compliance reports concerning divestiture negotiations.

FINDINGS ON ISSUE OF RELIEF AND RECOMMENDATIONS ON
REMAND

BY: ALVIN L. BERMAN, ADMINISTRATIVE LAW JUDGE.

JULY 12, 1974

PRELIMINARY STATEMENT

On Mar. 13, 1973, the Commission issued its opinion holding that Litton Industries, Inc. ("Litton") had violated Section 7 of the Clayton Act, as amended (15 U.S.C. 18), by its Jan. 1969 acquisition of controlling stock interests in Triumph-Werke Nurnberg, A.G. ("Triumph") and Adler-Werke, A.G. ("Adler"). The product markets with respect to which this holding was made were the typewriter industry as a whole, the office and portable typewriter submarkets thereof and the office electric and office manual segments of the office typewriter market. The geographic market was found to be the nation as a whole.

The Commission's order accompanying its opinion directed Litton, within one year, to divest itself of all stock, assets, properties, rights and privileges secured as a result of Litton's acquisition of Triumph-Adler. After requiring Litton to maintain the status quo of Triumph-Adler pending divestiture and enumerating various tangible and intangible items to be included in the divestiture and placing certain limitations thereon, Litton was further ordered, for a period of ten years, not to acquire the whole or any part of the stock, share capital or assets of any concern engaged in the business of manufacturing typewriters or typewriter parts or accessories for sale within the United States without the prior approval of the Federal Trade Commission.

In so deciding the matter, the Commission reversed the hearing examiner's initial decision dismissing the complaint and rejected such findings of the examiner that were inconsistent with its opinion. At the same time, the Commission made additional findings of fact and conclusions of law in support of its opinion.

On Apr. 9, 1973, Litton filed with the Commission a petition for reconsideration of the Commission's order of divestiture. In the alternative, in the event the Commission would not modify its order of divestiture without reconsidering the entire case, Litton moved that the Commission reconsider the full merits of the case and enter an order dismissing the complaint.

In support of its petition for reconsideration of the order of divestiture, Litton asserted that the divestiture of Triumph-Adler

would be anticompetitive and contrary to the public interest—that the impropriety of ordering divestiture was demonstrated by the evidence of record and the findings of the initial decision.

Litton argued that divestiture was not always required upon a finding of violation of Section 7 of the Clayton Act and, particularly, that divestiture was not required in the instant case. In addition to relying upon the evidence of record, Litton submitted affidavits with its petition which purported to present new facts together with a resolution of the executive committee of Litton's board of directors to the effect that, if the order of divestiture were to stand, Litton should withdraw from the typewriter industry. Litton alleged the competitive deterioration of all of the smaller companies in the United States office and portable typewriter markets in the face of the entrenched and growing positions of International Business Machines, Inc., ("IBM") and SCM Corporation ("SCM"). In addition, it asserted that the devaluation of the dollar and the ensuing monetary crisis have had a harmful effect on the ability of foreign typewriter manufacturers to compete in the United States against IBM and SCM. According to Litton, it was almost impossible to compete with IBM in the office typewriter market. It was further alleged that events occurring since the close of the record and current conditions have reenforced the hearing examiner's conclusion that Royal could not survive in the United States typewriter business without Triumph-Adler and that allowing Royal and Triumph-Adler to remain together was necessary to promote competition in the office typewriter market.

The importance of Royal becoming a viable competitor in the automatic typewriter submarket was alleged to be of particular significance because of the asserted acquisition by Xerox of the automatic typewriter division of Itel Corporation, including Itel's Diablo printer, and Xerox' development of a new automatic typewriter using the Diablo printer. Litton forecast that Xerox would be able to utilize its established, direct sales organization in the office copier business in conjunction with what was described as a significant advancement in automated typewriters to create a duopoly in the automatic segment of the office typewriter market. This, according to Litton, would make competition even more difficult for others and would make it all the more important for Litton to retain Triumph-Adler in order to offer effective alternative competition in the industry.

In addition to the direct result of lessening of competition in the typewriter industry that was alleged in the event the order of divestiture should remain, Litton alleged that, without Royal, the 900 or so independent office machine dealers who distribute Royal products would probably be forced to leave the typewriter business as they

would be unable to secure an acceptable alternative office electric typewriter.

Litton's petition, covering both the request for reconsideration of the order of divestiture and for reopening of proceedings, represented that if the Commission did not consider the affidavits and resolution attached thereto to be acceptable as probative and competent evidence as to the issues involved in the petition, Litton was requesting that the Commission reopen the proceedings to receive evidence as to these issues.

On May 16, 1973, [82 F.T.C. 1424] the Commission reopened this proceeding "solely for the purpose of reexamining the question of relief in its entirety." The proceeding was "remanded to an administrative law judge to conduct hearings on the question of relief." The administrative law judge was directed "[i]n conducting this inquiry * * * [to] examine the question of appropriate relief in its entirety, and upon completion of the hearings, * * * [to] furnish the Commission with his findings on the issue of relief and his recommendations."

The administrative law judge has construed this directive as requiring that, in making such findings and recommendations, he consider the entire record—both the portion made prior to the Commission's opinion and order of Mar. 13, 1973, [82 F.T.C. 979, 1016], and the part developed following the Commission's remand order of May 16, 1973, [82 F.T.C. 1426].

The Commission reopened the proceeding *solely* for the purpose of reexamining the question of relief. Litton's alternative motion to reconsider the merits of the case and enter an order of dismissal was not granted. The holding that Litton violated Section 7 of the Clayton Act by its acquisition of Triumph-Adler, which includes the finding that the acquisition's "effect may be to lessen competition substantially" (C.O. 36),¹ therefore, remains unchanged. Nevertheless, reexamination of the question of relief on the basis of the entire record, which includes the new evidence developed on remand bearing upon the question of whether divestiture should be required, necessarily overlaps the extent findings as to the anticipated effects of the acquisition. Consideration must be given to the probable anticompetitive effects of allowing the acquisition to remain in effect *vis-a-vis* those of requiring divestiture.

As stated in the Commission's order of Mar. 13, 1973, "[T]he findings of the hearing examiner should be adopted only to the extent consistent with the opinion accompanying [the] order"; and as phrased in the

¹ The following abbreviations are used herein as references: C.O.—the Commission's opinion dated Mar. 13, 1973 [82 F.T.C. 979]; I.D.—the examiner's initial decision dated Feb. 3, 1972 [82 F.T.C. 799]; CPF—proposed findings of complaint counsel; RPF—proposed findings of respondent; CRB—reply brief of complaint counsel; RRB—reply brief of respondent; Tr.—transcript page of original hearing; Tr. R.—transcript page of hearing on remand; CX—Commission exhibit; and RX—respondent exhibit.

opinion, "[T]he examiner's findings inconsistent with our opinion should be rejected." The extant findings, and of course those additional findings stated in the Commission's opinion, therefore, must be given full weight in reconsidering the question of appropriate relief. Nevertheless, the proceeding has been reopened to receive new evidence on the question of relief and such evidence must be considered even if it tends to show the propriety of different findings at this time.

The burden of proof to support an order remains with complaint counsel. After ascertaining that complaint counsel had no further evidence to present on direct, the administrative law judge ruled that it was respondent's burden to proceed. Hearings commenced on Dec. 3, 1973, and the last evidence was received on Feb. 5, 1974, at which time the record was closed.²

The matter thus is before the undersigned for the purpose of making findings on the issue of relief and recommendations. In so doing, the entire record has been carefully considered, including proposed findings of fact, conclusions and briefs filed by counsel as well as their responses.³ Those findings not adopted, either in the form proposed or in substance, are rejected either as not supported by the evidence or as involving immaterial matters.

In making findings, the administrative law judge has concerned himself with matters pertinent to the scope of the remand. The Commission's opinion rendered when the case was originally decided contains numerous findings of fact. Hearing Examiner Johnson's initial decision also contains a large number of findings that are not inconsistent with the Commission's opinion and so have been adopted by the Commission. While it would serve no purpose to recite all existing findings in this matter, a reference to certain of such findings and bases of decision would be appropriate at this point to place the case in perspective.

PERTINENT COMMISSION FINDINGS AND HOLDINGS

Litton is a large, conglomerate corporation with numerous diversified products and a worldwide operation. Organized in 1953, its sales increased from \$3 million in 1954 to \$1.9 billion in 1968 when it had assets of over \$1.2 billion. In 1968, it had a cash flow and profits before taxes of over \$100 million. Ranked as the 39th largest industrial

² By order of Apr. 10, 1974, the Commission extended the time for the undersigned to file findings and recommendations from May 6, 1974, until July 15, 1974.

³ In making findings and recommendations, the undersigned has also had the opportunity to observe the witnesses who testified during the proceedings conducted pursuant to remand.

The National Office Machine Dealers Association ("NOMDA") was, by order of the Commission, issued May 16, 1973, permitted to participate in the reopened proceeding to the extent of submitting a brief before the administrative law judge. However, no such brief has been filed.

corporation in the United States in 1969, nearly half of its growth is attributable to over 100 acquisitions since 1953 (C.O. 3). Its largest acquisition up to that time was that of Monroe Calculating Machine Company in 1958, a manufacturer of computers, calculators and adding machines (C.O. 3; I.D. 22).

Litton was interested in entering the typewriter industry as early as 1958, but negotiations with Underwood Typewriter Company in that year failed. It did enter that industry in 1965 when it acquired Royal-McBee Corporation. Subsequently, in 1966, it acquired Willy Feiler, GmbH, a German manufacturer which had a prototype of an electric portable typewriter. In November 1966, Litton acquired Imperial Typewriter Company, Ltd. of England. In September 1968, just prior to the Triumph-Adler acquisition, Litton's Royal Division manufactured and sold office and portable typewriters, both manual and electric.⁴ It had typewriter plants in Hartford, Conn., Springfield, Mo., Leiden, Holland, Leicester, England and Hull, England. Since 1967, Royal has also distributed "Mercury" portable typewriters manufactured by the Silver Seiko Company of Japan (C.O. 4, 5).

The Springfield, Mo. plant was closed in Apr. 1969 and the production of portable typewriters was moved to the Hartford, Connecticut plant. The Hartford, Connecticut plant stopped producing high-priced office electric typewriters in the summer of 1969. In July 1972, Royal announced the cessation of typewriter production at the Hartford, Conn. plant (C.O. 13).

Litton is organized into four operating groups with some 120 divisions. One of the four groups is the Business Systems and Equipment group which includes business machines and systems, retail and revenue systems, typewriters, office copiers, specialty paper and printing and forms (C.O. 3; I.D. 18-19). This is the group with which we are primarily concerned. In 1970, this group accounted for 29 percent of Litton's total sales (C.O. 4).

Litton is considered a leader in developing and applying advanced management techniques and in combining managerial resources, technical capability, marketing skill and research and development capability to build new businesses and to improve old businesses (C.O. 4). At the same time, each of its 120 divisions is operated as a separate business with its own responsibility for research and development, manufacturing, marketing and investments. Corporate level management, however, does assist and does intercede when a division is operating poorly (I.D. 19-21).

⁴ The Willy Feiler electric portable had design problems and, as of 1970, its production was planned to be phased out (C.O. 5). Similarly, Imperial's office electric typewriter proved unsuccessful and it was unable to develop a portable electric typewriter. Shortly after its acquisition, Imperial's production of office electric and portable manual typewriters was discontinued (I.D. 24-25).

Triumph and Adler were German companies, both of which manufactured typewriters, among other things. After Triumph acquired the controlling interest of Adler in 1958, both Triumph and Adler typewriters were sold in the United States. In 1963, American marketing was limited to the Adler machine. Adler had introduced an office electric typewriter in 1962. By 1963, Triumph-Adler had captured the major portion of the typewriter market in Germany and was supplying about 45 percent of Europe's requirements. By 1968, Adler typewriters were sold in more than 100 markets around the world.⁵ Triumph-Adler produces both office electric and portable electric typewriters. As of late 1968, it produced all it sold and was operating at full capacity. By 1964, there were 400-500 Adler dealers in the United States. The number doubled by 1968 and reached 1000 by 1969 (C.O. 6-7, 10).⁶

Triumph-Adler maintained a substantial research and development (R&D) staff with proven capabilities. Its R&D staff was increased by 25 to 50 percent between 1968 and 1970. In 1968 its R&D outlay, expressed as a percentage of sales, was almost twice as much as that of Royal. Early in 1956, Triumph-Adler undertook to design an electric typewriter "from the ground up." This was the basic machine that provided the foundation for Triumph-Adler's technological superiority in the office electric typewriter market with the result that Adler office electric typewriters are considered to be on a par with the best, since they require fewer service calls. After four years of development work, Triumph-Adler announced a portable electric typewriter in 1967 which it introduced into the United States in 1969 (C.O. 7-8).

The Commission found that the product markets within which the legality of the challenged acquisition might be tested were the overall typewriter market, the office and portable typewriter markets which together constitute the overall market, and the submarkets of the office typewriter market which are (1) office electric typewriters, (2) office manual typewriters and (3) self-contained code media automatic typewriters (C.O. 22-24).

The Office Electric Typewriter Submarket

Office electrics and office manuals, while performing similar functions, have distinct physical characteristics which are economically significant and, most important, there is a substantial price difference between them. In recent years, office electric typewriters have become popular and have made remarkable inroads in the office typewriter

⁵ In order to avoid being too dependent on the fluctuations of any one foreign market and to realize the highest revenues from its products, Triumph-Adler's policy is that of not exporting over 60-65 percent of typewriter production outside of Germany (I.D. 60).

⁶ Triumph-Adler sells its typewriters in the United States only through independent office machine dealers. It does not sell to mass merchandisers (I.D. 61).

market. During the 1960's, the office electric typewriter submarket was the most important segment of the entire typewriter industry, both in dollar sales and in market growth. Office electric typewriter dollar sales increased from 45.8 percent of all typewriter sales to 53.3 percent in 1968 and accounted for over 65 percent of the total industry growth during that period. In 1963, \$162.9 million worth of office electric typewriters were sold in the United States. This figure went up to \$307.2 million in 1968, an increase of some 88.5 percent (C.O. 25-26, 37).

There is no basis for grouping high-priced office electrics, factory reconditioned IBM office electrics and automatic typewriters into a so-called "heavy duty" office electric typewriter submarket, as distinguished from low-priced office electrics (office compacts) and office manuals which would be termed a "light duty" office typewriter submarket. Such a breakdown of the office typewriter market by the examiner, for the purpose of measuring market shares, was rejected by the Commission (C.O. 26-30).

In rejecting the examiner's inclusion of reconditioned IBM electric typewriters in the product market, the Commission stated that it found no convincing evidence to the effect that IBM reconditioned typewriters exercise any significant and direct influence upon the purchasing decisions of prospective buyers of new office electric typewriters (C.O. 30).

The Office Manual Typewriter Submarket

While the number of office manual typewriters sold in the United States declined from 466,000 in 1966 to 354,000 in 1968, the 1968 sales amount to \$90.4 million. The Commission found that, although office manuals no longer occupy the dominant position they held prior to the advent of electric typewriters and have been losing ground, they are not obsolescent and are preferred by certain classes of users; that the market is an important and profitable one and the demand is expected to level off (C.O. 25-26, 30-31; I.D. 74).

The Automatic Typewriter Submarket

While recognizing that automatic typewriters are far more expensive than conventional typewriters, the Commission took cognizance of the fact that they are offered at attractive rentals with the result that they have enjoyed growing acceptance. In finding this to be a submarket of the overall office typewriter market to be taken into account, the Commission stated:

* * * We are persuaded that automatic typewriters have established a secure foothold in the office typewriter market, and that their importance will probably increase in the years to come (C.O. 33).

The Commission, however, limited this submarket to automatic typewriters which are self-contained units and can be used as a standard electric typewriter when the code media device is not

switched on. The Commission described the automatic typewriter which was to be included as a self-contained unit consisting of a keyboard and a printer (in essence an electric typewriter) and an electronic code media control device which codes or records what is typed and is capable of being used to play back corrected, revised or repetitive products.⁷ Excluded from this submarket were various typing systems which use terminal typewriters, remote computers and others with various specialized applications (C.O. 32-33).

Consistent with the Commission's finding as to the importance and anticipated growth of the automatic typewriter submarket are the examiner's more detailed findings with respect to this category of typewriter (I.D. 82-88).

The Portable Typewriter Market

While recognizing that electric portables and manual portables may constitute separate submarkets of the portable typewriter market, the Commission found no need for purposes of its opinion to bifurcate this particular market (C.O. 35).

Competition in the Industry

Prior to World War II, four so-called historical typewriter companies controlled over 95 percent of the typewriter industry of the United States. These were Remington, Underwood, L.C. Smith & Bros. Typewriter Company and Royal. Woodstock and several European typewriter companies also sold here, as did IBM which had entered in 1933 when it acquired the rights to an electric typewriter (C.O. 10-11).

During the war, the four historical typewriter companies were required by the United States Government to discontinue the manufacture of typewriters and engage in production of war materials. IBM and Woodstock were the only two domestic typewriter companies not so bound. Woodstock continued to manufacture an office manual typewriter. IBM continued to develop and produce its electric typewriter. After the war, the four historical companies resumed production of their manual typewriters. In the early 1950's, the historical companies attempted to meet the demand for electric typewriters by adding a motor to their office manuals. While the sale of office electric typewriters surpassed sales of office manual typewriters by 1962, the historical companies failed to produce a fully-electric typewriter until the mid-1960's. Royal introduced a fully-electric typewriter in 1966 (C.O. 11; I.D. 29-32).

As a result of the introduction of electric typewriters and the new competition (that of IBM and of foreign-based companies), the four historical companies no longer control the domestic typewriter

⁷ Specifically included were the IBM Magnetic Tape Selectric Typewriter (MT/ST) and the IBM Mag Card Selectric Typewriter (MC/ST), a 1969 innovation which uses magnetic cards instead of magnetic tapes.

industry. IBM emerged as the new industry leader in the office electric typewriter submarket, although in 1968 Royal ranked first in the office manual typewriter submarket with over 40 percent, second in the office electric typewriter submarket with 11.4 percent and second with 21 percent of the portable typewriter market to SCM which had 50 percent (C.O. 12).

From 1903 through 1968, twelve typewriter manufacturers competed in the sale of typewriters in the United States. These were the four historical companies: Remington Rand Division of Sperry-Rand Corporation (successor to Remington), SCM (ultimate successor to L.C. Smith & Bros. Typewriter Company), Royal, and Olivetti (acquirer of Underwood), IBM, R.C. Allen and six foreign-based companies—Triumph-Adler, Olympia, Hermes, Facit, Brother, and Nippo. Four additional companies, Friden-Singer, ITEL Corporation, American Automatic Typewriter Company and Editype Corporation, sold only automatic typewriters. Woodstock was acquired by R.C. Allen in 1950, but R.C. Allen discontinued its typewriter business in 1970 (C.O. 12, 14, 15, 18, 43).

IBM manufactures and sells throughout the world various office machines, including office electric typewriters and automatic typewriters. It does not manufacture office manual or portable typewriters. IBM's total sales of products and services in 1968 approximated \$7.2 billion, which placed it fifth among the nation's largest industrial corporations. Its electric typewriters and automatic typewriters sold in the United States are manufactured in its own plants in the United States.

After World War II, when electric typewriters became generally accepted, IBM became a modest factor in the typewriter industry. During the 1960's, it established itself as the leader in the office electric typewriter market. In 1961, IBM introduced its "Selectric" typewriter which is a single element electric typewriter. This has been called the single most important development in the typewriter industry to date. Since its introduction, it has become the dominant machine in the office electric typewriter market. It is also the standard printer generally used by the industry in code media automatic typewriters. IBM introduced its magnetic tape selectric code media automatic typewriter (MT/ST) in 1964 and, in 1969, introduced its mag card selectric code media automatic typewriter (MC/ST).

In 1969, IBM manufactured 144,230 model D standard typewriters, 51,297 model D executive typewriters and 273,280 selectric typewriters. IBM sells and services its typewriters in the United States on a direct basis through its own sales organization. In 1969, it had over 200 branch

offices and employed 2,928 salesmen and 6,178 servicemen (C.O. 16-17; I.D. 48-52).

In 1968, Royal's office typewriter operation was profitable. Its portable typewriter operation was not (C.O. 6). Royal discontinued the sale of automatic typewriters in 1968. Adler did not sell automatic typewriters (C.O. 41).

From 1948 through 1965, all of Royal's electric typewriters were based upon various means of electrifying the Royal manual typewriter. From 1961-1966, Royal had spent almost \$4 million in an attempt to design a single element printer from scratch. The project was unsuccessful and was dropped. In 1966, after being acquired by Litton, Royal introduced the 660 standard office electric typewriter. It was initially successful but soon proved to have many basic quality problems (I.D. 146-151).

The Commission, as a matter of law, rejected Litton's contention that it needed the typewriters produced by Triumph-Adler in order to prevent further decline in its position and remain competitive (C.O. 48-49). The Commission also found that Royal did not face the imminent prospect of sliding into a bankrupt position without the benefit of the challenged acquisition; that, to the contrary, contemporaneous documents from Litton-Royal files reflected confidence and optimism about Royal's future market opportunities in the United States and took for granted Royal's continuance as a substantial factor in the typewriter industry. The Commission found that the acquisition was chosen as a more economical, less risky and more expedient course of action to other alternatives for continuing to remain a viable competitor in the typewriter industry. The Commission specifically "reject[ed] the examiner's finding that, had Litton not acquired Adler, the only alternatives confronting Litton would have been either to let Royal degenerate into a bankrupt situation or to close it" (C.O. 49-51).

Barriers to Entry

Barriers to entry in terms of technological and marketing requirements were found to be formidable, especially in the office electric typewriter market. It took Royal and SCM four to five years and more of developmental work before they could successfully develop and market a fully electric office typewriter in the United States. Triumph-Adler required over five years to develop and market an electric typewriter. The task of establishing an effective marketing organization and achieving a degree of market penetration needed to attain competitive costs is time-consuming and difficult. In addition, the field is already occupied by powerful, diversified firms including IBM, Litton, Sperry-Rand, Olivetti-Underwood and SCM. These factors account for the situation that no domestic manufacturer has entered

the United States typewriter market since 1934 except through acquisitions (C.O. 43,44).

The Finding of Violation

In evaluating the probable effect of the challenged merger for purposes of ascertaining whether there had been a Section 7 violation, the Commission relied upon an analysis of market shares and market structure which showed that the horizontal merger significantly increased already existing high concentrations in the markets considered. It took heed of *United States v. Philadelphia National Bank*, 374 U.S. 321, 362-63, 365 n. 42 (1963), where it was held that any merger which effects an undue increase in concentration presumptively violates Section 7 and that where an industry is already highly concentrated, "the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great" (C.O. 36).

In assessing market shares, the Commission held that dollar revenues realized by the various sellers was not the only accurate measure. Suggested retail prices were also considered reliable criteria in measuring market positions where, as here, some sales are directly at retail while others are at wholesale. Unit sales were also deemed important (C.O. 38 n. 24).

The Commission held that an "examination of the market structure of the individual product markets showed that the markets were highly concentrated; that the horizontal merger significantly increased the existing high concentration," so that the merger violated Section 7 (C.O. 37). Thus, violation was found with respect to (1) the office electric typewriter market where the second ranking firm with 11.4 percent of the market had absorbed the sixth ranking firm with 3.2 percent (C.O. 37-39), (2) the office manual typewriter market where the top ranking firm with 41.8 percent of the market had acquired the fifth ranking firm with 3.9 percent (C.O. 40-41), (3) the overall office typewriter market where the situation was stated to parallel roughly those of the office electric and the office manual typewriter submarkets (C.O. 41), (4) the portable typewriter market where the merger resulted in the absorption of the seventh ranking firm with 1 percent of the market by the second ranking firm with 20.5 percent (C.O. 42), and (5) the typewriter industry overall wherein the second ranking firm had acquired the eighth ranking firm and had thereby increased the combined share of the top four firms from 79.7 percent to 80.3 percent (C.O. 43-44).⁸

⁸ As Triumph-Adler's share in 1968 was found to be 2.6 percent (C.O. 43), the correct figure for the combined share of the top four firms after the merger was 82.3 percent.

EVALUATION OF BASIS FOR ORDERING DIVESTITURE

It is clear from the above that, in so finding a violation of Section 7 and ordering Litton to divest itself of Triumph-Adler, the Commission anticipated the continued existence of both Royal and Triumph-Adler as viable competitors in the various markets and submarkets of the United States typewriter industry.⁹ Indeed, the Commission, in assessing the situation as of the time of the January 1969 acquisition by Litton of Triumph-Adler, rejected the examiner's finding that Litton's only alternative to the merger would have been to allow Royal to slide into bankruptcy or to discontinue the typewriter business (C.O. 51 n. 38).

This basis for ordering divestiture, however, would disappear, or at least would have to be reexamined, if, contrary to what was anticipated in the Commission's decision, it should be found that Litton, by reason of the order of divestiture, would find it necessary to withdraw from all or a major portion of the typewriter industry. For then, instead of preserving the competition of Triumph-Adler in addition to that of Royal, Triumph-Adler's competition would be preserved at the expense of losing the larger competitive force of Royal. The competition aligned against the dominant factor in the industry, IBM, would be decreased by the order of divestiture rather than maintained, as intended.

This, essentially, is respondent's position. It contends that Royal is dependent upon Triumph-Adler for its basic, competitive office electric typewriter, and that it is also dependent upon the printer of that typewriter as an essential part of its automatic typewriter which it is about to market. Litton also contends that it does not have the research and development (R&D) capabilities to develop an electric office typewriter to replace that currently supplied by Triumph-Adler or to replace the printer it needs for its automatic typewriter. According to Litton, if it is required to give up Triumph-Adler, it will have to withdraw from the office electric typewriter market and abandon its efforts to enter the automatic typewriter market.

It is necessary, therefore, under the terms of the Commission's remand order, to evaluate Litton's contentions summarized above. This must be done in the light of its alleged dependence upon Triumph-Adler and its capacity to compete without Triumph-Adler. The latter consideration, in turn, requires an assessment of the present and potential importance of various areas of the market. Such an assessment, together with a consideration of the competitive situation

⁹ This was also anticipated by Commissioner Dennison as indicated in his concurring opinion, at pp. 9-12, [82 F.T.C. 976-979] where he agreed that action should be taken to prevent the loss of a significant competitor or of even a small competitor in an industry dominated by giants.

in such areas, is also necessary to determine whether it would be in the public interest to order the divestiture.¹⁰

OVERVIEW OF INDUSTRY

Complaint counsel and respondent have conflicting views as to how the typewriter industry should be analyzed for purposes of this remand. Complaint counsel take the position that the analysis should be in terms of the particular markets and submarkets considered by the Commission in finding violations of Section 7; that the only figures to be considered are those reflecting *sales* of typewriters at *suggested retail list price* or in terms of *units*. Thus, complaint counsel have submitted, as proposed findings 10, 17 and 22, compilations of United States sales and shares by company of (1) all office typewriters at suggested retail list price and in units, (2) office electric typewriters at suggested retail list price and in units and (3) office manual typewriters at suggested retail list price and in units.¹¹

Respondent, on the other hand, contends that, for purposes of this remand, particular attention should be paid to the total office typewriter business, with emphasis on those areas or segments which are and which promise to be most active—the areas alleged by respondent as those from which it will be forced to withdraw if it is required to divest itself of Triumph-Adler. Respondent also contends that, for purposes of this remand, actual revenues are more meaningful than suggested list prices or unit sales and that lease and rental income should be included in computing revenues—that revenues should not be limited to those resulting from sales. Accordingly, respondent urges primary consideration of compilations of (1) total United States office typewriter sales, (2) total United States office electric and automatic typewriter sales and (3) total United States heavy duty office electric

¹⁰ This approach does not conflict with the Commission's holding that a merger may not be justified in order that the market position of one of the leading firms in the market not decline or by reason of other economic benefits to the acquiring company (C.O. 49). Nor is it inconsistent with the Commission's rejection, under prevailing case law, of the concept of "countervailing power" (C.O. 52-53). It is, rather, a consideration of whether divestiture would, for all practical purposes, trigger the withdrawal of the acquiring company from an industry—a consideration that is, for all practical purposes, the counterpart of taking into account whether an acquired company would otherwise have gone out of business.

Complaint counsel appear to question the propriety of considering on remand the question of whether Royal would withdraw from any portions of the market, arguing that the Commission has already held that Royal had alternatives to going out of business if it had not acquired Triumph-Adler. That finding as to the possibilities open to Royal in 1969, however, may well differ from what may be anticipated as good business judgment on the part of Litton if it is required to divest itself of Triumph-Adler in 1974. Further, Litton's petition to the Commission for reconsideration of the order of divestiture was, in large part, grounded upon the assertion that, without Triumph-Adler, it would be necessary for Litton to dispose of the assets of Royal. By granting the motion for reconsideration, the Commission is understood to have directed the undersigned to consider this contention as well as the competitive implications and the public interest in the event the assertion should be found to have substance.

¹¹ Supplementary sales figures pertaining to the entire typewriter industry and the portable typewriter submarket were not introduced on remand.

and automatic typewriter sales—all three being compilations of actual revenues including rental incomes.¹²

Limitation of Analyses to the Particular Markets and Submarkets Considered by the Commission in Finding Violations of Section 7

While the Commission found, *inter alia*, that the office typewriter market and the office manual and office electric submarkets thereof were appropriate markets within which to ascertain whether Section 7 had been violated, we are not now concerned with whether respondent should be deemed to have violated Section 7 on the basis of updated statistics relative to those markets. The question of violation has not been reopened by the Commission.

The primary question now is whether it would be in the public interest to require the divestiture of Triumph-Adler. This question, in turn, depends upon whether Litton, without Triumph-Adler, would find it necessary to get out of all or part of the typewriter industry, the relative importance of the segments of the industry that would be affected by Litton's departure and the competitive situations in the various segments, so that an appraisal may be made of the loss of Litton's competition in any particular areas *vis-a-vis* the effect of the merger in areas in which Litton might be expected to remain.

The segments that must now be considered may or may not conform to the markets and submarkets assessed by the Commission in finding violations. Even if they do not conform, they must be considered if to do so may serve to shed light upon the issues now before us. For example, while the Commission recognized that automatic typewriters constitute a submarket of office typewriters, one which showed promise of increasing in importance (C.O. 32-33), the Commission did not find a violation in that submarket since neither Royal nor Triumph-Adler made automatic typewriters (C.O. 42). Notwithstanding the lack of finding of violation in the automatic typewriter submarket, an analysis thereof is highly important on this remand.

Complaint counsel make particular objection to consideration of what respondent has termed "heavy duty" office electric typewriter sales. This term includes automatic and standard office electric typewriters to the exclusion of compact office electric and office manual typewriters. Complaint counsel rely upon the fact that the Commission rejected the examiner's delineation of such a market (C.O. 26-29).¹³ The typewriters encompassed by the term "heavy duty," however, are the very products for which Litton claims it depends upon Triumph-Adler,

¹² Respondent also relies upon compilations of total United States office typewriter sales and total United States office electric and automatic typewriter sales, both in terms of suggested retail list price, but reflecting rental income as well as sales revenues.

¹³ As then defined by the examiner, "heavy duty" office electric typewriters would also have included IBM factory reconditioned electric typewriters.

the very products which it claims it must discontinue if divestiture is ordered. The situation with respect to "heavy duty" office electric typewriters, therefore, is one appropriately to be examined within the terms of the remand.

In appraising the viability of Royal as well as that of other competitors in the market, it is necessary to view the market as a whole. But it is also necessary to ascertain the success and potential of competitors in the relatively important and growing segments of the market regardless of whether these segments coincide with the submarket delineations that were utilized in finding Section 7 violations. A study of sales with respect to those areas where the action is—where the dollars are to be garnered—is significant both to judge whether respondent would stay in business under particular circumstances and to evaluate the public interest in the event respondent's competition and potential competition should be lost to particular segments of the industry.

Inclusion of Rental and Lease Income

Complaint counsel's contention that lease and rental income should be ignored is rejected. Such income accounts for a large share of IBM's total revenue and its omission would distort any consideration of what is occurring in the office typewriter market. For example, as of the end of 1972, IBM had out on lease or rental 66,836 office electric typewriters and 55,431 automatic typewriters (RX 2164, *in camera*). During 1972, IBM received \$17.9 million in lease or rental income for office electric typewriters and \$127.3 million for leased or rented automatic typewriters, or total earnings of \$145.2 million (RX 2008, *in camera*).¹⁴ This figure represents more than 25 percent of all revenues realized by all companies combined (including IBM) from office typewriters in 1972 and is substantially the same as what all companies other than IBM received from office typewriters in that year (RX 2105, *in camera*).¹⁵

There is no bar to jointly considering sales and rental income. Both sources constitute revenue to the company from which profits on the typewriters are derived. Indeed, a lease of a typewriter for a period may be considered as a "sale" of the use of the typewriter for that period. The rental income reflects the competitive weight to be given to

¹⁴ In 1972, 83.5 percent of IBM's revenues from automatic typewriters were from leases and rentals. IBM received \$127.3 million from leases and rentals and \$25.1 million from sales (RX 2007 B, *in camera*). The terms leases and rentals are used to distinguish between the length of time of the arrangement.

¹⁵ The exhibit shows that all other typewriter companies received \$128 million for their office typewriters in 1972. This is some \$17 million less than the \$145.2 million IBM received in lease and rental income during that year. The exhibit, however, does not reflect income from automatic typewriters received by those companies not shown on the exhibit. The parties disagree as to the amount in question. Respondent concedes that some \$13 million is involved (RPF 163-64), while complaint counsel assert the figure is \$19.4 million (CRB 30). See Table 5, *infra*, for discussion of this dispute.

the machine for the period rented and the impact upon IBM's competitors of typewriters leased or rented by IBM is just as real as if the machines had been sold.

It is clear, therefore, that no meaningful analysis of the office typewriter market may be made without considering income from leased and rented items.¹⁶

Consideration of Actual Revenues, Suggested Retail List Prices and Unit Sales

In its opinion, the Commission stressed the relative importance of measuring market shares in terms of suggested retail list prices and unit sales over simply comparing actual revenues of the various competitors. This was because some of the firms sold primarily at retail while others sold primarily at wholesale or some combination of the two methods. Utilization of realized revenues was deemed to commingle dollar sales at the two different wholesale and retail levels (C.O. 38 n 24).

Under the present remand, however, we are not as much interested in ascertaining market shares as we are in appraising the competitive strengths and potentials of the various firms in the industry and in the various segments thereof. An assessment of the viability of any company requires an examination of its income, for profits are realized out of income and profit goals are usually set in relationship to dollar volume of business of the company, not of its customers.

IBM makes all sales directly at retail. It offers no discounts except on sales to schools and governments (RPF 27). IBM's suggested list prices and its realized income, therefore, are substantially the same.¹⁷ Its competitors, however, sell largely through dealers who normally purchase at 40 percent off of suggested retail prices, sometimes more depending upon quantities purchased. In addition, quantity discounts are given to direct purchasing national accounts as well as to schools and governmental agencies (I.D. 90; RPF 31-33).

IBM's competitors did not receive the \$197 million suggested retail sales prices of their office typewriters sold in 1972, but only 65.5 percent of that amount, or \$128 million (CX 698, RX 2105, both *in camera*). Nor did Royal receive the \$57.1 million suggested retail sales prices of its office typewriters sold in 1972, but only 73 percent of that amount, or \$41.8 million (CX 698, RX 2105, both *in camera*).

The use of suggested retail list prices, therefore, drastically

¹⁶ This conclusion is in accord with the Commission's finding that automatic typewriters should be included as a submarket of the office typewriter market inasmuch as they do compete with other office typewriters on the basis of attractive rental offerings (C.O. 32-33).

¹⁷ Indeed, in attempting to compute suggested retail prices, IBM reported \$411.9 million as opposed to \$426.6 million in actual income (compare CX 581 B with RX 2105, both *in camera*). Hence, in comparing sales of competitors on the basis of suggested retail list prices, there is approximately a 3.5 percent understatement of IBM's revenue.

overstates the competitive viability of IBM's competitors including that of Royal, both in absolute terms and in relationship to that of IBM.¹⁸ A comparison of actual revenues is much more meaningful for purposes of this remand.

For purposes of this remand, actual revenues are also more meaningful than unit sales data. Again, we are not so much interested in market share as we are in viability of competition, with particular emphasis on appraising whether Royal would remain in business if it should be required to divest itself of Triumph-Adler. For this purpose, numbers of typewriters sold are not nearly as important as dollars received and profits realized.

Unit sales are particularly inappropriate in assessing the viability of competitors in the overall office typewriter market. In 1972, 216,324 manual typewriters were sold at a total retail list price value of \$52,475,000, or at about \$242 per unit (CXs 703 A, 704, both *in camera*). At about the same time, retail prices of representative standard office electric typewriters ranged from \$500 to \$600 (RPF 226). Automatic typewriters have a retail value of up to \$17,950 with IBM's MC/ST valued at about \$10,000 (CPF 123 n 4). It would be relatively meaningless, in assessing viability, to know the numbers of typewriters sold by the various companies in the office typewriter market unless the units were differentiated by category. Even then, because of the variances among typewriters within a category, revenue received is a more meaningful measure of viability.

There is still an additional reason for preferring an analysis of revenue over unit sales. This is the practical difficulty of constructing unit sales. As noted above, as of the end of 1972, IBM had out on lease or rental 66,836 standard office electric typewriters and 55,431 automatic typewriters, a total of 122,267 units.¹⁹ This is approximately the same number of office typewriter units that Olivetti, the third largest competitor, sold that year (CXs 703, 705, both *in camera*). In computing units, however, the same weight may not be given to machines sold and those rented. A sold machine is counted as one unit in the year of sale. A rented machine, however, may be rented for a number of years and would produce income for each of those years. It could be counted as a unit in years subsequent to the first no more than a typewriter sold in a prior year, but still in use in subsequent years, could be counted as a unit in those subsequent years. On this record, there is no practical way of giving appropriate comparative weights to

¹⁸ Since IBM sells directly to consumers, the retail price is revenue to IBM. In order to compare the viability of Royal and the competition afforded by others in the market, their revenues should also be considered. Dollar revenues, from which profits are derived, are what Royal will look at in deciding whether to stay in business.

¹⁹ IBM had 118,358 units on lease or rental at the end of 1971 and 117,272 units on lease or rental at the end of 1970 (RX 2164, *in camera*).

machines sold and leased in a given year other than considering revenues.

Market Statistics

In evaluating the statistics reflecting the competitive situation, therefore, primary weight will be given to revenues received, with additional consideration given to computations reflecting suggested retail list prices and unit sales, as appropriate. The following tables are relevant to the matter under consideration.

[EDITORS NOTE: Tables 1-11 are not reproduced here for the reason that they have been placed in *in camera* files.]

Another pertinent market statistic relates to the relative importance of IBM's Selectric typewriter, the only single-element typewriter on the market today.²⁰ In 1972, IBM's revenue from Selectrics was 36 percent of all revenue of all companies from office typewriter sales. It exceeded by \$71 million all non-IBM office typewriter sales that year. Sales of Selectrics accounted for 41 percent of all heavy-duty office electric typewriter revenues, 49.6 percent of all nonautomatic office typewriter revenues and 59.2 percent of all office electric typewriter sales revenues realized in the United States by all companies in 1972 (RXs 2105, 2007 B, 2008 B, all *in camera*).

As indicated previously, the Commission refused to include reconditioned IBM electric typewriters in the product market (C.O. 30). For purposes of remand, it is here noted that in 1972, IBM received \$17.9 million on sales and rentals of reconditioned demonstrator electric typewriters to schools and reconditioned used electric typewriters to wholesale distributors (RXs 2007 B, 2008 B, both *in camera*). IBM's \$17.9 million in revenues from reconditioned demonstrator and used office electric typewriters was exceeded only by Royal's \$29.5 million and Olivetti's \$24 million in revenues from office electric typewriters. (See Table 3, *supra*.)

The record on remand contains no additional sales data covering the United States portable typewriter market. Thus, the latest data in the record is to the effect that, in 1968, SCM accounted for 50 percent of a \$178 million market computed at suggested retail prices, Royal was second largest with 21.5 percent and Adler was the seventh ranking firm with 1 percent (C.O. 42). In terms of actual revenues received, the total market was \$114.3 million, with SCM's share 52 percent, Royal's share 22 percent and Adler's share 1 percent. In 1969, in terms of actual revenues received, the total market was \$117.6 million, with SCM's

²⁰ This has been noted by the Commission as the most important development in the typewriter industry to date, the dominant machine in the office electric typewriter market and the standard printer in code media automatic typewriters (C.O. 17).

share 57 percent, Royal's share 16.3 percent and Adler's share 1.3 percent (I.D. 121).

With the foregoing statistical analyses in mind, we now turn to respondent's contention that, without Triumph-Adler, it would be forced to withdraw from the typewriter market.

REMOVAL OF LITTON FROM TYPEWRITER MARKET

Events Leading to Litton's Acquisition of and Dependence upon Triumph-Adler

Prior to its acquisition of Triumph-Adler in January 1969, respondent's overall office typewriter sales were decreasing whether measured in absolute revenues, suggested retail prices or market shares.²¹ Its office electric typewriter sales increased slightly in 1967, but dropped in 1968.²² As for a heavy duty standard electric, its sales were only \$3.9 million in 1965. It introduced the Royal 660 standard office electric in 1966 with initial success, but that machine had many basic quality problems and, by November 1967, sales began to decline substantially (I.D. 147-51, 156).²³ Royal's sales of both manual typewriters and compact office electric typewriters were declining. Its share of sales of compact electric typewriters was also declining.²⁴

Faced with declining sales and an unacceptable standard electric typewriter (Royal 660), it was concluded that there was no way to keep Royal viable with its current product lines (I.D. 156-57). The alternatives were (1) internal development of an office electric machine, (2) distribution of an office electric machine and (3) acquisition of a foreign manufacturer with a good electric machine and a strong market position abroad (C.O. 51). Respondent opted for alternative number 3 and, in January 1969, acquired Triumph-Adler.

Respondent phased out production of the Royal 660 standard electric typewriter in 1969 (Tr. 7762-63; Tr. R. 856-57) and, effective January

²¹ Actual revenues decreased from \$60.5 million (18.5 percent share) in 1966 to \$58.8 million (17.1 percent share) in 1967 to \$53 million (14 percent share) in 1968. Based on suggested retail list prices, the decrease was from \$80.7 million (19.1 percent share) in 1966 to \$77.1 million (17.8 percent share) in 1967 to \$72 million (16 percent share) in 1968. (See Tables 1 & 2, *supra*.)

²² Based on suggested retail list prices, Royal's figures were \$30.6 million (11.1 percent share) in 1966, \$35.7 million (12.4 percent share) in 1967 and \$34.9 million (11.4 percent share) in 1968 (CX 702, *in camera*). Share percentages are slightly overstated as they do not take into account IBM's rental revenues.

²³ Heavy duty office electric typewriter sales increased (in actual revenues) from \$3.9 million in 1965 to \$6.3 million in 1966 and \$15.8 million in 1967. But by 1968, revenues had fallen to \$12.7 million (Table 8, *supra*). These figures do reflect a small amount of automatic typewriter sales in 1965, 1966 and 1967. (Compare Table 7, *supra* and CX 702, *in camera*, which reflect, in suggested retail list prices, automatic typewriter sales by Royal of \$.77 million in 1965, \$1.3 million in 1966 and \$.9 million in 1967. The tables show there were no revenues from automatic typewriters by 1968. See also C.O. 41).

²⁴ In 1966, Royal sold 187,487 manual typewriters which had a suggested retail list price value of \$48.7 million. This went down to 155,421 units and \$40.4 million in 1967 and 146,676 units and \$37.8 million in 1968 (Tables 9 and 10, *supra*).

Royal's sales (in revenues received) of electric compacts was \$17.1 million (70.7 percent share) in 1965, \$19.6 million (59.8 percent share) in 1966, \$15 million (46.8 percent share) in 1967 and \$14.8 million (39.9 percent share) in 1968. (See Table 11, *supra*.)

1970, distributed as its standard electric typewriter the model 970 which was made for it in Germany by Triumph-Adler (Tr. R. 854-55). Respondent has been attempting to develop an automatic typewriter (a computer typing system - "CTS") since 1968 (Tr. R. 862-63).²⁵ This typewriter is presently undergoing test marketing (Tr. R. 753, 1106-07). The printer used in respondent's automatic typewriter is made by Triumph-Adler. It is the same basket type that is used in the model 970 (Tr. R. 733-34, 753, 758-60, 862-62A).

IBM's Selectric is the standard printer in most code media automatic typewriters (C.O. 17). Triumph-Adler started working on a single element printer in 1968 or 1969. It will soon be ready for limited production and testing. Triumph-Adler is already working on an advanced version single element printer (Tr. R. 1392-94, *in camera*; Tr.56-57).

Thus, Litton depends upon Triumph-Adler both for its standard electric typewriter and for the printer of its proposed automatic typewriter.²⁶ It is also dependent upon Triumph-Adler for the single element printer for use in its standard electric and automatic typewriters when that printer is ready for marketing.

Direct Effects of Order Requiring Litton to Divest Itself of Triumph-Adler

(1) Standard electric and automatic typewriters.

The direct effects of an order requiring Litton to divest itself of Triumph-Adler, therefore, would be to stop Litton from selling standard electric typewriters and remove its capability to enter the automatic typewriter market. Thus, Litton would be foreclosed from competing for a share of those revenues which, in 1972, constituted 88.62 percent of all revenues realized from the sale and lease of office typewriters in the United States (application of Tables 1 and 8, *supra*).²⁷ In the office electric typewriter submarket, it would be foreclosed from competing for sales of standard electrics which, in 1972, accounted for 89.27 percent of all revenues in that submarket. (application of Tables 3 and 11, *supra*.)

If forced to divest Triumph-Adler, respondent would not only lose its

²⁵ The project originally started with Royal in 1966 and was then known as the Overland project (CPF 300).

²⁶ Royal's lightweight typewriter, formerly model 560, has been drastically redesigned by Triumph-Adler's research and development personnel in Germany and is being marketed as model 590. It would require complete reengineering to perform as a heavy duty machine. The extent of redesign necessary to make the machine suitable as a standard electric typewriter or to be used as the printer in an automatic typewriter would be almost as extensive as starting from scratch to make a new heavy duty office typewriter. Royal does not have design and mechanical engineers capable of doing this (Tr. R. 879-80, 884-85, 1104-06).

²⁷ Automatic typewriters account for 31.85 percent and standard electrics account for the other 56.77 percent (application of Tables 1 and 5, *supra*; also Tables 3 and 11, *supra*). Complaint counsel have objected to considering automatic typewriters as part of overall statistics because of their relatively high costs. Excluding automatic typewriters, standard electric typewriters account for 83.29 percent of revenues from all office typewriters (application of Tables 3 and 11, *supra*).

standard electric typewriter and the printer for use in its projected automatic typewriter, but it would also lose the R&D capability necessary to develop such a typewriter and printer. As already found by the Commission, Triumph-Adler had a substantial R&D staff with proven capabilities. This staff was increased by 25 to 50 percent between 1960 and 1970. In 1968, Triumph-Adler's R&D expenditures, expressed as a percentage of sales, were almost twice as large as Royal's (C.O. 8). R&D outlays at Triumph-Adler have increased at a faster rate since the acquisition than before. Triumph-Adler now has an R&D staff of between 600 to 700 with half working on electro-mechanical devices (including typewriters). It has successfully developed a single element printer for use in an automatic typewriter and is already developing an improved printer for that purpose. The Triumph-Adler single element typewriter is soon to be test marketed (CPF 321-23).

Royal, on the other hand, has no R&D personnel capable of conceiving and developing a typewriter. When the model 970 was introduced, Royal had 130 employees engaged in R&D work. Today Royal has five sustaining engineers, only one of whom has a degree. The rest of its R&D staff are draftsmen or model shop employees. The function of Royal's R&D staff of some 30 to 40 persons is to handle service complaints (CPF 306-07; RPF 231).²⁸

There can be no question that, at least with respect to standard electric and automatic typewriters, Royal has no product, production or R&D and that it is totally dependent upon Triumph-Adler. This is conceded by complaint counsel (CPF 334, 442).²⁹

(2) Compact electric and manual typewriters.

Litton would not be directly foreclosed by the loss of Triumph-Adler from competing for revenues realized from the sale of compact electric and manual typewriters. The sale of compacts, however, accounts for only 6.82 percent of total office typewriter sales revenues (application

²⁸ Royal does have a separate R&D staff of about nine people engaged in developing everything for its automatic typewriter except the printer which was developed by Triumph-Adler. These R&D personnel have been working continuously on development of the CTS since 1969 (CPF 308-09).

²⁹ Complaint counsel's position appears to be that Litton has allowed this situation to develop despite the complaint's challenge to the merger and the protective agreement with Commission counsel whereby Litton agreed to operate Triumph-Adler separately and to maintain it independent of any other Litton division (see C.O. 10 n. 7); that, under such circumstances, Litton's dependence upon Triumph-Adler should be disregarded in reaching a decision on remand.

To the contrary, Litton is not deemed to have violated the protective agreement. Triumph-Adler has been maintained independent to the extent agreed to. Litton has not been shown to have taken any action with respect to Triumph-Adler that would impede the carrying out of an order of divestiture. Further, there is no question but that Litton acquired Triumph-Adler in order to secure and make use of its products and R&D capabilities. The discontinuance of a Royal product that was unsatisfactory and the steps taken to rely upon Triumph-Adler's products and R&D personnel, together with the dismantling of an unnecessary and unsatisfactory Royal R&D contingent, has not been shown to be other than the exercise of good business judgment under the circumstances. The obligation of the Commission remains to determine what relief would best serve the public interest, not to punish Litton for not having taken steps to develop Royal as an independently viable competitor.

of Tables 1 and 11, *supra*), 10 PERCENT of total office typewriter sales revenues excluding the sale of automatic typewriters (application of Tables 3 and 11, *supra*) and 10.73 percent of all revenues in the office electric typewriter submarket (application of Tables 3 and 11, *supra*). While revenues from the sale of compact office electric typewriters increased from \$24.2 million in 1965 to \$45million in 1969, revenues decreased to \$39.2 million in 1972. Royal's revenues from this type of typewriter went down from \$17.1 million in 1965 to \$13.8 million in 1972 and its share of revenues received has decreased each year from 70.7 percent in 1965 to 35.1 percent in 1972 (Table 11, *supra*).

Accepting the Commission's holding that compact office electric typewriters should be included in the office electric typewriter submarket (C.O. 26-29), the statistical projection for compact office electric typewriters still does not afford much promise for Litton's ability to compete in the typewriter market overall or in the office electric typewriter submarket.

The office manual typewriter market, measured in units sold, decreased from 465,949 in 1966 to 216,324 in 1972. Royal's unit sales decreased from 187,487 (a 40.2 percent share) in 1966 to 74,360 (a 34.4 percent share) in 1972 (Table 10, *supra*). Measured on the basis of suggested retail list price, the market decreased from \$119.3 million in 1966 to \$53.7 million in 1972. Royal's sales, also measured on the basis of suggested retail list price, decreased from \$48.7 million (a 40.9 percent share) to \$17.6 million (a 32.9 percent share). In 1972, manuals accounted for only 8.8 percent of the total office typewriter market, computed on the basis of suggested retail list price. (Table 9, *supra*.) Even excluding automatic typewriters, the share is only 11.6 percent (application of Tables 4 and 9, *supra*).³⁰

In its opinion (C.O. 30), the Commission held that manuals constituted an economically important submarket and that, while it had lost ground since 1968, the demand was expected to level off. At the time of that opinion, 1968 was the last year for which actual sales figures were available to the Commission. The record on remand now provides sales figures for 1972 which negate the expectancy of a leveling off of demand for manual typewriters.

In units sold, the market from 1968 to 1972 has decreased from 354,351 to 216,324. Based on suggested retail list price, the market over that period has decreased from \$90.4 million to \$53.7 million. On that same basis, market share has decreased from 19.9 percent to 8.8

³⁰ The above analysis is given in terms of suggested retail list price, since this was the measure used by the Commission in computing market share. In terms of revenues realized, a basis more appropriate when appraising the competitive viability of a company, office manual typewriter sales in 1972 were only \$31.7 million, 5.7 percent of the total office typewriter sales of \$554.7 million (RX 2107, *in camera*). Excluding automatic typewriters, the share was still only 8.1 percent (application of Table 3, *supra*, and RX 2107, *in camera*).

percent (Tables 9 and 10, *supra*). In the face of a uniform and material decline in the sale of manual typewriters since 1966 in units sold, dollar sales and share of the market, there is now no basis for anticipating that sales in this market will level off at an economically important level, at least not one of relative competitive importance in the office typewriter market.³¹

Despite Litton's relatively large share of the manual submarket, that submarket does not afford much promise for Litton's ability to compete in the office typewriter market.

* * * * *

Royal's total revenues in 1972 from office typewriter sales was \$41.8 million (Table 1, *supra*). Its revenues from office electric typewriters was \$29.5 million (Table 3, *supra*) of which \$13.8 million was from compacts (Table 11, *supra*), leaving \$15.7 million realized from standard electric office typewriters. Thus, the direct effect of an order requiring the divestiture of Triumph-Adler would be to reduce Royal's income from the sale of typewriters by \$15.7 million annually, 37.6 percent of its office typewriter sales revenues and 53.3 percent of its office electric typewriter sales revenues. Based on 1972 figures, it would be left with annual revenues of \$13.8 million from the sale of compact office electrics and \$12.3 million from the sale of manual office typewriters. As described above, however, Royal's sales of both compact electric typewriters and manual typewriters have been decreasing, the manual typewriter submarket is itself decreasing at a substantial rate, Royal's share of revenues from the sale of compact electrics has been going down and compact sale of compact electrics has been going down and compact and manual sales account for relatively small shares of the office typewriter market.

The facts recited above reflect what would be the direct and immediate effects if respondent were to divest itself of Triumph-Adler. There is also a question of whether, as an indirect result, Litton would find it expedient, as a matter of good business judgment, also to withdraw from the sale of manual and compact electric typewriters. This question is addressed *infra*, at p. 61 [p.368, herein].

³¹ Complaint counsel argue that the sales figures developed on remand are consistent with what the Commission anticipated in its opinion, pointing out (CPF 19) that the Commission relied upon testimony to the effect that the decline in unit sales of manuals would bottom out at no less than 200,000 per year. The witness relied upon, the Manager of Marketing Services of Olympia, USA, testifying on Mar. 11, 1971, forecast a *gentle decline in the next five to ten years*, bottoming out between 200,000 to 250,000 units annually (Tr. 4902). His forecast can be given little weight in light of the steep decline to 216,324 units by the very next year.

ALTERNATIVES OPEN TO LITTON TO REINSTITUTE COMPETITIVE EFFORTS

Any appraisal of whether Litton would take steps to reinstitute competitive efforts with respect to standard electric and automatic typewriters can only be made in the light of the competitive climate. Therefore, before analyzing the various steps open to Litton, we first examine the competitive situation within which it would have to exercise its options.

Competitive Climate within Which Litton Must Choose

The situation is one of domination by IBM to the extent of making it very difficult for others to compete. In the overall office typewriter market, based on actual revenues, IBM's share has steadily increased from 50.4 percent in 1965 to 77 percent in 1972. Based on suggested retail list prices, IBM's share over this period has increased from 43 percent to 67 percent (Tables 1 and 2, *supra*). Even excluding automatic typewriters, IBM's 1972 share, based on revenues, was 67.5 percent (Table 3, *supra*); and excluding automatics, based on suggested retail list prices, its share increased from 51.7 percent in 1969 to 57.4 percent in 1972 (Table 4).³²

IBM's 1972 share of the office electric typewriter submarket, based on revenues, was 72.4 percent (Table 3, *supra*). And CX 702, *in camera*, which understates IBM's sales by not including \$17.9 million in rentals, shows that, based on suggested retail list price, IBM had 64 percent of the market.

Based on actual revenues, IBM's share of office electric and automatic typewriter sales combined increased from 67.8 percent in 1965 to 81 percent in 1972. Based on suggested retail list price, IBM's share over that period increased from 62.9 percent to 73.9 percent (Tables 6 and 7, *supra*).

The most important consideration is with regard to the type of typewriters with respect to which Litton's competitive efforts would be directly and immediately cut off if it were forced to divest itself of Triumph-Adler. These are standard electric and automatic office electrics. Here, IBM's share of revenues increased from 77 percent in 1965 to 87 percent in 1972 (Table 8, *supra*). Considering automatic typewriters alone, IBM's 1972 share, based on actual revenues, was 89 percent (Table 5, *supra*). Considering standard electric typewriters alone, IBM's 1972 share, based on actual revenues, was 81 percent (application of Tables 3 and 4, *supra*).

While the Commission refused to include reconditioned IBM electric

³² If Royal were to be divested of its standard electric typewriter, it is assumed that a major portion of its lost sales volume would go to IBM, thus making IBM's share even larger.

typewriters in the typewriter market for purposes of measuring market shares (C.O. 39), Litton could not, when considering whether to resume competitive efforts, ignore the fact that, in 1972, IBM received \$17.9 million on sales and rentals of reconditioned demonstrator electric typewriters to schools and reconditioned used electric typewriters through wholesale distributors (RXs 2007B, 2008B, both *in camera*).³³ How could it ignore the fact that IBM's \$17.9 million revenue in 1972 from reconditioned standard electric typewriters alone was greater than Royal's entire revenue (\$15.7 million) in that year from standard electric typewriters?

Used IBM typewriters suitable for reconditioning³⁴ are completely overhauled on a regular assembly line in IBM's Kentucky factory where new typewriters are manufactured. This includes replacement of parts, adjustments and repainting. The recons are boxed and sold through three wholesalers who, in turn, sell to key dealer accounts³⁵ and other dealers who blanket the country (Tr. R. 296-99). More NOMDA dealers sell IBM recons than any other brand of office typewriter (Tr. 6550).

Suitable demonstrators are similarly overhauled on an assembly line in IBM's Kentucky factory. These are sold directly to schools as available. This is about two or three times a year. They sell out in a relatively short period of time (Tr. R. 299-304).

The prices on recons are substantially below those for new IBM typewriters (Tr. R. 302-305, 312). Factory warranties are available (Tr. R. 305, 355-56). IBM is the only company that reconditions and sells its own typewriters (Tr. R. 351-52). These machines are a class apart from used typewriters and compete directly and successfully against other companies' new typewriters.³⁶

The competitive dominance and power of IBM which is reflected by the sales figures referred to above is substantiated by other evidence in the record. Indeed, IBM's sales appear to have been somewhat curtailed by an inability to produce up to the level of demand (RX 2026 A-B).

The Commission recognized that IBM was the industry leader in the office electric typewriter submarket and that, from 1903 to 1968, there

³³ IBM sold over 15,000 reconditioned Selectric demonstrators to schools in 1972. It received some \$7.5 million (Tr. R. 339, 334-45, *in camera*).

³⁴ Typewriters that cannot meet the standards of IBM recons are sold as is (Tr. R. 296-97).

³⁵ There are over 300 key dealers who are selected on the basis of community reputation, capability of sales force, willingness to expand operations as necessary and willingness to agree to reach specified sales quotas (Tr. R. 296-99).

³⁶ The president of NOMDA, who also owns an office machine business of his own and carries both Royal and Adler typewriters, explained how the IBM recons compete directly with new Adler and Royal typewriters (Tr. R. 488, 507-08) and how he has lost school business to IBM's recons (Tr. R. 508).

Another dealer, who carries both Adler typewriters and IBM recons, testified that these machines compete against each other on a direct basis (Tr. R. 590-91); that people like the IBM recon, it is well received and is saleable and profitable (Tr. R. 591-92).

were eleven other competitors in the typewriter market: Remington, SCM, Royal, Olivetti, R.C. Allen, Triumph-Adler, Olympia, Hermes, Facit, Brother and Nippo (C.O. 12). Allen went out of business in 1970 (C.O. 18). SCM discontinued the manufacture of office manual typewriters in 1970 (Tr. 654). In the same year, it discontinued the manufacture of standard electric office typewriters and concentrated solely on compacts (RX 1193, p. 6). SCM's self-limitation in the office typewriter market is reflected by its reduction in sales, at suggested retail list price, from \$20.6 million in 1968 to \$13.4 million in 1972 (Table 2, *supra*). Nippo sold only portable typewriters (C.O. 21-22).

Hence, in the office electric typewriter submarket, IBM now has only nine competitors. Based on actual revenues, IBM had a 72.4 percent share in 1972 and its largest competitor was Royal with only 8.1 percent. If Royal were to withdraw, the next largest competitor would be Olivetti with only 6.6 percent (Table 3, *supra*). And if Royal were to withdraw, it is to be anticipated that IBM would get the lion's share of that business. There have been no new entrants into the electric office typewriter market since 1934 (C.O. 43, 44) and none can be foreseen (CPF 437).

As previously recounted, IBM is the fifth largest industrial corporation in the United States and it manufactures in the United States the typewriters it sells here. Its "Selectric" typewriter introduced in 1961, the single most important development in the typewriter industry to date, is still the only single element typewriter on the market and is the standard printer generally used even by its competitors in their automatic typewriters. The large share of the market controlled by IBM by virtue of its Selectric typewriter is detailed *supra*, at p. 35 [p.351 herein].³⁷

The Selectric is just one example of improvements and innovations offered by IBM which keep it ahead of its competitors. See C.O. 17 and I.D. 49-50, 185 for descriptions of various features offered by IBM. Subsequent advancements include the Correcting Selectric, the Mag Card Executive and the Mag Card II with electronic memory features (TR. R. 245; RXs 2042, 2046 A-C).³⁸

At the end of 1972, IBM had almost 200 branch offices for the sale and servicing of its typewriters. It had some 3,000 salesmen and almost 5,500 typewriter repair engineers (RX 2010 B, *in camera*).

The acceptance of IBM products allows IBM to charge more for its products than its competitors do. Correspondingly, the price of IBM's

³⁷ In 1969, IBM manufactured 273,280 Selectrics, 144,230 model D standards, and 51,297 model D Executives (RS 632).

³⁸ Such innovations have meant increased business losses to competitors (TR. R. 519-21).

new typewriters sets the upper limits of competitors' prices (I.D. 178-180).

As the general sales manager for the Sperry Remington Division of Sperry-Rand explained (Tr. R. 211, *in camera*):

In the typewriter industry IBM is the typewriter everyone wants unless you can provide justification for them to buy something else.

We have attempted to provide price as a justification.³⁹

Similarly, Olympia historically has priced its standard electric typewriter at a price below IBM's in order to market the machine. However, because of the devaluation of the dollar in comparison to the German mark from February 1969 to September 1973, the Olympia typewriter, which is made in Germany, has cost 68 percent more landed in the United States. In order to remain competitive with IBM, Olympia was able to increase its prices only by 34 percent, thus substantially reducing its margin of profit (Tr. R. 845-46, *in camera*; RX 2098, *in camera*).

Wang, an automatic typewriter competitor, in a report to the Securities and Exchange Commission in October 1973, stated (RX 2143, p. 13):

It is generally accepted that IBM dominates the word processing equipment market. Any price reductions or substantial changes in rental terms and discounts offered by IBM in this area will generally have a significant effect on others competing in the word processing market, and may require corresponding reductions in prices and modifications of terms of rental or sales of the Company's word processing products.

Litton, although it claims to have a better automatic typewriter than IBM, anticipates that it will have to price lower than IBM because of IBM's established position in the market (Tr. R. 761).

Redactron, which describes itself as the second largest manufacturer of editing typewriters in the world (CXs 592C, 593E),⁴⁰ stated in a November 1972 share-offering prospectus (CX 600Q):

IBM is the largest manufacturer and distributor of automatic typewriter equipment in the world and has an international sales and marketing force, service facilities and reputation. In view of IBM's position in this market, management believes that the Company will remain a minor factor in the market.

Xerox, which has acquired a printer and is developing an automatic typewriter for entry into that market (Tr. R. 399-412, *in camera*), has never considered entering the office electric typewriter market because it is a replacement market, relatively stable with little present growth (Tr. R. 444-45, *in camera*). This appraisal is consistent with the situation, previously noted, that there have been no new entrants into

³⁹ Because of increased prices that Remington has had to pay Olympia for German made typewriters following devaluation of the dollar, Remington has had to increase its prices in relation to IBM's. Consequently, Remington's sales have gone down (Tr. R. 211-213, *in camera*).

⁴⁰ Based on actual 1972 revenues, IBM had 88.8 percent of the market and Redactron and 1.5 percent (Table 5, *supra*).

the office typewriter market (except for the automatic submarket) since 1934.

The devaluation of the dollar in relationship to the German mark and the Japanese yen has helped add to IBM's dominant position. While IBM typewriters are made in America, many of the competing typewriters come from Germany and Japan.⁴¹ Thus, IBM's competitors that sell German and Japanese made machines have had to pay more for their machines which places them at an increased competitive disadvantage with IBM.

The devaluation of the dollar in relationship to the German mark began in 1969. In 1968, one dollar bought four marks. As of the end of 1972, the dollar was worth 3.2 marks. By Aug. 1973, it had dropped in value to 2.4 marks. In Jan. 1974, the value had gone up to 2.88 marks and as of Mar. 15, 1974, it was down to 2.64 marks. The dollar was worth about 360 yen until 1970, when it started to lose value, decreasing to 302 yen by the end of 1972. For most of 1973 it was worth about 265 yen, went up to 297 yen in Jan. 1974 and decreased to 286 yen as of Mar. 1974 (RRB 56-57, Appendix, Charts I and II; CPF 263, 264; RX 2104 C; Tr. R. 1199).

Using as an example a change of value from four marks for a dollar to two and one half marks per dollar (an exemplification of what occurred between 1968 and August 1973), an importer who, at four to one, had to pay \$100 for a German machine would now be required to pay \$160. This can be termed a 60 percent increase in dollar cost or a 40 percent decrease in the number of marks to buy a dollar (Tr. R. 1199-1202). The record provides examples of what this has meant to competitors of IBM.⁴²

There is insufficient evidence in the record to predict with any degree of assurance whether the devaluation experienced is a long-term or short-term matter or just where the dollar-mark, dollar-yen relationship will settle or in which direction it will go.⁴³ Suffice it to say that the devaluation as of now is a very real thing, there is nothing to

⁴¹ German or Japanese made typewriters are sold by Paillard-Hermes (Tr. 146-47; RX 1946 Z-8), Olympia (Tr. 710), Remington (RX 1980 C-E, *in camera*), Brother (C.O. 21) and, of course, by Royal and Triumph-Adler.

⁴² The following are some of the examples:

Remington was required to renegotiate the price charged it by Olympia of Germany because, in March 1973, the exchange rate for the dollar in marks had gone below 2.9 percent. The price was increased so that Remington, in turn, had to increase its prices in relation to IBM to the point that it lost sales (Tr. R. 178, 211-12, *in camera*; Tr. 194-95; CX 644).

Due to devaluation, the Olympia typewriter, as of September 1973, cost 68 percent more to Olympia in the United States than in 1969. In order to attempt to remain competitive with IBM, Olympia increased its prices only by 34 percent. It was forced to absorb the remaining increase and reduce its margin of profit (Tr. R. 845-46, *in camera*; RX 2098, *in camera*).

Hermes, in July 1973, largely because of the devaluation of the dollar, eliminated two models of office manuals, as well as two portable typewriters, from sale in the United States (RXs 1951 B, 2094; Tr. R. 549-551, 584-85).

⁴³ Dr. Weston, an economist called by respondent, stated his opinion that the value of the dollar would fluctuate, but that it would settle at a point not much above a three mark value; that the situation with respect to the yen was just about the same (Tr. R. 1204-05, *in camera*).

indicate that the monetary relationships will return to their former levels, and the situation is still another factor favoring IBM's continued dominance.

Keeping in mind IBM's dominance of the office typewriter market to the extent recounted above as well as the limitations of opportunity in the office electric typewriter market as recognized by Xerox, we now consider the alternatives open to Litton in the event it should be required to divest itself of Triumph-Adler.

Alternative 1: Internal Development of Standard Electric Typewriter and Printer for Automatic Typewriter

The Commission has already found that there are formidable technological and marketing barriers to entering the office electric typewriter market, noting the 4-5 years it took Royal and SCM to market their electric typewriters and the more than five years it took Triumph-Adler (C.O. 44).⁴⁴ Royal, without Triumph-Adler, would be facing an even greater struggle since it has no research and development capabilities and would have to acquire R&D personnel and facilities before it could even begin to develop its own machines. Estimates of Litton executives that it would take two years to gather an R&D team capable of designing a typewriter and printer and another five to seven years to go through the various stages of design, testing, tooling and factory preparation leading up to production (Tr. R. 945-46, 1098-1100) do not appear to be out of line.

It should also be recalled that, in order to become competitive, Royal would have to develop not merely a printer, but a single element printer; that IBM introduced its "Selectric" single element printer in 1961, and it remains the only single element printer on the market.

The Litton executives' estimates are more than substantiated by the following. It took IBM ten years to develop its Selectric typewriter (RX 652 A). Triumph-Adler, with a qualified R&D staff started on the single element printer in Jan. 1969 and is scheduled to test market the product this year (Tr. R. 1100). Remington, which has been working on a single element typewriter under a licensing agreement with IBM since 1967, still had not marketed such a product (RRB 100). The Diablo printer, which has been acquired by Xerox, was designed in 1969 (RX 2066 A-D, *in camera*). Xerox' automatic typewriter using the Diablo printer is still not on the market (Tr. R. 455, *in camera*), although Xerox acquired the printer in Mar. 1972 (RX 2055, *in camera*). The record demonstrates numerous problems that have developed with regard to the printer which, so far, have kept Xerox from marketing its automatic typewriter (see, *e.g.*, RX 2077 Z-11, Z-13, *in camera*; Tr. R.

⁴⁴ It took Triumph-Adler four years of developmental work before it was able to announce an electric portable typewriter in 1967 (C.O. 8).

468-70, *in camera*). Xerox personnel have had various target dates for introduction of the Xerox automatic ranging from the fall of 1972 to July 1975. Some Xerox personnel feel the correct date is "Never" (Tr. R. 468-69, *in camera*).

IBM spent over \$5 million to develop its single element typewriter (RX 652, *in camera*). In 1971, the national typewriter manager of Remington estimated that the cost of producing a workable single element typewriter, even with the advantage of being able to use IBM's patents, would be between \$5 to \$10 million (Tr. 4591-92, *in camera*). From 1961 to 1966, Royal spent \$3.9 million in an effort to design a single element printer. Hardly any progress was made and the effort was scrapped after it was estimated that it would cost Royal as much to manufacture the typewriter as the price for which IBM was selling its Selectric (CX 418, *in camera*; Tr. 4974-75, 5609-10, 7505-06). In 1966, after Litton acquired Royal, Royal developed the 660 standard electric typewriter. This machine, however, was qualitatively unacceptable and was scrapped in favor of the 970 produced by Triumph-Adler (see, pp. 36-37 [p. 352, herein], *supra*).

Testifying in Dec. 1973, the general sales manager of Remington in charge of typewriters gave his opinion that, in view of the investment required, it would be very difficult to get production started in the United States with an office electric typewriter of any type that would be competitive in the United States (Tr. R. 216, *in camera*).

Nevertheless, complaint counsel contend that Litton should be able to develop a new typewriter and printer quickly and inexpensively, and point to OCI and Ancilex as examples of companies that have been able to do so. The president of OCI did testify to the development by his company, in a relatively short period of time and for a relatively small amount of money, of a text editing typewriter (Tr. R. 1642-1650, 1686, 1693; Tr. R. 1653-1664, 1716-1733, *in camera*). Similarly, the president of Ancilex testified to the development, in a relatively short period of time and at a relatively small cost, of a printer suitable for use in automatic typewriters. The printer would be made available as OEM equipment to companies that want to compete in the automatic typewriter market (Tr. R. 1779-81; Tr. R. 1782-1821, *in camera*).

The testimony with regard to the OCI and Ancilex products, however, falls short of describing the marketing of successful products acceptable and competitive with products already on the market. Nor can the absence of such evidence be tempered by the glowing descriptions of the products and predictions of success by the presidents of the two companies. The experiences of IBM, Triumph-Adler, Remington, Xerox and Royal itself are deemed more indicative of the problems, time and monetary expenditures that Royal may

anticipate should it endeavor to develop its own typewriter and printer.⁴⁵

As stated by Litton's vice president and group executive in charge of typewriters, "Royal's record of R&D in the past was deplorable. They don't have the capability now. It would be foolish to go back and reinvest millions and millions of dollars and take the time to try to do it with no assurance of success." (Tr. R. 825-26)

Considering IBM's entrenched position of dominance and, in view of the time required, the large expenditures involved and the risk that the products developed may be unacceptable or unprofitable, it is deemed unlikely that Litton, if required to divest itself of Triumph-Adler, would take the steps necessary to develop, produce and market its own standard electric and automatic office typewriters. This is particularly true with respect to electric typewriters where, except for mergers, no new entrants have appeared on the market since 1934.⁴⁶

Alternative 2: Procurement of Typewriter or Printer for Use in Automatic Typewriter from an Outside Source

Litton executives with responsibility for the typewriter area have unequivocally testified that Litton must have control of its own printer; that if Litton lost control of its printer by virtue of the divestiture of Triumph-Adler, good business judgment would dictate against procurement of the printer from a third party supplier and Litton would get out of the typewriter business.⁴⁷ Having heard these witnesses, and upon an evaluation of the reasons given as well as other evidence in the record, it is deemed unlikely, as a matter of good business judgment, that Litton, in the event it should be required to divest itself of Triumph-Adler, would remain in the typewriter business by means of securing typewriters and the printer from third party sources.

A prerequisite to a company becoming an effective competitor in the automatic typewriter market is that it have control of its own printer. Otherwise it is at the mercy, for a key part of the machine, of its supplier which, in all likelihood, is or may develop into a competitor (Tr. R. 758-60, 1433-35).⁴⁸

If Litton had to secure a typewriter or printer elsewhere, its price

⁴⁵ Note too that SCM discontinued the production of full-sized office electric typewriters "since the return on further investments required would not meet our standards" (RX 1193, p. 30). RX 2134 P notes several companies that withdrew from the automatic typewriter market due to lack of success. Friden-Singer, the second largest seller of automatic typewriters in 1972, is withdrawing completely from the market by the end of 1974 (Table 5, *supra*). Edityper has withdrawn from that market (RX 2072, p. 45, *in camera*).

⁴⁶ This estimate is confirmed by Xerox' decision not to enter any portion of the office typewriter market other than the automatic portion in view of the lack of opportunity in the other submarkets.

⁴⁷ Vice president of Litton and group executive, Office Communications Equipment Group responsible, *inter alia*, for typewriters - Tr. R. 757-761, 778, 818-834, 1425-26, 1434-35; executive vice president of Litton, heading the business systems and equipment activities, including typewriters - Tr. R. 958-966, 1139-1140, 1149-1152; chairman of the executive committee of Litton - Tr. R. 1072, 1078-79, 1151-52.

⁴⁸ One of the uncertainties considered by Xerox when it decided against acquiring Redactron as a means of entering the automatic typewriter market was the element of risk in that IBM was the sole source of Redactron's

(Continued)

for its typewriter would have to include the supplier's profits or else it would have to reduce its margin of profit. This would place it at a competitive disadvantage, particularly if the supplier were a competitor. In the event of shortages, the supplier-competitor would take care of itself first. There would also be problems of quality control, since Litton could not insure that the product was being manufactured in accordance with specifications (Tr. R. 758-761, 818-823). There is also the possibility that certain suppliers might go out of business, be struck by their employees or have some other crisis whereby they could not make necessary deliveries (Tr. R. 950-52).

There would be insurmountable difficulties in negotiating an acceptable long-term contract for a typewriter or printer. It is impossible to predict what quantities may be required over a long period of time. There is the danger of contracting for too many units or not enough. Then there is the problem of obsolescence. The item contracted for may become obsolete while Litton is still contractually obligated to continue to accept deliveries of an unwanted product. Litton would have to renegotiate with suppliers for advanced products, if it could, to keep competitive.⁴⁹ Because of inflation, or fluctuations in monetary exchange rates if the supplier is a foreign company, prices cannot be set absolutely for long periods, but must be subject to renegotiation. Such renegotiation, while Litton is dependent upon continued supply, would place the supplier in the driver's seat capable of imposing burdensome conditions upon Litton.⁵⁰ Retooling must take place periodically and the costs involved would again place the contractual relationship in limbo (Tr. R. 818-824).

In case of breach of contract, while Litton could sue on the contract, this would not serve to supply Litton with the necessary product while the suit was underway (Tr. R. 821-23).

These problems have all been experienced by Litton and others. Sperry-Rand (Remington) had a supply contract for typewriters with Olympia which provided that the parties would renegotiate price if devaluation went beyond a particular point. The point was reached, price was renegotiated at a higher level and Sperry-Rand's profits

typewriter (RX 2064 G, *in camera*).

CPT Corporation, while it believed it could rely on IBM to supply the required typewriter, recognized that "discontinuance of supply for any reason could have a material adverse effect on * * * [its] operations" (RX 2118 K, *in camera*).

Wang also recognized its dependence upon its suppliers and the adverse effect a failure of adequate deliveries might create. It then noted that it was wholly dependent upon IBM for its electric typewriters which it described as "an essential element of the Company's word processing equipment [automatic typewriter]" (RX 2143, p. 12). See also CX 600J (Redactron's estimate of reliance upon IBM).

⁴⁹ It goes without saying that competitors are not about to cancel or amend contracts voluntarily in order to supply Litton with their latest innovations. Litton would always be a step or two behind. Litton could never be a leader.

⁵⁰ Litton would be in the same disadvantageous position when it was negotiating with a supplier for a needed improvement or innovation.

were reduced (Tr. R. 193-96; RX 1980 B, *in camera*). Olympia refused to ship as many typewriters as Sperry-Rand required. The contract didn't provide for enough. This resulted in loss of customers (Tr. R. 208-210, *in camera*). Sperry-Rand recognizes that it could well use the profit Olympia is making on it (Tr. R. 209, *in camera*). Sperry-Rand is also purchasing a typewriter from IBM for use in an automatic typewriter. IBM is charging top dollar and Sperry-Rand is trying to develop its own printer in order to be more competitive and flexible pricewise (Tr. R. 206-07, *in camera*).

Litton has been marketing calculators made for it by a Japanese firm. However, it has not been able to secure the quantities it requires (Tr. R. 926-28). It is also having quality and price problems with respect to a Japanese supplier of calculators. The product is being phased out because of these problems. (Tr. R. 1371-72, *in camera*). Another Japanese supplier of plain paper copiers has refused to comply with contract specifications regarding price and a new product and has insisted upon renegotiation. Because of uncertainties in this matter, Litton may be forced to drop this product (Tr. R. 1026-29, 1044-45, 1401-04, 1410-11, all *in camera*).

In the field of typewriters itself, Litton had a contract with a Japanese manufacturer of flat portable typewriters calling for 50,000 per year. Four months after operations under the contract, the supplier stated it would not deliver unless it got more money. When Litton tried to enforce the arbitration clause in the contract, the supplier stated that, if sued, it would go out of business. Under such compulsion, Litton agreed to a price increase. The supplier then cut down its deliveries to 30,000 per year claiming it could get more money elsewhere (Tr. R. 823). Subsequently, the supplier insisted on still more money despite the contract (Tr. R. 1409-1411, *in camera*; RX 2146 A-B, *in camera*). Litton's other Japanese supplier of portable typewriters has also insisted on a large price increase despite contract provisions. Consequently, the contract for certain typewriters is being terminated (Tr. 1413-14, 1422, *in camera*).

Printers that could be used are limited to those of IBM, Olympia, Triumph-Adler and Xerox' Diablo (Tr. R. 824-25, 958-59).⁵¹ These companies, however, are all competitors or potential competitors and they could not be relied upon to supply Litton with their most up-to-date and competitive products. Also, because of the limited number of suppliers, Litton could not negotiate a favorable contract (Tr. R. 825).

IBM gets top dollar even when selling on an OEM basis (Tr. R. 207; CX 600 J), and does not bind itself by contract (CX600 C; RX 2118K).

⁵¹ The possibility of planning to secure presently needed supplies from untested companies such as Ancilex and OCI has already been discounted.

As noted above, Olympia is under contract to supply Sperry-Rand, so there is some question whether it could take on another account, particularly since it has been unable to supply Sperry-Rand with all of its requirements. Further, as already recounted, Olympia has had to raise its prices to Sperry-Rand because of the devaluation of the dollar in relationship to German currency and this has cut into Sperry-Rand's profits. Olympia's expenses in selling its own product in the United States went up by 68 percent because of the change in the German-American exchange rate and it had to absorb half of this price increase out of its own profits in order to remain competitive with IBM (Tr. R. 845-46, *in camera*).

The same problem of negotiating a workable price would exist with regard to Triumph-Adler, which also manufactures in Germany and is confronted with the unfavorable German-American monetary exchange rate. Indeed, for fiscal year ending July 31, 1973, Litton suffered a loss, based on factory cost, of \$23.29 for each model 970 secured from Triumph-Adler that it sold in the United States (Tr. R. 681, 683, *in camera*, 1445; RX 2150, *in camera*). From Aug. 1, 1973 to Dec. 1, 1973, the loss was \$55.93 per unit (RX 2148, *in camera*; Tr. R. 1452-53, 1458).⁵² Even excluding nonoperating expenses, the allocation of which complaint counsel questioned, Litton lost \$6.12 on every model 970 typewriter it sold from Aug. 1, 1973, to Dec. 31, 1973 (RX 2148, *in camera*). In view of such losses on the resale of typewriters supplied by Triumph-Adler computed at factory cost, it is not likely that Litton could negotiate a price with Triumph-Adler where Triumph-Adler could make a fair profit and Litton could still compete on the resale of the typewriter in the United States.

As for Xerox' Diablo printer, Xerox itself is holding up indefinitely the marketing of its automatic typewriter because the printer is not acceptable (Tr. R. 468-470, *in camera*; RX 2077 Z-11, Z-13, *in camera*). Under such circumstances, Litton could not be expected to try for the Diablo. Further, it is doubtful whether Xerox, if it should become a competitor, would furnish Litton with its improved versions.

This is a problem appropriately perceived by Litton's executive vice president with respect to any competitor supplying products. Competitors would be prone to supply something that is ready to become

⁵² Complaint counsel have questioned respondent's method of arriving at the loss. The loss, however, was computed from official books and records of Litton as kept in the regular course of business, books used for auditing purposes, reporting to the S.E.C. and Internal Revenue. The auditing manager of Litton who computed and testified to the losses explained his accounting methods in detail and stated that he had followed accepted accounting procedures (Tr. R. 643-44, 1483-84, 1552, 1567-69, 1573-74). Complaint counsel introduced no witness to controvert the testimony of respondent's expert.

Complaint counsel contend that the cost of moving manufacturing facilities from Hartford, Conn., to England was an unusual expense and helped reflect a loss when in fact, apart from the cost of the move, there would have been a profit. The cost of the move, however, is reflected in fiscal year ending July 1972 (CX 711, *in camera*) and we are here concerned with losses incurred after that time.

obsolete when they are ready to introduce the next generation of printers. This is a field where development is rapid. A company that purchases from a competitor would always be at least a generation behind (Tr. R. 959-960, 966).

It may thus be concluded that, if forced to divest itself of Triumph-Adler, Litton, as a matter of good business judgment, would be unlikely to acquire a typewriter or printer from a third party source.

* * * * *

There is still another reason why, if forced to divest itself of Triumph-Adler, it is not reasonable to expect that Litton would take steps to get back into the mainstream of competition, *i.e.*, standard electric and automatic typewriters.

As Litton's executive vice president testified, Litton would not go into the automatic typewriter business on any basis that did not provide for production under economies of scale (Tr. R. 962). In order to compete against IBM, economies of scale are essential for survival (Tr. R. 972).

Even if Litton were to reopen its Hartford plant, it doesn't sell enough manual or electric typewriters in the United States to be profitable (Tr. R. 974-75). Litton's requirements for a 970 type machine are only about 50,000 per year and it could not achieve enough economies of scale at that level to be competitive (Tr. 1149-1150). On the other hand, with Triumph-Adler it does have certain economies of scale and is planning moves to achieve even more (Tr. R. 762-63, 869, 870, 898-99, 956-57, 971-72, 1144-46, 1151).⁵³

Alternative 3: Termination of Manual and Compact Electric Typewriter Production

A third alternative open to Litton is that of not only staying out of the standard electric and automatic portions of the market, but of also withdrawing from the production and sale of manual and compact electric office typewriters.

As of Apr. 1969, Royal's only typewriter manufacturing or assembly plant was in Hartford, Connecticut. The plant produced primarily office manuals. In July 1972, all typewriter production and assembly was stopped in Hartford and was transferred to Royal's plants in England. Royal's production of manual and compact electric typewriters is now confined to factories in England and Amsterdam (C.O. 5, 13 n 9; I.D. 45; Tr. R. 788-90, 911-12, 919-920, 1112-14).

At the time of moving the Hartford facilities to England, considera-

⁵³ The above is noted, not as a finding of countervailing power to justify a merger, but simply as a finding that, if divested of Triumph-Adler, it is unlikely that Litton would undertake the expensive steps to compete in the areas in which it depended upon Triumph-Adler.

tion was given to closing down the entire Royal typewriter operation. Estimates of between \$64.5 million to \$90 million were made as to the cost of doing so (Tr. R. 796, 805-813, 993-98, 1056-59, 1075-77).

Litton's vice president and group executive in charge of Royal estimates that the total cost now would be only \$30 million to \$40 million which would be offset by the sale of properties; that having moved production from Hartford to England with lower penalties for discharging employees, lower material costs, lower leasehold obligations and with a saleable international business, European Royal is now a marketable commodity which would offset the cost of closing (Tr. R. 916, 1090-91).

As explained by the same Litton executive, Litton could phase out its international operations at a profit. Right now the international market is doing well, but within five to ten years Litton's products will be obsolete. There will be need for a single element machine and other products to keep competitive. If Royal lost Triumph-Adler's R&D, now would be a good time to sell its foreign business (Tr. R. 826-27). This is what he is recommending (Tr. R. 834, 1139-1140; see also, Tr. R. 1116-17).

Royal maintains 59 direct sales branches for office typewriters (Tr. R. 751-52). It also distributes through some 900 office machine dealers (Tr. R. 536, 901). The normal office machine dealer carries only one brand of office typewriter (Tr. R. 487, 536-37). The only Royal typewriter worth carrying by an office machine dealer is the model 970. A dealer could not stay in business with the Royal manual as there is not sufficient call for it (Tr. R. 503, 509-10, 611). Similarly, without the model 970, Litton could not maintain its direct sales force (Tr. R. 758; see also, Tr. R. 966-68, 970). It thus appears that if Royal were to lose the model 970 typewriter, it would be hard put to distribute its manual and compact electric typewriters in the United States.

It is concluded, therefore, that if Litton were required to divest itself of Triumph-Adler, not only is it unlikely, as a matter of good business judgment, that it would take steps to produce or acquire standard electric and automatic typewriters, but it may also be anticipated that it would withdraw from the sale of manual and compact electric typewriters.⁵⁴

* * * * *

Notwithstanding all of the above, complaint counsel contend that, in light of Litton's overall diversified corporate strength, its expenditure

⁵⁴ This conclusion is also reached upon reflection of the relative unimportance of manual and compact electric office typewriters to the entire office typewriter market and Royal's steadily decreasing success in selling such typewriters in the United States.

of \$3.6 million over the past several years to develop an automatic typewriter and the outlay of over \$24 million in 1972 to move its typewriter manufacturing facilities from Hartford, Connecticut to England, it is committed to remain in the typewriter business (CPF 282, 312-13, 401). This ignores the facts (1) that the expenditures for developing the automatic typewriter were made with the assumption that the Triumph-Adler printer was to be an integral part of that machine, and (2) that the move from Hartford to England was one of retrenchment rather than expansion. By the move, Litton avoided labor problems, cut down labor costs, closed down an uneconomical plant and utilized plant capacity in England that was going to waste (Tr. R. 788-790, 976-79).

As of Dec. 1973, Litton was in the process of liquidating four divisions with combined assets of \$52 million because they were unprofitable. In addition, under a program instituted in 1972 of divesting itself of activities not deemed to be in the mainstream of its business, Litton has sold 13 divisions for some \$140 million (Tr. R. 1059). There is no basis, therefore, for complaint counsel's position that Litton is committed to remaining in the typewriter business. This is particularly so since Litton's typewriter operations have been conducted at a loss.⁵⁵

Documentary evidence introduced by Litton through Anthony Lonardo, auditing manager of its Office Communications Group, shows that the Royal-Imperial Division of Litton, which includes Royal-U.S. and the typewriter plants in England, incurred losses of \$12,475,000 in 1971, \$35,560,000 in 1972 and \$11,990,000 in 1973 (RX 1920, *in camera*). Mr. Lonardo explained in detail how RX 1920 was computed, that it was derived from the books and records kept by Litton in its normal course of business⁵⁶ and that good accounting practices were followed in all instances (see, *e.g.*, Tr. R. 643-44, 648-651, 655-59, 664-66, 1477-1485; Tr. R. 1498-1511, 1527-28, 1543-1551, 1567-69, *in camera*). There is nothing in the record to controvert Mr. Lonardo's testimony.

Complaint counsel (CPF 385) object that RX 1920, *in camera*, does not reflect profits realized by the Royal-Imperial Division on copiers. Such profits are properly excluded for our purposes since we are interested in Royal's profits or losses on typewriters. The exhibit, however, does include losses on adders and calculators which should be disregarded in arriving at the picture with regard to typewriters. Complaint counsel have computed the losses on adders and calculators (CPF 390). While complaint counsel's calculations appear to be based, in

⁵⁵ It is noteworthy that complaint counsel recommend that respondent get out of the portable typewriter market when they advise that Royal's "basic losses could be excised by closing its Consumer Products Division, a continual loser" (CPF 392).

⁵⁶ The books and records were made available to complaint counsel.

part, upon unsupported assumptions and have some internal inaccuracies and inconsistencies, even applying complaint counsel's results, we have the following:

	FY 1971	FY 1972	FY 1973
Loss shown on RX 1920, <i>in camera</i>	\$12,475,000	\$35,560,000	\$11,990,000
Less loss on adders and calculators contended for by complaint counsel	1,814,000	4,385,000	3,776,000
Loss on typewriters	\$10,661,000	\$31,175,000	\$8,214,000

The \$24,459,000 loss realized in 1972 by virtue of moving facilities from Hartford to England is an unusual one-time expense and should be excluded when appraising Royal's typewriter profit picture. Thus, the losses arrived at, applying the exclusions contended for by complaint counsel, are \$10,661,000 in 1971, \$6,716,000 in 1972 and \$8,214,000 in 1973.⁵⁷

PUBLIC INTEREST IN LITTON'S WITHDRAWAL FROM OFFICE
TYPEWRITER MARKET

Withdrawal from Entire Office Typewriter Market

We have seen that IBM is the dominant factor in the office typewriter market in terms of its overall share and increasing strength (particularly in those portions of the market which are most important), in terms of its ability to set pricing levels, in terms of its technological superiority as evidenced by its Selectric typewriter, and on the basis of its vast sales and service system; that IBM dominates to the extent of making it very difficult for others to compete.

At CPF 430, complaint counsel refer to past opportunities Litton had "to develop an office electric typewriter which would be competitive with the IBM products." Again, at CPF 433, complaint counsel speak in terms of Royal's and Adler's capability "to provide competition to IBM in the various typewriter lines." These statements accurately reflect the record to the effect that competition in the office typewriter market narrows itself down to an effort by others to compete with IBM. (See, *e.g.*, pp. 48-49 [p. 360-61 herein], *supra.*)

On the basis of a statistical analysis alone, it must be concluded that it would be anticompetitive and against the public interest if Litton were to withdraw from the office typewriter market. In the total market, IBM's share in 1972, based on suggested retail list price, was

⁵⁷ It is recognized that the above computation mixes figures utilized by respondent's and complaint counsel's different approaches to the evaluation of Royal's losses and that complaint counsel, if they were to follow respondent's method, might contend for larger losses for adders and calculators. The computation is nevertheless deemed adequate to demonstrate that Royal's typewriter endeavors have not been profitable for the past three years.

67.4 percent. Royal was second with 9.4 percent and Olivetti was third with 6.8 percent (Table 2, *supra*). If Litton were to withdraw from the entire office typewriter market, it would mean the loss of IBM's largest competitor with the likelihood that IBM would acquire the lion's portion of Litton's share and so be even more dominant. The loss of Royal's competitive effort reflected by its 9.4 percent share of the market would be more anticompetitive than the loss of Adler's independent anticompetitive effort and the merger of its 3 percent share with the Litton effort.⁵⁸

Cessation of Efforts to Compete in Automatic Submarket

The automatic typewriter submarket has already been found by the Commission to promise increasing growth and importance in future years (C.O. 33). This is the area perceived by Xerox to promise the greatest growth and profit opportunity (Tr. R. 444-45, *in camera*; RX 2072, pp. 17, 48, 83, *in camera*). In this submarket, in 1972, IBM had 88.8 percent of all revenues received. Its dominance is further reflected by the fact that the company with the second largest share of revenues, Friden-Singer with 6.3 percent, is withdrawing from the market, leaving Ty-Data and Redactron as the next largest competitors with but 1.6 percent and 1.5 percent of revenues, respectively (Table 5, *supra*).⁵⁹ Further, Redactron which, by November 1972, described itself as the second largest manufacturer in this submarket, predicted that it would remain a minor factor because of IBM's dominant position (CX 600 Q).

As the Commission found, IBM's Selectric printer has become the standard printer in the automatic typewriters of its competitors (C.O. 17; I.D. 49). This situation still exists (RPF 55, 79, 84, 85, 86, 92, 93, 95, 96, 99, 100, 102, 104; CPF 170, 177, 182, 185, 189, 365).⁶⁰

Given a situation where the automatic typewriter submarket is so dominated by one firm and where its competitors are dependent upon it for the use of its printer, it would be procompetitive and in the public interest for the appearance of a new entrant not dependent upon that dominant company and with an established distribution system. Royal is such a potential entrant provided it can keep Triumph-Adler and utilize the Triumph-Adler printer.⁶¹ The effect of an order requiring

⁵⁸ The same conclusion must be reached upon a statistical analysis of the total office typewriter market for 1972 (exclusive of automatics), based on suggested retail prices. Here IBM had 57.4 percent of the market and Royal and Olivetti were distant second and third largest competitors with 12.4 percent and 9 percent shares, respectively. (Table 4, *supra*.) Adler's share was 4 percent. (Table 4, *supra*.)

⁵⁹ As noted on Table 5, respondent contends that only about one-half of Friden-Singer's sales in 1972 were of automatic typewriters as that term is defined in the Commission's opinion, so that its share was only some 3 percent.

⁶⁰ All but one of the firms in the automatic typewriter market are using a printer made by another firm in the office electric typewriter market (CPF 437).

⁶¹ There is no horizontal merger of market shares here to be considered. Neither Royal nor Triumph-Adler presently are in the automatic typewriter submarket.

Litton to divest itself of Triumph-Adler would be to remove Royal as a potential entrant, an entrant that is sorely needed.⁶²

Withdrawal From Office Electric Submarket

The office electric submarket of the office typewriter market was found to be the most important segment of the typewriter industry in the 1960's, both in terms of total dollar sales and market growth. The dollar value of office electric typewriters sold in the United States increased from \$162.9 million in 1963 to \$307.2 million in 1968 (C.O. 37). By 1972, the dollar value, computed at retail list price, had increased still further to \$399.8 million. IBM's share of this market, measured in terms of retail list price, was 64 percent.⁶³ Royal ranked second with 9.9 percent followed by Olivetti with 8.4 percent (CX 702, *in camera*).

Again we have a situation where IBM dominates the submarket and sells 10 times more worth of typewriters than its closest competitor. If Litton were to withdraw from the office electric typewriter submarket, it would mean the loss of IBM's largest competitor with the likelihood that IBM would acquire the lion's share of what Litton previously had so as to be even more dominant. The loss of Royal's competitive effort reflected by its 9.9 percent share of the market would be more anticompetitive than the loss of Adler's independent competitive effort and the merger of its 3.6 percent share with the Litton effort (CX 702, *in camera*).

The loss of Litton's competition in this submarket would be particularly hard-felt since it would be irreplaceable. Barriers to entry in the office electric typewriter submarket are formidable. No domestic manufacturer has entered the United States typewriter market other than by acquisitions (except for automatics) since 1934 (C.O. 43, 44). And, except for automatic typewriters, there are no new entrants in the wings (CPF 437). It is clear, therefore, that it would be anticompetitive and against the public interest if Litton were to withdraw from the electric submarket of the office typewriter market.

The same conclusion would be reached if Litton were to withdraw only from the standard electric portion of the electric submarket, but were to continue the manufacture and sale of compact electrics. Litton's 1972 revenues from office electric typewriters were \$29.5 million of which \$15.7 million or 53.3 percent was from standard office electric typewriters (application of Tables 3 and 11, *supra*). The loss of more than 50 percent of Litton's competitive effort in the electric

⁶² The President of OCI, a company that is planning to market an automatic typewriter perceived a benefit to his company if Litton were allowed to keep Triumph-Adler. It was that "any competition against IBM is helpful. * * * It is difficult for a small company to convince anyone you are for real if only IBM is in the market" (Tr. R. 1693).

⁶³ This share is approximately the same as in 1963. It does represent an increase from 58 percent in 1968. An obvious reason why IBM's share has not increased in this submarket is its large sales of automatics which can be used in place of standard electric typewriters.

submarket would still be greater than the loss of Adler's independent competitive effort by virtue of the merger.

Withdrawal from Manual Portion of Market

If Royal were to withdraw from the manual submarket of the office typewriter market, it would reduce the number of competitors in that submarket from seven to six and allow the six remaining smaller competitors to fight for Royal's leading 32.9 percent share (Table 9, *supra*). At the same time, whatever competitive impact Litton's sales of manual typewriters might have on the overall office typewriter market would be lost.

If Litton should not withdraw from the manual submarket, its share, if allowed to keep Triumph-Adler, based on 1972 figures, would increase from 33 percent to 40 percent (Table 9, *supra*). As previously developed, the manual submarket is becoming increasingly unimportant, both relatively and absolutely. Litton's sales too are rapidly decreasing. The public interest would be much better served by allowing such an increase in concentration in this relatively unimportant market than by having Litton withdraw from all or a major portion of the electric submarket and losing Litton's potential competition in the automatic submarket.⁶⁴

As previously developed, the direct effect of an order requiring the divestiture of Triumph-Adler would be to stop Litton from selling standard electric typewriters, the type of machine that, in 1972, accounted for 89 percent of all revenues in the office electric typewriter submarket and 57 percent of revenues from all office typewriters in the United States. It would also stop Litton's effort to enter the automatic typewriter submarket which, in 1972, accounted for 32 percent of all revenues realized from office typewriters. Thus, Litton would be precluded from selling those typewriters that accounted for 89 percent of all revenues received from the sale of office typewriters. This competition would be precluded in the face of the fact that IBM's 1972 share of revenues from automatic typewriters was 89 percent while its share of revenues from the sale of standard electric

⁶⁴ The same reasoning is applicable to the portable typewriter market. There, the latest evidence shows that, in 1968, SCM accounted for 50 percent of a \$178 million market, Royal was second largest with 21.5 percent and Adler ranked seventh with 1 percent (C.O. 42). Again, it would be of far greater public interest to have Litton continue as a competitor in the electric submarket of the office typewriter market and actually enter and provide competition in the automatic submarket than it would be to preclude the increase of its 21.5 percent share in the portable typewriter submarket by 1 percent.

This is particularly true since Royal does not manufacture its own portable typewriters and has cut down on the number of portable models imported from Japan into the United States (Tr. R. 815-16, Tr. 1030-31, *in camera*). The record further indicates that it is having trouble securing adequate numbers of portables from its two Japanese suppliers and is about to cancel its contract with one of them (Tr. R. 1410-14, 1422, *in camera*). Since SCM manufactures in the United States, Royal currently is subject to the problems related to the devaluation of the dollar in relationship to the yen in attempting to compete with the market leader. (See, pp. 49-51 [pp. 361-62, herein], *supra*.)

Complaint counsel's advice to respondent is to close "its Consumer Products Division [which includes portable typewriters], a continual loser" (CPF 392). Portable typewriters were also a loser in 1968 (C.O. 6).

typewriters was 81 percent; that IBM's share of revenues from standard office electric and automatic typewriters combined increased from 77 percent in 1965 to 87 percent in 1972.

Even if Litton were to continue to sell manual and compact electric typewriters it would be, in the case of manuals, in a relatively unimportant and steadily declining market and, in the case of compact electrics, it would be selling a product where Litton's sales and shares have been steadily decreasing.

Possibility of Diminution of Triumph-Adler's Competitive Effort

In evaluating the anticompetitive effect of Litton's withdrawal from the market, comparison has been made between Litton's competitive impact and that of an independent Triumph-Adler. In so doing, it has been assumed that if Triumph-Adler were divested, it would continue its competitive efforts in the United States to at least the degree reflected by its past achieved sales and market shares. Respondent, however, contends (RPF 181) that if Triumph-Adler became an independent company, the dedication of new management to remain in the United States market would have to be questioned--this because of IBM's dominance in the United States and Triumph-Adler's ability to make more money on its typewriters on sales outside of the United States.

Consideration must be given to the incentives for Triumph-Adler to remain in and become a more substantial factor in the United States market. In doing so, however, little weight is given to whether Triumph-Adler is owned by Litton as opposed to being owned by another company or becoming independent. Litton is not viewed as an altruistic entity dedicated to continue Triumph-Adler's American efforts in the face of better profit opportunities elsewhere. It is assumed that the extent to which Triumph-Adler will expend its efforts in the United States market will be determined by the exercise of good business judgment, regardless who owns or controls Triumph-Adler.

Triumph-Adler lost \$151,000 on the sale of its heavy duty office electric typewriter model 21 D in the United States in fiscal year ending July 31, 1973, a loss of \$4.50 per unit.⁶⁵ During the same period of time, it made a profit of \$2,342,000 on sales of the same model typewriter in West Germany, or \$53.21 profit per unit (Tr. R. 700-02, *in camera*). For the same fiscal year, Triumph-Adler lost \$549,000 on the sale of office manual typewriters in the United States, or a \$31.86 loss per unit (Tr. R. 713-14, *in camera*).⁶⁶ During the same period, it lost

⁶⁵ On sales of this model to schools, the loss was \$261,000, or \$37.84 per unit. On sales to commercial accounts, the profit was \$110,000, or \$4.13 per machine (Tr. R. 709-713, *in camera*).

⁶⁶ On sales of this model to schools, the loss was \$396,000, or \$36.18 per machine. On sales of this model for commercial use, the loss was \$153,000, or \$24.29 per machine (Tr. R. 718-720, *in camera*).

\$18,000 on sales of its manual typewriters in West Germany, or \$.91 per unit loss (Tr. R. 721, *in camera*).

By 1963, Triumph-Adler had control of the major portion of the German market and was supplying about 45 percent of Europe's typewriter requirements. In 1969, it sold 28 to 30 percent of the office electric typewriters sold in Germany, 50 percent of manual office typewriters and over 40 percent of the standard manual and flat portables sold there. It sold in over 100 markets around the world. However, to avoid being too dependent on any one foreign market because of fluctuations and in order to realize the highest revenue from its products, Triumph-Adler has a policy of not exporting more than 60 to 65 percent of its typewriters outside of Germany (C.O. 6; I.D. 60).

There is, therefore, a distinct possibility of a diminution of Triumph-Adler's efforts in the manual and electric submarkets of the United States office typewriter market, so that Litton's continued presence in these submarkets is of even greater public interest.

Effect on Independent Office Machine Dealers Carrying Royal Typewriters

Some 900 independent office machine dealers carry Royal office typewriters (Tr. R. 536, 901). Normally only one brand of office typewriter is carried by an office machine dealer (Tr. R. 487, 536-37). The cornerstone of the dealer's business is the typewriter. Without it there is no business (Tr. R. 495). From 25 to 50 percent of the dealer's volume is generated from service revenue (Tr. R. 486). Carrying a typewriter establishes the dealer's credibility as a knowledgeable person in that segment of the industry. Typewriter maintenance can support the dealer's service department since it accounts for more than half of his service business. The sale of typewriters, coupled with service agreements entered into at time of sale, goes far to support the dealer's service department. Without a typewriter, the dealer is apt to be unable to support his entire service department (Tr. R. 498).

If Royal were no longer to furnish office typewriters, its dealers would be hard-put to find replacement machines. There are a limited number of brands, and competitors already have their dealer networks. It would be unreasonable to expect them to add former Royal dealers who would duplicate and compete with existing outlets. Competitors' present dealers would not stand for it (Tr. R. 499, 607-08). It may be anticipated, therefore, that if Litton were to stop distributing typewriters by reason of being required to divest itself of Triumph-

Adler, many of its present office machine dealers would be forced out of business⁶⁷ or would otherwise suffer severe business losses.⁶⁸

In light of the foregoing, in the context of the other findings and considerations in this matter, it is not deemed to be in the public interest for the Commission to order Litton to divest itself of Triumph-Adler, where it is probable that the effect of that order would be to force hundreds of Royal office machine dealers out of business.

* * * * *

In summary, it would be anticompetitive and against the public interest for Litton to withdraw from the office typewriter market and to stop its efforts to enter the automatic submarket of that market. It is to be anticipated that, in the exercise of good business judgment, Litton would withdraw from the office typewriter market and terminate its efforts to enter the automatic submarket thereof if it were required to divest itself of Triumph-Adler. An order requiring such a divestiture, therefore, would itself be anticompetitive and not in the public interest. Even if, following a required divestiture of Triumph-Adler, Litton should remain in the manual submarket and the compact portion of the electric submarket, the anticompetitive effect and adverse impact on public interest with respect to the remainder of the market would far outweigh any procompetitive results with respect to the narrow and relatively unimportant segments in which Litton might remain.

RECOMMENDATIONS

On the basis of the foregoing analysis and findings, it is recommended that the Commission modify its order of Mar. 13, 1973, by *rescinding* that portion which requires Litton to divest itself of Triumph-Adler.

In making this recommendation, the undersigned has considered and deemed unacceptable complaint counsel's suggestion (CPF 446) that divestiture be ordered, but that the Commission "permit the divested Triumph-Adler to supply the model 970 to Royal for five years from the date a divestiture order is entered."

Such an order would assume that Litton, as a matter of good business judgment, would undertake to establish an adequate R&D staff and rebuild necessary production facilities. Litton, however, has no assurance that it can develop a competitive typewriter and printer, particularly one that would justify the large expenditures that would be involved.

⁶⁷ The president of NOMDA estimated that most Royal dealers would be put out of business (Tr. R. 495, 501-03).

⁶⁸ On the other hand, if Litton stays in business and merchandises its automatic typewriter, it plans to utilize Royal dealers for both sales and service of the machine (Tr. R. 763-66, 830, 899-901, 1111; RX 2103, *in camera*).

Litton is now losing some \$55 on every model 970 typewriter that it sells. This loss does not take into account any manufacturing profit to Triumph-Adler. An independent Triumph-Adler would insist on a reasonable profit on any product sold to Litton. This, in turn, would add appreciably to Litton's losses on the model 970 and make complaint counsel's suggestion even less feasible. All of the problems discussed *supra*, pp. 54-59 [pp. 364-68 herein] with regard to relying upon a third party competitor for a typewriter and printer would apply equally to Triumph-Adler being the supplier and dictate against complaint counsel's suggested solution. Litton would have the additional disadvantage that, after five years of continued promotion of the model 970, it would have to convert dealer and consumer acceptance to whatever Litton might come up with in the way of a typewriter, if anything.

Finally, complaint counsel's suggestion poses practical problems with regard to the divestiture of Triumph-Adler in that a prospective purchaser could only be offered a company which had material obligations over a five year period to a competitor. While complaint counsel's suggestion was that the Commission "permit" the divested Triumph-Adler to supply Litton with the model 970, such a "permit" would be worthless to Litton. It would require a series of contractual obligations, not only as to the model 970, but as to new generations of typewriters and printers, including the much needed single element printer.

It is specifically recommended that the portion of the order which proscribes the acquisition by Litton for ten years of any concern engaged in the manufacture of typewriters or typewriter parts or accessories, without prior approval by the Commission, remain in effect.

In 1969, Litton was the 39th largest industrial corporation in the United States. Its sales increased from \$3 million in 1954 to \$1.9 billion in 1969.⁶⁹ Nearly half of its growth during that period was attributable to acquisitions. It entered the typewriter industry in 1965 by acquiring Royal-McBee Corporation, then the second largest typewriter company in the United States. Subsequently, it acquired Willy Feiler in Germany, Imperial in England and, most recently, Triumph-Adler.

The recommendation to continue in effect the moratorium against acquisitions is made in consideration of Litton's propensity to achieve growth through acquisition, its history of acquiring typewriter companies including Triumph-Adler, which acquisition the Commission has found to violate Section 7, the small number of competitors in the typewriter industry and the high barriers to entry that exist (with the

⁶⁹ In the six months ending Jan. 31, 1972, its sales were \$1.2 billion and its assets as of Jan. 31, 1972, were over \$1.96 billion (RX 2165 B, C).

exception of the number of relatively insignificant new competitors in the automatic submarket).

ORDER MODIFYING CEASE AND DESIST ORDER

On Apr. 9, 1973, pursuant to Section 3.55 of the Commission's Rules of Practice, respondent filed with the Commission a petition for reconsideration of the order entered in this matter on Mar. 13, 1973, which required respondent to divest the assets of Triumph-Adler, and not to acquire, for a period of 10 years without the Commission's prior approval, any concern engaged in the business of manufacturing typewriters. By order dated May 16, 1973, the Commission reopened the proceedings solely for the purpose of reexamining the question of relief in its entirety, and remanded the matter to the administrative law judge to conduct hearings and to furnish the Commission with his findings and recommendations on the issue of relief.

After hearings, the administrative law judge filed "Findings on Issue of Relief and Recommendations on Remand," with the recommendations that the Commission order of Mar. 13, 1973, be modified by rescinding the provision requiring respondent to divest Triumph-Adler, but that the moratorium against acquisitions continue in effect. Complaint counsel filed an appeal from the former recommendation, and the matter was heard by the Commission on briefs and oral argument of counsel.

The Commission having duly considered the administrative law judge's recommendations, and the briefs and argument of counsel, has determined for the reasons set forth in the accompanying opinion that the order should be modified in accordance with the recommendations of the administrative law judge. Accordingly,

It is ordered, That the Commission order to cease and desist and order of divestiture entered in this matter on Mar. 13, 1973, be, and hereby is, stricken and the following order substituted:

ORDER

It is ordered, That respondent for a period of ten (10) years from the date on which this order becomes final shall cease and desist from acquiring, directly or indirectly, through subsidiaries or otherwise, the whole or any part of the stock, share capital or assets (other than products sold in the normal course of business) of any concern, corporate or non-corporate, engaged at the time of such acquisition in the business of manufacturing typewriters or typewriter parts or accessories for sale within the United States without the prior approval of the Federal Trade Commission.

The prohibition shall include, but not be confined to, the entering into of any arrangement by respondent pursuant to which respondent acquires the market share in whole or in part of such concern in any of the aforesaid product lines, (a) through such concern discontinuing manufacturing, or selling any of said products under a brand name or label it owns and thereafter manufacturing or distributing any of said products under any of respondent's brand names or labels, or (b) by reason of such concern discontinuing manufacturing any of said products and thereafter transferring to respondent customer lists or in any other way making available to respondent access to customers or customer accounts.

It is further ordered, That respondent shall, within sixty (60) days after the date of service of this order, and every sixty (60) days thereafter until respondent has fully complied with the provisions of this order submit in writing to the Federal Trade Commission a report setting forth in detail the manner and form in which respondent intends to comply, is complying, or has complied with this order.

OPINION OF THE COMMISSION

MARCH 4, 1975

BY DIXON, *Commissioner*:

On Mar. 13, 1973, the Commission issued an opinion in the above-captioned matter, holding that Litton Industries had violated Section 7 of the Clayton Act, as amended, by its Jan. 1969 acquisition of the controlling stock interest in Triumph-Werke Wurnberg A.G. ("Triumph") and Adler-Werke A.G. ("Adler"). Litton was ordered, *inter alia*, to divest "all the stock, assets, properties, rights and privileges" of Triumph-Adler within one year of the date of the order becoming final, and not to acquire, for a period of ten years, without the Commission's prior approval, any concern engaged in the business of manufacturing typewriters.

Within a month of the Commission's opinion, on Apr. 9, 1973, Litton petitioned the Commission either to modify its order of divestiture without reconsidering the entire case, or to reconsider the full merits of the case and to enter an order dismissing the complaint. Litton, in its brief and affidavits accompanying the petition, maintained that since the position of smaller companies had deteriorated in the office and portable typewriter markets "in face of the entrenched and growing positions of IBM and SCM," divestiture was not the appropriate remedy. While six United States companies manufactured typewriters at the time of the January 1969 acquisition of Triumph-Adler, at the time of the filing of the petition there was only one, IBM, selling

standard office electric typewriters, and one, SCM, manufacturing and selling portable typewriters. Litton further contended that IBM and SCM "have been able to increase their monopoly positions in the office and portable typewriter markets, respectively, because of their substantial profitability which permits them to increase their marketing effort." In addition, respondent maintained that "the evidence [of record] is overwhelming that Royal could not survive in the United States typewriter business without Triumph-Adler." This was the conclusion of the hearing examiner in the initial decision, and "events occurring since the close of the records and conditions today enforce the hearing examiner's conclusion and make it even clearer that maintaining Royal and Triumph-Adler together is necessary to promote competition in the office typewriter market in the United States."

Transmitted with the petition was a resolution of the Board of Directors of respondent's Executive Committee in which the Board resolved that it was its "judgment and conclusion * * * that the Royal Division would not be a viable competitor in the typewriter business without Triumph-Adler" and that if Litton should be required to divest Triumph-Adler "it will be necessary for Litton to dispose of the typewriter business of the Royal Division."

The National Office Machine Dealers' Association also petitioned the Commission to reconsider the divestiture order. This organization of over 900 independent office machine dealers in the United States contended that the divestiture of Triumph-Adler would force the dealers distributing Royal and Adler typewriters out of business.

Counsel supporting the complaint answered the petitions, arguing that the requests should be denied.

On May 16, 1973, the Commission ordered the reopening of the proceeding "solely for the purpose of re-examining the question of relief in its entirety." The administrative law judge, on remand, was instructed to "examine the question of appropriate relief in its entirety, and, upon completion of the hearing, [to] furnish the Commission with his findings on the issue of relief and his recommendations." Commissioner Engman did not participate in that decision, and Commissioner Jones dissented. On July 12, 1974, Administrative Law Judge Alvin L. Berman issued his "Findings on Issue of Relief and Recommendations on Remand."¹ He recommended that the ten year moratorium against acquisitions be continued, but that Litton not be required to divest Triumph-Adler.

This matter is now before the Commission on the appeal of complaint

¹ Referred to hereinafter as ALJR.

counsel from the administrative law judge's recommendation that divestiture not be required.

I

Because it is assumed that the restoration of competition in markets adversely affected by an acquisition requires a return of the acquired and acquiring firm to these markets, divestiture is ordinarily deemed "peculiarly appropriate"² relief when the acquisition is held to have violated Section 7 of the Clayton Act. In cases where the firms are competitors, divestiture will minimally bring about deconcentration in the adversely affected markets and may additionally serve to restore competition in the relevant markets by lowering or checking the rise of barriers to entry, decreasing the possibility of entrenchment, and reestablishing toehold firms. However, when only one of the involved firms will be restored to the relevant market, divestiture *may* not have these salutary effects, and the Commission will consider other relief.

While a proceeding on the question of relief in a Clayton Act Section 7 matter is unusual, it is not one of first impression. In *Diamond Alkali*, 72 F.T.C. 739 (1967), the Commission found that respondent's acquisition of Bessemer Limestone and Cement Company, a competitor of Diamond, eliminated a substantial competitive factor in the relevant line of commerce, *i.e.*, portland cement, and violated Section 7 of the Clayton Act. Respondent closed the cement facilities it was operating at the time of the acquisition, raising the question whether divestiture was the appropriate relief "in view of the fact that divestiture usually envisions a resultant situation wherein two firms exist where there had been one, and thus diminution of concentration, a circumstance which is not the case here* * *." *Id.* at 743.

The matter before us, of course, differs from *Diamond Alkali* in that there is a dispute in the instant matter as to whether divestiture of Triumph-Adler would result in restoration of two firms, or one, as it did in *Diamond Alkali*. The administrative law judge found that Litton-Royal would not remain in the relevant lines of commerce. Complaint counsel contend that Litton-Royal would not abandon the relevant lines of commerce. Our first task, then, is to determine which of these contentions is supported by the record.

II

To determine whether Litton-Royal would continue to manufacture and sell typewriters if required to divest Triumph-Adler requires preliminarily identification of the relevant markets, and then an

² *United States v. E. I. duPont de Nemours & Co.*, 366 U.S. 316, 328 (1961).

analysis of what is required of firms to operate profitably, given the nature of competition, in those relevant markets.

A. Relevant Markets

The Commission in its original opinion in this matter examined the competitive effect of Triumph-Adler's acquisition in the overall typewriter market and in the office typewriter and portable typewriter submarkets. The office typewriter submarket was divided further into the office electric and office manual submarkets. Although the Commission determined that self-contained automatic typewriters which perform ordinary office typing functions constituted a second major submarket, it was not utilized in analyzing the legality of the acquisition, as neither Litton-Royal nor Triumph-Adler had manufactured automatic typewriters from 1963 to 1968.

To measure market shares, the Commission considered unit sales (as witnesses testified, it was a "relevant" and "basic" system of measure), and manufacturers' suggested retail prices (because some firms sold primarily at retail, others at wholesale, and some in between), and dollar revenues. The emphasis was on the first two.

The Commission specifically rejected segmenting the office electric typewriter submarket into further "heavy duty" and "light duty" typewriter submarkets.

The administrative law judge on remand considered product markets and means of measuring these markets that varied in several instances from those utilized by the Commission in its opinion. He reasoned that markets and measures relevant for determining a violation may vary from those utilized in considering the question of the survival of Litton-Royal without Triumph-Adler. The administrative law judge said:

In appraising the viability of Royal as well as that of other competitors in the market, it is necessary to view the market as a whole. But it is also necessary to ascertain the success and potential of competitors in the relatively important and growing segments of the market regardless of whether these segments coincide with the submarket delineations that were utilized in finding Section 7 violations. A study of sales with respect to those areas where the action is—where the dollars are to be garnered—is significant both to judge whether respondent would stay in business under particular circumstances and to evaluate the public interest in the event respondent's competition and potential competition should be lost to particular segments of the industry. ALJR 19.

Specifically, the administrative law judge segregated revenue figures for the sale of "heavy duty" office electric typewriters. These machines, which he characterized as a "segment" of the office electric typewriter market, were included since they are "the very products for which Litton claims it depends upon Triumph-Adler, the very products which it claims it must discontinue if divestiture is ordered." ALJR.

The administrative law judge also included, as a measure of the firms' position in the relevant markets, income from the lease and rental of the relevant products as "such income accounts for a large

share of IBM's total revenue and its omission would distort any consideration of what is occurring in the office typewriter market." ALJR 19.

In addition, rather than emphasize unit sales and manufacturers' suggested prices, the administrative law judge gave primary consideration to actual revenues in determining the viability of competition and competitors. He reasoned that actual revenues best demonstrate the economic standing of firms in the market.

Finally, although the Commission did not consider in its original opinion the sale of reconditioned demonstrator typewriters to schools, and reconditioned used typewriters, for the reason that there was "no convincing evidence which shows that the IBM recons exercise any significant and direct influence upon the purchasing decision of prospective buyers of new office electrics,"³ the administrative law judge thought these sales were an important source of revenue and should not be ignored when gauging the economic viability of the firms in the market.

* * * * *

It is important to note at this juncture that, as a general proposition, the Commission when considering the competitive consequences of divestiture will reject as irrelevant evidence relating to the effects of divestiture in markets which were not found to be relevant markets for the purpose of determining the legality of the acquisition. It is the burden of respondents, as the proponent of the proposition that relief other than divestiture is appropriate, to show by a preponderance of the evidence⁴ that divestiture is unnecessary to restore competition *in the markets found to be adversely affected by the acquisition*. Since evidence relating to other, non-relevant markets can have but a tenuous connection to either anticompetitive or *de minimis* consequences of divestiture in those markets found to be affected by the acquisition, such evidence is irrelevant and inadmissible. But since the administrative law judge did not utilize "new" markets or measures for any purpose other than determining the chances of Litton-Royal's survival, we will not reject, at least on grounds of irrelevance, his findings based on these further markets and measures. In addition, it is significant that these "new" markets and measures are closely connected to those found relevant by the Commission. The "heavy duty" office electric typewriter is a segment of a market (*i.e.*, office electric typewriters) found relevant for the purposes of determining whether the Clayton Act charge was sustained. The automatic

³ *Litton Industries, Inc.*, 82 F.T.C. 970, 1000 (1973).

⁴ F.T.C. Rules of Practice, 3.43(a).

typewriter market was recognized as relevant in the Commission opinion, but, as noted above, it was not analyzed in determining legality of the acquisition, as neither Triumph-Adler nor Litton-Royal had sold automatics from 1963 to 1968. Finally, revenues which were emphasized in the remand proceeding were recognized as relevant by the Commission in its opinion, although considered relatively less important than other standards.

Before turning to an examination of the markets and other indicators that may shed light on Litton-Royal's chances of surviving without Triumph-Adler, it is necessary to consider the use of post-acquisition evidence. In remanding this matter the Commission, of course, opened the record to the admission of post-acquisition evidence on the issue of relief. Left unanswered, however, was the question of what limitations, if any, should be placed on the weight to be given such evidence. Pertinent in this regard is the Supreme Court's recent admonition concerning the utilization of post-acquisition evidence to show the anticompetitive effects of a merger: "Violators could stave off [a Clayton Act Section 7 divestiture suit] by refraining from aggressive or anticompetitive behavior when such a suit was threatened or pending." *United States v. General Dynamics Corp.*, 415 U.S. 486, 504 (1974). The Court's warning is particularly apposite here as respondent, since the 1969 acquisition, has been in a position to deplete the acquired firm or some portion of its own operation, and then contend that the divestiture would not result in the restoration of two firms, and, accordingly, divestiture might not be warranted. We recognize, then, that the probative value of evidence controlled by respondent is limited, and shall give it less weight than post-acquisition evidence that respondent had no motive or capacity to manipulate.

* * * * *

We return to the identification of relevant markets. We agree with the administrative law judge that in testing the prospects of respondent's survival without Triumph-Adler's assets, greater weight should be given to those markets and submarkets that are likely to enjoy the most growth. After all, it is reasonable to assume that bright prospects in a declining market will not induce a reasonable businessman to commit resources to the overall market if prospects are dismal in those segments of the market that are likely to experience the most growth. The record shows that the greatest growth is likely to continue in the overall electric typewriter market and the automatic typewriter submarket, and heavy duty electric "segment" of that market. Since

1967, IBM's share of these markets has increased from what was even then an impressive share.⁵ Based on market shares and excluding such considerations as potential competition and barriers to entry, IBM must be considered to be in a dominant position in these vital growth areas. In addition, none of IBM's competitors, including Litton-Royal, could be considered of sufficient market strength, based solely on their individual share of the market, to countervail the apparent competitive strength of IBM.⁶

If past unerringly foretold future, we would conclude that respondent would not do well in the important growth markets. However, the predictive value of these figures depends upon Litton-Royal's ability to overcome the obstacles that have kept it, and the other competitors of IBM, from successfully challenging IBM. We consider these obstacles next.

B. Technological Barrier

It is not disputed that the principal barrier to success in the growth typewriter markets has been, and will likely remain, technology. IBM's success in the office electric market and the automatic submarket stems in large part from its development of the electric typewriter, which is distinguishable from the products of its competitors by the single element printer. The capacity of IBM's competitors to obtain or develop a similar device is a measure of their capacity for future success in the growth markets. The administrative law judge considered Litton-Royal's prospects in this regard by examining its internal research and development capability and its capacity to obtain technology through purchase or license from IBM or other possible sources of a single element printer.

1. *The Prospects of Internal Development of a Competitive Typewriter*

We have carefully examined the record with this precise question in mind: Would it be reasonable for Litton-Royal's management, should Litton-Royal be required to divest Triumph-Adler, to attempt to create, through research and development, typewriters capable of competing with the IBM and SCM machines that have dominated the

⁵ Market shares are based in large part on sensitive *in camera* sales figures. To convey an accurate picture of the competitive positions of the firms in the relevant markets, it is not necessary to reveal this confidential data.

⁶ As to the principal nongrowth market, office manual typewriters, Litton-Royal still occupies an important position, but its share has declined substantially from 1965 to 1972, a period when industry sales fell off by close to 50 percent. In short, Litton-Royal's position has been deteriorating in a waning market. Even if respondent was to reverse the trend of declining sales of manuals, the market's prospects are so bleak that we doubt that Litton-Royal's prosperity in this market would, in the eyes of respondent's management, justify its continued presence in the overall typewriter market.

various growth markets? Litton-Royal's past efforts do not suggest an affirmative response.⁷

During the five years prior to the challenged acquisition, Litton-Royal's expenditures in research amounted to \$13.6 million, with \$3,942,000 earmarked for the development of the single element printer. The principal result of this effort was not the single element printer, however, but an office electric typewriter sold as the Royal 660, a machine that required frequent repair and failed to strengthen Litton-Royal's position in the electric typewriter market. An effort in the portable typewriter market met with similar failure. Given these failures, it is difficult to be optimistic about the capacity of Litton to develop, internally, machines capable of competing with IBM and SCM in the relevant growth markets.

Even assuming that Litton-Royal could improve on its past poor performance in research and development, the firm would require at least four years to produce a machine that would be competitive with what IBM and SCM are presently marketing. It is significant, in this connection, that SCM, whose research and development performance generally appears to have been adequate, and surely superior to that of Litton-Royal's, left the office electric typewriter market. The firm did not believe that the expenditures required to produce a machine competitive with IBM would be justified by what SCM foresaw to be the return on sales. There is nothing in the record that argues that Litton-Royal is in a more favorable position.

These considerations lead us to the same conclusion as the administrative law judge:

Considering IBM's entrenched position of dominance and, in view of the time required, the large expenditures involved and the risk that the product developed may be unacceptable or unprofitable, it is deemed unlikely that Litton, if required to divest itself of Triumph-Adler would take the steps necessary to develop, produce and market its own standard electric and automatic office typewriters. This is particularly true with respect to electric typewriters where, except for mergers, no new entrants have appeared on the market since 1934. ALJR 54.

2. *The Prospects of Acquiring a Printer from an Outside Source*

Our review of the record to determine whether it would be reasonable to expect Litton-Royal's management, if Triumph-Adler were ordered divested, to procure from an outside source the printer needed for respondent to be competitive in the growth markets, not surprisingly shows that such a course would be marked with great

⁷ Royal contends that one of the principal reasons it cannot be expected to remain in the typewriter industry is that it presently has no research and development capability. However, respondent, after the acquisition of Triumph-Adler, dismantled its own research and development effort and came to rely solely upon Triumph-Adler. Because respondent was in a position to rid itself of this capability, and so manipulate the evidence; and, in addition, had a motive for doing so (i.e., to make it appear that it was incapable of research and development, and thus gain support for its position that divestiture is not warranted), greater weight will be given to the pre-acquisition position of Litton-Royal in research and development.

uncertainty. There is no way that Litton-Royal could be assured that a supplier would maintain adequate quality controls; that shortages, strikes, or even the caprice of a supplier would not result in the discontinuance or cutback of shipments; or that changes in the monetary system would not turn a profitable arrangement into an unprofitable one. To be specific, none of the possible sources of a printer would offer to Litton-Royal a reliable source of supply. IBM, for one, will not even enter into a contract, so Litton-Royal would not be assured of a firm price or a definite supply. Olympia, which presently supplies Sperry-Rand with a single element printer, is a German firm. Since the devaluation of the dollar, its printer has become unreasonably expensive. There is also a question whether Olympia would take on another purchaser of its printer. Triumph-Adler, a potential source of supply upon divestiture, is similarly unattractive because of the uncertain foreign exchange rate.⁸ The fourth possible source, Xerox, which controls the Diablo printer, is not likely to make the printer available to a potential major competitor such as Litton-Royal. Finally, and most importantly, these possible sources of the printer would be actual or potential competitors of Litton-Royal and hence unlikely to share fully new developments and to be protective of Litton-Royal in the way that a purchaser expects from a supplier before it enters into the kind of commitment that would be required here.

Of course, these risks can only be compounded by the presence of IBM. The firm is deeply entrenched in the growth markets. In addition, IBM has the advantage of having had the single element printer since 1961 to refine and incorporate into its various systems.

Our reading of the record then leads us to conclude that Litton-Royal's management, acting as sound businessmen, could not be expected to acquire the single element printer from an outside source.

III. COMPETITIVE EFFECTS

Having found that respondent's divestiture of Triumph-Adler will likely result in Litton-Royal's departure from the relevant markets (*i.e.*, the overall typewriter market, the overall office typewriter market, the office electric market, the manual typewriter market, and the portable typewriter market), we turn to the question whether divestiture is necessary to restore competition in those markets found to have been adversely affected by the acquisition. Specifically, we

⁸ As counsel supporting the complaint point out, exchange rates may well change so that it would be profitable for Litton-Royal to purchase from a foreign firm, such as Olympia or Triumph-Adler. However, what will not change is the possibility of further unfavorable fluctuations in the world money market. Foreign suppliers will always, for this reason, be less than attractive sources of the single element printer.

have examined the record to determine whether the retention of the German firm would result in a lessening of competition, *and* whether its divestiture would be procompetitive. This entails consideration of how concentration, entry barriers, and entrenchment will be affected by (a) the loss of Litton-Royal, (b) the loss of Triumph-Adler as an independent, and (c) the presence of a combined Litton-Royal and Triumph-Adler. Only those markets found to be adversely affected will be considered in this connection.

A. Concentration

Each of the affected markets, except that of office manual typewriters, is dominated either by IBM or SCM, while each of the other firms in the market retains a small share, whether shares are measured by revenues, units sold, or suggested retail prices. Although Litton, in each market, is second in sales, its share is small, so that it is a very distant second to the dominant firm. In addition, Litton does not possess a significantly larger share than the firms beneath it. Triumph-Adler's share is invariably one of the smallest.

We agree with the administrative law judge that the departure of Litton-Royal would not result in procompetitive deconcentration, since the marketing and other capabilities which have led IBM and SCM to gain and retain a dominant position would bring about a shift of Royal's share to them.

Further, we see no significant increase in concentration resulting from Royal's retention of Triumph-Adler, both because Triumph-Adler's share in the affected markets is so small, and because Litton-Royal's share has steadily trended downwards. These markets, in brief, will remain overall very much as they were at the time of the acquisition - dominated either by IBM or SCM, with the other firms in the industry sharing fragments of the remainder.

Equally as remote is the possibility that the removal of Triumph-Adler as an independent might result in the loss of the German firm as a possible toehold to a potential entrant, or that Triumph-Adler, through internal growth and expansion, might assume a greater share of the affected markets. On the basis of a finding that Triumph-Adler, in 1973, lost \$4.50 on the sale of each heavy duty electric typewriter in the United States, while it profited by \$53.21 on the sale of each such typewriter in West Germany during that year, the administrative law judge concluded that there was a "distinct possibility of a diminution of Triumph-Adler's efforts in the [electric typewriter submarket in the] United States" ALJR 72. The lack of success in this country negates the prospect of Triumph-Adler's growth by internal expansion in the relevant markets. There is insufficient record evidence that Triumph-Adler would serve as a toehold to a potential entrant.

The manual typewriter market differs from the other relevant markets in that it is not dominated by any one firm, and both Royal and Triumph-Adler rank high in terms of sales - Royal first, and Triumph-Adler fifth. Litton-Royal's or Triumph-Adler's withdrawal from the market would have unpredictable results. It is not possible to estimate with sufficient certainty whether the top firms might divide up Litton's share, thereby increasing concentration, or whether Triumph-Adler's share might be absorbed by the smaller firms. Unlike the other relevant markets, no firm is so favorably situated that we can assume it will take over Litton-Royal's share if Triumph-Adler's divestiture is required. There is no question, however, that concentration will increase significantly if the subject acquisition is allowed to stand, and that the resultant increase in concentration is presumptively a violation of Section 7 of the Clayton Act. The administrative law judge did not analyze the basis of this presumption, but, instead, weighed the presumptively anticompetitive consequences of the acquisition in the manual typewriter market as against the procompetitive effects of the retention of Triumph-Adler by Litton-Royal in the other relevant markets. This approach is unacceptable. If divestiture is necessary to restore competition in the manual typewriter market, we must require it, even though in the other markets divestiture may be contraindicated. The Commission will not be placed in the position of justifying the anti-competitive effects in one market by the pro-competitive consequences in another. The Court, in *United States v. Philadelphia National Bank*, 374 U.S. 321, 370 (1963), rejected such an approach as "every firm in an industry could, without violating Section 7, embark on a series of mergers that would make it in the end as large as the industry leader." Hence, if the presumption stands when applied to the manual typewriter market, the divestiture will be required.

From our examination of the record, we have determined that there is evidence to rebut the "inherently anti-competitive tendency manifest by the concentration" figures. *Id.* at 366. In the manual typewriter market high concentration does not coincide with anticompetitive performance. Profits are low and sales declining. The limited number of firms in such circumstances is probably accounted for by the market's lack of promise. In the manual typewriter market, unit sales for 1965-1972 declined by almost 50 percent. Significantly, SCM discontinued the production and sale of manual typewriters, even though it at least matched the technological and marketing capabilities of the major firms in the market, and, in 1968, was the fifth ranking firm in that market. Its departure was not brought about by an inability to compete, but apparently by its lack of enthusiasm for a market where the prospects for growth and profits were dismal. The fact then that

the market is concentrated stems from a lack of interest in the market by competitors and potential entrants. In addition, any entry barriers that may be present would easily be overcome by SCM and IBM. We find, then, that since the firms remaining in the manual typewriter markets are not in a position to exploit their "oligopolistic" position, the increase in concentration resulting from Litton-Royal's retention of Triumph-Adler is not competitively significant.

B. Barriers to Entry and Entrenchment

Entry by a new firm, or growth by existing firms, in the relevant markets are conditioned by their capacity to overcome technological and marketing barriers. We find nothing in the record to indicate that these barriers to entry will be affected in any way whether Triumph-Adler is divested or retained by Litton-Royal. As for possible entrenchment, the record shows that Litton-Royal will be advantaged by the retention of Triumph-Adler. This enhancement of respondent's competitive position does not, however, amount to entrenchment. At most, it means that the firm can continue as a viable competitor in the affected markets, and expand into the growth submarkets.

Finally, then, we find it unnecessary to order the divestiture of Triumph-Adler. The German firm's return to independent status will not enhance competition, nor will its retention by Litton-Royal adversely affect competition in the relevant markets. We agree, however, that the administrative law judge's recommendation that the provision requiring respondent not to acquire, for a period of ten years without the Commission's prior approval, any firm in the business of manufacturing typewriters is necessary and should stand. Litton has a history of growth through acquisition in the typewriter market, as well as in other markets. The need for a moratorium on this means of growth has been amply demonstrated.

IN THE MATTER OF

NATIONAL DYNAMICS CORPORATION, ET AL.

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

Docket 8803. Decision, Feb. 16, 1973 - Modified Order, Mar. 4, 1975

Order modifying previous Commission order, 82 F.T.C. 488, 38 F.R. 9157, issued against a New York City seller of battery additive, VX-6 and other products, by changing the provisions of Paragraph 1 of the order to permit respondents to represent sales, earnings, and profits in a format utilizing ranges instead of

averages. Paragraph 2 was modified to require maintenance of substantiation claims made pursuant to the requirements of Paragraph 1 as modified.

Appearances

For the Commission: *Jeffrey Tureck* and *Michael McCarey*.
For the respondents: *Solomon H. Friend*, New York, N.Y..

OPINION OF THE COMMISSION

BY DIXON, *Commissioner*:

The Commission issued an order in this case on Feb. 16, 1973, from which respondents appealed to the Court of Appeals for the Second Circuit, challenging four of the six order paragraphs. The court has remanded the matter to the Commission with instructions that paragraphs 1 and 2 of the Commission's order be reformulated in accordance with the court's decision.¹

The paragraphs in question would enjoin respondents from:

1. Representing, directly or by implication, that persons purchasing respondents' products can or will derive any stated amount of sales, profits or earnings; or representing, directly or by implication, the past or present sales, profits or earnings of purchasers of respondents' products unless in fact the past sales, or profits and earnings represented, are those of a substantial number of purchasers and accurately reflect the average sales, profits or earnings of such purchasers under circumstances similar to those of the purchaser or prospective purchaser to whom the representation is made; or misrepresenting in any manner, the past, present or future sales, profits or earnings from the resale of respondents' products.

2. Failing to maintain accurate records which substantiate that the past or present sales, profits or earnings represented are accurate and are those of a substantial number of purchasers and accurately reflect the average sales, profits or earnings of such purchasers under circumstances similar to those of the purchaser or prospective purchaser to whom the representation is being made.

In framing these order provisions, the Commission sought to eliminate the substantial misrepresentations of earnings figures which were found by the administrative law judge and whose existence was unchallenged before the Court of Appeals. The court concluded, however, that the Commission had reined respondents in too tightly. It expressed disapproval of the prohibition on representations of earnings figures that were not average figures, and use of the phrase "under circumstances similar to those of the purchaser* * *" which the court

¹ *National Dynamics Corp. v. F.T.C.*, 492 F.2d 1333 (2d Cir. 1974); *cert. denied*, 419 U.S. 993 (1974). Certiorari had been sought by respondents with respect to the two paragraphs of the order which the Court of Appeals affirmed.

concluded was unduly vague. The court indicated that respondents should be able to make use of ranges of earnings in their advertisements.² Paragraph 2, a recordkeeping requirement, was remanded so that it could be changed to reflect whatever alterations were made in Paragraph 1.

The Commission on remand has considered the views of respondents and complaint counsel. Both have submitted proposed drafts of a reformulated order, and have commented on each other's proposal. While we do not doubt that the submissions evidence that "good will on both sides" which the court thought would yield a solution on remand, to say that the parties remain at odds is an understatement. The Commission has sought to address the court's mandate by retaining those portions of the broad prohibitory language in Paragraph 1 of which the court did not disapprove, while adding two provisos which make clear the right of respondents under the order to use earnings ranges and testimonials under specified conditions. The Commission believes that this order addresses the court's fundamental concern, which was to allow respondents to utilize certain common approaches to the advertising of earnings, while forbidding them to use these or other techniques to perpetuate the deceptions described in the record.

Under modified Paragraph 1, use of earnings ranges may be made provided that for any stated range (*i.e.*, \$5—10,000), respondents also provide an equally clear and conspicuous statement of the number of distributors who achieved earnings within that range, and a statement of the period of time over which the figures were compiled. In addition, the top figure for the highest earnings range may not exceed the highest earnings figure actually achieved by a distributor, to prevent, for example, use of a \$20—40,000 category when the highest achieved figure might be only \$30,000. We believe that these requirements are necessary to prevent the deceptive use of earnings ranges, without being unduly burdensome.

With respect to testimonials the Commission has taken a similar approach. Among the earnings representations found deceptive by the administrative law judge were representations of the earnings of a few exceptional individuals in a context which implied that they were typical. While the Court of Appeals did not make clear its view on the

² The court said:

We likewise do not see why NDC should be limited to advertising only the average sales or earnings of its distributors rather than be permitted to state ranges for various types of distributors provided it does not make deceptive use of unusual earnings realized only by a few.

The court did not address itself expressly to the question of earnings "testimonials." Respondents assert that these should be permitted; complaint counsel cite the quoted language as evidence that the court disapproved of such testimonials, and argue that to cite the experience of an atypical distributor in an advertisement is inherently deceptive. The above-quoted language can certainly be read to imply that the court felt that nondeceptive use could be made of unusual earnings realized only by a few. The Commission's modified order addresses this issue by requiring clarifying disclosures where earnings testimonials are used.

use of earnings testimonials, as opposed to earnings ranges, the Commission has endeavored to permit use of testimonials in a nondeceptive manner, in view of the court's general desire to permit truthful claims. The second proviso to Paragraph 1, therefore, permits accurate testimonials provided they are accompanied by (1) a disclosure of the amount of time per week or per month required by the testifying party to achieve the stated results; (2) a disclosure of the year or years during which, and the geographic area in which, the stated results were achieved; and (3) a disclosure of the median or average results of all participants, or the following statement:

IMPORTANT NOTICE: THE RESULTS ACHIEVED BY THIS PURCHASER ARE BETTER THAN, AND NOT TYPICAL OF, THE RESULTS ACHIEVED BY THE MAJORITY OF PURCHASERS WHO PARTICIPATED DURING THE TIME PERIOD DESCRIBED.

One of these last alternative disclosures must be made *only if* the results described in the testimonial do not in fact represent the average or median results achieved by purchasers of respondents' products.

The necessity for these disclosures is readily apparent. Consumers cannot possibly assess the relevance of a testimonial to their own likely experience without knowing the amount of time per week or month devoted by the testifying party to achieving the results, or the geographic area within which such results were achieved. A statement of the year or years during which the stated results were achieved is needed to ensure that testimonials either reflect recent results or consumers are aware that they do not.

The third disclosure is designed to eliminate the likelihood that a consumer will construe the testimonial of an individual as being representative of what the average participant in the program has achieved, when such performance is not representative. Even when testimonials are not accompanied by deceptive embellishments, there is a substantial likelihood that many consumers will understand them to represent a result that the average consumer can expect to achieve. Moreover, in this case respondents sought in many ways to convey to prospective purchasers that the exceptional results of individuals were not exceptional at all, for example, by stressing the ordinariness of the individuals who had achieved the unusual results. Where the results described in testimonials are not typical, we believe that the only way that deception may be avoided is by means of disclosures which indicate the lack of representativeness. An ideal solution would be a flat requirement that where stated performance is not typical, respondents be required to state affirmatively what exactly is the typical result. Only in this way is the consumer likely to be made fully aware of the extent to which the testimonial result departs from what the majority have accomplished. In recognition, however, of the fact

that detailed compilation of average or median figures for all distributors may impose a substantial burden on respondents³, our order provides, as an alternative, that respondents may state conspicuously that the performance of a testifying party is not typical, and exceeds the average. Respondents recognize, in their own proposed order, the necessity for some indication of whether or not testimonial results are typical. We have enlarged upon this recognition simply to the extent of requiring that the lack of representativeness be disclosed clearly and forcefully, in a way that its import cannot be mitigated by the text of the testimonial.⁴

With respect to the words "circumstances similar to those of the purchaser or prospective purchaser," to which the court objected, complaint counsel note that inclusion of these words may be unnecessarily cautious inasmuch as most of respondents' distributors are part-time and any figures (mean, median, range) based on the performance of a large number of distributors would necessarily be largely results of part-time performers. In light of this the Commission has determined simply to omit the language to which the court had objected.

Paragraph 2 has been modified to require maintenance of substantiation for claims made pursuant to the requirements of Paragraph 1.

The Commission has further determined to republish those portions of its order which were appealed and affirmed by the Court of Appeals or not appealed at all. An appropriate order is appended.

ORDER MODIFYING FINAL ORDER ON REMAND

This matter is before the Commission upon remand from the United States Court of Appeals for the Second Circuit for revision of Paragraphs 1 and 2 of the order, and upon briefs submitted by counsel for respondents and complaint counsel relating to said paragraphs. The Commission has determined to modify paragraphs 1 and 2 as explained in the accompanying decision, and has further determined to republish the remainder of the order in the same form as issued, such remainder having become final. Therefore,

It is ordered, That respondents National Dynamics Corporation, a corporation, and its officers, and Elliott Meyer, individually and as an officer of such corporation, and respondents' agents, representatives, and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale, or distribution of the battery additive, VX-6, or of any other products, in commerce, as

³ In this respect earnings claims may be somewhat different from typical product performance claims, as to which information regarding average performance should be readily available to the advertiser.

⁴ If respondents do not wish to maintain information allowing them to know whether or not testimonial results are typical, we think clearly the presumption must be that such results exceed the average. Respondents can avoid this disclosure by compiling and stating average or median results.

"commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that persons purchasing respondents' products can or will derive any stated amount of sales, profits, or earnings; or misrepresenting in any manner, the past, present, or future sales, profits, or earnings from the resale of respondents' products;

Provided, That the foregoing paragraph shall not be construed to prohibit:

(a) an accurate representation of any range or ranges of sales, profits, or earnings achieved by purchasers of respondents' products which includes a clear and conspicuous disclosure (in bold-face type at least equal in size to that of the representation of the range or ranges where such appear in print) of the following information:

(i) an accurate statement of the number of participants achieving sales, profits, or earnings within the stated range; and

(ii) an accurate statement of the time period in which the reported figures were achieved.

The figure purporting to be the end figure of the highest range in an advertisement may not exceed the highest amount of sales, profits, or earnings actually achieved by a purchaser.

(b) accurate testimonials regarding the sales, profits, or earnings achieved by a purchaser of respondents' products; *Provided*, That any such testimonial includes or is accompanied by the following clear and conspicuous disclosures (in bold-face type at least equal in size to that of the principal portion of the testimonial, if printed):

(i) an accurate statement of the average amount of time per week or month required by the purchaser to achieve the stated results;

(ii) an accurate statement of the year or years during which, and the geographical areas in which, the stated results were achieved; and

(iii) if the results achieved by the purchaser providing the testimonial do not represent the average or median sales (or profits or earnings, whichever is included in the testimonial) of all purchasers of respondents' products during the time period covered by the testimonial, an accurate statement of the average or median sales (or profits or earnings) of all purchasers of respondents' products during the time period covered by the testimonial, or the following statement: **IMPORTANT NOTICE: THE RESULTS ACHIEVED BY THIS PURCHASER ARE BETTER THAN, AND NOT TYPICAL OF, THE RESULTS ACHIEVED BY THE MAJORITY OF PURCHASERS WHO PARTICIPATED DURING THE TIME PERIOD DESCRIBED.**

2. Failing to maintain records which substantiate that any past or

present sales, profits, or earnings represented are accurate. Where ranges of sales, profits, or earnings are represented, such records shall be sufficient to substantiate the number of purchasers achieving results within any stated range and the time period during which such results were achieved. Where average or median figures are represented, such records shall be sufficient to substantiate that such median or average figures are accurate. Where testimonials regarding sales, profits or earnings are employed without the statement entitled "IMPORTANT NOTICE," described in Paragraph 1(b)(iii) above, such records shall be sufficient to substantiate that the performance described in the testimonial constitutes the average or median performance for all purchasers of respondents' products during the stated time period.

3. Representing, directly or by implication, contrary to fact, that any product has been approved by any laboratory or by any other organization or person.

4. Representing, directly or by implication, in any advertisement that an independent laboratory has tested any product or that any laboratory test substantiates or supports performance claims in said advertisement, unless each performance claim in said advertisement has been substantiated by a competent scientific test conducted by said laboratory or laboratories and unless such laboratory or laboratories have supplied respondents with a written report which describes, in detail, the entire test performed, including, but not limited to, the product tested, instruments used, test procedures, data, and results of such test.

5. Using, publishing, or referring to any testimonial or endorsement unless (1) such use, publication or reference is expressly authorized in writing, and unless (2) respondents have good reason to believe that at the time of such use, publication, or reference, the person or organization named subscribes to the facts and opinions therein contained.

6. Failing to deliver a copy of this order to cease and desist to all present salesmen or other persons engaged in the sale of respondents' products, and failing to secure from each such salesman or other person a signed statement acknowledging receipt of such 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 shall notify the Commission at least 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

Order

85 F.T.C.

subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of the order.

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

IN THE MATTER OF
THE COCA-COLA COMPANY, ET AL.

Docket 8855. Order, Mar. 4, 1975

On pre-trial discovery, subpoena *duces tecum* issued by the administrative law judge was quashed, and the production of documentary materials was directed.

Appearances

For the Commission: *Raymond L. Hays, William D. Henderson, Michael J. Bloom and Duncan J. Farmer.*

For the respondents: *White & Case, New York City. Gordon B. Spivack, Lord, Day & Lord, New York City. Miller, Martin, Hitching, Tipton, Lenihan & Waterhouse, Chattanooga, Tenn. Richard F. Atwood, Atlanta, Ga.*

ORDER QUASHING SUBPOENA *Duces Tecum* AND DIRECTING
PRODUCTION OF DOCUMENTARY MATERIALS

This matter is before the Commission pursuant to Section 3.23 of the Rules of Practice and Procedure. Through that provision the Commission may *sua sponte* review a decision by an administrative law judge to issue a subpoena requiring the production of Commission records under Section 3.36 of the Rules.

On Oct. 9, 1974, the administrative law judge issued a subpoena *duces tecum* which required that the Secretary of the Commission make available to the respondents certain internal agency documents. Although the respondents' motion requesting the subpoena was accompanied by a memorandum in support thereof, and complaint counsel submitted a brief in opposition, the administrative law judge did not append to the subpoena any explanation of his decision to grant the requested discovery or any indication of the "terms and conditions for the production of the material * * * as may appear necessary and appropriate for the protection of the public interest." 16 C.F.R. Section 3.36(c).

The issuance by an administrative law judge of a subpoena calling for

internal Commission documents, without any explanation as to whether or not terms and conditions should be attached to their production and disclosure, does not in all cases indicate that the administrative law judge has failed to give appropriate consideration to the requirements of Rule 3.36. But where, as here, a wide array of documents relating to a number of different subjects is involved, and where the administrative law judge has neither ordered an *in camera* inspection of the documents nor required complaint counsel to describe their nature and content, the Commission cannot but conclude that the administrative law judge did not exercise his discretion in the matter and failed to give proper consideration to the question of whether or not terms and conditions to their production and disclosure are necessary and appropriate in the public interest.

Having concluded that the administrative law judge erred in the matter, the Commission may either determine the matter itself or remand the matter to the administrative law judge with instructions to reconsider the matter and to accompany his resulting decision with an appropriate opinion. In order to avoid further delay in the completion of pre-trial proceedings before the administrative law judge, and since the documents described by the subpoena have been compiled by the Secretary and have been inspected by the Commission *in camera*, and the parties have had the opportunity to fully brief the issues relating to disclosure and production of the documents, the Commission has determined to decide the matter itself.

The modern view of pre-trial discovery, as typified by the Federal Rules of Civil Procedure, is that all parties to a proceeding should be permitted access to whatever materials may be available for the uncovering of relevant probative evidence for use at trial. This principle applies to federal agencies as well as to private litigants. To that end, the Commission's own rules provide for a sweeping array of discovery tools, including the production of internal agency records when necessary and appropriate.

While permitting the issuance of subpoenas which call for internal documents, Rule 3.36 is, however, designed to accommodate the necessity of balancing the private litigant's right to prepare a proper defense against the government's vital interest in maintaining the integrity and efficiency of the administrative process.

The courts have traditionally honored the privilege which protects the government's decision- and policymaking processes from indiscriminate disclosure. See, *e.g.*, *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939, 946 (Ct.Cl, 1958); *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 325 (D.D.C. 1966), *aff'd*, 384 F.2d 979 (C.C. Cir. 1966), *cert. den.*, 389 U.S. 952 (1967); *Cf.*,

Environmental Protection Agency v. Mink, 410 U.S. 73, 87 (1973); *United States v. Nixon*, 418 U.S. 683, 41 L.Ed. 2d 1039, 1064, n. 17 (1974).

This privilege, as do all evidentiary privileges, effects an adjustment between important but competing interests. There is, on the one hand, the public concern in revelations facilitating the just resolution of legal disputes, and, on the other, occasional but compelling public needs for confidentiality. In striking the balance in favor of nondisclosure of intra-governmental advisory and deliberative communications, the privilege subserves a preponderating policy of frank expression and discussion among those upon whom rests the responsibility for making the determinations that enable government to operate * * *. Nowhere is the public interest more vitally involved than in the fidelity of the sovereign's decision- and policymaking resources. *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, supra*, 40 F.R.D. 318, 324.

While taking action to establish a policy favoring openness and to support the citizen's right to inquire into the workings of the government, the Congress nonetheless incorporated into the Freedom of Information Act an exception for those internal memoranda which comprise the crucial decisionmaking process. 5 U.S.C. Section 552(b)(5). The Commission itself has very recently indicated that the highly sensitive nature of such documents should shield them during the discovery process in the absence of "the most compelling circumstances." *Chock Full O'Nuts Corp., Inc.*, Docket No. 8884, 82 F.T.C. 747 (Order Quashing Subpoena *Duces Tecum*, Mar. 2, 1973, p. 2).

The documents described by the subpoena are listed in Appendix A to our Opinion. Certain statistical tables contained in Documents 10, 15, 19 and 23 consist of purely factual materials and are severable from the context of the documents in which they are contained. Therefore, we are directing the Secretary to produce these tables.

Specification 2 of the subpoena, broadly interpreted, would appear to specify certain portions of a copy of an electronic data processing magnetic tape, which the Commission's Bureau of Economics has rented from Economic Systems, Inc., a private firm located at 41 W. 38th St., N.Y., N.Y. This magnetic tape includes certain purely factual information of a type generally available from published sources, respecting various companies including several companies engaged in one or another facet of the soft drink industry. However, in view of the availability of this information from alternative sources, respondents and intervenors have not shown, as required by Commission Rule 3.36(b), that this information is not available from other sources by voluntary methods or pursuant to Commission Rules 3.33-3.34. Respondents and intervenors will be permitted to seek discovery of this information from the Commission in the event that efforts to obtain such materials from alternative sources on a voluntary basis are unsuccessful.

As for the remaining materials described in the subpoena, the

Commission has concluded that all of them are of an advisory or deliberative nature and are privileged in that their disclosure "would be injurious to the consultative functions [of the Commission and its staff] which the privilege of nondisclosure protects." *Environmental Protection Agency v. Mink*, 410 U.S. 73, 87 (1973), quoting from *Kaiser Aluminum & Chemical Corp. v. United States*, *supra*, 157 F. Supp. at 946.

While these privileged documents are of such a nature that disclosure might be authorized if circumstances of the most compelling nature were presented, respondents and intervenors have not demonstrated that any such circumstances exist in this case, nor are such circumstances apparent on the basis of the record presently before the Commission.

The order we enter today will not preclude respondents and intervenors from again applying for discovery of these documents and attempting to demonstrate before the administrative law judge that, notwithstanding the privileged nature of the documents, circumstances of the most compelling nature exist to warrant their production. If respondents and intervenors do so, the administrative law judge should make appropriate findings on this point in disposing of the application for discovery. To the extent that any such application is granted, the Administrative Law Judge should explain what, if any, terms and conditions for the production of the material are necessary and appropriate for the protection of the public interest. Accordingly,

It is ordered, That the subpoena *duces tecum* be, and it hereby is, quashed without prejudice. However, the Secretary of the Commission is directed to produce and disclose to respondents and intervenors copies of the statistical tables appearing at the particular pages indicated in the following described documents: (1) pages 2-6 of a memorandum from Edward Manfield to Michael Glassman, Chief, Division of Economic Evidence, dated Nov. 30, 1972, entitled "Soft Drink Industry" (identified in Appendix A hereto as Document No. 10); (2) pages 3-5, 7, 13 and 15 of an undated attachment entitled "Proposal for the Study of the Soft Drink Industry" to a memorandum from H. Michael Mann, Director, Bureau of Economics, to the Commission, dated Feb. 4, 1972, entitled "Study of Soft Drink Industry" (Document No. 15); (3) pages 3-5, 7-8, and 12 of a memorandum from the Bureau of Economics to the Commission, dated Oct. 18, 1973, entitled "Recommendation: That an Investigation be Initiated in the Soft Drink Industry" (Document No. 19); and p. 6 of a 6-page attachment entitled "Proposal for a Study of the Soft Drink Industry" to a memorandum from Robert Lerner, Chief, Division of Industry Analysis, and James Dalton, to H. Michael Mann, Director, Bureau of Economics, dated Oct.

18, 1971, entitled "Priority Rating of Soft Drink Study" (Document No. 23). The Secretary is further directed to excise all textual materials which appear on the aforementioned pages before producing them to respondents and intervenors.

APPENDIX A

Documents Described in Specifications of Subpoena Duces Tecum

1. A memorandum to the Commission from Division of General Trade Restraints dated June 18, 1969, entitled "Budget Plan and Program for Fiscal 1971-Response to Commissioner Jones' memorandum of May 27, 1969."
2. Two tables from a compilation of tables entitled "OPPE Antitrust Benchmark Data System for Key Competitive Characteristics: Volume 1. Agriculture, Construction, Mining and Manufacturing," as follows: (a) "Profile of Competitive Characteristics, SIC 2087, Flavoring Extracts and Sirups NEC" and "Profile of Competitive Characteristics, SIC 2086, Bottled and Soft Drinks."
3. A memorandum to the Commission from Bureau of Economics dated Jan. 25, 1972, entitled "Allocation of Commission Antitrust Resources-in Response to Commission Minute of September 15, 1971, Regarding Policy Planning Program," consisting of 3 pages.
4. A memorandum from William F. Long, staff economist, Bureau of Economics, dated Jan. 25, 1972, entitled "Allocation of Commission Antitrust Resources," a 42-page document.
5. A memorandum to the Commission from H. Michael Mann, Director, Bureau of Economics, dated Apr. 4, 1972, entitled "Allocation of Commission Antitrust Resources Regarding Policy Planning Program-Response to Commission Minute of Sept. 15, 1971," a one-page document attaching "Appendix A" to the Bureau of Economics' memorandum of Jan. 25, 1972. "Appendix A" is a 15-page econometric model consisting of a series of algebraic formulations, purporting to be a highly technical demonstration of the proofs necessary to sustain many of the documents contained in that memorandum.
6. A memorandum from William F. Long, Bureau of Economics, and Edward J. Heiden, Office of Policy Planning and Evaluation, dated Mar. 30, 1972, entitled "Pilot Project to Illustrate a Policy Planning Model for the Bureau of Competition-in Response to the Minute of Feb. 8, 1972." This is a 34-page document which presents a "provisional" model of a decisionmaking framework for the allocation of the Commission's antitrust resources and incorporating the "monopoly loss calculations" developed in the Bureau of Economics' memorandum of Jan. 25, 1972 (Item 4 above), information on competitive characteristics from the OPPE benchmark data system, and estimates of the probability of enforcement success from the Bureau of Competition.
7. Tables for Long/Heiden memorandum of Mar. 31, 1972, consisting of 13 tables amounting to a total of 30 pages, summarizing, industry by industry, the quantitative data developed in the referenced memorandum (Item 6 above).
8. A memorandum to the Commission from the Bureau of Economics and Office of Policy Planning and Evaluation dated Mar. 30, 1972, entitled "Prototype Resource Allocation Model for two Antitrust Activities: Shared Monopoly and Horizontal Mergers," a 6-page response to a Commission Minute of Feb. 8, 1972.
9. A one-page memorandum to the Commission from William F. Long, Bureau of Economics, dated May 10, 1972, entitled "Errata for BE/OPPE memorandum of Mar. 30, 1972," and attached revised Table 13.
10. A memorandum from Edward Manfield to Michael Glassman, Chief, Division of

Economic Evidence, dated Nov. 30, 1972, entitled "Soft Drink Industry", summarizing the author's views concerning market structural trends in the industry.

11. A memorandum from Edward Manfield to Staff, dated July 12, 1973, entitled "A Theory of Shared Monopoly," consisting of 5 pages.

12. A memorandum from Mr. Manfield to Mr. Glassman, dated Oct. 26, 1972, entitled "Preliminary Thoughts on Franchising" (12 pages).

13. A memorandum from Mr. Manfield to Mr. Glassman, dated Mar. 2, 1973, entitled "Barriers to Entry," consisting of 20 pages.

14. A memorandum from James Dalton and Robert Lerner to H. Michael Mann, Director, Bureau of Economics, dated Oct. 7, 1971, entitled "Data Requirements and Availability for the Proposed Soft Drink Study," consisting of 2 pages.

15. A memorandum from H. Michael Mann, Director, Bureau of Economics, to the Commission, dated Feb. 4, 1972, entitled "Study of Soft Drink Industry-Response to Commission Minute of Sept. 17, 1971," consisting of 20 pages.

16. A one-page memorandum marked "CONFIDENTIAL," from Robert Lerner, Chief, Division of Industry Analysis, Bureau of Economics, to John Ferguson, Assistant General Counsel, dated Sept. 23, 1971, attaching a first draft study of the soft drink industry.

17. A memorandum from Messrs. Dalton and Lerner of the Bureau of Economics, to Messrs. Bob Lee and Dave Wilson, attorneys, dated Dec. 8, 1971, entitled "Justification for Request From Soft Drink Companies," consisting of 3 pages.

18. A memorandum from Robert Lerner, Chief, Division of Industry Analysis, and Mr. Dalton to H. Michael Mann, Director, Bureau of Economics, dated Oct. 18, 1971, entitled "Priority Rating of Soft Drink Study," consisting of 2 pages.

19. A memorandum from the Bureau of Economics to the Commission, dated Oct. 18, 1973, entitled "Recommendation: that an investigation be initiated in the soft drink industry," consisting of 17 pages.

20. A memorandum from the Bureau of Economics to the Commission dated Mar. 1, 1972, entitled "Study of Soft Drink Industry-Response to Commission Minute of Feb. 22, 1972," consisting of 5 pages.

21. A memorandum from James W. Meehan, Jr., Assistant to the Director of the Bureau of Economics, to Commissioner Mary Gardiner Jones, dated May 25, 1972, entitled "Study of the Soft Drink Industry," consisting of 7 pages.

22. A memorandum from James Dalton to H. Michael Mann, *et al.*, dated Feb. 16, 1972, entitled "Commissioner Jones' Memorandum of Feb. 15, 1972," consisting of 2 pages.

23. A memorandum from Robert Lerner, Chief, Division of Industry Analysis, to H. Michael Mann, Director, Bureau of Economics, dated Oct. 18, 1971, entitled "Priority Rating of Soft Drink Study" (same as #18 above), with appended materials as follows: pages 2 through 22 of Item #18 above; an undated 6-page document entitled "Proposal for Study of the Soft Drink Industry"; four numbered undated pages beginning "What the Study Will Do"; and another copy of the Lerner and Dalton memorandum included as an attachment to Item #15 above.