IN THE MATTER OF

LIGGETT & MYERS INCORPORATED

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

Docket 8938. Complaint, Aug. 14, 1973—Final Order, April 29, 1976

Order requiring among other things, one of the largest manufacturers of dog food, located in Durham, N.C., to divest itself completely of a competitive company within one year, subject to F.T.C. approval. Additionally, the order prohibits the company from acquiring corporations engaged in selling or producing dog foods for a period of ten years.

Appearances

For the Commission: *Steven A. Rothman, Martin A. Rosen* and *Robert J. Joseph.*

For the respondent: *Harvey D. Myerson, C. Kenneth Shank, Jr., Kurt V. Blankmeyer* and *James S. Sligar, Webster, Sheffield, Fleischmann, Hitchcock & Broodfield,* New York City, *Frederick P. Haas,* New York City and *James Scott Hill,* Senior Counsel of Liggett & Myers, Inc., Durham, N.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondent, Liggett & Myers Incorporated, a corporation, has violated the provisions of Section 7 of the Clayton Act, as amended (15 U.S.C. § 18), by reason of an acquisition more particularly described herein, and it appearing to the Commission that a proceeding by it with reference thereto would be in the public interest, hereby issues its complaint, stating its charges as follows:

THE ACQUIRING CORPORATION

Liggett & Myers Incorporated

1. Respondent, Liggett & Myers Incorporated [hereafter L&M], is a corporation organized, existing and doing business under the laws of the State of Delaware, with its principal office and place of business located at 630 Fifth Ave., New York, New York.

2. L&M is a leading producer of tobacco products in the United States. In recent years, L&M has diversified through acquisitions of companies engaged in manufacturing or distributing nontobacco products, including alcoholic beverages, animal and poultry feeds, dog foods and other consumer products.

3. In 1964, L&M commenced manufacturing and distributing dog food by acquiring Allen Products Company, Inc. Since 1964, L&M has become one of the nation's leading dog food manufacturers.

4. In fiscal 1968 and 1969, L&M was ranked by *Fortune* 219th among the Nation's largest corporations with estimated sales of $617 million and $658 million, respectively. L&M's nontobacco business accounted for approximately 35 percent of the company's net sales in 1968 and 42 percent of said sales in 1969. Dog food sales represented approximately 30.0 percent of L&M's nontobacco business in 1968 and 39 percent in 1969.

5. L&M, in the sale of its products, relies heavily on advertising. In 1969, L&M's total advertising expenditures were $41.0 million of which $5.2 million was expended for dog food advertising through its wholly-owned subsidiary, Allen Products Company, Inc. Respondent has continued to expand its advertising expenditures.

6. At all times relevant herein, L&M has been and is engaged in "commerce," as "commerce" is defined in the Clayton Act, as amended, through the sale and shipment of products to purchasers located in various States of the United States and has caused and does cause such products to be transported from its facilities to such purchasers.

Allen Products Company, Inc.

7. Allen Products Company, Inc. [hereinafter Allen], a wholly-owned subsidiary of L&M, is engaged directly or through its subsidiaries in the manufacture, sale and distribution of dog food. Its primary brand is ALPO. Allen owns and operates dog food manufacturing facilities in Pennsylvania, Delaware, Nebraska and Ohio.

8. By virtue of an extensive advertising campaign ALPO has become one of the largest selling brands of dog food in the country.

9. Allen's total sales of dog food were approximately $13.2 million in 1964, $48.4 million in 1967, $66.1 million in 1968 and $81.2 million in 1969.

10. At all times relevant herein, Allen has been and is engaged in "commerce," as "commerce" is defined in the Clayton Act, as amended, through the sale and shipment of products to purchasers located in various States of the United States and has caused and does cause such products to be transported from its facilities to such purchasers.

THE ACQUISITION

11. On January 29, 1969, L&M acquired all capital stock of Ready Foods Corporation for consideration of approximately $29.5 million.

THE ACQUIRED CORPORATION

12. Perk Foods Co., Inc., [hereinafter Perk] the successor of Ready Foods, is a corporation organized, existing and doing business under the laws of the State of Delaware with its principal office and place of business located at 500 No. Dearborn St., Chicago, Illinois.

13. At the time of the aforesaid acquisition, Perk was engaged principally in the manufacture, sale and distribution of pet foods, including VETS and PERK dog foods. It operated plants in Pennsylvania, Illinois, Kansas and California. Perk's total sales of pet foods were approximately $35 million in 1968 and $41 million in 1969. Perk's total sales of dog food were approximately $24.9 million in 1967, $26.5 million in 1968 and $27.7 million in 1969.

14. Prior to the aforesaid acquisition Perk did not rely heavily upon media advertising. One year prior thereto, Perk planned to engage in an extensive media advertising program. In 1969 Perk's total budgeted advertising was $830,000 of which $703,000 was for television advertising.

15. At all times relevant herein, Perk has been and is now engaged in "commerce," as "commerce" is defined in the Clayton Act, as amended, through the sale and shipment of products to purchasers located in various States of the United States and has caused and does cause such products to be transported from its facilities to such purchasers.

TRADE AND COMMERCE

16. For purposes of this complaint, the relevant product market is dog food, and the relevant geographic market is the United States.

17. Dog food is comprised of all wet, dry, and semimoist commercially prepared foods for dogs, exclusive of treats.

18. The manufacture of dog food is a significant industry in the United States. The dog food market has been growing rapidly in recent years. Total sales of dog food were approximately $506 million in 1967 and $682.5 million in 1969.

19. There has been a trend toward concentration in the dog food industry. Concentration has remained high notwithstanding a growing market and the existence of small companies. Between the years 1964 and 1970, there were at least nineteen mergers in this industry. L&M has been a leading participant in the dog food merger movement, with two acquisitions of companies manufacturing dog foods, Allen and Ready Foods. L&M also acquired a manufacturer of dog treats, Liv-A-Snaps, Inc.

20. The dog food market is concentrated. In 1967, the four largest

dog food manufacturers accounted for approximately 57.3 percent of total sales, and the eight largest for 76.2 percent. By 1969 the four largest producers accounted for approximately 61.4 percent of total sales, and the eight largest for 80.4 percent.

21. Since 1962 there has been a significant increase in the amount of advertising and promotional expenditures in connection with the distribution and sale of dog food. Consumer appeal created by advertising is an important element in the marketing of dog food products.

22. At the time of the aforesaid acquisition L&M and Perk ranked approximately fourth and seventh respectively in total sales of all dog food manufacturers. Of total sales in the dog food industry at the time of the acquisition in 1969, L&M accounted for approximately 12 percent and Perk for approximately 4 percent. As a result of the acquisition, L&M became the second ranked manufacturer of dog food with approximately 16 percent of total dog food sales in 1969.

23. Prior to the aforesaid acquisition, L&M and Perk were substantial and actual competitors in the manufacture, distribution, and sale of dog food.

EFFECTS OF ACQUISITION

24. The effect of the acquisition of Perk by L&M may be substantially to lessen competition or to tend to create a monopoly in the production, distribution and sale of dog food in the United States in violation of Section 7 of the Clayton Act, as amended, in the following ways, among others:

a. Actual and potential competition between L&M and Perk in the production, distribution and sale of dog food has been or may be eliminated;

b. Perk has been eliminated as an independent competitive factor in the manufacture, distribution and sale of dog food;

c. The combination of L&M and Perk may so increase respondent's manufacturing and distribution facilities and technology as to provide L&M with a decisive competitive advantage in the dog food industry to the detriment of actual and potential competition;

d. Concentration in the manufacture and sale of dog food will be maintained or increased, and the possibility of deconcentration may be diminished;

e. Existing barriers to new entry may be increased substantially;

f. Additional acquisitions and mergers in the industry may be encouraged;

g. Independent manufacturers, distributors and sellers of dog food may be deprived of a fair opportunity to compete with the combined resources and market position of L&M and Perk;

h. Members of the consuming public may be deprived of the benefits of free and unrestricted competition in the manufacture, sale and distribution of dog food.

VIOLATION

25. The acquisition of Perk by L&M constitutes a violation of Section 7 of the Clayton Act, as amended (15 U.S.C. §18).

INITIAL DECISION BY MORTON NEEDELMAN, ADMINISTRATIVE LAW JUDGE

JUNE 25, 1975

I

STATEMENT OF THE CASE

[1] The Commission's complaint, issued on August 14, 1973, charges that Liggett & Myers' acquisition on January 29, 1969, of Ready Foods Corporation (after the acquisition the name of the firm was changed to Perk Foods, Inc.) violates Section 7 of the Clayton Act, as amended (15 U.S.C. § 18). The complaint alleges that the effect of the acquisition may be "to substantially lessen competition or to tend to create a monopoly in the production, distribution and sale of dog food in the United States." Dog food is defined in the complaint as "all wet, dry, and semimoist commercially prepared food for dogs exclusive of treats."

Respondent filed its answer on September 21, 1973, in which it admitted making the challenged acquisition. It also admitted certain corporate and jurisdictional facts. Respondent denied all other substantive allegations in the complaint, particularly those relating to the existence of an "all" dog food relevant product market, and the charges respecting the alleged anticompetitive effects of the acquisition.

At the prehearing stage some additional discovery was granted to both parties, stipulations were entered into, and the issues were further refined.[1] Specifically, respondent again argued, as it had in its answer, that from an economic standpoint there is no "all" dog food market, and that the acquisition could properly be evaluated only in terms of its impact on certain economically significant markets,

[1] The undersigned replaced Administrative Law Judge Andrew C. Goodhope who was relieved of the assignment on June 3, 1974. I presided at the Prehearing Conferences of July 29, 1974 and October 18, 1974, and all evidentiary hearings.

namely, five separate markets including a premium-priced canned dog food market where L&M did business before the acquisition, an inexpensive canned dog food market where most of Perk's sales were concentrated, medium-priced canned dog food, dry dog food, and semimoist dog food.

[2] Hearings were held between January 10, 1975, and January 30, 1975. All counsel were afforded full opportunity to be heard, and to examine and cross-examine witnesses.

The record was left open until February 5, 1975, for the receipt of additional stipulations. Proposed findings of fact and conclusions of law, together with supporting briefs were filed by the parties on March 7, 1975, and replies were filed on March 24, 1975.[2]

After reviewing the evidence, the proposed findings, and conclusions submitted by the parties[3] and based on the entire record, including my observation of the witnesses, I make the following findings of fact:[4]

II

Findings of Fact

L&M, Allen, and Perk

1. Respondent, Liggett & Myers Incorporated (hereinafter L&M), is a Delaware corporation with its principal offices located at 4100 Roxboro Rd., Durham, North Carolina. (Answer ¶ 1; Stip. of 2/14/75; Tr. 1751)

2. Prior to 1964, L&M was exclusively engaged in the manufacture, distribution, and sale of cigarettes and other tobacco products. (CX's 334a, 335c)

[3] 3. On November 19, 1964, L&M began a long-term program of diversification by acquiring (for approximately $12,000,000) Allen Products Company, Inc. (hereinafter Allen), a manufacturer of a line of premium-priced canned dog food sold under the Alpo label. (CX's 2e, 2h, 29a-c, 334a; Tr. 1753)[5]

4. Continuing with its acquisition program, on January 29, 1969, L&M acquired (for approximately $29,500,000) all the stock and assets

[2] By leave of the Commission and because of prior trial commitments of the administrative law judge, the time for filing an initial decision was extended from May 6, 1975, to June 30, 1975.

[3] Proposed findings not adopted, either in the form proposed or in substance, are rejected as not supported by the evidence, or as involving immaterial matters.

[4] The following abbreviations are used in citing to the record: "Tr." (transcript of testimony); "CX" (complaint counsel's exhibits); "RX" (respondent's exhibits).

[5] The Alpo line currently consists of 13 items — Beef Chunks, Chopped Beef, Chopped Horsemeat, Chicken & Chicken Parts, Trio (Beef-Chicken-Liver), Horsemeat Chunks, Liver Chunks, Lamb Chunks, Rib of Veal, Savory Stew, Beef Stew, Meat Balls with Gravy, and Egg'n Beef. (CX 269d) The leading item is Alpo Beef Chunks Dinner. (Tr. 1770)

Until 1974, Alpo was manufactured in plants located in Allentown, Pennsylvania, Crete, Nebraska, and Cleveland, Ohio. Operations in the Cleveland plant were discontinued in 1974 because of environmental and labor problems. (Tr. 1839-41) of Ready Food Corp., another manufacturer of dog food. (CX 6j; Ans. ¶ 11; Tr. 1989-90) Following the acquisition, the name of the acquired firm was changed to Perk Foods Company, Inc. (hereinafter Perk). (Ans. ¶ 12) Perk is a Delaware corporation with its main offices located at 500 No. Dearborn St., Chicago, Illinois. (Ans. ¶ 12) The acquisition of Perk by L&M is the subject of this proceeding.

5. At the time of the acquisition, Perk manufactured and marketed a line of economy-priced canned dog foods which were sold under the firm's proprietary labels, Vets and Perk.[6] The company also made a dry dog food (Vets Nuggets) and sold a small amount of semimoist dog food under the Vets Burger label. (CX 25k)

[4] 6. In addition to its proprietary sales of Vets and Perk brand products, since 1949 Perk has manufactured private label[7] dog food products for the Safeway chain. (Tr. 2093-96) Since 1966 Perk has also engaged in custom-packing[8] for various companies including Allen, and several companies, besides Perk, have custom-packed for Allen during the same period. (Tr. 1829-30, 2001, 2023, 2101) In 1968, the year prior to the acquisition, Perk custom-packed about $2,400,000 worth of dog food for Allen. (CX 307b) The value of Perk's custom-packing for Allen increased in 1969 to approximately $5,100,000 and in 1970 to approximately $9,000,000. (CX 306a; RX 63a)[9]

7. In 1969, the acquiring company, L&M, ranked among the Nation's largest industrial corporations with sales of $658,000,000. L&M's non-tobacco business, including its pet food business, accounted for approximately 42 percent of its total sales in 1969. (CX 334d; Ans. ¶ 4)

8. At all times relevant to this case, L&M, Allen, and Perk were engaged in commerce, as "commerce" is defined in the Clayton Act, as amended. (Ans. ¶¶ 6, 10, 15)

The Product Market

9. The Perk acquisition took place in a dog food industry which in 1969 accounted for approximately $810,000,000 in retail sales. (CX 41e)

[6] Prior to the acquisition, the canned products made by Perk were Vets Regular, Vets Chicken Flavor, Vets Liver Flavor and Perk Regular. (CX 25k) After the acquisition, additions were made to the canned line and it now includes Vets Beef Flavor, Lamb Flavor, Horsemeat Flavor and Variety. (CX 269b) Both before and after the acquisition, Perk products were manufactured in plants located in Chicago, Illinois (2 plants), Kansas City, Kansas, Harrisburg, Pennsylvania, and Los Angeles, California. (CX 25p, q; Tr. 2105-06) At the time of the acquisition, Perk also operated a plant in Hillsboro, Oregon, on a cooperative basis. (CX 25p, q)

[7] Private labeling is an operation in which a manufacturer usually, although not always, makes dog food products according to its own formulation and sells the products to a supermarket chain for marketing under labels owned by the supermarket chain. (Tr. 1483, 1767-68, 2000)

[8] Custom-packing (sometimes referred to as co-packing) is an operation by which one company manufactures a product for a client company, usually under a cost-plus arrangement and using the brands, labels, and recipes of the client company. (Tr. 1346, 1829, 1832, 2000-01; RX 58)

[9] Despite a sharp increase in custom-packing production for Alpo since the acquisition, Perk still has excess capacity. (Tr. 1968)

This dog food industry is part of a larger pet food industry which has been growing at an average rate of 11 percent per year in recent years, and had increased its retail [5] sales from $700,000,000 in 1965 to an estimated $1.4 billion in 1971. (CX 95b) Retail sales of dog food alone reached a level of $1.5 billion in 1974. (Tr. 363) American consumers spend considerably more for dog food than they do for baby food. (CX's93b, 97L)

10. As for the putative object of all this spending — the dog[10] — the authoritative National Research Council (NRC)[11] of the National Academy of Sciences has stated that its nutritional needs are as follows:

> Dogs can meet their nutritional requirements from protein, carbohydrates, fats, minerals and vitamins combined in a purified ration form or from one of many combinations of natural foodstuffs. They can meet their energy requirements from plant materials if they have an adequate supply of essential animo acids. They can meet their protein requirements from many sources of proteins that supply the essential amino acids. (CX 206, p.1)

11. With respect to these nutritional needs of a dog, the NRC has concluded that "A dry, semi-moist or canned diet can provide all the nutrients required by dogs if the diet is properly formulated and processed." (CX 206, p. 24)

12. The three categories of dog food cited by NRC — dry, semimoist, and canned — are generally understood in the industry to consist of the following:

[6] "Dry" dog food is primarily grain-based meal, pellets, or "kibbles" with a relatively low moisture level (approximately 10 percent). It is customarily packaged either in boxes or bags. (Tr. 450, 953, 2016-17, 2210, 2308-10)

"Semimoist" (sometimes called softmoist) looks like hamburger but contains both meat (35 percent) and cereal ingredients as well as between 20 to 25 percent sugar as a preservative. It has a moisture content of about 20 to 30 percent. The product is formed by an extrusion process into pattie-like "hamburgers" and it is packaged in a cellophane wrapper. (Tr. 447, 952, 1870, 2013-14)

Canned dog food, sometimes called "wet" dog food, has a high moisture content (68-78 percent) and it can be made of various proportions of meat or meat by-products, egg, fish, cereals, textured vegetable protein, flavorings, vitamins and minerals. (CX's 94a, 190, 192, 194; Tr. 448, 951, 1533, 1573-74, 2201)

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[10] In 1969 the canine population of the United States was about 25 million dogs in some 19 million homes. (CX 6j)

[11] The NRC nutritional standards are the "standards of the industry." (CX 75a; see also RX 72, p. 8) The NRC standards are the bases of nutritional claims made by many dog food companies. (CX's 178b, 179b; Tr. 1118-19)

13. At the time of the acquisition (1969) retail sales of the three kinds of dog food were divided as follows:

TABLE 1:	Percentage of Retail Dollar Sales of Dog Food (Based Upon Estimated Total Retail Sales of $810 million)
Canned	49%
Dry	37%
Semimoist	14%

(Source: CX 41e)[12]

14. To assure that all dog foods are properly formulated, the NRC has published standards for a well-balanced canned, dry, or semimoist main meal. These standards are accepted industrywide and most dog food manufacturers, including Allen (after 1970) and Vets [7] (before and after the acquisition), produce products which meet or exceed the minimum standards of the NRC for a complete and balanced dog food diet. (CX's 75a, 178a-b, 179, 190, 192, 194, 201; Tr. 1342, 1688-89, 1771-72, 1807, 2181-83)

15. All main meal dog food products, in all price ranges, which meet or exceed the NRC minimum standards, adequately fulfill the entire nutritional needs of a dog, and all of these products are intended to serve this purpose. (Tr. 211, 451, 725, 729-30, 952-54, 1125-26, 1533-35, 1686-87, 1813, 1818, 2181-83, 2234, 2320)

16. In addition to the three basic categories, it is well accepted in the dog food industry that the canned category is subdivided into at least two sub-categories — economy, and premium. Economy is also referred to, from time to time, as "inexpensive," "ration" or "maintenance." (CX's 25k, *151n, in camera)* It has a loaf or pudding appearance and (in the case of Vets) is made of meat or meat by-products (20 percent to 7 percent), substantial quantities of cereal (20 percent), soy bean meal (16 percent) and water for processing. (Tr. 1575, 2026-27, 2201) The acquired company in this proceeding, Perk, essentially was in the business of selling a canned dog food which falls into this economy or maintenance subcategory.

Allen, on the other hand, with its all-meat Alpo, was the pioneer and to this day dominates the premium subcategory of the canned part of the industry. Premium (brands such as Alpo and Kal Kan) sells for a

[12] The picture has changed in recent years, and dry dog food now leads the market. (Tr. 1062) Thus, the record shows that Ralston Purina, the dominant dry company, has increased its own market share from 14.19 percent of all dog food sales in 1969 (Finding 94) to over 20 percent in 1975. (Tr. 310)

higher price than economy and at least until 1970 was, in fact, (in the case of Alpo) all-meat and meat by-products.[13] The premium-priced product is usually manufactured in a chunky form (although other forms are used, too), and it has been variously referred to in the industry as "all meat," "specialty," "supplement" or "gourmet." (CX's 41d, 151p, *in camera;* Tr. 230, 1571-73, 1745)

[8] 17. The differences between the prices of the Alpo and Vets canned[14] lines are shown in Table 2:[15]

TABLE 2: Average Retail Price Per #300[16] Can (cents per can)

Year	Vets	Alpo
1968	9.70¢	28.35¢
1969	10.06	28.92
1970	10.33	29.26
1971	10.87	29.78
1972	11.24	29.37
1973	12.53	31.92

(Source: RX 175)[17]

[9] 18. In 1975, following "good price increases," Vets canned dog food was selling at retail between 15 cents and 18 cents a can. (Tr. 1981, 2039)[18] The price of products like Vets has gone up because of inflationary pressures. (Tr. 1656, 2039) Allen's own experience, however, with premium-priced Alpo indicated a consumer willingness to pay higher prices for dog food. This experience was confirmed by a 1972 report to L&M (*i.e.,* its Perk Division) about "preference for economical brands:"

The low average ratings of a factor describing preference for low-priced brands and purchase of brands on sale tend to corroborate other data and conclusions: the emotional attachment to dogs, interest in product quality, the nutritional balance, which imply a willingness to pay premium prices.

Historically, perhaps, the dog food industry has operated under some price constraints, actual and even self-imposed. Today's intense consumer demand for convenience, for the social reinforcement of personal judgment and choice that highly

[13] In 1970, vitamins and minerals were added to Alpo to enable it to meet NRC minimum requirements for a complete and balanced diet. Since mid-1973, due to shortages of meat and high meat costs, textured vegetable protein (TVP) has been added to Alpo. Alpo's current composition is: Meat and meat by-products 92 percent; TVP 6 percent; vitamins and minerals 2 percent. (Tr. 2026-27)

[14] The record does not contain comparable data for semimoist or dry. The record shows, however, that on a cost per feeding basis, dry costs about 11 or 12 cents per average feeding, as compared to 25 cents for canned inexpensive dog food (*i.e.,* more than one can is used in an average feeding) and semimoist, and about 60 cents per premium canned dog food — again, more than one can is used in average feeding. The cost per feeding of the super premium product, Mighty Dog, would be twice as much as premium canned. (Tr. 1095)

[15] The price differences between Vets and Alpo cannot be translated into any generalized difference between *all* premium and *all* economy because, for example, there are so-called premium brands which have sold for substantially less than Alpo (Tr. 806), and economy products come in several price ranges. See Note 50, *infra.*

[16] The standard size can for packing dog food is the 300 by 407 (3" x 4.7/16") can which holds between 14 and 16 ounces. (Tr. 2201-02) The super-premium product, Mighty Dog, is sold in a 6-1/2 ounce can. (Tr. 1447)

[17] The average wholesale price of Alpo beef chunks was 24 cents in 1969 and 25 cents in 1970; the average wholesale price of Vets Regular was 7 cents in 1969 and 9 cents in 1970. (CX 306a; RX 63a)

[18] In 1975, Alpo was selling between 36 cents and 39 cents a can. (Tr. 1775)

advertised brands convey, and for vicarious indulgence on behalf of a dog, indicate that dog-food manufacturers may have more flexibility in pricing structure. (RX 13, p. 113)

19. The most serious reservation expressed by the NRC with respect to the proper feeding of dogs related to the all-meat (*i.e.*, premium-priced) diet. According to NRC:

> **[10]** Difficulties associated with high protein diets have become more commonplace since the introduction of dog foods composed almost entirely of meat and meat by-products. (Goddard *et al.*, 1970)
>
> Optimal levels of dietary protein for some physiological states of the dogs are not completely defined, but it is clear that diets containing as much as twice the minimum required amount of protein can have serious consequences, irrespective of vitamin and mineral supplementation, if fed over long periods (Krook, 1971; Newberne and Wilson, 1971). Digestive upsets and bone changes occurred in puppies fed diets composed primarily of meat and meat by-products, and such diets may have adverse effects on older dogs with liver and kidney diseases (Jubb and Kennedy, 1970; Kennedy, 1957). Since excess protein must be metabolized by the liver and the nitrogen must be excreted by the kidney, high protein diets increase the workload of these organs, and, in a diseased state, the organs may be incapable of adequately handling the additional nitrogen. Diets high in protein contribute to renal disease (Kennedy, 1957).
>
> In view of the difficulties, it is prudent to adhere to dietary levels approximating those set forth in tables 1, 2, and 4. [*i.e.*, NRC, Nutritional Requirement Tables]
>
> There is no evidence proving that animal protein is an essential constituent of a dog's diet (Walker, 1971). Koehn (1942) maintained and reared dogs successfully on diets containing proteins of plant origin only. In practice, it is usually advisable to include some animal proteins both for enhancing acceptability and for ensuring a desirable and economical amino acid pattern. (CX 206, p. 7) [19]

[11] 20. Alpo was changed from an all-meat formulation to a more balanced diet in 1970; thereafter, the product met the minimum nutritional standards of NRC. Prior to its reformulation in 1970, Allen knew that there had been veterinarian and professional breeder criticism of the all-meat diet. (CX's 41b, 72b) [20]

21. There are differences in the cost of ingredients as between a premium canned product and an economy canned product. For example, in 1969 and 1970, the average cost of ingredients in Alpo's leading product, Beef Chunks, was approximately 10 cents per can. During the same period of time, the average cost of ingredients in Vets

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[19] The NRC standards were largely the basis of the F.T.C.'s Guides For the Dog and Cat Food Industry adopted in 1969, 16 C.F.R. 241. Section 241.5(j) of the Guides provides as follows:

> The quality of an industry product from the nutritional standpoint is not necessarily dependent upon its meat content, or upon the amount or nature of other ingredients derived from animals, poultry or fish which it may contain. Accordingly, it is improper to represent that a dog or cat has a nutritional requirement for such an ingredient, or that solely because a particular industry product contains, for example, a specified percentage of meat it is nutritionally superior to products having a lesser quantity of meat, or to those which contain other and different ingredients. Such advertising is deceptive because it does not take into consideration the nutritional properties of various ingredients or combinations thereof used in the formulation and processing of industry products.

[20] One industry representative testified "old Alpo was all meat and it is pretty well known that you can't feed an animal all meat." (Tr. 1739)

leading product, Vets Regular, was about 3 cents per can. (RX 61a; Tr. 1764, 1773-74, 2034-35)

22. The physical differences between the various categories and subcategories of dog food are not static. The record shows the following:

(a) All-meat Alpo became less than all-meat Alpo when (i) Allen decided in 1970 to add vitamins and minerals to make the product more nutritionally well-balanced and thereby meet the minimum NRC standards; and (ii) the price of meat went up in 1973 and TVP (textured vegetable protein) was added. (Tr. 1770-72) [12] Moreover, the premium priced category can hardly be classified as a uniformly "all-meat" segment since two of the companies in the so-called premium category — Recipe and Kal Kan — have engaged in aggressive *anti* all-meat advertising. (CX 44d; Tr. 1611-12)

(b) There are "premium" chunky-style products which have substantially *less* meat than Alpo and much *more* cereal than Alpo. (Tr. 1659, 1869, 1939-40) Just prior to the acquisition, Perk had developed a product called Vets Canned Chunks, which was intended as a premium-priced dog food made from cereal and produced at a low raw material cost. The product was considered revolutionary at the time since it had a meat flavor and texture even though it was produced entirely from a cereal base. (CX 25o)

(c) The chunky appearance of Alpo (not chunks of meat, but meat "formed" into chunks) is not the only *form* of a premium-priced product. The Alpo line consists of products in both chunk (Alpo Beef Chunks, Alpo Horse Meat Chunks, Alpo Liver Chunks, Alpo Lamb Chunks) as well as non-chunk, chopped form — Alpo Rib of Veal, Alpo Chopped Beef, Alpo Chopped Horse Meat, Alpo Meat Trio, Alpo Savory Stew, Alpo Beef'n Eggs, Alpo Meat Balls with Gravy, Alpo Chicken and Chicken Parts. (CX 269d)

(d) The meat content of dry can be varied significantly, as in fact Alpo has done with its Beef Bites product which contains 25 percent dried beef. (Tr. 1338, 1792-93, 1809) Besides, in an industry where image advertising is extremely important, physical differences can be blurred by clever copy. Ralston Purina's Chuck Wagon (a dry without a speck of meat) has been advertised as "meaty, juicy, and chunky." (Tr. 1407-08, 1941) In their advertising, different categories of dog food are constantly making competing claims about "meatiness," palatability, and nutritional balance. (see Findings 47-49)

(e) Ingredient contents are subject to change. Thus, research done for L&M has recommended product exploration including "analogues of human mixture foods, such as hash (meat and potatoes) with egg * * * ." [13] and creating resemblances to human foods such as "canned meat balls *au jus* or canned burgers with bouillon sauce." (RX 13, pp. 130-131)

(f) The palatability of dry can be increased significantly by coating the cereal with fats. (Tr. 2153) While palatability tests indicate that because of its near all-meat (and high fat) content, a premium-priced product like Alpo ranks higher in palatability than a cereal-based product like Vets.[21] Dr. Corbin, an expert on animal feeding at the University of Illinois, testified that he has had first hand experience in observing animals who preferred a non-all-meat diet to an all-meat diet. (Tr. 1137) Moreover, within the premium sector of canned, and even in the historical development of a particular product, palatability is by no means permanently fixed — for example, current Alpo is less palatable than all-meat Alpo. (Tr. 1028)

23. Both chunk and loaf-style products use some of the same equipment — closing machines, hydrostatic cookers, and labeling machinery — but other equipment cannot be used for both kinds of products.[22]

[14] 24. There are differences in the cost of the facilities used for manufacturing chunk-style premium products (approximately $1,400,000) and loaf-style economy products (approximately $650,000). (Tr. 2010-11) At the time of the acquisition, however, not only did Perk already have the capability for making "chunky" products in its Los Angeles plant, but its plant in Pennsylvania could be used to make chunk items "rather simply at a cost of approximately $200,000." (CX 27a)[23]

[21] Alpo's all-meat and high fat content undoubtedly produced a high level of palatability which in turn resulted in animal "contentment." (RX 76v, x; Tr. 537, 1019) As for nutritional value of such a diet, see Finding 19. As one of respondent's witnesses put it "The dogs loved it. It is like offering a child cake. They will eat cake all meals, too." (Tr. 1739)

[22] The following process and equipment are used to manufacture a chunk-style product like Alpo Beef Chunks: Meat and meat by-products are frozen and stored in a freezer. Later, the meat and meat by-products are thawed slightly, sliced, and cubed, pre-cooked (or braised), and mixed with TVP (textured vegetable protein) and vitamins and minerals. The mixture is conveyed on a belt or screw conveyors to circular tables where the ingredients are scrapped into cans from revolving fillers. Juices are added and cans are sealed by closing machines. After the cans are cooked, they are labeled, and packed in cases. (Tr. 1776-79, 2007-09)

The following processes and equipment are used to manufacture a loaf-style product like Vets: Meat and meat by-products are ground, pre-cooked in a temperature container, and conveyed to cookers. Cereals are conveyed from a silo to the cooker; water is added and the temperature is increased to 175 degrees. The mixture is then conveyed to a filler where the cans are filled by piston filling machines. The filled cans are sealed by a closing machine and conveyed to hydrostatic cookers. After the cans are cooked, they are labeled, and packed in cases. (Tr. 2003)

[23] There is no evidence that the cost of equipment is a significant entry barrier into the manufacturing of any category of dog food. (see, Tr. 1974)

25. Different manufacturing facilities and processes are used to manufacture dry[24] and semimoist,[25] and these facilities and processes, in turn, differ from the methods used to manufacture canned products. The approximate cost for a single dry manufacturing line (including silo) is $1,250,000. (Tr. 2018) The cost of a single manufacturing line for semimoist is between $300,000 to $400,000. (Tr. 2015)

[15] 26. Although there are differences in the cost, manufacturing processes and physical properties of equipment used to make various kinds of dog food, there is no evidence in the record that these differences have economic significance in terms of competition among categories or entry into any one category. Thus, these differences notwithstanding, there is substantial evidence of supply-side flexibility as among competing manufacturers. The record shows the following:

(a) Several manufacturers have the capability for making all, or at least several categories of dog food. (CX 21e; Tr. 210, 446-74, 449-50, 535, 797-98, 952-54, 1035-36, 1532, 1539-40, 1653, 1688-89, 1719, 1734-35, 2293) Even a relatively small company like Perk had the capability before the acquisition for making dry, semimoist, expensive, and inexpensive canned dog food. (CX's 25p, q, 27a)

(b) Lack of manufacturing capability was not the reason for Perk's failure to enter the premium canned category. Since Perk was custom-packing for Alpo prior to the acquisition, clearly it had the manufacturing capability for going into the premium category. (Tr. 1830-31)

(c) The non-chunk parts of the Alpo premium line — *i.e.*, the chopped

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[24] Cereal ingredients move from an automated silo system to a dry hatch mixer, where they are agitated. Meat meal is added, the mixture is blown into an expansion or extrusion cooker and is cooked at over 200 degrees Fahrenheit. Moisture is then added. Ingredients are conveyed into a constricted tube (with dies at one end) and heated to 250-275 degrees Fahrenheit. Heated cereal ingredients pass through the dies under pressure and the starch is converted into chemical sugars. Ingredients are dried to a 10 percent moisture level in a dryer. The ingredients are sprayed with fat on a revolving cylinder and conveyed to packaging. (Tr. 2015-17)

[25] Meat ingredients are ground and dropped into a cooker. Water is added and the mixture is brought up to 212 degrees Fahrenheit and held at that temperature for 10 minutes to kill bacteria. Other ingredients, including soybean oil, starch and about 20 percent sugar and syrup preservatives are added, and mixed while cooking continues. Meanwhile soybean meal is being cooked (pasteurized) at at least 150 degrees Fahrenheit. The two batches of ingredients are moved through a screw conveyor into a series of batch mixers where they are mixed while being held at a pasteurizing temperature. The entire mixture is then forced through a die into the desired form and is passed through a cooling tunnel to the packaging phase. The cooled product is then dropped into equipment which packages it in cellophane pouches. (Tr. 2012-14)

products — can be made on the same equipment as that used to manufacture a loaf-style inexpensive product. (Tr. 1831-32, 1984, 2002)

[16] (d) Alpo's lack of its own dry manufacturing capability did not prevent it from attempting to enter the dry category through the use of the dry facilities of Perk. Companies like Alpo which have historically operated in one category are nevertheless considering possible entry into other categories. (Tr. 1365)

27. Dog treats or snacks are not part of any dog food market or submarket advanced by either party. Treats are not intended nor are they used for the same purpose as dog food — they are a reward or training device and not a nutritionally adequate main meal for dogs. Moreover, snacks and treats are perceived by industry experts as being entirely different products from main meal dog foods. (CX's 41o, p, 44g, 95r, 208, p. 17; Tr. 401, 403, 405, 408-410, 411-14, 416, 418-21, 423, 429-30, 452-53, 790, 796, 1072, 1075-79, 1821, 1828-29)

28. While there are physical and price differences among the various kinds of dog foods, as well as physical similarities — practically all dog food will adequately maintain a dog — the question of market definition can only be resolved by looking to the competitive dynamics of the dog food industry, namely, that in the 1960's and continuing to the present time, a handful of large companies, including L&M, have engaged in a variety of massive advertising strategies (with varying degrees of effectiveness) in an attempt to presell their products, win supermarket shelf space, create brand loyalty, break down competing brand loyalty and, thereby gain a larger share of the consumer's dog food dollar. (Findings 29-84)

29. All dog foods — dry, semimoist, and canned — in all price categories, are competing against each other to win shelf space in the dog food section[26] of the supermarket. (CX 97zl; Tr. 497, 783-88, 1481, 1507, 1668) The nature of competition for the limited dog food shelf **[17]** space available is such that any dog food is vulnerable to deletion in order to make room for another. (Tr. 1476) Thus, Alpo's primary distribution objective in 1967 was "Gaining new Alpo shelf space and facings (at the expense of competitors) * * *." (CX 87z5)[27]

30. The record contains an illustration of the intensity of this struggle for shelf space. Commission Exhibit 93, an Alpo brochure, asks supermarkets "Are you giving Alpo the shelf space your profits deserve?" Directing supermarkets to "take a closer look at the profit picture," Allen argues for more shelf space on the basis of how Alpo

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[26] The dog food section is in the "pet food aisle" of the supermarket. (Tr. 1472)

[27] See also, CX's 63a, 68a, 95d and RX 19, p. 3, for additional discussion of shelf space competition. Further evidence of industry recognition of competition for shelf space is shown by the fact that the food brokers who represent the manufacturers are usually not permitted to sell any competitive brand. (Tr. 733-734) Consistent with this policy, the food brokers who sell Alpo are not permitted to sell a ration-type product. (Tr. 1817)

stacks up against other dog foods in terms of profits. In this connection, it compares the profitability of Alpo to:

General Foods (Gainesburgers, and five other brands)
Rival
Quaker Oats (all 6 Ken-L-Ration Brands)
Perk Company (Vets and Perk Brands)
Strongheart Company
Ralston Purina Company
Friskies (Carnation)
Kal Kan
and all others combined (17 brands plus private label).
(CX 93i)

The same brochure says "You make more profit per can on Alpo. So the more space you give to high-profit Alpo, the more money you'll make." (CX 93j) This sales pitch emphasizes (1) the greater profitability of Alpo as compared to cheaper brands, particularly those selling between 8 cents and 20 cents a can, (CX 93j)[28] and (2) the fact that Alpo is presold by massive advertising. (CX's 93L, n) In addition, Allen tells supermarket managers:

> [18] It pays to be shelf conscious: keep Alpo well stocked.
> How much brand loyalty has someone who buys 15 cent dog food?
> How many low priced brands do you really need?
> How much more profit per shelf foot could you earn if you develop the space for Alpo?[29] (CX 93k)

31. The most important factor in the fight for shelf space is how effectively the advertising programs of the various dog food manufacturers presell their products on television. (Tr. 1473-75, 1500-03, 1510)

32. The record shows that there are many different advertising techniques, strategies, and counter-strategies used to presell dog food and thereby gain supermarket shelf space and the consumer dollar. (Findings 33-59)

33. This advertising war takes place against a background of a trend toward a "humanized" dog-owner relationship which has been described in research done for L&M as follows:

> The transfer of human concerns to a dog's health, eating and family membership represents a factor with a high rating for importance. The factor and its rating suggest

[28] Like Vets. See Finding 17.

[29] Respondent introduced evidence that Alpo and the inexpensive brands are traditionally stocked on different shelves in the pet food section of the supermarket (see Respondent's Proposed Finding 104). In view of the unrebutted evidence relating to the contest amongst *all* brands for each other's shelf space, I attach little significance to this evidence. Thus, as shown in CX 93, Alpo wants the shelf space of the inexpensive brands even though, as respondent's evidence indicates, Alpo's traditional "gondola" location may be on a higher shelf than the Vet's location.

that dog-owners are going to judge their dog's eating habits and preferences in dog food, to a degree, on the basis of their own sensory impressions and food tastes. The factor also suggests that family sentimentality about dogs is an influence on interest in dog food advertising, product naming, acceptance of product qualities. The [19] dog's family role is mostly like that of a child, despite a dog's age, dependent and in need of direction, guidance and control * * * which is possibly why nutritional balance as an ideal quality of dog food is so important.

There are plenty of cases of fact and behavior to corroborate the prevailing attitudes defined by the factor of family membership. We note that people are tending to give their dogs humanizing names (Max, Jacque [sic], Shirley) rather than the traditional names of Rover, Shep, Spot, and so on. Increasing numbers of dog kennels and veterinary offices suggest that people are projecting their own ailments and infirmities, sympathetically, to their ailing dogs. Dogs are increasingly being included in family portraits, certainly a fairly specific definition of the dog as an authentic member of the family. In the extreme, dog kennel motels and hotels featuring valet service, swimming pools and solariums, at $20 per day, are doing a business that is completely booked for months ahead. The ultimate is the burial of dogs with proper solemnities and memorials, a service provided at Forest Lawn for many years, which may well migrate eastward within the next few years. (RX 13, pp. 11-12)

34. In terms of diet, this trend toward a "humanized" approach to dogs means that consumers (women mainly, according to L&M research) indulge their animals. They look for a dog food that is close to human food because this satisfies the emotional needs of the owner and strengthens her belief that the animal is a family member. Variety is important because humans do not want the same food at every meal and they believe the dog should not either. Few owners try to discipline their pets into eating recommended foods with the result that a product which the dog initially rejects will not be purchased again. Coercion of good eating habits is rejected because the owners seem to be secretly proud that their pets cannot be forced to eat what they do not like. [20] Dog foods with a strong and pungent odor (identified with horsemeat, fish, or liver) are at a disadvantage because of the unmistakable connection with the animal origin of the food. (RX 12, pp. 6-9) In sum, there is a "prime concern that the dog be fed 'human' types of food * * * He is almost human and should be treated and cared for as such." (RX 12, p. 9)

35. As for marketing strategy, the "humanized" dog-owner relationship has inspired products and advertising which imply "qualities and traditions of what people think a dog food should be like." (RX 13, p. 136)[30]

36. Against the background of the fight for shelf space and the implications for advertising of the "humanized" owner-dog relation-

[30] For industry recognition of the psychological influences prevalent in the sale of dog food, see Tr. 1682, 1735-36. Research done in 1972 for L&M (Perk) found that dog owners ignore the advice of veterinarians and "go beyond a rational approach to feeding — in other words, a strong emotional focus." (RX 12, p. 4) And while consumers are "aware" of the nutritional needs of animals they "push rational considerations aside in favor of emotional considerations." (RX 12, p. 7)

ship described in Findings 33-35, Allen adopted a strategy directed at conveying "two simple facts" whose "logic is completely understandable to the women who buy." These simple facts, according to Weightman (the Allen advertising agency), are:

1. Dogs need meat—not promises.[31]
2. ALPO offers the best because it is 100% meat. (CX 97z13)

The strategy aimed for two objectives:

[21] 1. Establish and maintain a quality reputation for Alpo; and
2. Leave consumers with the beliefs that * * * — Meat is better than any product containing cereal, whether dry, canned or moist. — Alpo is 100% Meat. * * * and no amount of confusing claims by "cereals," "moist" or any other products change these facts. (CX 97z13)

37. To carry out the "all-meat" strategy, Allen made the following advertising expenditures for Alpo:

TABLE 3: Advertising Expenditures for Alpo (In Millions of Dollars)

1964	1.5
1965	1.9
1966	2.5
1967	3.6
1968	4.1
1969	5.7
1970	6.8

(Source: CX 334d)

Alpo is currently advertised at the rate of $10,000,000 a year. (Tr. 1344)

38. Of Allen's total advertising budget for the years 1964 to 1969, between 78 percent to 90 percent was in television.[32] (CX 43j) Network television received 66 percent of Allen's total media dollar in 1969. (CX 43j) Television is the principal battle-ground for the advertising of dog foods and the largest share of the major brand advertising for all dog food (dry, semimoist and canned) is done on network television. (CX 87v)

39. Allen's heavy reliance on network television began in 1965 when expansion of distribution to the West Coast made it [22] practical for the first time to use this media. (CX 2k) Before 1965, local

[31] As a result of the F.T.C. Guides (see Note 19, *supra),* this was changed in 1969 to "Your dog *loves* meat." (RX 77b), and more recently to "Doesn't your dog deserve Alpo?" (CX 352) Although the NRC report raised serious doubts about the nutritional balance of the all-meat diet, for advertising purposes, this was of little consequence since "nutritional balance * * * tends to be implied in the canned category by product quality and by meatiness, with meat, in studies of human nutritional attitudes, always rating as abundant in primary nutrients." (RX 13, p. 80)

[32] In 1975, about 85 percent of Alpo's advertising was on television. (Tr. 1342-43)

and regional television advertising had played a key role in the growth of Alpo (CX 2k), although Allen began advertising on NBC's "Today" and "Tonight" as early as June 1964. (CX 20d)

40. With the switch to network television in June 1964, Allen realized substantial cost efficiencies in advertising (CX's 43L, 87i; RX 18b) Network television, on a cost per person reached, is the most efficient method of advertising (Tr. 977); moreover, there are discounts for volume for advertisers using network television (Tr. 1343).

41. The "all meat" message and its network media spending strategy were intended by Allen to carve away from the general dog food buying population those consumers who have above average incomes ($10,000 or more) and who, consistent with the trend toward a "humanized" dog-owner relationship, regard their animals with special affection, that is, almost as members of the family. (CX's 44f, 95L; Tr. 1445-46, 1947, 1958)

42. Allen's media strategy has been implemented by selecting network shows like "Tonight" and "Today"[33] and the network news programs such as "CBS News with Walter Cronkite," "The Huntley-Brinkley Report" as well as daytime programs which reach upper income homes. (CX's 43L, 87h, 87z23)

43. While Allen's main efforts have been on network television, this does not mean that it concedes regional markets to regional competitors. During its years of greatest growth, about 12 to 17 percent of its media dollars were placed in spot television. These funds enable Allen to "fight competitive efforts" (CX 87z27) with "special opportunistic spot buys." (CX 87z24) Spot television is looked upon as "a *'warchest' against competitive* introductory efforts to get established [23] at Alpo's expense." (CX 43k, emphasis in original; *see*, also, RX 18b) In recent times, Allen has split its advertising evenly between network and spot television. (Tr. 1343)[34]

44. The Allen advertising strategy has worked. By spending millions of dollars on advertising, Allen created the all-meat category. (Tr. 1377, 1406) During the years of Allen's greatest growth, 1967, for example, when it achieved record sales and its sales increase was several times greater than the average industry gains, the Alpo success was directly attributed to its effectiveness in conveying to consumers its basic message —

[33] In addition to delivering high income audiences, these programs have "the extra value (longer than the 60-second commercials, implied endorsement of show talent, and the word-of-mouth stimulation and copy flexibility) of live commercials." (CX 87z25)

[34] Allen also uses magazines and newspapers (including large space coupons) and outdoor advertising such as king size bus posters and giant painted billboards. (CX 43n; Tr. 1342) Allen has placed minimal reliance on promotional marketing methods such as couponing and case allowances. (Tr. 1364, 1786-87)

Your dog needs meat. Alpo is 100% meat.[35] (CX 4o)

The success of its strategy was such that Allen was cited in advertising trade publications as a "breakthrough advertiser" and another trade publication referred to Alpo as "one of the great all-time success stories of TV advertising." (CX 4o)[36]

[24] 45. Alpo's success has been at the expense of the cereal-based canned maintenance products like Vets and higher-priced (but less than premium-priced) cereal-based canned maintenance products such as Ken-L-Ration.[37] (CX's 87z16, 151z52, *in camera;* RX 6, p. 2 (of text); [25] Tr. 1050-52, 1681-82,2243) In a report which identified Vets as "stiff competition"[38] (CX87s), Allen's advertising agency told management:

> Alpo's biggest gains had been at the expense of the cereal based canned dog foods. Alpo's all-meat theme has registered. (CX 87z16)
> We believe the all-meat category will continue to gain a larger share of the total dog food market * * *.

46. Having achieved a notable marketing success by convincing purchasers of inexpensive cereal-based canned products to trade-up to Alpo, Allen then directed its "all-meat" strategy to a broader front. In 1966, the Allen advertising agency reported:

> As the expected "all meat" and "moist" competition grows, we will no longer be fighting to win customers from the cereal packs. Our fight will be to persuade dog owners that Alpo 100% meat is better than *any* other dog food. (CX 87z17; emphasis in original)

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[35] Although Alpo is no longer 100 percent meat (Finding 20), its image remains "all meat." (Tr. 830)

[36] It is clear from the record of this case that massive spending alone will not ensure success. Ralston Purina spent $10,000,000 on a premium canned (Flavor Plus) and failed. (Tr. 257) Quaker Oats, which had huge advertising resources available to it, decided in 1968 that it could not improve the position of Ken-L-Ration in the canned category by additional advertising expenditures because it was "unable to obtain powerful copy" and advertising was not producing an adequate response since "it's difficult to find something to say that's new and interesting due to the maturity of the category." (RX 6, p. 8)

[37] The decline of the entire maintenance category was attributed by Quaker Oats (manufacturer of Ken-L-Ration, a maintenance product) not only to the superior palatability of the "supplements" (*i.e.*, all-meat brands), but also the convenience and "implied palatability of semimoist, and improving palatability, convenience and lower cost of dry products." (RX 6, p. 2) At Quaker Oats in 1968, "the anticipation was that [the] continued growth of the so-called all meat segment would in fact continue to impact negatively on the maintenance category." (Tr. 1052) *See*, CX 151z52, *in camera*, for evidence of similar conclusions by Ralston Purina in 1969.

On the basis of this record, it is impossible to tell how much of Alpo's growth was at the expense of cheap canned maintenance as compared to the higher-priced maintenance products. (*See*, for example, CX 95b.) While some industry representatives said that Alpo's business came primarily from the higher priced maintenance products, principally Ken-L-Ration, and that it was less likely that lower-priced maintenance contributed substantially (Tr. 535, 2316-17), there was other testimony indicating that cheap canned lost business, too. (Tr. 2243) I assign the greatest weight to Ken-L-Ration's contemporaneous documents which indicate that the entire maintenance category, including the 10 cent brands like Vets, were losing ground to the "all-meat" premiums. (RX 6, pp. 1-2 of text) The Ken-L-Ration conclusions are consistent with respondent's own contemporaneous documents (CX's 87s, 87z16), which identify Vets as "stiff competition" and then say that Alpo's growth has been at the expense of "cereal based canned dog food" — a description which fits Vets.

[38] Even before L&M acquired Allen, respondent was informed that Perk was a "major competitive brand." (CX 20e, f)

47. Alpo's "all-meat" strategy has not gone unchallenged. It has produced a direct advertising counterattack by Alpo's competitors in semimoist and dry. Allen's advertising agency gave this account of the "meat" war of 1966:

Competitive Advertising Copy of the many different selling approaches in dog food advertising today one theme dominates the entire market: MEAT! Meat is the name of the game. It is the lodestone that advertisers are either claiming * * * or trying to better. Can meat alone be bettered? According to Quaker Oats, General Foods and Purina advertising, it can — by adding the vitamins, minerals, and carbohydrates essential to a dog's health. These additives, they imply, cannot be found in sufficient quantity in meat alone. Typical lines are:

[26] more nutritious than meat alone.
12 ways better than Beef.
Three ways better than hamburger.
Dogs think it's meat, but it's more.
More nourishing than the sirloin steak
you'd eat yourself.

The brands which are promoting these arguments — PURINA, GAINES, KEN-L-RATION BURGER, TOP CHOICE — all belong to the Semi-moist category — except Purina which is dry — and they are spending a lot of money to make their arguments stick. This is Alpo's competition. (CX 87u)

48. As a new product — semimoist — began to make its impact on the market in 1966 (CX 87t), the Alpo advertising agency drew up the following battle plan:

Big competitors are jumping on the "all-meat" bandwagon or attack it by bringing out moist products. As the latter is the case, Alpo must be prepared with an all out counter attack. The chink in the moist armor is the fact that moist products contain about 25% sucrose, or sugar. Advertising counter attacks were being tested during 1967. (CX 87z10)[39]

[27] 49. In general, a pattern emerged in the mid-1960's which continues to the present of sharp inter-category challenges in the form of non-price *advertising* competition as shown in the following examples:

(a) An anti-all-meat attack was launched by the semimoist brands. It was aimed directly at the "Alpo type" higher income customers. (CX's 41d, 44d, 87t-u, 95c), as well as buyers of other canned products. (Tr.

[39] There was no suggestion in contemporaneous documents that Allen should ignore the semimoists because they are in a "different market" as respondent now claims. There was, however, one reservation expressed by Allen with respect to a possible attack on the sugar content of the semimoists. While Allen recognized "that quantities of sugar can actually prove harmful to a dog," its advertising agency recommended that the sugar danger "be handled with extreme caution, if used, since ALPO itself may later bring out a similar 'moist' product containing sucrose." (CX 87z16) Research done for Allen in 1965 indicated that a 22 percent to 25 percent sugar content exposes dogs to three dangers — diarrhea, diabetes, and uremia (kidney disease). (CX's 36a, 50b)

545) In fact, the semimoists built their business by attacking canned. (Tr. 1191) In the period 1965-1967, the semimoists were Alpo's "toughest competition." (CX 43q)

(b) Allen has counter-attacked (apparently with some success, Tr. 1949) against the semimoists with the slogan "no sugar added" and copy which read as follows:

> Burger dog foods advertise meaty too. But their labels list "sucrose" as a major ingredient. That's pure sugar. A burger can contain as much as 20% sugar. There's also up to 35% vegetable matter. How much real beef, or meat by-products are in a burger? Well, it would take at least ten burgers to equal the beef and meat by-products in one can of ALPO Beef. (CX 94a; see, also, CX 87h)

(c) From its inception and continuing to the present, virtually all semimoist advertising of the dominant semimoist company, General Foods, contains the slogan "the canned dog food without the can." (CX 182a, b, c; Tr. 487) This is intended to emphasize the convenience of semimoist. (*See,* also, CX's 179, 180, 183 for value, convenience, palatability, and nutrition comparisons between semimoist and canned as well as between semimoist and other categories of dog food.)[40]

[28] (d) The palatability of Alpo (to dogs) is compared to "other leading canned dog food, the leading dry dog food and the leading burger-type dog food." (CX 340a, b)

(e) Ralston Purina, the leading manufacturer of dry, has conducted anti-all-meat campaigns. (CX's 41d, 87u; Tr. 1844-47) Alpo has retaliated with television commercials showing dogs choosing Alpo while cows happily chewed on Purina dry. (CX 344a; Tr. 1435-36, 1843-47) Other Alpo attacks on dry lash out at the "meaty texture and meaty flavor" of products "made primarily with corn." (CX 94a) In a counter-attack, dry advertising by Ralston Purina shows a can of Alpo alongside a package of Purina High Protein Dog Meal (Dry). Above the Alpo appears the words "Twice the price;" above the Purina the words "Twice the protein." The copy reads:

> We took a good look at the leading canned dog food, meat and meat by-products, and felt we could do something better. And we think we did. (CX 184)

(f) Canned dog foods which are less expensive or have less meat than Alpo (and more cereal) have issued strong anti-all-meat advertising. (CX's 43b, 44d; Tr. 1844-47) Allen, on the other hand, urged consumers to add Alpo to dry instead of using cheap canned. (CX 353)

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[40] The General Foods' Prime Variety package (a semimoist) contains the following statement:

One packet replaces a one-lb. can of dog food or 1-1/2 to 2 cups of dry dog food * * * No metal cans to open — nothing to add — no mixing or mashing. (CX 187a, b, see, also CX 180b; Tr. 484-85)

The Quaker Oats' Ken-L-Ration Burger (a semimoist) package contains the following statement:

Economical. Each 6 oz. pouch contains more food solids than a 1 pound can of dog food and costs less than most dog foods. (CX 183)

50. In addition to the intercategory challenges, another strategy commonly followed in the dog food industry is the introduction of close imitations to successful brands, *i.e.*, "me-too brands." Thus, Allen's competitors attempted to match the Alpo success by introducing new premium canned brands which had an all-beef "image." These products were intended to compete head-to-head for Alpo's market share. (CX's 41d, 42c) The record shows the following:

(a) Quaker Oats tried to introduce a premium-priced all-meat canned product, KLR 100, which was targeted at Alpo, as a defensive move when it was found that Quaker's maintenance product "stopped growing when Alpo came in." (Tr. 1050; see, also, Tr. 1049-52)

[39] (b) General Foods came out with Gaines Supreme, another premium-priced all-meat canned product for the specific purpose of gaining a share of the premium canned category. (Tr. 534)

(c) Ralston Purina introduced Flavor Plus,[41] which had as its primary target the premium area since it was growing at a faster rate than low-priced canned dog food. (Tr. 319-20, 323-24)

(d) National Biscuit's Rival Division introduced a premium-priced all-meat product to carve away sales from Alpo and Kal Kan.(Tr. 813-14)

51. The response of Allen to the "me-too" premium brands (both all-meat and non-all-meat) was to monitor and then counter-attack, often with the theme that some of the premium-priced canned products were not all-meat. (RX's 16, 17-18b, 20, 22, 23-48)[42]

52. Allen's internal marketing documents show that a challenge of a new brand (me-too or otherwise), or even a new category, is met by more advertising rather than price cuts.[43] If a competitor threatens to encroach on Alpo's market share, the reaction of Allen is to consider still more massive spending on advertising. (CX's 42c, 43h, 44d-g, 87j) By the same [30] token, the record shows that Allen aggressively challenges others on the basis of advertising strategies rather than price. For example, in moving against its major direct competitor, Kal Kan, Allen's strategy was to "make inroads into * * * [Kal Kan's] largest markets [The West Coast] thus forcing [Kal Kan] to switch dollars currently being used to expand into Alpo's major Eastern markets back into these [Western] markets." (CX 41c; Tr. 1372)

53. The technique of using imitative brands positioned to compete

[41] This product was in a "virtual demise" by 1971 (CX 44d), and there is no evidence that any of the products discussed in Finding 50 were successful.

[42] As is apparent from these exhibits, most of which are dated after 1970, the intensity of L&M's concern with the "me-toos" increased markedly after 1970 when its own success attracted attempts at successful imitation.

[43] In contrast, new brands, like Skippy Premium, have attempted to cut into Allen's market share by pricing slightly below Alpo. (RX 60L) The price of Skippy Premium, however, could not be set too low because consumers would not believe it is truly competitive in quality to Kal Kan and Alpo. (Tr. 1669) There is no evidence that Skippy Premium's lower price cut into Alpo's market shares.

head-to-head against dominant brands is not confined to the premium canned category:

(a) Allen's BeefBites is designed to compete with Ralston Purina's Chuck Wagon. (Tr. 1375-77, 1443)

(b) Allen's Alamo is designed to compete with Ralston Purina's Dog Chow and General Foods' Gaines Meal. (Tr. 1793, 1814)

(c) Vets' Perkburger (a semimoist) was introduced to compete against the Gainesburger (General Foods) and the Ken-L-Burger (Quaker Oats). (Tr. 2081)

54. In addition to inter-category challenges, firms in the industry try to create consumer franchises by positioning their products on the basis of some "unique" attribute — even the "shape" of the dog food has been used for this purpose. As one industry representative put it "if somebody else is yelling at the top of their voice [by spending] $8 million that we['re] all meat then you'd better yell about something else * * *." (Tr. 835)

55. Although the enormous success of the premium canned brands, particularly Alpo, as well as the semi-moists and highly advertised dries, was at the expense of the inexpensive brands, companies producing these "maintenance" products did not counter-attack with massive advertising campaigns aimed against their [31] competitors.[44] Respondent's Exhibit 6 cites several reasons for the failure of the entire maintenance category (both higher-priced maintenance brands like Ken-L-Ration and "10¢ brand" like Vets) to retaliate, in kind, against the competitive inroads of the "all-meats," the semimoists, and the dries:

(a) Due to the "maturity" of the maintenance category it was "difficult to find something to say that's new and interesting." (RX 6, p. 8)

(b) The "meat" appeals of the premium canned and the semimoists were too strong and their budgets too large to be met head on. (RX 6, p. 10)

Respondent's Exhibit 6 also suggests that still another factor was that the manufacturers of the older category (maintenance), with the exception of Ken-L-Ration, had not used media advertising extensively[45] and considering the lack of excitement in their products, and the nature of the competition they were facing, there was no incentive to invest heavily where they had not invested before. *See*, RX 6, p. 7.[46]

[32] 56. In the absence of any counter-attack against the premium

[44] To the extent that they *did* advertise, the economy brands issued intercategory challenges. *See*, Finding 49(f).

[45] Perk advertising had been done, essentially in newspapers, with some spot TV. Since the company did not have adequate depth of national distribution, it did not advertise on the networks. (Tr. 1148-49)

[46] Despite the relative decline in the maintenance category and the faster growth of premium, it is significant that the category was, nevertheless, attractive to L&M management. *See*, Note 99, *infra*, and Finding 126.

canned or the semimoists or highly advertised dries which had successfully created franchises amongst upscale consumers, the inexpensive brands were put in the position of vying with each other and the supermarket private labels for the business of those consumers who were still mainly interested in price. The dilemma of companies without massive advertising budgets (or something new to say about old brands) is illustrated by a 1972 consumer "attitude" study:

> Among non-users, Vets [Dry] is virtually an invisible, unfamiliar brand, and product ratings are non-committal. A limited, residual market has gravitated to Vets' economy but there are no signs that such a market has any likelihood of increasing in size in view of the formidable strength and positioning of competitive brands, especially Purina. (RX 13, p. 77)

57. As an alternative to the massive image advertising tactics of the national brands, the cheap brands like Vets confined themselves to their traditional methods of marketing:

(a) Use of low prices on the assumption that whichever brand has the lowest price at a particular time will attract the bulk of the business. (Tr. 2218-19, 2303-05)

(b) Use of couponing and supermarket promotions — *i.e.*, "deals" to encourage cooperative advertising, and in-store displays. (Tr. 2025-26)[47]

58. While consumer interest in the maintenance or cheap category was declining in the 1960's, the Vets' marketing strategies met with good success. For despite the fact that prior to the acquisition Vets was competing against giant companies with huge advertising budgets, [33] it registered sales and earnings gains on a par with or superior to the industry average because of three factors: (a) its established brand names, (b) its strong brokerage distribution network, and (c) an emphasis on volume production through economy prices and promotional allowances. An assessment of the company made prior to the acquisition, concluded that "This performance is particularly noteworthy in light of the Company's financial resources and advertising budget relative to that of its major competitors." (CX 25i)

59. The advertising budgets of Perk's major competitors, however, were bound to have a substantial impact on brand choice. While consumers prefer "to believe they are objective and independent in making their brand decisions * * * More indirectly and more validly, the high degree of acceptance of well-known and heavily advertised brands reveals advertising's true influence on brand choice." (RX 13, p. 117) Motivational research which was done for L&M concluded:

[47] In contrast, by concentrating on national advertising, and creating the largest selling and most profitable brand, Alpo has not had to "pay for" retailer support. (CX 41c)

* * * advertising functions beyond establishing product or brand acceptance by providing social reenforcement of an individual's brand choice. Advertising implies to an individual that peers value the same brand or product as he does. Therein, the individual is assured of the rightness of his choice. (RX 13, p. 117)

60. The marketing strategies of Alpo and other large advertisers, as well as the contrasting techniques of the inexpensive brands described in Finding 57 have created discernible demographic patterns and affected consumer perceptions of brands and cross-elasticities among dog food products. (Findings 61-72)

61. "SAMI" (Selling Areas Marketing Inc.) data for the period 1966-1973 show that the price of canned [34] dog food ranged from about 6 cents to 38 cents per 300 can.[48] There are, however, several *statistically* identifiable price sub-ranges where retail sales can be placed including what respondent's statistician called the economy (Vets and others), regular (Ken-L-Ration[49]) and premium (Alpo and imitators) categories. During this entire period (1966-1973), Alpo was selling in the "premium" category while Vets was selling in the "economy" category with occasional slippage over to the "regular category." (RX 120)[50]

[36] 62. While sales in the canned category can be arranged in

[48] Respondent's graphic renditions of the SAMI *regional* reports show some breaks in this overall price range. (RX's 135-164) However, the SAMI *national* reports show substantial sales at practically every price ranging from 6 cents to 38 cents with few or no price breaks. See, RX 111z68 (1973 — sales at all prices from 7 cents to 38 cents; RX 110z62 (1972 — sales at all prices from 7 cents to 36 cents except for no sales at 36 cents); RX 109z62 (1971 — sales at all prices from 7 cents to 35 cents); RX 108z58 (1970 — sales at all prices from 7 cents to 35 cents); RX 107z52 (1969 — sales at all prices from 7 cents to 35 cents); RX 106z25 (1968 — sales at all prices from 6 cents to 34 cents except at 12 cents); RX 105z13 (1967 — sales at all prices from 7 cents to 36 cents except no sales at 11 cents, 34 cents and 35 cents); RX 104z5 (1966 — sales at all prices from 7 cents to 36 cents).

[49] Quaker Oats' Ken-L-Ration is clearly the dominant brand in this "high-priced" maintenance category with little competition. (see, RX 6, p. 3)

[50] Drs. Miller and Gutman, respondent's statistician and economist, respectively, testified that their visual inspection of the SAMI bar charts discloses only three price "peaks" (Tr. 2417, 2427, 2430, 2432, 2946) which somehow prove the existence of three canned markets — premium, regular, and economy. Many of the bar charts contain several more "peaks" than the three that these witnesses saw (see, *e.g.*, RX's 135-164); moreover, Dr. Miller's own statistical methodology (*i.e.*, "averaging") clearly produced fourth or fifth "markets" in certain areas which he later discarded because he "would have had difficulty defending the existence of the 4th market." (Tr. 3168, see, also, Tr. 3168-70, 3172, 3175-76) On the basis of Dr. Miller's testimony with respect to his exclusion of certain statistical markets, I specifically ruled that all of [35] the exhibits prepared by him and Dr. Gutman which are premised on a three "market" analysis (RX's 120, 121, 123, 131e, 165, 166, 167, 170a) must have a disclaimer attached to them respecting the possible existence of other so-called "markets" or "submarkets." (Tr. 3282-83) It should also be noted that Dr. Miller's description of *two* categories below premium (*i.e.*, "economy and regular") does not reflect the *industry's* working recognition of the sub-premium or "maintenance" categories. Thus, in 1969, when Vets was selling at about 10 cents a can (RX 175), the "maintenance" category was described as having *three*, not two price ranges, as follows:

below 10 cents
10 - 14 cents
15 - 19 cents

(CX 152e, *in camera;* see, also, Tr. 1020, 1694 for industry recognition of at least three price ranges in "maintenance")

The most that can be said for Dr. Miller's testimony is that applying a statistical methodology — averaging (Tr. 3138-65) — sales of canned dog food can be clustered around several price ranges although as the SAMI national bar charts make plain there are substantial sales all over the lot (see Note 48). While Dr. Miller's exclusion of a fourth category was not based on any statistically valid reason, I have not discredited his entire testimony since the basic point he was making — that the process of "averaging" shows at least three price ranges — was not challenged by complaint counsel. Considering, however, Dr. Miller's qualifications which are confined to statistical analysis, as well

(Continued)

various pricing ranges including low, medium, and expensive, both ranges and the identity of sellers in particular ranges may change. Thus, as indicated in Note 50, *supra*, respondent's retained statistical expert testified that his review of SAMI data for 1973 has uncovered at least a *fourth* pricing range — super-premium. Moreover, prior to the successful entry of Alpo, Ken-L-Ration, which is now in the so-called medium or "regular" price range, "used to be in the higher priced group." (Tr. 2298)[51]

63. The buyers who are persuaded by Alpo advertising to buy premium-priced canned dog food *tend* to have the following demographic profiles:

(a) They tend to be upscale in income, education and job status. (CX 158, pp. 88-89)

(b) They tend to be urban dwellers with smaller than average families. (CX 158, pp. 88-89)[52]

(c) They own smaller than average dogs.[53] (CX 158, pp. 88-89; RX 12, p. 3)

(d) While it is a truism among dog owners generally that the dog is a member of the family (see Findings 33 and 34), premium canned users tend to take the dog very seriously as a family member and treat it much as they would treat their children. (RX 12, pp. 4-5)[54]

[37] 64. As for these premium buyers' image of dog food brands, the cumulative effect of premium dog food pricing and advertising was to register the following impressions:

(a) They perceive Alpo and other premiums[55] as a high quality[56] "meaty" product. (RX 13, p. 94)

(b) Alpo and other premiums are far from ideal in economy. (RX 13, p. 94)

as my observation of his demeanor while he inadequately explained his reason for excluding certain statistical "markets," I attach no weight whatsoever to any opinion testimony he may have given which indicates the existence of any economic markets which are relevant to this case. By the same token, I am not persuaded that Dr. Gutman's (respondent's economist) adoption of Dr. Miller's "average" categories gives any additional weight to this evidence which, in any event, is of doubtful materiality in defining a market for a Section 7 case.

[51] Further evidence of the instability of the price categories is shown by the fact that in recent years Ken-L-Ration began taking price increases and discovered it did not have a negative effect on sales. (Tr. 1029) See, also, Finding 18 for evidence of a recent sharp escalation in economy prices.

[52] The "premiums" are by no means uniform in this respect. Alpo, in contrast to Kal Kan and Recipe, has strong representation in rural areas. (Tr. 1276)

[53] Owners of smaller dogs can afford the more costly canned products because the dog eats less. (RX 12, p. 3)

[54] There are, however, perceptible differences in the attitude toward dogs of premium users. "The Alpo user would be likely to teach his dog standard obedience responses: sit, stay, come, and retrieve. The objective would be a well behaved dog whose education paralleled that of well trained children * * *. The poodle owned by the user of Recipe might well appear with painted toenails and with a ribbon in her hair. This represents an *overt attempt* to personalize and humanize the dog." (RX 12, pp. 12-13, emphasis in original)

[55] As in the case of demographics, consumer perceptions of the premiums are not uniform. According to research done by L&M since premium-priced Recipe has a significantly different rating in "ingredient variety" it is placed in a different "zone of market competition" from Alpo and Kal Kan. (RX 13, p. 90) Interestingly, one of respondent's witnesses, Kassens of Perk, testified with respect to competition between all-meat Alpo and less than all-meat Kal Kan that he felt that they do not compete. (Tr. 2058)

[56] "Quality" in this context means (among other things, but most importantly) that dogs like it. (RX 13, p. 81)

(c) They perceive dog foods like Vets as either of doubtful quality (RX 13, p. 94), or else as having an "invisible" image. (RX 13, pp. 68, 77)[57]

[38] 65. Since the impact of the premium canned campaign largely registered with upscale consumers, the inexpensive brands, particularly Vets, were left by 1972 with customers who *tend* to have the following demographic profile:

(a) Downscale in income, education, and job status. (CX 158, pp. 77-82, 86-89)

(b) Rural dwellers with larger than average families. (CX 158, pp. 77-82, 86-89)

(c) They own larger than average dogs. (CX 158, pp. 77-82, 86-89)[58]

[39] The 1972 demographics described above are by no means static, and they undoubtedly have evolved as consumers have been "traded up" to more expensive dog food. Just three years earlier, in 1969, when dry was mostly "rural" and "lowest income"[59] and specialty and semimoist were urban and upscale in income, maintenance was the "most *evenly balanced* type by demographic category." (CX 151z47, *in camera;* emphasis in original) In 1966, Ken-L-Ration, a maintenance product, was particularly strong with high income families, and Vets was strong with middle income families. (CX 88d)

66. Buyers of Vets and other inexpensive brands have the following perceptions of these brands:

> Vets, Strongheart and Skippy have similar brand images among their respective users * * * lower than ideal in quality, meatiness and ingredient variety, and higher than the ideal in economy. Again suggesting something of a systems effect in which lower price sets off negative impressions of quality and meatiness. (RX 13, p. 103)[60]

67. The fact that the Alpo sales pitch has registered most dramatically with the upscale consumer, does not mean that other dog food companies, which make dry or semimoist, concede this part of the

[57] Respondent's Exhibit 13, which respondent heavily relies on to prove its "market" case, hardly supports the notion that Vets and Alpo are in separate markets in a Section 7 sense. To the contrary, this report on the "canned dog food market" (RX 13, p. 104) describes "four modal profiles [Recipe, Alpo, Ken-L-Ration and Vets] * * * with some brands achieving stronger positions, and others declining." (RX 13, p. 102)

[58] The demographic differences discussed in Findings 63 and 65 do not describe hard and fast consumer classes — to the contrary, there is considerable demographic overlap as between Vets customers and Alpo customers. (See, CX 158, pp. 86 and 87; Tr. 1277-79.) It should also be noted that the *same* study showed that there are "significant demographic differences" between Vets and Strongheart (CX 158, p. 92) and between Vets and Skippy (CX 158, p. 95), which, according to respondent, are all in the *same* economy "market." Moreover, the all-meat category and the semimoists have similar demographics (Tr. 1386), although respondent claims that these products are in different markets. In addition, based on a 1969 study, Ralston Purina was told "buyers come from virtually all categories and are not easily divided into discreet groups based upon demographic classifications. *Most* dog food types and brands appeal to *some* people from *all* buyer groups at one time or another."(CX 152c, *in camera;* emphasis in original)

[59] The instability of demographics as a fixed phenomenon of the marketplace is shown by the fact that currently dry dog food is the fastest growing category despite the overall trend toward higher income and urbanization. (*See,* Note 12, *supra;* Findings 68, 76)

[60] *See,* also, Tr. 1062 (inexpensive brands are "looked at as something inferior because they're inexpensive") and Tr. 1222 (consumers "are equating low price with low quality").

consuming public to Allen. To the contrary, this is exactly where the new growth in the *entire* industry is likely to come from. Thus, Allen itself was given the following assessment of the future of the industry:

> [40] The dog population is growing (24.7 million in 1966 — up 7.9% vs. 1965 — MRCA [survey source]). Basically, more families are getting dogs. These families tend to be upscale — good Alpo prospects. And the level of personal income is growing, making ALPO affordable to more families * * *. (CX 87z7)

68. Moreover, the growth of *all* dog foods is directly tied to their ability to take advantage of the same factors, *i.e.*, (1) higher levels of consumer disposable income; (2) greater percentage of income allocated to pet foods; (3) a trend toward pre-cut meats and a resulting decrease in table scrap consumption, and (4) general increases in the dog and cat population. (CX's 25f, 29b, 87p) A study of the industry made just prior to the Perk acquisition concluded:

> As standards of living are upgraded and as the upward demographic trend continues * * * further increases in pet food consumption are expected at rates well above the economy in general as well as at growth rates superior to that of the overall food industry. (CX 25f, g)

69. In sum, there is nothing unique about the fact that Alpo aims at the upscale consumers. In 1964 when Vets was identified as one of the leading national brands (at that time Alpo was not included since it did not have national distribution), the best dog food market was "households in the upper-income group." (CX 21h)

70. As for the cross-elasticity of demand, the effect of the massive advertising campaigns conducted by the dog food companies is that whole categories and subcategories of dog food have become insensitive to increases in their own price or increases in prices of other categories or subcategories. A cross-elasticity of demand[61] experiment conducted by [41] respondent in 1974 specifically for this litigation shows the following:[62]

(a) A 10 percent increase in the price of premium canned — say,

[61] Cross-elasticity of demand is a measurement of the relative change in the quantity of one product sold resulting from a change in the price of another. (Tr. 2522, 2712)

[62] Complaint counsel have vigorously objected to the admissibility of the seven city cross-elasticity experiment conducted by respondent specifically for this litigation. (*See*, Complaint Counsel's Reply Brief, Mar. 24, 1975, at pp. 20-27.) The points raised by complaint counsel respecting alleged infirmities in the procedure go to the weight to be given this study. Even accepting all the points raised by complaint counsel, I have relied on the results of this study (RX 131c) for the pragmatic reason that the record contains nothing better on cross-elasticities. Certainly, complaint counsel introduced no evidence which would show that the demand for either premium or economy is sensitive to *price* changes (in contrast to advertising) in the other category.

Respondent's cross-elasticity experiment consisted of putting together a consumer panel whose purchases of dog food was presumably confined to ordering from a catalog where the regular prices the consumer paid were raised or lowered by 10 percent. The experiment then recorded the effects of these price changes on the demand for particular products.

from 33 cents to 36 cents — had no significant impact on the demand for inexpensive canned. (RX 131c)

(b) A 10 percent increase in the price of premium canned had no impact on the demand for premium canned. (RX 131c; Tr. 2582, 3127)[63]

(c) With the exception of dry and regular canned (Tr. 2584), there are no significant positive cross-elasticities between *any* two of the dog food categories — *i.e.*, the three canned, dry, and semimoist. (RX 131c)

[42] 71. With respect to the cross-elasticity of products in the dog food industry, the record shows that the introduction in 1973 by Carnation of a highly advertised and much *more* expensive "super" premium brand (Mighty Dog) had the effect of *reducing* the demand for cheaper Alpo. (RX's 55a-d, 170a; Tr. 1795-96)[64]

72. During the period of some of Alpo's most sensational growth (from 1968 through 1972) increases in the price of the product had no apparent effect on the demand for Alpo.[65] The average price of Alpo went from 28.35 cents in 1968 to 29.37 cents in 1972. (Finding 17) Sales during that same period went from $66 million to $121 million. (Finding 86)[66]

73. While the cross-elasticity and demographic studies show a substantial measure of success by Alpo and some of its competitors in carving out franchises for their products, the permanency of any company's consumer franchise is open to substantial doubt. (Findings 74 to 79)

[43] 74. In the first place, since brand loyalty is largely a function of advertising, any successful, massive campaign represents a threat to loyalty. While it is true that there have been few new entrants in recent years (Finding 116), the existing giants are fully capable of issuing strong inter-category challenges. (Findings 47 to 49) As for the vulnerability of brands or categories to these challenges, a 1969 study conducted for Ralston Purina concluded that "significant portions of most brands' buyers * * * are in the traditional sense relatively non-loyal." (CX 153d, *in camera)* The same study found:

Specialty and Alpo buyers * * * show similar patterns across the loyalty dimension,

[63] The elasticity study results are supported by the testimony of the representative of Kal Kan who said that within the premium category there has not been price sensitivity among premium brands. (Tr. 1618-19)

[64] The quality of "price competition" in this industry is further shown by a 1969 attempt by Cadillac to sell an all-meat product on the basis of a claim of "5¢ less." When this commercial registered a reduced response with TV viewers, Allen's advertising agency said "It may be that this ("5¢ less") is simply not a believable point, and the product gets dismissed as a result." (CX 59b)

[65] See, Tr. 1900 for testimony about the lack of price sensitivity in the premium category. Even Ken-L-Ration, a maintenance product has found that price increases have no effect on sales. (Tr. 1029)

[66] The record contains some evidence as to how the problem of a price increase is met — namely, by *more* advertising. In 1965 when Allen announced a price increase which was passed along to consumers "in spades," its advertising agency said "It may be that our media buying strategy for the fall could be based on packing those cities where we have to overcome consumer resistance to a price increase." (CX 48b) On the other hand, when there was a decline in Allen's costs, it was suggested that prices be maintained, and the saving be used for an extra advertising effort. (CX 72c)

with only minor concentrations of loyal buyers and heavy concentrations of non-loyal buyers. Around 40-45% of the buyers satisfy less than 20% of their volume with Alpo or Specialty. Also consistent with both is the increasing importance of Dry and Maintenance among the less loyal buyers. (CX 153L, *in camera)* [67]

Alpo had, in fact, built the greatest brand loyalty in the canned segment, but a significant number of Alpo users as well as all other dog food users showed little brand loyalty. (CX 158, pp. 99-101) And the most recent development in the industry has been the erosion of Alpo's brand loyalty by the massive Mighty Dog campaign. (RX's 55a-d)[68]

On the question of brand loyalty, the head grocery buyer of the Giant chain made the point that all dog foods are displayed together in the dog food section of the supermarket, and since they all perform the same function they are "shopped" by consumers, many of whom have little brand loyalty. (Tr. 1481)

[44] 75. Another factor which may break down brand or even category loyalty is the substantial volume of combination buying which prevails in the marketplace. Combination buying is the purchasing of more than one type of dog food by the same consumer. As one industry representative put it "* * * the vast majority of dog owning households buy a multiplicity of [dog] foods and thereby either alternate or mix with substantial frequency." (Tr. 482)[69] The record shows the following:

(a) Ralston Purina produced studies of combination buying based upon actual buying done by the National Purchase Diary Panel (NPDP) in 1969 and analyses of the NPDP results done by Market Science Associates (MSA). The "Purina Studies"[70] show that most dog food buyers purchase more than one kind of dog food. The results of this study are summarized in Table 4 below.

TABLE 4: Combination Purchasing during *Six-Month Period in 1969*

Category	Percentage Using Category	Nonexclusive Feeders	Exclusive Feeders
Dry	69%	65%	35%

[67] *See*, however, evidence cited in Finding 75(d) which indicates that by 1970 while premium buyers were still buying *some* maintenance, their volume of purchases in this category was declining.

[68] According to research done for L&M "Brand loyalty is defined by factor items as a combination of brand familiarity, a tendency to judge quality on the basis of price, and a consistent purchase of a single brand." (RX 13, p. 115) The same study concluded "Evidence of dog owners' interests in a new product qualities suggest loyalty to a brand may last until something apparently better comes along." (RX 13, p. 115)

[69] A dog's main meal may be served, basically, in three ways: (1) one type of product (wet, dry, or semimoist) may be used by itself; (2) two or more types of products may be mixed together; (3) two or more types of products may be served at the same time, but separately. (CX's 140k, n; Tr. 482, 775).

[70] I have used the term "Purina Studies" to refer to NPDP results, MSA analysis of these results, and Purina in-house conclusions based upon the results and analyses. The "Purina Studies" appear in the record as CX's 151-53, *in camera*. In my order of November 8, 1974, I said that neither the administrative law judge, nor any other reviewing authority shall be limited in any way in the public use of this *in camera* material.

Maintenance			
(Inexpensive canned)	53%	86%	14%
Specialty			
(Expensive canned)	34%	92%	8%
Semimoist	27%	88%	12%

(Source: CX 151d *(in camera)*)

[45] (b) Purina Dog Chow (a dry brand) is considered one of the strongest dog food brands in the market;[71] yet the "Purina Studies" show that only 18.2 percent of its buyers were exclusively loyal. (CX 152d, *in camera)* This pattern of combination buying led Purina to conclude that Purina Dog Chow is "to a greater or lesser degree in direct competition with most types and brands of dog food." (CX 152c, *in camera)*

(c) The pattern of combination buying shown by the "Purina Studies" was summarized as follows:

The material * * * shows how much PDC [Purina Dog Chow] is in the *total dog foods business* whether we have product entries in every type category or not. (CX 152d, *in camera)* [emphasis in original]

— the highly interactive buying patterns of dog food users must now be considered a fact; very few buyers rely on any one type or brand to satisfy their dog feeding needs

* * * * * * *

— the traditional segmentation of the dog foods market into types is logically and practically unsound; "types" are apparently a host of image and usage benefits to consumers, not dry *or* maintenance. The market is *one* and, new consumer information is needed to penetrate its buyer dynamics * * *. (CX 152g, *in camera)* [emphasis in original]

Combination purchasing *is* the market (62%) and probably will continue to increase in importance * * *. The former five-type segmentation is *obsolete;* today's dog food buyer is seeking multiple types to meet her feeding needs.* * * (CX 151z52, *in camera)* [emphasis in original]

[46] (d) Respondent's exhibits 125-130, which are based on the consumer diary panel maintained by Market Research Corporation of America (MRCA) in 1970, also show that relatively few consumers buy any *one* kind of dog food exclusively. Within the canned category, for example, only 17.6 percent of families polled who bought *some* canned dog food were exclusive buyers of premium canned (they may, in addition, have been using dry and semimoist) and only 23.6 percent of the families polled who used *some* canned dog food were exclusive buyers of low-priced canned[72] (they, too, may have bought dry and semimoist). (RX 125)

[71] *See, e.g.*, RX 13, p. 78.

[72] The designations premium, regular, and low-priced as used in RX 125 are derived from the statistical analysis of SAMI data. (*See*, Note 50, *supra.*) As in the case of SAMI data, purchases of canned dog food were made by the MRCA panel members at practically all prices ranging from 6 cents to 38 cents with no price breaks. (RX 124b)

Respondent's exhibits 125-130 become more difficult to use in determining the *intensity* of combination buying. While the conclusions from the "Purina Studies" were based, in part, upon the impact of combination buying on the total volume purchased in a specific category, respondent's exhibits do not readily lend themselves to this kind of analysis. In fact, the parties have made conflicting claims from the same exhibits and this conflict is not easily resolved by either the exhibits or the surrounding testimony. Respondent's statistician claimed, for example, that RX 125, which shows that 15 percent of the MRCA families that bought *some* canned, purchased both premium and inexpensive, but it also shows that about 75 percent of the families who purchased premium bought over 80 percent of their requirements in the premium category alone. Respondent's statistician also claimed that the exhibit shows that only 4-1/2 percent of the families which purchased canned bought as much as 20 percent of their requirements in both the inexpensive and premium categories. (Tr. 2910-16) The difficulty with this approach is that it tells us nothing about the percentage of the total volume in either the premium or inexpensive categories which is represented by the heavy users of either category. To illustrate the problem, assume for the moment that a consumer purchased one can of premium and zero cans of maintenance. **[47]** According to RX 125, this particular purchaser of premium would appear as a heavy user of premium — *i.e.*, in the top left hand corner of RX 125 as one of the 284 families which purchased 100 percent of its canned dog food in the premium segment and none in the inexpensive category. (Tr. 2635-36) On the other hand, a purchase of 10 cans of economy and two cans of premium would be recorded as a light user (in terms of percentage of total canned purchases) of premium. While the ambiguities in respondent's exhibits cannot be resolved, there is other evidence in the record which indicates that combination buying is quite intensive. The "Purina Studies," show the following:

(i) Specialty (expensive canned) and maintenance (inexpensive canned) were used by 11 percent of the NPDP families, and these families purchased 8 percent of the total of specialty sold. (CX 151p, *in camera)*

(ii) Seven percent of the NPDP families used maintenance and specialty and these families purchased 6 percent of the total volume of maintenance sold. (CX 151n, *in camera)* [73]

(iii) "Exclusive buyers" in any one category, for the most part, account for a relatively small percentage of the total volume of that category — *i.e.*, 44 percent of dry, but only 19 percent of semimoist, 18

[73] Combination purchasers of dry, maintenance and specialty made up a much larger percentage than those who bought just maintenance and specialty.

percent of maintenance, and 9 percent of specialty. (CX 151d, *in camera)*

On the basis of these data, the "Purina Studies" concluded that among the consumers who bought specialty canned in 1969, the purchase of maintenance canned played a "major role." (CX 151p, *in camera)* By the same token, among purchasers of maintenance, specialty canned served a "major role." (CX 151n, *in camera*) The specialty canned products covered in the "Purina" Studies included Alpo and the maintenance canned products included products like Vets. (Tr. 233-35)

[48] Despite the infirmities in respondent's exhibits and the apparently conflicting conclusions drawn from the more detailed "Purina Studies," I believe that with respect to specialty and maintenance, a reading of the entire record (*see,* for example, CX 158, p. 28) would lead to the conclusion that the intensity of combination buying has changed since the "Purina Studies" were conducted in 1969, and that respondent's Exhibit 125 can be broadly interpreted as showing the emergence of a trend in 1970 away from combination buying as between these two categories.[74] However, I have no basis for concluding, one way or the other, [49] that this post-1969 trend is inevitable and may not revert to an earlier pattern should these categories or, more importantly, consumer perceptions of these categories change.[75]

76. Still another factor affecting brand or category loyalty is a change in consumer taste brought about, for example, by a generally deteriorating economy which reduces the level of discretionary income, and leads many consumers to look for cheaper alternatives to expensive dog food. (Tr. 1055-57) Since 1972, the premium-priced "all-meat" category has had little or no growth, while sales of cheaper dry

[74] As respondent's experts, Drs. Miller and Gutman would have it, the MRCA data, such as RX 125, are statistically and economically inconsistent with the hypothesis of an all dog food market, presumably because they show a trend away from combination buying in 1970. (Tr. 2453-56, 2481-86, 2805-06) Even if these data show this, and as I indicated above, it is by no means certain that they do, the trouble with this analysis is that it totally ignores the equally reliable (in fact, the "Purina Studies" are based on a larger panel than the MRCA results), and more detailed analysis of combination buying in the "Purina Studies" which show a high degree of combination buying in 1969, the year of the acquisition. In looking to the evidence on combination buying I have followed neither the approach of complaint counsel (*i.e.*, that the "Purina Studies" *prove* the overall market) nor of respondent's counsel (*i.e.*, the MRCA studies *prove* no overall market and the "Purina Studies" can be explained away). It seems to me that both sides claim too much, and that combination buying, to whatever extent it exists, is simply one factor, among others, indicating the precariousness of brand loyalties in this business.

[75] For additional evidence on the prevalence of combination buying, particularly the mixing of wet and dry, see CX 149g; CX 158, p. 26, *et seq.*; Tr. 346, 1063. The record shows that Allen, itself, designed Mix-Mate (RX 15) its rice-based dry product "particularly for dog owners who mix canned and dry foods, a majority of the total." (CX 6j) According to L&M "Almost twice as many dog owners mix canned and dry foods as those who use either product straight." (CX 11b; see, also, CX 35a)

dog food continue to grow at a rapid rate. (Tr. 1055-58, 1062, 1584-89, 1794)[76] On the other hand, "as consumer environments change * * * as people love their dogs more, placate and coddle them more and more, spend more money on them, vest their egos in their dogs, there is no reason why additional new product factors cannot be introduced to dog-food buyers." (RX 13, p. 104)

77. In addition, there are a substantial number of consumers who come into the market each year with no brand loyalty. These are new dog owners who may try several different categories before settling on one or more than one. (RX 6, p. 10; Tr. 2240-41)

[50] 78. Also influencing brand loyalty is the factor of consumers' anthropomorphic (see Findings 33 and 34) attitudes toward their dogs:

> Some dog owners seem to create a state of dependency of their dogs "good will" in their projection of personal feelings to a dog, a tendency somewhat more noticeable among owners of small dogs than among owners of large dogs. In effect, such owners condition a dog to be "a fussy eater" which in turn reenforces a belief that their dog is special, unusually discerning, and in a general sense superior. The conditioning and reenforcement are turned into a kind of ritual of trying new brands, switching flavors and preparing special dishes for a dog. (RX 13, pp. 25-26; see, also Tr. 384-85)[77]

79. Finally, since elasticity and demographic differences are to a significant extent a result of successful advertising, changes in advertising policy could break down these distinctions. That changes do take place is shown by the fact that Perk had planned, prior to the acquisition, to exploit its price advantage by using radio and television in selected markets. (CX 25n) And L&M is currently planning to advertise on network television both Perk canned and dry foods. This is Perk's first venture into network television. (Tr. 1981, 1987)[78]

80. In arguing for five separate markets, respondent has placed major emphasis on testimony by manufacturers to the effect that none of these products (*i.e.*, dry, semimoist and cheap, regular and expensive canned) compete. (*See* Respondent's Proposed Findings 106-155). This testimony must be evaluated in the light of contemporaneous documents from the files of L&M's own advertising agency and others which show that the "all meat" success was largely achieved at the expense of cheap canned dog food, including Vets, and that, historically, all categories of dog food have been engaged in intensive

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[76] See, also, CX 44b which shows that in 1971 "perhaps reflecting the recession" canned dog food sales were up only 8 percent as compared to greater growth for cheaper dry and semimoist.

[77] Interest in new brands is especially prevalent among canned dog food users. (RX 13, p. 20)

[78] Given adequate margins, there is no reason why cheap dog food cannot be sold aggressively on television. Ken-L-Ration, a maintenance product, has been advertised on both network and spot television. (Tr. 976)

inter-category [51] non-price competition. (Findings 29 to 59, 74 to 79)[79] Moreover, the massive spending by Alpo and others to differentiate their products (Findings 36-44; 100-113) and the results that this advertising has achieved (Findings 61-79) has undoubtedly impacted on the perspective some industry members now have as to head-to-head competition. For example, respondent cites the testimony of Victor F. Barsky, a custom-packer for Allen, and producer of Thrivo, an inexpensive maintenance brand similar to Vets. On direct examination, Barsky said that Thrivo does not compete in any way with Alpo. (Tr. 2205) On cross-examination, he acknowledged that one of the reasons for the sharp decline in his firm's sales between 1961 to 1969 was that consumers were switching from his product to Alpo or products like Alpo. (Tr. 2243)

81. As indicated in Finding 80 where there is a conflict between contemporaneous documents showing a direct competitive interrelationship between all dog foods and testimony elicited by respondent from its own officials and others, including complaint counsel's own witnesses, about the lack of intense head-to-head competition between categories of dog food, I would give greater weight to the contemporaneous documents. As it happens, I believe this "conflict" can be readily explained. I see nothing contradictory in a businessman trying to sell his products to everyone who owns a dog (and in that sense competing with all other dog food manufacturers to get as much shelf space as possible) and the same businessman adopting a specific strategy to create a franchise or to whittle down someone else's franchise and in *that* process positioning his product so as to produce *more* intense competition around a cluster of techniques and customers which have the characteristics of a submarket.

For industry recognition of just such an all-dog food market as well as submarkets, see Tr. 274-76, 321 (Ralston Purina's dry products compete against all different brands and types of dog food, but at the manufacturing level, specific products are aimed at [52] the fastest moving categories); Tr. 529-31, 530-37 (all General Foods dog food products — canned, dry, and semimoist — are in an overall dog food market where they compete for the purpose of feeding all dogs, but there are submarkets where products compete more directly; for example, General Foods premium canned was designed to draw away Alpo's business); Tr. 759, 791, 792, 808, 813, 837-38 (Rival's medium-priced canned maintenance competes against all dog food manufacturers in trying to feed every dog but its premium canned product was

[79] It is well established that where testimony is in conflict with contemporaneous documents, greater weight should be given to the ordinary documents not associated with litigation. *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395-96 (1948).

designed to carve consumers away from Alpo and Kal Kan); Tr. 968-69, 1038, 1049-52 (Quaker Oats' dry, semimoist, and canned products compete against all other dog food, but its premium canned was positioned to compete head-to-head against Alpo); Tr. 1631, 1612-13 (Kal Kan competes against all other dog food, but Kal Kan advertising has singled out Alpo as a target).[80]

82. Further support for the existence of an overall dog food market as well as submarkets appears in the business records of respondent and its advertising agency which show concern with premium imitators (Finding 51) as well as Alpo's place in an overall market. The record shows the following:

(a) In everyday operations, Allen's advertising people write of a "total dog food market" and the share of the total market that may be gained by the "all-meat category." (CX 87z16) The same document says that "there is every indication that the all-meat category will continue to gain a larger share of the dog food market with Alpo as the leader." (CX 87z10)

(b) "Competition," according to Weightman, "has been getting tougher (and investing more heavily) each year, with a) all-meat competitors expanding, now backed by large corporations; and b) the cereal products fighting back with tough specific hard-sell *anti* all-meat copy now on TV." (CX 43b; emphasis in original)

(c) In a review of "major competitive developments," Weightman refers (1) to the tactics of "all-meat" brands which are "directly competitive;" (2) anti-all-meat advertising of General Foods and Ralston Purina and (3) the use by the semimoists of copy "directly competitive" to "all-meat" canned products. (CX 41d)

[53] 83. Still added support for the existence of an all dog food market is the fact that L&M and other firms monitor all categories and record in their business records the fact that the growth of one category is dependent on the marketing strategies of other categories. The record shows the following:

(a) In 1965, Allen was informed that Alpo's market share was dependent not only on the major national brands, but also the tactics employed by "stiff competition" like Vets in the Midwest. (CX 97x)

(b) In 1966, the Alpo growth plan took into account the "heavily financed competitive efforts" of semimoists (CX 87v), as well as Purina dry. (CX 87u)

(c) An analysis of "competitive dog food expenditures" for the year 1967 included spending by Perk on its Vets products. (CX's 162e, i, j)

(d) A 1968 analysis of "dog food competitive advertising expendi-

[80] For additional discussion of an overall market, see Tr. 727, 778, 791, 1481, 1502-03, 1554-57.

tures & sales" prepared for Allen included all well-known dry, canned, semimoist products including products made by Perk. (CX 163f)

(e) A 1968 study prepared by Quaker Oats concluded that the maintenance brands will "continue to decline" in importance due to the supplements [*i.e.*, all-meat], semimoists, and dries. (RX 6, text p. 2)

(f) On the basis of a 1969 study of purchases by the National Purchase Diary Panel (NPDP), Ralston Purina concluded "as canned specialty [*i.e.*, premium canned] and soft/moist [semimoist] both grow in relative importance dry and canned maintenance, as presently in the market, will decline." (CX 151z49, *in camera)*

(g) The "Alpo 1969 plan" was designed to cope not only with the all-meat imitators, but the *anti* all-meat copy of the cereal products. (CX 43b)

(h) A 1971 marketing plan prepared for Allen analyzed "Market Share Breakdown of Competitive Dog Foods." It included sales of dry, semimoist, and canned low-priced Vets. (CX 95q) The same year, Weightman reported:

> [54] Alpo is the leader in the high-priced segment of the canned market, in fact, growing more rapidly than the "cheapies" which are losing in share. A substantial portion of the total canned dog food growth each year is Alpo. Although there will always be a market for a real "cheapie" at 10 cents a can, the so-called "medium-priced" (20 cents) brands have been severely squeezed during recent years. (CX 95b)

(i) In 1972, Weightman reported to L&M that "The relatively flat trend of canned dog food when compared to dry and semimoist indicates that *we should be developing ways of re-establishing the growth of canned dog food at the expense of dry and semimoist.*" (CX 275a; emphasis in original)

(j) When National Can introduced its premium product (Skippy Premium) in 1973, it armed its sales representative with a chart showing "Canned Dog Food Growth Total U.S. Market," which made the following comparisons:

	July 1971 to June 1972	July 1972 to June 1973	Increase or Decrease
Total			
Canned	$519,000,000	$556,000,000	+ 7%
Gourmet	$288,000,000	$342,000,000	+ 19%
Ration	$230,490,000	$213,000,000	- 7%
			(RX 60Z14)

(k) In recent months, the premium category has experienced little or no growth, while dry dog food sales continue to increase sharply (Tr. 1584-89, 1794)[81] Dry is taking business from premium. (Tr. 1058)

[55] 84. In addition to the evidence cited in Finding 83, the business records of respondent, its advertising agency, other industry firms and experts studying the industry make reference to, and recognize the existence of an all dog food market or an all dog food business. These references to an all dog food industry or market appear in the context of discussions of industry trends, competitive advertising expenditures, growth, and market shares of particular brands. (CX's 2h, 6j, 19c, 21c, d, h, i, 25k, 29b, c, 41e, 42a, f, 43q, 44b, 62b, 63a, 87d, e, o, z8, z10, 93i, 95q, 97c, i, j, k, v, w, x, z8, z12, z17, 151c, z24, z25, *in camera*, 152d, *in camera*, 163a-h, 347a; RX 6d)

The Geographic Market

85. The parties have stipulated that the only relevant geographic market in this matter is the entire United States. (Tr. 68, 108)

Concentration

86. The wholesale dollar value of Allen's sales of Alpo for the years 1967 through 1972 are shown in Table 5:

TABLE 5: Allen Wholesale Sales of Alpo (in millions of dollars)

Year	Total
1967	$ 48.43
1968	66.14
1969	81.02
1970	93.31
1971	108.51
1972	121.16

(Source: CX 270a, 335d)[82]

[56] 87. The dollar value of Perk's wholesale sales of its proprietary[83] dog food products for the years 1967 through 1972 are shown on Table 6:

[81] For other evidence of intercategory monitoring by L&M and others to determine impact of one category on another, *see* CX's 6j, 44c, 50b, 51b, 55c, 59a, b, 60a, 62b, c, 72a, b, 87o-q, s-w, 88a-h, 344a, 346b, 347a; Tr. 212, 215, 475-76, 490-91, 757-79, 761, 762-65, 788-89, 829, 958, 965, 1536, 1539, 1954.

[82] There were small sales of Allen's dry (Mix Mate) in 1969 ($190,000) and 1970 ($60,000). The figures appearing on Table 5 were derived by subtracting Mix Mate figures appearing in CX 335d from total Allen figures appearing in CX 270a to arrive at Alpo figures.

[83] Proprietary products are products which one company manufacturers and markets according to its own formulations and sells under its own labels — *i.e.*, in this case, the Vets and Perk brands.

TABLE 6: Perk's Wholesale Sales of Proprietary Products *(in millions of dollars)*

Year	*Total Sales*	*Canned*	*% of Total*	*Dry*	*% of Total*	*Semi-Moist*	*% of Total*
1967	$19.60	$12.9	65.8%	$5.7	29.1%	$1.00	5.1%
1968	20.68	14.2	68.7	6.1	29.5	0.38	1.8
1969	20.95	15.2	72.6	5.6	26.7	.15	0.7
1970	22.73	16.2	71.3	6.5	28.6	.03	0.1
1971	19.60	14.1	71.9	5.5	28.1	None	–
1972	17.90	13.2	73.7	4.7	26.3	None	–

(Source: Stipulation, Tr. 1334)

88. The universe used by complaint counsel to test concentration in the overall dog food market is reliable for the purpose intended. A list of the 56 [84] companies surveyed by complaint counsel (CX 332) was shown to several industry representatives who testified that there were no significant manufacturers omitted. (Tr. 221-22, 527, 557, 985, 1083-85)

89. While the universe used by complaint counsel is adequate for the purposes of this case, it by no means measures the exact metes and bounds of the dog food market.

[57] The administrative law judge allowed respondent 20 subpoenas with which to demonstrate that the universe was not reliable. Counsel for respondent were specifically admonished to rely upon the combined expertise of both the acquiring and acquired firms for the purpose of identifying their significant competitors who were omitted from complaint counsel's universe. The administrative law judge also made it clear that he would not later accept any argument that the 20 subpoenas were used simply to make a random survey of the industry. (Tr. 3379)

Considering the specific instructions which were given to respondent's counsel on how to use these subpoenas, I conclude that with all of the expertise available to respondent, it was able to uncover a discrepancy of $7,419,000 (representing the sale of 10 companies) in complaint counsel's 1969 universe. The only important omission was the A&P supermarket chain which manufactured $3,308,000 worth of dog food in 1969.[85]

Adding all the omissions uncovered by respondent to complaint counsel's universe, the 1969 universe figure increases from $683,476,620 to $690,895,620, a change of 1.09 percent.

90. There is other evidence of the reliability of complaint counsel's universes for the periods 1967–1969:

[84] In 1968 a "reasonably comprehensive list" drawn from industry sources of the companies manufacturing dog food (including treats) contained 14 names. (CX 25h, i)

[85] A&P is the only supermarket chain which does its own manufacturing. (Tr. 2000)

(a) For internal marketing purposes, Allen had reported retail sales of dog food of $810 million in 1969. (CX's 95q, r) Based upon a commonly used conversion factor of between 15 and 20 percent (Tr. 1004), this would mean a total wholesale volume of between $648 million and $689 million — figures which are quite consistent with complaint counsel's universe.

(b) According to complaint counsel's universe, L&M's market share for 1968 is approximately 11 percent of all dog food sales. Respondent's internal documents, based upon estimates of the Pet Food Institute, put Alpo's market share at 12.9 percent, [58] a *larger* market share than the figures derived from complaint counsel's universe. (CX 43e)

(c) The universe constructed by complaint counsel for 1967 is substantially consistent with the Census Report for 1967 to the extent that the two can be compared. (CX 329)

91. It is apparent from the testimony of industry experts that the dog food industry essentially consists of a handful of core companies and others of no competitive significance. As one industry representative put it, "the top five to ten [companies] account for 95 per cent of sales, so you can go on and on, page after page, and I don't think it would significantly change the number more than a percent or two." (Tr. 1084)

92. Based upon complaint counsel's universe (as corrected by the addition of A&P's production), the top 4-firm concentration in the dog food industry for the years 1967-1969[86] was as follows:

TABLE 7: 4-Firm Concentration (in % of Total Dog Food Sales)

	Rank	*1967*	*Rank*	*1968*	*Rank*	*1969*
General Foods	1	17.87	1	16.79	1	16.98
L&M	4	9.09	4	10.99	2	15.76
Ralston Purina	2	14.62	2	14.82	3	14.19
Quaker Oats	3	11.35	3	11.84	4	12.08
Totals		52.93		54.44		59.01

Source: CX 323; 1969 figures adjusted to include omissions in universe covered by stip. of 2/14/75)

[59] 93. Top eight-firm concentration in the dog food industry for the years 1967 to 1969 was as follows:

TABLE 8: 8-Firm Concentration (in % of Total Dog Food Sales)

	Rank	*1967*	*Rank*	*1968*	*Rank*	*1969*
General Foods	1	17.87	1	16.79	1	16.98
L&M	4	9.09	4	10.99	2	15.76

[86] Although there are no statistics in the record, an industry representative testified that there is more concentration in the dog food industry today than there was in the period 1967-1969. (Tr. 1093).

Ralston Purina	2	14.62	2	14.82	3	14.19
Quaker Oats	3	11.35	3	11.84	4	12.08
Mars	8	3.22	7	4.40	5	5.20
Carnation	5	4.97	5	5.11	6	5.04
Associated	7	3.65	8	3.60	7	3.70
National Can	*		*		8	3.59
Perk	6	4.70	6	4.41	**	
Totals		69.47		71.96		76.54

(Source: CX 324; 1969 figures adjusted to include omissions in universe covered by stip. of 2/14/75)

* Not ranked in Top Eight in this year.

** Included in L&M sales after acquisition.

[60] 94. Top 20-firm concentration in the dog food industry for the years 1967 to 1969 was as follows:

TABLE 9: 20-Firm Concentration (in % of Total Dog Food Sales)

	Rank	*1967*	*Rank*	*1968*	*Rank*	*1969*
General Foods	1	17.87	1	16.79	1	16.98
L&M	4	9.09	4	10.99	2	15.76
Ralston Purina	2	14.62	2	14.82	3	14.19
Quaker Oats	3	11.35	3	11.84	4	12.08
Mars	8	3.22	7	4.40	5	5.20
Carnation	5	4.97	5	5.11	6	5.04
Associated	7	3.65	8	3.60	7	3.70
National Can	-	*	12	1.41	8	3.59
Savannah Foods	-	*	11	1.53	9	2.19
Doric	12	2.16	10	1.99	10	1.88
Riviana	-	*	-	*	11	1.88
Allied Foods	14	1.35	13	1.36	12	1.19
Standard Brands	16	1.30	14	1.23	13	1.17
Borden	15	1.31	16	1.18	14	0.98
Ralph Wells	18	1.02	20	0.90	15	0.96
Armour Dial	17	1.27	18	1.09	16	0.84
Allied Mills	-	*	-	*	17	0.84
U.S. Tobacco	-	*	-	*	18	0.84
Agway	19	0.99	19	0.92	19	0.78
Hi-Life	-	*	-	*	20	0.73
Perk	6	4.70	6	4.41	-	**
Hills	11	2.44	9	2.05***	-	***
Laddie Boy	13	1.53	15	1.21#	-	#
Lewis Food	9	2.59	17	1.13##	-	##
Western Grain	10	2.55	-	###	-	###
United Brands	20	0.86	-	*	-	*
Totals		88.85		87.96		90.82

(Source: CX's 325, 326; 1969 figures adjusted to include omissions in universe covered by stip. of 2/14/75)

* Sales of this company did not rank among the top-20.

** Acquired by Liggett & Myers Incorporated, January 1969.

*** Acquired by Riviana Foods, Inc., September 1968.
# Acquired by National Can Corporation, October 1968.
# # Acquired by National Can Corporation, June 1968.
# # # Acquired by Savannah Foods & Industries, Inc., April 1968.

[61] 95. As for the individual segments of the dog food industry, the dry category is highly concentrated with Ralston Purina controlling 50 percent (Tr. 308, 538), and General Foods having approximately 16 percent of the business. (Tr. 538)

96. Prior to the acquisition, Vets had about 4 percent of the dry category and was the fifth ranking firm in the category. (CX 25k) Because of the overwhelming dominance of Ralston Purina and General Foods, however, Vets was not perceived by industry members (especially Ralston Purina) as a significant dry producer. (Tr. 318-19, 538-39, 544-47, 1676, 1733)

97. The semimoist category is also highly concentrated with General Foods (about 60 percent)[87] and Quaker Oats (about 35 to 40 percent) controlling 95 percent to 100 percent of sales. (Tr. 1008) These are the only significant manufacturers of semimoist. (Tr. 976, 1444, 1623, 1733, 1769)

98. In 1968, the top five firms controlled 63 percent of the concentrated *all* canned category. Alpo ranked first while Perk (Vets) ranked fifth:

TABLE 10: Top Five Firm (By Brand) Share of All Canned - 1968 (in % of $360,000,000 total)

1. Alpo	*22.2%*
2. Ken-L-Ration	*18.1*
3. Kal Kan	*11.5*
4. Rival	*7.2*
5. Vets	*4.4*
Total of Top 5	*63.4*

(Source: CX 95q)

[62] 99. The expensive canned category is highly concentrated,[88] with Alpo alone controlling close to 50 percent of the category.

TABLE 11: Alpo Share of Expensive Canned Category

Year	*Alpo % Share of Premium*
1966	*60.61*
1967	*62.05*
1968	*55.71*
1969	*53.22*
1970	*54.90*
1971	*54.60*

[87] General Foods has several brands in the semimoist field — *i.e.*, Gainesburgers, Top Choice, and Prime Variety (Tr. 446); Quaker Oats' brand is Ken-L-Ration Burger which comes in several varieties. (Tr. 952-53)

[88] When asked to describe the premium category, the head of Allen's advertising agency testified "Well, basically it is Alpo and Kal Kan, one and two, and I believe Mighty Dog's phenomenal success has become number three." (Tr. 1447)

1972	*51.68*
1973	*47.69*[89]

(*Source: RX 123*)

100. At the time of the acquisition, Perk ranked first in the economy-priced category of the dog food market. (CX 25k) Since the acquisition in 1969, the Perk share of economy has dropped: **[63]**

TABLE 12: Vets Share of Economy[90] *Sales*

Year	*Vets % Share*
1966	33.26
1967	32.89
1968	32.14
1969	27.61
1970	26.37
1971	25.93
1972	24.99
1973	18.04

(Source: RX 123)

There are no reliable statistics on concentration in the economy category, but there are parts of the country, particularly the South, where strong local brands predominate. (CX 25L) However, one industry representative said that in recent years there has been only one new entry — Allied Foods in Georgia, while "quite a few" have been leaving. (Tr. 2216)

Barriers

101. Escalating advertising expenses are the main barriers to entry into the dog food industry. (Findings 102-116)

102. Traditionally, the introduction of new products in the dog food industry has been accompanied by massive expenditures on advertising. Allen's advertising agency gave the following history of specific brands from the late 1950's to the mid 1960's:

> Purina Dog Chow reportedly spent $1.8 million in 1958. General Foods Gravy Train was introduced in 1961 with a $1.8 million expenditure. Gaines (also General Foods) spent over $3MM in 1962, over $5 million in 1963. Speak, by General Mills, spent over a half-million in test markets in 1963; and over $2 million in national advertising to introduce in 1965. General Foods' Prime spent **[64]** $4.2 million in 1965 and their new Top Choice appears to have the heaviest introductory spending yet. (CX 87s; see, also CX 97y)

103. Approximately 10 percent of Allen's sales were spent on advertising and promotional expenditures during its period of greatest

[89] The Alpo decline in market share in 1972-73 is attributed to the massive advertising and successful entry of Carnation's Mighty Dog, a super-premium. (*see*, Finding 71)

[90] "Economy" as used in this finding does not include higher priced "maintenance" products which have been placed by respondent into a "regular" category. Ken-L-Ration is clearly the dominant brand in this "regular" category. *See*, Note 49, *supra*.

growth. (CX 20d) General Foods' A/S (advertising to sales) ratio was approximately 8.9 percent in 1968, 11.2 percent in 1969, and 10.6 percent in 1970; Ralston Purina's A/S ratio was about 6.1 percent in 1968, 5.7 percent in 1969 and 7.7 percent in 1970; Quaker Oats had a 5.5 percent A/S ratio in 1968, a 6.1 percent in 1969 and a 3.5 percent A/S ratio in 1970. (CX's 41f, 44c)

104. A new entrant may be required to spend at considerably higher A/S ratios than a mature brand. (Tr. 1374) Thus, Allen has found that opening new markets always requires more intensive spending on advertising. First year advertising to sales ratio (A/S) for new markets opened by Allen in 1965 was 22.8 percent. (CX 42c) In opening new markets on the West Coast in 1969, Allen had A/S's of 23 percent in Los Angeles, 20.8 percent in San Francisco and 14.3 percent in Seattle. (CX 81c)

105. The rule of thumb, based on extensive A.C. Nielsen research, is that a brand's share of its category's advertising expenditures, must be at least equal to its share of market, or it will lose share. Conversely, one must invest in a higher share of advertising to gain an increased share of business. (CX 43g)

106. Moreover, advertising costs are increasing. L&M, itself, estimates that the introduction of its new dry dog food, BeefBites, will require between four and five years before actual profits, if any, are shown. (Tr. 1810)[91] In order to introduce the product in a test market, L&M is spending at a rate equivalent to $7,000,000 a year. (Tr. 1811)

[65] 107. Not only is the condition of entry in the dry segment determined by the ability to match Ralston Purina's advertising budget, but, in addition, there are more subtle ways in which entry can be controlled. Thus, when L&M, itself, attempted to test market one dry product (BeefBites) in upstate New York, Ralston Purina "swamped" the area with advertising and "free" coupons for the very purpose of making the test difficult to "read." As a result, L&M had to spend still additional funds for more testing and to this date L&M has not been able to determine if BeefBites can be marketed successfully. (Tr. 1375-77, 1792-94)[92]

108. Entry into the semimoist category depends largely on the ability of a prospective entrant to match the advertising expenditures

[91] Allen has test marketed three dry products since 1969 — Mix Mate, BeefBites, and Alamo — but it has not successfully entered this category to this point in time. (Tr. 1375-76, 1385, 1791-94)

[92] There is no reason to suspect that these tactics are peculiar to Ralston Purina. In 1965 when Purina was test-marketing an all-meat canned product, the L&M advertising agency said it "will develop plans to protect our franchise in Purina test markets as soon as we determine where they plan to test." (RX 20)

of General Foods and Quaker Oats which dominate this category. (Tr. 1188, 1512, 1790)[93] Despite the fact that Perk spent about $110,000 in advertising its semimoist product in Chicago alone, its entry into this category failed because "equal dollars" were not spent to advertise and merchandise the product.[94] (Tr. 1188-1190) Quaker Oats plans to spend about $7,000,000 in 1974-75 to introduce Ken-L-Ration Burger'n Egg, a semimoist product. (Tr. 978)

109. In addition to heavy advertising budgets and control of existing shelf space, there exists another entry barrier in semimoist by reason of control by General Foods of patents governing semimoist technology. (Tr. 2086)

[66] 110. There have been no new entries into semimoist in recent years. (Tr. 1768-70)

111. In the mid-1960's, Perk test-marketed a semimoist product under the Vets label. This product failed in test-marketing, although a few sales are reported for the years 1969 and 1970. (Tr. 2083-84, 1224)

112. L&M has never even attempted to enter the semimoist market because of the dominance of Quaker Oats and General Foods. (Tr. 1768-1770)

113. To enter the expensive or premium canned category, a large advertising budget is necessary in order to pre-sell the brand to consumers. (*see,* for example, RX 60z72) It is estimated that in 1969 to introduce a new premium brand nationally would require about seven and a half million dollars to ten million dollars.[95] (Tr. 1999, 2187-88) A company like Perk which lacked the funds to undertake a massive national campaign might have attempted to enter by moving from test market to test market during a five-year period. If entry in this manner were successful, however, "competition from the majors would move in and wipe [Perk out] before it can get national distribution." (Tr. 1999)

114. In the past five years, there have been few successful entrants into the expensive canned dog food category. Several large companies have failed in their attempts to enter despite massive spending (Tr. 267), while others are still engaged in test marketing. The only widely recognized new entrants are Campbell Soup's Recipe in 1971 and the

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[93] As a representative of Perk's advertising agency put it "in order for the consumer to hear us we would have to spend some figure that [equates] to their [General Foods and Quaker Oats] market incursion." (Tr. 1188)

[94] Perk's advertising agency recommended that Perk spend $7,541,000 on advertising over a two-year period to introduce a semimoist product. During this period, there would be no profit in the product. (Tr. 1169)

[95] This investment is no guarantee of success. Ralston Purina spent $10 to $11 million on three premium-priced canned products without success. (Tr. 257)

super premium product, Mighty Dog, introduced successfully by The Carnation Company in 1973.[96] [67] The entry of both of these brands was marked by massive expenditures on network television. Moreover, even Recipe's presumed success is open to some question. It is estimated that Campbell spent between $25 million to $30 million in advertising and promotion the first year the product was on the market,[97] but the product's no-profit "payout" period has been extended another year, and "the brand now appears to be in trouble." (Tr. 1393)

115. In the early 1960's, Perk test-marketed a meat-type premium priced canned product under the Vets label which failed in test-marketing. (Tr. 1993-94) Just prior to the acquisition, Perk had several premium-priced canned products in various stages of development, including a revolutionary "chunky-style" all cereal premium-priced product. (CX 250)

116. That barriers to entry are high in the dog food market is corroborated by the lack of substantial entry into the market despite extensive market growth. The dog food industry has grown consistently and substantially in terms of total retail and wholesale dollars of dog food sold between 1963 and 1974. In 1963, total retail sales of dog food was approximately $530 million, in 1969, $800 million, and by 1974, total retail sales of all dog food had grown to between $1.4 and $1.6 billion, an increase of over 180 percent. (CX 21c, CX 97i-j; Tr. 358, 363, 374, 1924)

Despite the rapid growth of the dog food industry, only one company, Campbell Soup, has entered the dog food industry *de novo* since 1969,[98] and the success of its entry is doubtful.

117. On the basis of a letter survey, complaint counsel purport to show some trend toward concentration by reason of 26 acquisitions in the dog food industry, 13 of which allegedly are horizontal. (CX's 337a-i, 339c, d) Considering the importance of advertising in this industry, I have attached no weight to the flimsy showing of complaint counsel that prior acquisitions [68] contributed to concentration. As it happens, there are other reasons for questioning the economic significance of these acquisitions. Of the ten purported "horizontal" acquisitions occurring prior to 1969 three (Nos. 3, 6 and 12) merely involved an initial non-horizontal acquisition and then putting the various Strongheart facilities back together again (Tr. 2327-29), a fourth (No. 5) was a

[96] The president of L&M identified one other successful premium entrant, Wayne, but he conceded that the entry into any dog food category is difficult. (Tr. 1803-04; *see*, also, Tr. 1383 for similar testimony from the head of Allen's advertising agency)

[97] Apparently to convey the message "Lassie eats it, therefore your dog ought to like it."(Tr. 838)

[98] The only other significant new brand identified in the record was Carnation's Mighty Dog. Carnation was already making a dog food under the brand name "Friskies." (Tr. 1925)

geographical extension (Tr. 731, 797, 830), a fifth (No. 1), involved a company which has since exited from the business (CX 3321), a sixth (No. 11) involved the acquisition of a company having sales of only approximately $1 million (Tr. 2328; CX 358e), and the other four (Nos. 2, 7, 8 and 13) involved companies which even after the acquisition had combined sales in 1969 ranging from $232,000 to $1,375,000. (CX 332h-i) Of the two "horizontal" acquisitions occurring after the Perk acquisition, one (No. 24) involved the acquisition of a company having sales of $1,322,000 (CX 332h) and the other (No. 25) was necessitated when the acquiring company's facilities were condemned. (Tr. 1730-31)

118. While I am not persuaded by complaint counsel's "merger history," it is true that the threat of a heavy advertising campaign by one of the industry giants may encourage a smaller, independent firm to seek the shelter of a larger company. Prior to the L&M acquisition, Allen was considering selling out to a larger company because of the "ever present competitive danger from new products such as General Foods' PRIME * * * which are backed by heavy advertising campaigns." (CX 20b)

Effects of the Acquisition

119. In 1968, L&M ranked fourth with 10.99 percent and Perk ranked sixth with 4.41 percent of total dog food sales. (Finding 93) The acquisition of Perk raised L&M's market standing to second with a 15.76 percent share of the overall market. The acquisition directly increased the level of four-firm concentration from 54.44 percent to 59.01 percent, and increased the level of eight-firm concentration from 71.96 percent to 76.54 percent. (Findings 92, 93) The dog food industry is even more highly concentrated today than it was in 1969. (Tr. 1093)

[69] 120. The acquisition of Perk by L&M eliminated actual and potential competition between Perk and L&M in the production, distribution and sale of dog food and eliminated the competitive activity of an independent enterprise which had been a substantial factor in competition. (Findings 121-126)

121. At the time of the acquisition both L&M and Perk were among the top eight firms manufacturing dog food. (Finding 93) As a result of the acquisition, competition *between* the fourth and sixth ranked sellers of dog food, respectively, has been lost.

122. The acquisition eliminated Perk as an *independent* firm offering consumers a low-priced alternative to highly advertised brands. Perk's unique position in the dog food industry was summarized as follows:

Whereas the Company's major competitors have relied on advertising and promotional expenditures as their principal marketing tool, Ready [Perk] has maintained its growth by competing exclusively on a price basis with its well established brand names and by alloting generous promotional allowances to its dealers. (CX 25n)

123. The acquisition by L&M of Perk has eliminated the independence of a company which, at the time of acquisition, had an unusual competitive potential because of its knowledgeable management with many years of successful operations, strong established brand names, established and effective marketing and distribution system, and a highly mechanized and efficient manufacturing operation. (CX's 25e, g)

124. The acquisition eliminated Perk as an independent source of competition to Alpo in the premium segment which Allen dominates. The record shows that Perk (a) has manufactured private label premium canned dog food for Safeway; (b) custom-packed premium canned Alpo for a number of years for Allen (Finding 6); (c) recognized that development of a proprietary brand premium canned dog food was a part of its future plans (CX 25o); (d) test marketed, **[70]** although without success, its own premium canned dog food in the early 1960's (Tr. 1994); and (e) had developed by mid-1968 a "somewhat revolutionary" premium-priced "chunky" dog food at low raw material cost. (CX 25o)

125. There was testimony that Perk was not perceived by some industry members as a significant company in the dog food industry at the time of the acquisition. (Tr. 1682-83) One witness called by complaint counsel even testified on cross-examination that he viewed Perk as going "down and out of the business." (Tr. 1630) And that the effect of the acquisition was to keep the Perk brands on the supermarket shelves. (Tr. 1633) I give little weight to this testimony because the uncontroverted *facts* (in contrast to industry perception or gossip) are that Perk was a strong, and viable company, although it is true that the "maintenance" canned category does not compare favorably in growth to all-meat canned and semimoist categories.[99] (Tr. 1023) In July 1968, just one year prior to the acquisition, the following *factual* assessment was made of the company:

The company's performance over the past five years has been superior to the pet food industry. Ready Foods [i.e., Perk] net pet food sales increased from 21.5 million in fiscal 1963 to 32.5 million in its fiscal year ended September 30, 1967. Over the same period, net income increased from $472,000 to $1,087,000. Results for the first six months of fiscal 1968 indicate a net sales increase of 7% over the corresponding 1967 period to 17.6 million and an increase in the net income of from 33% to $589,000. For the fiscal year ending

[99] Notwithstanding its slower rate of growth (see Finding 45), L&M considered maintenance "a viable area of the business" and a "big category." As for Perk, L&M "felt very strong about their relative position and their future potential." (Tr. 1979)

September 30, 1968, the company has projected net sales of 35.9 million, a net income at 1.3 million.

[71] The company's major strengths are (1) a knowledgeable management with many years of successful operations within the pet foods industry, (2) strong established brand names (Vets and Perk), (3) an established effective distribution market and (4) a highly mechanized and efficient inhouse manufacturing operation. (CX 25e) [100]

126. It is also significant that L&M which had first-hand knowledge of Perk as a result of the custom-packing relationship, and had made an extensive investigation of Perk prior to the acquisition did not view the company's future as doubtful. L&M considered Perk a well-run company, with competent management and a solid franchise in economy canned. (Tr. 1978-79)

127. Despite the viable condition of Perk, the two individuals who controlled it, Clyde Kassens (25 percent shareholder) and Dorothy Chianelli (daughter of the founder, the late Henry Stoffel, and 75 percent shareholder) decided in 1967 to begin looking for a buyer when it became apparent that in order for the company to take advantage of trends in the dog food industry, Perk must improve its dry product and market and advertise heavily a premium brand.(Tr. 2185-86). Mrs. Chianelli was not willing to risk her capital on successful entry into premium. (Tr. 1993, 1999-2000, 2114, 2185-87)

128. Between 1967 and 1969, several large companies both in (Borden's and National Can) and outside the dog food industry (Foremost-McKessen, United Baking, General Mills, United Brands and Beatrice) expressed an interest in Perk, but only L&M would guarantee (1) that existing staff would be retained and (2) was willing to pay cash. For these reasons the company was sold to L&M. (Tr. 1992, 2116-17, 2119-20, 2127-28) [72]

III

Discussion

Liggett & Myers (L&M) through its Allen subsidiary manufactures Alpo, a premium-priced, highly advertised, all-meat (or near all-meat), canned "gourmet" dog food. L&M acquires Ready (later Perk) the manufacturer, principally, of Vets, an inexpensive cereal-based "ration" or "maintenance" canned dog food which, prior to the acquisition, had not been heavily advertised in the media. In addition, Perk made dry dog food, and from time to time it produced some semimoist dog food. Perk also custom-packed dog food for other manufacturers, including Allen, as well as packing private label dog

[100] In 1967, Perk's net return on average net worth was 22.3 percent (CX 25x) and its net return on average invested capital was 17.9 percent. (CX 25x) It was estimated that its net sales would increase at a compound annual rate of 10.7 percent between 1969 to 1972 in line with the company's rate of growth from 1963 to 1967. (CX 25z4)

food for the Safeway supermarket chain. Does the acquisition violate Section 7 of the Clayton Act?

On the threshold and crucial question of market definition, complaint counsel, ticking off a few, but by no means all of the *Brown Shoe* criteria[101] — functional end use interchangeability, evidence of sales interrelationship, industry recognition of an overall dog food market, some overlap in production facilities, and identical vendors (*i.e.*, the pet food section of the supermarket) — argue for an all dog food market, consisting of all dry, semimoist, and canned products selling in all price ranges.

[73] While complaint counsel's mechanical incantation of some *Brown Shoe* criteria follows the accepted ritual for a Section 7 case, in this particular instance, it nicely avoids the novel market definition question raised by this acquisition — whether or not the expenditure of massive sums of money on persuasive advertising, or "image building," can be so successful in differentiating a product and creating a brand preference (even, if you will, an irrational brand preference) that the effort can be said to carve out a separate product market for premium-priced, "all-meat" canned dog food, that is, Alpo and a few close imitators.

I say "irrational" because, minimally, there is substantial doubt whether premium-priced "all-meat" products like Alpo (at least during the years of Alpo's most sensational growth when it *was* all-meat), represented a "premium" diet for a dog. Materials prepared by respondent's own advertising agency show that respondent's entire effort was directed at creating a *belief* that Alpo was good for dogs although respondent, itself, was aware of reports indicating there was some question whether an all-meat diet was truly beneficial.[102] The only hard evidence in the record on this point shows that the all-meat formulation may, in fact, have been harmful to some dogs, and that cheaper products made with cereal, including Vets, were probably adequate for all dogs.[103]

The nutritional doubts raised about the all-meat diet, notwithstanding, the record shows that respondent's massive expenditures for advertising did indeed successfully create the *impression* (1) that an all-meat diet was, in fact, good for a dog and (2) that Alpo "means" all-meat.[104]

[74] It should be understood that I am not saying that the sheer

[101] Under the *Brown Shoe* criteria, the outer boundaries of a product market are determined by the reasonable interchangeability of use or cross-elasticity of demand but submarkets may exist by reason of industry or public recognition, peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. See, *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325 (1962).

[102] Finding 20.

[103] Findings 14, 15, 19.

[104] Findings 36 to 44.

volume of advertising was the *only* factor which explains Alpo's success. Undoubtedly, the advertising paid off because it effectively presented a product which was formulated to play on dog owners' anthropomorphic identification with their animals.[105] Moreover, the "meatiness" and palatability of the product resulted in animal contentment and, in turn, owner contentment, in much the same way that candy or sugar-coated cereals appeal to children, as well as the parents of these "good eaters."[106] But irrespective of the exact proportions of the ingredients which make up the Alpo success formula — *i.e.*, volume of advertising, kind of advertising, the lack of objective information available to consumers about the *relative* quality of dog food,[107] and the [75] consumer's search for "human" values in dog food — the question remains whether this success had the effect of creating a separate market for premium-priced, all-meat (or almost all-meat) canned products; the market consisting of Alpo, and a few imitators, but certainly not, in respondent's view, cereal based and economy-priced Vets.

In support of the position that Alpo is in a separate market, the record contains a detailed description of both the strategy as well as the results of what can be called a winning product differentiation campaign. The elements include the following:

1. Management develops a product which can sell at a premium price by exploiting consumers' "humanized" identification with their pets.[108]

2. Millions of dollars are spent to pre-sell this product concept through advertising.[109]

3. The sum is largely spent on national television where there are economies of scale in reaching the most consumers.[110]

4. The image registers most successfully in terms of brand loyalty

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[105] Findings 33 to 36.

[106] *See*, Note 21, *supra*.

[107] The market interplay between persuasive advertising and the consumer's lack of *objective* information is well recognized in the economic literature:

> * * * in choosing a well-known, highly advertised, but expensive brand over an unknown, little-advertised, but low-priced product, the consumer may simply be doing his best to cope with his lack of objective information concerning relative product quality, and this may represent a reasonable method of minimizing the risk to him that the product will not do the job for which it is being purchased. In other words, consumers may regard advertising as an implied warranty regarding product performance. Comanor and Wilson, Advertising and Market Power 25 (1974).

* * * * * * *

When consumers purchase a high-priced brand in a commodity class where low-priced brands are frequently available, this can probably be explained by the consumer's degree of risk aversion together with the fact that, in the absence of alternative sources of low-priced information, the degree of consumer ignorance about unadvertised products is likely to be high. *Id.* at 39.

[108] Findings 33 to 36.

[109] Findings 37 to 43.

[110] Findings 38 to 40.

with certain kinds of consumers — upscale, fairly well-to-do, well-educated, small families who own small dogs.[111]

5. The result of the campaign is that Alpo seems to insulate itself from time to time from price competition by the cheap brands, and as a matter of fact, it seems to isolate itself during its period of greatest growth from *all* price[112] competition — in other words, it carves out a "franchise."

[76] To put it somewhat differently, the effect of Allen's marketing strategy was that it succeeded (at least temporarily) in differentiating a product which otherwise would be functionally substitutable for all other brands of dog food especially those available on the market at lower prices, such as Vets. According to respondent, this achievement creates a "market" in a Section 7 sense.[113]

In evaluating this argument, I am willing to accept the notion that the product differentiation effort of a company can be so successful that even though the highly advertised product is functionally interchangeable with a whole range of other dog food products, the marketing strategy can create the belief in the minds of a significant number of consumers (again, for some undefined period of time) that there is no acceptable substitute for the heavily advertised product, with the result that a large measure of freedom from price competition can be achieved for the successfully differentiated product. In this connection, as I indicated earlier, there is evidence that respondent's advertising did create a market environment for Alpo in recent years which protected it from price competition by inexpensive canned brands like Vets.[114] Certainly, there is no proof that the demand for Alpo has been sensitive to the low-priced blandishments of "ration" canned dog foods, and as a matter of fact, all of the evidence points in the opposite direction. But, by the same token, the evidence indicates that during the same period of time, within the premium segment of the market, itself (where Alpo dominates), there was little price sensitivity, either. Thus, a 10 percent increase in the price of all premium products during a six-month experimental study conducted in 1974 produced no decrease in the demand for these products. [77] And not unexpectedly, whatever evidence there is in the record about Alpo's *own* elasticity tends to show that substantial price increases over the period of its most sensational growth have had no impact whatsoever on consumer demand for the product.[115]

Even more curious is the fact that Mighty Dog, a *super* premium

[111] Findings 63, 67 to 69.

[112] Findings 70 to 72.

[113] See, especially, testimony of respondent's economist, Dr. Gutman, at Tr. 2922, *et seq.*

[114] Finding 70.

[115] Findings 70 and 72.

product successfully entered the market in 1972-73 supported by a massive national advertising campaign, and selling at a much *higher* price than Alpo. From the fact that Alpo lost significant market share to Mighty Dog, one could surmise that advertising has convinced a substantial number of dog owners that the more money spent, the more "love," which is communicated to this "member of the family."[116]

What all of this tends to prove is that it is totally unrealistic to attach controlling significance to cross-elasticity of demand analysis when dealing with a discretionary-extra consumer product, particularly dog food which is bought on the basis of highly emotional, rather than objective considerations,[117] and is being sold on the basis of low absolute cost (*i.e.*, the spread from cheap to premium is about 20 cents a can), and yet it comes to the market supported by massive advertising. Certainly, the fact that there are *low* cross-elasticities between various categories of dog food products does not prove that they are in separate markets. It merely shows that because of massive advertising otherwise *competing* products have been insulated from some price competition — *i.e.*, increases on the order of 10 percent (raising Alpo's price from 33 cents to 36 cents) does not cause increases in the demand for Vets.[118] But the point which respondent's [78] argument misses is that it is the very process of *competition* — *i.e.*, *non-price* competition in the form of massive persuasive advertising — which produces the product differentiation, the brand loyalty, and the low cross-elasticities.[119]

[79] If, on the other hand and as respondent would have it, market definition in highly advertised consumer products *did* turn on price sensitivity, I am sure that it could be demonstrated with appropriate statistical and economic flourishes that there may be periods of time

116 Finding 71; see also Findings 18 and 66, and Notes 43, 64, 65, 66, *supra*.

117 *See*, Note 30, *supra*.

118 The economic literature recognizes that low cross-elasticities may exist among competing products in the same market:

> The degree of product differentiation *in a market* is measured by the cross-elasticities of demand and supply that exist among *competing* products. Low cross-elasticities of demand between these products indicate that buyers prefer the products or brands of particular sellers and will not switch in significant numbers in response to small differences in price. Comanor and Wilson, Advertising and Market Power 43 (1974). [Emphasis added.] See, also, Caves, American Industry: Structure, Conduct, Performance 17-21 (1964)

119 Tibor Scitovsky's analysis of this process starts with his description of the "ignorant buyer" — *i.e.*, "[the] person who is unable to judge the quality of the products he buys by their intrinsic merit. Unable to appraise products by objective standards, he is forced to base his judgment on indices of quality, such as the price of products and the size, long-standing and general reputation of the producing firms. Moreover, aware of the shaky basis and insufficiency of his judgment, the ignorant buyer dare not rely on his judgment alone and falls prey to the emotional suggestion of advertising." Scitovsky then goes on to describe the effect of buyer ignorance as follows:

> * * * the ignorant buyer's habit of judging quality by price weakens also price competition. For the offer of a lower price will largely defeat its purpose in markets where a low price is regarded as a sign of inferior quality. In such markets a price change will lead few buyers to transfer their custom from one producer to another. Hence the price elasticity of demand will be low in such markets. Scitovsky, *Ignorance as a Source of Market Power*, 40 American Economic Review (No. 2 Papers and Proceedings) 48, at 49-50 (1950).

when a particular brand is really a market unto itself in terms of its demand resistance to lower-priced products.[120] Respondent, of course, takes a more modest approach and says that Alpo's market consists of just Alpo, Kal Kan and a few other imitators since these products are not price-sensitive to all the other dog foods. It then follows, under respondent's theory, that since Alpo is positioned in a "separate market," it is free to acquire any of the companies, regardless of size, which stand apart from its "premium" segment of the canned dog food category, including any semimoist, dry, or inexpensive brand of canned dog food. The logical extension of respondent's argument is that any time massive consumer advertising creates a degree of brand loyalty, and so long as that loyalty has not been successfully impaired by a matching or higher level of advertising (as eventually happened with Mighty Dog), the successful brand is not competing, within the meaning of Section 7, with other brands which serve the same functional purpose. I disagree.

I believe that respondent's argument totally misconceives the purpose of market definition under Section 7. The competition which Section 7 is concerned with is the struggle between firms offering functionally interchangeable goods in various promotional and price packages. The fact that the firm which packages its product in a premium image, and supports that image with massive advertising is more successful than the firm which offers low prices does not mean that these firms do not compete against each other.[121] As it happens, differences [80] between the way consumers perceive the premium-priced, highly-advertised product and the way they see the low-priced "ration" product, has been cited as quite consistent with the notion that both products are in the *same* market. Comanor and Wilson have said:

> In many markets, an important function of advertising is to permit firms to maintain price levels that equal or exceed those of their rivals * * * consumers frequently consider highly advertised products as higher in "quality" than others in the market and, as a result, these products command a higher price. Where advertising outlays are low, on the other hand, firms are often unable to reach effective price parity with their rivals, for consumers view their products as substandard, and prices must be set lower to attract buyers. We have only to observe the striking price differences that exist among competing brands of aspirin, soap, or various cosmetics to recognize the significance of this effect.
>
> *In the same market*, some firms may choose to engage in heavy advertising outlays

[120] Absurd as the notion of a separate market for each brand may be, the statistical analysis applied by respondent's retained expert uncovered a new "market" — "super" premium which was dropped from summary tabulations because he "would have had difficulty defending the existence of the fourth market." (Tr. 3168)

[121] The existence of specific buyer preference for one functionally interchangeable product over another, or specific buyer rejection of one or the other betokens not an absence of competition "but only that for the time being as to certain customers one or the other form of the product for one reason or another has forged ahead in the competitive race." *American Crystal Sugar Co.* v. *Cuban-American S. Co.*, 259 F.2d 524, 530 (2d Cir. 1958).

and sell their products at the higher prices that such outlays permit. Others may find it more profitable to dispense with most of these expenditures, produce a more standardized product, and accept a lower price.[122]

Moreover, as a matter of policy, the concept of market definition for a Section 7 case cannot turn on either the success or failure of the strategies adopted by producers of functionally interchangeable products to win the contest for the consumer dollar. For if Section 7 market definition did turn on such considerations, it would produce the anomalous result under Section 7 that an expensive brand could acquire, and if it chooses, eliminate a cheap alternative by simply [81] raising the price of the cheaper brand. In other words, under the "relevant market" rationale advanced by respondent, *because* the expensive brand has convinced a substantial number of consumers that the cheap alternative is not really much of a substitute and they should "move up" to Alpo, Section 7 allows the economic future of the cheap brand to be entrusted to the very company which has successfully differentiated the one brand from the other. As respondent would have it, the reward for *non-price* competition, would be to turn over whatever *price* competition remains to the principal source of the non-price competition. In the name of "market definition" the very purpose of Section 7 — to preserve competitive consumption opportunities — would be absolutely frustrated.

In addition, I doubt that the brand or even category loyalty, which is at the heart of respondent's argument, rests on footing that is solid enough to support a "market definition" which, in turn, would allow a permanent structural change in this industry. While many dog food buyers may have reacted favorably to the Alpo advertising campaign, and this reaction can then be described in terms of Alpo's ability to price above "ration," there is nothing inevitable about either the strategy or the reaction, and countervailing massive advertising in another direction may change consumer taste and break down brand loyalty. The most direct proof of this fact is that Alpo's *own* growth through advertising was largely achieved *at the expense of cheap canned dog foods including Vets.*[123] And [82] Alpo, in turn, lost market

[122] Comanor and Wilson, Advertising and Market Power 197 (1974). [Emphasis added.]

[123] Finding 45. Competition in this form is not uncommon in consumer goods. Professor Turner has described it as follows:

> At the same time on another channel, or on the same channel at another time, someone else is likely to be inviting listeners to "move up" to a competing product. This is competition of a kind. We should recognize, however, that this form of rivalry is likely to be considerably different in economic effect from those forms of competition which are concerned with the prices established in the market, and the possibility at least exists that the former may be at the expense of the latter. Turner,*Advertising and Competition*, 26 Fed.B.J. 93, at 98 (1966).

Given the importance in consumer goods of non-price competition, it has also been suggested that the economic concept of substitutability need not turn on cross-elasticity measured in terms of pricing behavior, but rather "* * *

(Continued)

share to the super premium, Mighty Dog, when the impact of a still more massive advertising campaign and still higher price was felt.[124]

Both the intensity and duration of category loyalty is made further suspect by the fact that on the demand side, the prevailing pattern is one of "combination buying" (*i.e.*, the buying of more than one kind of dog food).[125] Combination buying shows that many consumers are already using more than one category and, therefore, the volume of sales of any category could change as massive advertising exploits one or the other theme whether it be anthropomorphic identification with the animal, convenience, nutrition or even in hard times, the demand for low prices. This ephemeral nature of consumer category loyalty is illustrated by the fact that current economic conditions, which have caused a general decline in discretionary income, have also produced a shift away from the premium canned brands to lower-priced dry dog food.[126] Moreover, quite apart from the question of existing brand loyalty, there are a substantial number of consumers who are coming into the market each year with *no* brand loyalty. [83] These are the new dog owners who represent a target for all brands and all types of dog food.[127]

On the supply side, there are factors pointing to an overall dog food market. The record shows that despite the success of Alpo in canned, or General Foods in semimoist, or Ralston Purina in dry, the reaction of manufacturers in *other* segments of the industry was not to concede separate "markets" to these brands, but constantly to engage in intercategory challenges.[128] Thus, respondent's own internal documents contain many references to a dog food market, and there is a constant monitoring of all segments of the industry by Alpo and others to determine trends and strategy, both in terms of turning out imitative brands and changing emphasis in intercategory non-price competition.[129] And while it is true that the most intense challenges to any successful brand does come in the form of direct imitation, *all* manufacturers of *all* dog food are directly competing against each other in trying to get their products into the limited space available in

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the response of the quantity of one firm's product demanded to a change in the level of another firm's advertising outlays * * *." Needham, Economic Analysis and Industrial Structure 21 (1969).

[124] Findings 71, 74, 99.

[125] Finding 75.

[126] Findings 76, 83(k).

[127] Finding 77.

[128] Findings 49, 67 to 69.

[129] Findings 82 to 84. The significance of the battle for shelf space is manifest. In *United States* v. *Jos. Schlitz Brewing Company*, 253 F.Supp. 129 (1966), *aff'd per curiam*, 385 U.S. 37 (1960), the court rejected an attempt, similar to the one being made in this case, to separate premium-priced and highly advertised beer into a separate market from local non-promoted brands. The court said "* * * this competition for the beer consumers' dollar is reflected in competition among *all* beers for shelf space, servicing at retail outlets and point-of-sale advertising space." 253 F.Supp. at 146.

the pet food section of the supermarket, and thereby reaching as many consumers as possible who "shop" the brands in that section.[130]

[84] It is also significant that there is substantial supply-side manufacturing flexibility which indicates a capability for switching from category to category as the competitive picture and brand or category loyalty change.[131] For example, Alpo has experimented in dry in an effort to challenge Ralston Purina and General Foods, while Ralston Purina and General Foods, in turn, have challenged Alpo in premium canned. Many manufacturers, including Vets, itself, had the manufacturing capability to go into *all* categories: premium and inexpensive canned, dry, and semimoist. Moreover, most manufacturers of dog food are constantly trying to blur whatever physical differences exist between categories as they vary ingredients, palatability, and convenience of the products.[132]

In sum, the pattern that emerges is one of an overall dog food market although there are readily identifiable categories consisting of products and strategies which are used to carve away franchises from this overall market.[133]

I believe this conclusion is consistent with the relatively few precedents which have touched on the problem of cross-elasticities in highly differentiated and massively advertised consumer products.[134] [85] The most thorough treatment of the question appears in *Procter & Gamble*,[135] a product extension merger where the Commission carefully analyzed the nature of competition in the household bleach industry. Clorox, which was functionally interchangeable with all other bleach, was a highly-advertised, premium-priced brand that commonly sold for several cents per quart more than regional, local or private brands. The fact that Clorox was *able* to command a premium price did not end the inquiry (as apparently respondent would have us do in this case), but rather was the start of the Commission's detailed examination of the dynamics of competition in the industry. The Commission's description of the competitive processes at work in household bleach is particularly pertinent to this case:

By reason of distinctive packaging, the firm's long history, mass advertising and sales

[130] Findings 29 to 32.

[131] Findings 26, 50, 53. "Even assuming that consumers buy from a definite price range — this does not compel narrow product market definition if there is flexibility of manufacture." *United States* v. *Brown Shoe Co.*, 370 U.S. 294, at 366-68 (concurring opinion of Mr. Justice Harlan).

[132] Finding 22.

[133] Finding 81. These categories may, in fact, be relevant submarkets for the purpose of Section 7. But the existence of such submarkets does not preclude a finding of an overall market consisting of all the products which make up the submarkets. *United States* v. *Phillipsburg National Bank*, 399 U.S. 350 (1970).

[134] In *Brown Shoe*, for example, the Supreme Court rejected, without extensive discussion, as "unrealistic" Brown's contention that its medium-priced shoes occupied a different market from that of Kinney's low-priced shoes. 370 U.S. 294, at 326 (1962).

[135] 63 F.T.C. 1465 (1963), *aff'd*, 386 U.S. 568.

promotion, or other factors, a firm may succeed in establishing such a definite preference for its brand that the consumer will pay a premium to obtain it, although it is functionally identical to *competing* brands.[136]

It is true, of course, that there are cases involving industrial or trade users (in contrast to consumer purchasers) where product differentiation is difficult to achieve and price is so crucial that the market definition problem may conveniently be disposed of by looking to cross-elasticities of demand. *See, e.g., United States* v. *Aluminum Co.*, 377 U.S. 271 (1964). But even in industrial cases, the courts have held that the absence of price sensitivity is not determinative. In *United States* v. *Continental Can Co.*, the Supreme Court said,

> * * * [T]hough the interchangeability of use may not be so complete and the cross-elasticity of demand not so immediate as in the case of most intraindustry mergers, there is over the long run the kind of customer response to innovation and other competitive stimuli that brings the competition between the two industries within § 7's competition-preserving proscriptions.[137]

[86] In the same case, the Supreme Court stated:

> * * * That there are price differentials between the two products or that demand for one is not particularly or immediately responsive to changes in the price of the other are relevant matters but not determinative of the product market issue * * *.[138]

And recently, in *Telex Corp.* v. *IBM Corp.*, the Tenth Circuit held that the *du Pont (Cellophane)*[139] test of "reasonable interchangeability" meant that if one product "*may substitute*" for another it is reasonably interchangeable. As for price sensitivity the court said:

> *One* evidence of cross-elasticity is the responsiveness of sales of one product to price changes of another. But a finding of actual fungibility is not necessary to a conclusion that products have *potential* substitutability.[140]

Turning to the effects of the acquisition, I start with the fact that in this overall dog food market, even prior to the acquisition, there existed a high degree of concentration with four firms, including L&M, controlling 54.44 percent of the market and eight firms controlling 71.96 percent of the market. In this concentrated [87] market, L&M

[136] 63 F.T.C. 1465, at 1553. [Emphasis added.]

[137] 378 U.S. 441, at 455 (1964).

[138] *Ibid.*

[139] *United States* v. *du Pont de Nemours & Co.*, 351 U.S. 377 (1956).

[140] *Telex Corp.* v. *IBM Corp.*, 510 F.2d 894, 917-18 (10th Cir. 1975). [Emphasis added.] In still another recent interpretation of *du Pont (Cellophane)*, it was held that "the Cadillac is interchangeable with other luxury automobiles on the market which serve the same purpose and, in addition, it competes with even the less expensive models of automobiles in serving the consuming public's transportation needs and desires." *Mogul* v. *General Motors Corp.*, 391 F.Supp. 1305 (E.D. Pa. 1975), 5 CCH Trade Reg. Rep. ¶60,296, at 66,173.

ranked fourth with 10.99 percent and Perk ranked sixth with 4.41 percent.[141] Thus, the immediate impact of the acquisition was to eliminate the sixth ranking firm, raise L&M to second position in the industry with 15.76 percent of the market, increase four-firm (including L&M) concentration to 59.01 percent, and eight-firm concentration to 76.54 percent.[142]

The increase in concentration brought about by the acquisition must also be viewed in light of the existing high entry barriers. Where entry barriers are high, the elimination of even potential entrants, let alone an actual competitor, may contribute to the anticompetitive effects associated with concentrated markets.

The main barrier to entry in the dog food market is product differentiation maintained and achieved by persuasive "image" advertising.[143] The record shows beyond any question that entry into most categories of dog food is largely determined by the ability to match the massive advertising expenditures of the industry's giants.[144] Furthermore, there are several reasons why a new entrant may be required to spend substantially more than established firms. Because of the difficulty of getting consumers to "switch brands" (in contrast to the established firms' goal of "repeat buying") a proportionally larger volume of advertising is necessary if significant market share is to be gained.[145] The [88] existing level of "noise" in the market means that a new entrant must "shout louder to be heard."[146] In other words, because the effectiveness of additional advertising messages declines as the aggregate volume of industry advertising increases, it will be necessary for new entrants to spend more to gain an established market position than existing firms did in the past.

Considering the existing level of concentration, and the entry barriers to new competition which prevail, I believe the case is well within the established precedent respecting illegal horizontal acquisitions. The Supreme Court has repeatedly said — in view of the intense Congressional concern with rising concentration — that where concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great. *United States* v.

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[141] Findings 92, 93, 142.

[142] Findings 92, 93, 119, 121.

[143] Prolonged, persistent, and massive persuasive advertising leading to product differentiation has been well recognized by the Supreme Court and in the economic literature as a key entry barrier. *See, e.g., FTC* v. *Procter & Gamble Co.*, 386 U.S. 568 (1967); Bain, Barriers to New Competition 114 (1956); Kaysen and Turner, Antitrust Policy 74 (1959); Scherer, Industrial Market Structure and Economic Performance 344 (1970).

[144] Findings 101 to 116.

[145] Findings 104 to 106.

[146] Comanor and Wilson, Advertising and Market Power 47 (1974); Scherer, Industrial Market Structure and Economic Performance 95-97 (1970).

Philadelphia National Bank, 374 U.S. 321, 365, n. 42 (1963); *United States* v. *Aluminum Co.*, 377 U.S. 271, at 279 (1964).

The concentration ratios involved in this case are certainly as high as those which have been found in the past to create a dangerous trend toward anticompetitive markets. Thus, in *United States* v. *Pabst Brewing Co.*, 384 U.S. 546 (1969), the Supreme Court struck down a merger of the 10th and 18th ranking firms where their combined market share was less than 5 percent[147] and eight-firm concentration was less than 60 percent of the national market. In *Von's Grocery Co.* v. *United States*, 384 U.S. 270 (1966), the Supreme Court struck down an acquisition where eight-firm concentration was 41 percent and the combined market share of the sixth ranking acquired firm and third ranking acquiring firm was 7.5 percent. In *Aluminum Company of America* v. *United States*, 377 U.S. 271 (1964), one of the two **[89]** relevant markets where the merger was declared unlawful involved the eighth ranking firm with 4.7 percent and the third largest firm with 11.6 percent of the market. See, also, *Stanley Works* v. *FTC*, 469 F.2d 498 (2d Cir. 1972), *cert. denied*, 412 U.S. 928 (1973), where the subject companies had preacquisition shares of relevant market of 22 percent and only 1 percent, but the market was already concentrated with four largest firms controlling 49 to 51 percent.

While the structural impact of this acquisition is to increase concentration, which, in turn, may lead, inherently, to anticompetitive effects, *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 362-63 (1963), I have also looked beyond mere market shares to the question of the continued availability of Vets as an alternative choice to consumers of inexpensive dog food.

There is no doubt that the acquisition has merged the company which has a track record of being an intensive user of persuasive image advertising with a small company that had a sensible, low-priced, nutritionally adequate, and not heavily advertised product.[148] In a word, the independence of Vets is worth worrying about because this firm represents a considerable share of the reasonably priced dog food available to consumers. The question that has to be answered is whether the acquisition increases, decreases, or is a neutral factor in the *continued* availability of low-priced alternatives to consumers. Given the immutable fact that advertising and fantasy will continue to dominate this industry, I believe that the function of public policy here

[147] The Supreme Court also found that the merger was unlawful in a three-State geographic beer market where the combined market share of the acquiring and acquired firms was 11.32 percent. 384 U.S. 546, at 551-52.

[148] Finding 122.

should be to maintain as varied a shopping list of consumption opportunities for consumers as is reasonably possible.[149]

[90] By this I mean that whether it is socially desirable or not, consumers should be free to spend, even spend irrationally and emotionally their discretionary income as they choose.[150] But by the same token, consumers must have the option to buy cheap products which adequately serve the same end use as the highly differentiated product. In short, apart from changes in structural concentration, the effect which I consider most relevant to this case is how this particular acquisition may impact on consumers' ability to choose a low-priced, no-frills product.

[91] In looking to the effects on diversity which I have discussed above, the starting point is that there is a strong presumption which argues in favor of maintaining Perk as an *independent* decision and profit-making force in the dog food industry — that is, not aligned to any other existing dog food company. The basis for this premise is the belief that independence is more likely to produce the very diversity which is the essential point of this case.[151] By this I mean that while an independent company may pursue an unrestrained strategy aimed at *all* consumer dollars, the merged companies may adopt a more accomodating objective of trying to keep Alpo users within the premium segment, while only allowing the Perk part of the business to follow a strategy of going after existing "maintenance" business. In other words, while it is true that an independent Perk, like a Perk aligned to Allen, will have to make a profit-maximizing decision on whether (and how) to continue to market cheap dog food, the decision in the case of an independent Perk will not be circumscribed by the

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[149] The substantial lessening of competition, which is the concern of Section 7, includes not only the effect on the competitors of the merged companies but also the impact on the buyers who must rely upon the merged companies and their competitors as sources of supply. *United States* v. *Bethlehem Steel Corp.*, 168 F.Supp. 576, 588 (S.D.N.Y. 1958). Among other reasons the Bethlehem and Youngstown merger was illegal because, "it would eliminate a substantial independent alternative source of supply for all steel consumers." *Id.* at 615. See, also, Scherer, Industrial Market Structure and Economic Performance 324-25 (1970).

[150] In the words of one wry observer of the consumption patterns of our culture:

> Other values derive from the proposition that cheapness is not enough. The buyer of an advertised food buys more than a parcel of food or fabric; he buys the pause that refreshes, the hand that has never lost its skill, the priceless ingredient that is the reputation of its maker. All these may be illusions, but they cost money to create, and if the creators can recoup their outlay, who is the poorer? Among the many illusions which advertising can fashion are those of lavishness, refinement, security, and romance. Suppose the monetary cost of compounding a perfume is trivial; of what moment is this if the ads promise, and the buyer believes, that romance, even seduction, will follow its use? The economist, whose dour lexicon defines as irrational any market behavior not dictated by a logical pecuniary calculus, may think it irrational to buy illusions; but there is a degree of that kind of irrationality even in economic man; and consuming man is full of it. Brown, *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 Yale L.J. 1165, 1181 (1948).

[151] Finding 123. See, Brodley, *Oligopoly Power Under The Sherman and Clayton Acts - From Economic Theory To Legal Policy*, 19 Stan. L.Rev. 285, at 341 (1967). In passing the amended Clayton Act, Congress believed that small aggressive companies could best be maintained as important competitive factors by preserving their independence rather than see them absorbed by one of the giants. *United States* v. *Aluminum Co. of America*, 377 U.S. 271, 281 (1964); *United States* v. *Brown Shoe Co.*, 370 U.S. 294, 344 (1962).

possible impact on Alpo's already substantial premium sales and profits.[152]

[92] This presumption in favor of an independent decision-making force cannot be overcome, as respondent argues, by showing that since the acquisition Perk has been maintained as a separate "profit center"[153] within the L&M hierarchy. So long as Perk is aligned to L&M, Perk's status, whether it be styled a separate profit center or otherwise, is a matter solely within the discretion of L&M management, and L&M's management may either change its mind completely about Perk's autonomy, or simply shift the so-called "autonomous" unit to some other aspect of the dog food business, say, custom-packing exclusively for high-priced Alpo. In this connection, it is worth noting that Perk custom-packed for Alpo prior to the acquisition; that one of the reasons why Perk was acquired is that Allen management was impressed by Perk's ability as a custom-packer; and that since the acquisition there has been a sharp increase in the volume of custom-packing done by Perk for Alpo.[154]

Nor can the acquisition be defended on the grounds that up to this point there is no evidence that L&M intends to eliminate Vets as an inexpensive brand, and, indeed, that the immediate effect of the acquisition may have been to rejuvenate a brand which was perceived by at least one industry member as being in a declining market position.[155] Even if this post-acquisition [93] evidence with respect to L&M's immediate plans for cheap Vets is considered (and I believe it

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[152] *See, e.g., United States* v. *Continental Can Co.*, 378 U.S. 441 (1964), where the Supreme Court said that "Continental acquired by the merger the power to guide the development of Hazel-Atlas consistently with Continental's interest in metal containers," 378 U.S. at 463. The Supreme Court added:

> It would make little sense for one entity within the Continental empire to be busily engaged in persuading the public of metal's superiority over glass for a given end use, while the other is making plans to increase the Nation's total glass container output for that same end use. 378 U.S. 441, at 465.

[153] See Respondent's Proposed Findings 5, 43, 71, 356-59, 364-66.

[154] Finding 6.

[155] Finding 125. Testimony of dog food manufacturers (so heavily relied on by respondent, see Respondent's Proposed Findings 328-335) to the effect that the acquisition has not had anticompetitive ramifications is entitled to little weight. *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 367. The elimination of Perk which was offering a cheap alternative to consumers may, in fact, have little perceptible adverse effect on either large companies which compete against L&M on the basis of the size of their respective advertising budgets or even on smaller companies which had to meet Perk prices. But the test of a competitive market is not only whether competitors flourish " *but also whether consumers are well served.*" *Id.* at 367, n. 43. Furthermore, the absence of demonstrable anti-competitive effects does not mean that competition has not been adversely affected; once the acquisition takes place "no one knows what the fate of the acquired company and its competitors would have been but for the merger." *United States* v. *General Dynamics Corp.*, 415 U.S. 486, at 505 (1974), quoting *FTC* v. *Consolidated Foods Corp.*, 380 U.S. 592, 598 (1965). This admonition is especially relevant in this case where, but for the L&M acquisition, Perk may have been acquired by an aggressive *non* dog-food company which could have made competitive inroads into *all* segments of the dog food market. (See Finding 128.)

should not be because L&M's intentions could change drastically once this litigation is over),[156] it sheds no light on the legality of the acquisition. If L&M wants to rejuvenate the inexpensive category,[157] let it do so on its own. There is no compelling reason why L&M had to eliminate Perk as an independent company in order to sell cheap dog food. Moreover, even assuming that Perk had inadequate resources to maintain or improve its market position, this can hardly justify *this* acquisition. There were several large non-dog food companies which were interested in Perk and acquisition by these companies would be pro-competitive in contrast to the increased concentration resulting from the L&M acquisition.[158]

[94] Beyond the presumption in favor of independence, another major factor which argues in favor of undoing this acquisition is the resulting increase in concentration considered earlier, which may impact directly on the alternatives available to consumers. As I indicated above, it is important that this increased concentration occurs in an industry which is already highly concentrated and where there are substantial entry barriers which makes the elimination of existing competition especially dangerous.

Existing concentration in premium canned, dry, and semimoist and the high advertising barriers surrounding this concentration could easily deter new entry into those tightly controlled categories.[159] A prospective entrant, however, who was interested in the cheap canned segment of the industry, might, prior to the acquisition, reasonably expect to achieve some measure of market success by turning out a low-priced product which is not heavily advertised. This is exactly what Perk did before the acquisition.[160] Now the picture has changed. The prospective "economy" entrant may perceive its changes of winning *any* market share as substantially reduced. Certainly, the Perk market share now assumed by L&M may be assesed as infinitely more difficult to challenge since there is a risk that any such serious challenge will be met by L&M's resorting to an expensive advertising

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[156] See, *United States* v. *General Dynamics Corp.*, 415 U.S. 486 (1974), where the Supreme Court said that post-acquisition good behavior or lack of anticompetitive effects is of no consequence, and that only post-acquisition changes in patterns and structures beyond the acquiring company's control is of any relevance.

[157] As it happens, the inexpensive category is not so cheap any more. Since the acquisition Vets has had "good price increases" due to inflationary pressures but research conducted for L&M suggests that even higher moves may be in the offing. Finding 18.

[158] Finding 128. Unless Perk comes within the "failing company" defense, which was not even advanced in this case (and if it were, it would be clearly inapplicable, *Citizen Publishing Co.* v. *United States*, 394 U.S. 131 (1969)), its profits (which were adequate before the acquisition) or its market share (which was higher before the acquisition), or the reasons why its management selected L&M over other companies are completely irrelevant particularly when there were other interested non-dog food companies in the picture whose acquisition of Perk would be more consistent with the policy of the antitrust laws. *United States* v. *Phillips Petroleum Co.*, 367 F.Supp. 1226 (C.D. Calif. 1973), *aff'd.*, 418 U.S. 906 (1974) (1974 — 2 Trade Cases, ¶75,143).

[159] Findings 95 to 99, 101 to 116.

[160] Findings 58, 122.

war in which it could attempt to use some of its "Alpo" advertising techniques in the cheap category.[161]

[95] In short, the acquisition could extend the major entry barriers which already exist in premium canned, dry, and semimoist — massive brand differentiation advertising — to "ration" with the result that not only will new entry be discouraged, but the conditions of entry, namely, the ability to spend heavily on advertising, could result in so inflating the cost of staying competitive as to cause the elimination of all cheap dog food.

The acquisition could impact on market structure in still other ways. If the acquisition were to be approved, the other giants in the industry may make similar moves by acquiring one of the few remaining small firms in the industry, particularly the few who make cheap dog food.[162] More importantly, existing smaller firms may be forced to seek the shelter of one of the giants as the only feasible way of meeting the threat of having to compete against Perk's successor, L&M.[163]

[96] While I have stressed the impact of the acquisition on cheap dog food, this is not to say that I accept respondent's view that the acquisition will be procompetitive in any other category.[164] To the contrary, it could have adverse effects in each of these categories.

With respect to premium canned, Perk unsuccessfully tried to enter in the early 1960's and failed. But just prior to the acquisition it was considering a "revolutionary" new premium product which was to be produced at a much lower cost than Alpo.[165] Therefore, it is fair to conclude that the merger may have eliminated Perk, or any independent successor which acquired Perk, as a potential source of price competition for Alpo which dominates this segment.

As for dry, it is true that this category is highly concentrated with Ralston Purina and General Foods accounting for about 70 percent of

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[161] As the Supreme Court said in *Procter & Gamble*, "a new entrant would be much more reluctant to face the giant Procter than it would have been to face the smaller Clorox." *FTC* v. *Procter & Gamble*, 386 U.S. 568, 579 (1967). In *American Tobacco Co. v. United States*, 328 U.S. 781, 797 (1946), the Supreme Court stated:

> The record is full of evidence of the close relationship between * * * large expenditures for national advertising of cigarettes and resulting volumes of sales * * *. Such advertising is not here criticized as a business expense. Such advertising may benefit indirectly the entire industry, including the competitors of the advertisers. Such tremendous advertising, however, is also a widely published warning that these companies possess and know how to use a powerful offensive and defensive weapon against new competition. New competition dare not enter such a field, unless it be well supported by comparable national advertising.

[162] *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 343-44 (1962).

[163] See Finding 118.

[164] The Supreme Court has rejected the concept of "countervailing power" — that is, that anticompetitive effects in one area might be justified by procompetitive effects elsewhere, *United States* v. *Philadelphia National Bank*, 374 U.S. 321, at 370 (1963).

[165] Finding 124.

the sales. Moreover, there are entry barriers in the form of huge advertising expenses which a new entrant would have to overcome.[166] The fact that Perk was not recognized by industry members as a significant dry manufacturer prior to the acquisition, merely attests to the existing level of concentration and the need for *more* competition, not less.

Prior to the acquisition, Perk had become the fourth ranking company in the dry category, offering a cheap alternative to the leading brands,[167] while Allen had been test marketing more expensive dry products for several years.[168] In respondent's view, given the **[97]** highly concentrated structure of the dry category, the combined efforts of Perk and Allen may produce a more viable challenge to the market domination of Purina. But this argument neither explains how the elimination of the independence of the fourth ranking firm deconcentrates anything, nor why Perk's market share must be acquired by Allen in order for Allen to challenge Purina. Clearly, it would be better to preserve whatever competition already exists while Allen presses forward with its own efforts to enter this category by internal expansion.

In the case of semimoist, Perk had been an outright failure in challenging the overwhelming market position of General Foods.[169] But at least it tried which is more than can be said for Allen.[170] Historically, semimoist was aimed at the canned market,[171] and it is understandable why it is not necessarily in L&M's interest to push any product development in this area. Moreover, I believe that an independent Perk would have been more likely than a merged Perk to attempt to market a cheap product in this category.

While I believe that this acquisition may impact unfavorably on product diversity and adversely affect consumer choice, I fully realize that, considering the massive level of consumer manipulation which already exists in the overall product market, the ultimate fate of any cheap alternative may depend on the adoption of new techniques, namely, how successfully and aggressively a cheap product is advertised on national television by companies like Alpo.

[98] Of course, as I indicated earlier, if L&M believes it can stimulate a profitable increase in demand for cheap dog food by advertising on television, it is free to do so by internal expansion. Certainly, there is no issue in this case as to how extensively L&M may

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[166] Findings 95, 106, 107.
[167] Finding 96.
[168] *See*, Note 91, *supra*.
[169] Findings 97, 108, 111.
[170] Finding 112.
[171] Finding 49.

advertise any cheap dog food that it may decide to produce on its own. Nor is it relevant to this case that the effect of bruising competition resulting from any internal expansion by L&M may be (1) the elimination of competitors, both large and small, or (2) a precipitous increase in the price of cheap dog food to offset the cost of advertising.

What the Clayton Act will not tolerate is a decision by L&M that, instead of competing as aggressively as it can through internal expansion, it may choose, instead, to eliminate an independent firm which not only offered a cheap alternative to L&M's own high-priced products, but offered it in a way that the antitrust laws especially favor — by lower prices rather than the nonprice competition which prevails in this industry.

IV

Relief

Only complete divestiture, including divestiture of after-acquired assets, can return Perk to a position which assures its independence as a competitive force offering meaningful alternatives to consumers in this highly concentrated industry. *See, United States* v. *E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 326, 327 (1961); *Diamond Alkali Co.*, 72 F.T.C. 700 (1967).[172]

[99] In addition, I believe that an order requiring prior Commission approval for any acquisitions by L&M for the next ten years in the dog food industry is warranted. In view of the structure of this industry, respondent should be prevented from eliminating through acquisition any of the few remaining independent companies which represent significant competition. *Ecko Products Co.*, 65 F.T.C. 1163, 1228 (1964).

In ordering the relief outlined above, I have rejected the arguments of complaint counsel which would compel a "spin-off" of Perk and a divestiture of the profits earned by Perk since the 1969 acquisition.

In an early stage of this proceeding, Administrative Law Judge Goodhope would not allow discovery on the issue of Perk's profits because the Commission's Notice Order* had not included "divestiture of profits." Complaint counsel made a second request for discovery on this issue before me, but I concurred in Judge Goodhope's earlier decision and would not allow it. As a result of these rulings, there is no record evidence going to the necessity or even the feasibility of such novel relief. In effect, both administrative law judges who have been assigned to this matter have refused to expand the scope of the inquiry

[172] "In the absence of proof to the contrary the assumption of this Commission must be that 'only divestiture can reasonably be expected to restore competition and make the affected markets whole again.' " *Diamond Alkali Co.*, F.T.C. Dkt. 8572, 72 F.T.C. 700, 742, quoting from *National Tea Co.*, F.T.C. Dkt. 7453, 69 F.T.C. 226 (1966)

* Not reproduced herein.

in the absence of a clear indication in the Commission's complaint or Notice Order that this was to be an issue in this case.

Moreover, it seems to me that the basic premise of complaint counsel's argument on the necessity for "spin-off" and divestiture of profits is that this relief is justified in order to punish a flagrant violation of Section 7 and serve as a deterrent to future violators.[173] The **[100]** complaint makes no such charge nor have I found that L&M is a willful violator of Section 7. In any event, such a finding would be completely irrelevant since respondent's intent is not an issue. Relief under Section 7 is not to punish[174] but rather to restore competition, and I believe *that* objective can be accomplished in the usual way of requiring divestiture to a non-dog food company and Commission approval for future acquisitions. In this connection, I am not as certain as counsel seems to be that spin-off rather than divestiture is necessarily the best way to restore competition in this industry. (Complaint Counsel's Main Brief, p. 134.) While it may be desirable to have a small non-affiliated company, an equally forcible argument can be made that divestiture to a large, aggressive, and well-financed *non*-dog food company may be a more realistic way to have Perk do battle with the likes of Quaker Oats, Ralston Purina, General Foods, and L&M than to send it out on its own. In any event, since I believe that divestiture may be easier to accomplish than a "spin-off," I am at a loss as to how a spin-off of profits can in any way facilitate the divestiture, since any forced capital contributions by L&M to Perk will simply mean an increase in the price of Perk to a new buyer.

V

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of respondent, Liggett & Myers Incorporated.

2. Respondent, Liggett & Myers Incorporated, Allen Products Company, Inc., and Ready Foods Company (now Perk) were at all times material herein, corporations engaged in commerce, as "commerce" is defined in the Clayton Act, as amended.

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[173] Complaint counsel say that the Perk profits may have been used for Alpo plant expansion and Alpo advertising (Complaint Counsel's Main Brief, p. 37). Even if this were a relevant consideration, and I believe it is not, it would take *another* protracted and possibly futile proceeding to trace Perk profits as distinguished from overall L&M profits, and determine whether these were used as merely a part of L&M's dividend distribution to its stockholders or were specifically diverted to some "anticompetitive" purpose. As for complaint counsel's "unjust enrichment" argument, it overlooks the probability that Perk's profits may represent nothing more than a reasonable return on L&M's investment and, in fact, there was no enrichment, unjust or otherwise.

[174] Complaint counsel suggest as an alternative form of "divestiture of profits" that L&M be required to lower the wholesale price of Alpo. This, too, is a punitive measure which has nothing to do with restoring competition.

[**101**] 3. The proper product market within which to determine the probable effects of this acquisition, for purposes of this proceeding, is the manufacture, sale and distribution of dog food.

4. The proper geographic market within which to determine the probable effects of this acquisition, for purposes of this proceeding, is the United States as a whole.

5. The effect of the acquisition by Liggett & Myers Incorporated of Ready Foods Company (now Perk) has been, or may be to substantially lessen competition or tend to create a monopoly in violation of Section 7 of the Clayton Act, as amended, in the following ways:

(a) Concentration in the manufacture, sale and distribution of dog food has been increased and the possibility of deconcentration has been diminished;

(b) Actual and potential competition between L&M and Perk in the manufacture, sale and distribution of dog food has been and may be eliminated;

(c) Perk has been eliminated as an independent and competitive factor in the manufacture, sale and distribution of dog food with the result that the consuming public may be deprived of a cheap alternative to high-priced dog food.

(d) Additional acquisitions and mergers in the dog food market may be encouraged.

6. The appropriate relief is divestiture and a 10-year ban on dog food company acquisitions without the prior approval of the Commission.

Accordingly, the following order will be issued: [**102**]

ORDER

I

It is ordered, That respondent Liggett & Myers Incorporated, a corporation, and its officers, directors, agents, representatives, employees, subsidiaries, affiliates, successors and assigns, within one year from the date this order becomes final, shall divest absolutely and in good faith all assets, properties, rights and privileges, tangible and intangible, including but not limited to all plants, equipment, trade names, trademarks and good will acquired by Liggett & Myers Incorporated as a result of its acquisition of the assets and business of Perk Foods, Inc., together with all plants, machinery, buildings, improvements, equipment and other property of whatever description which has been or hereafter shall be added to the property of Perk Foods, Inc. since that acquisition.

II

By such divestiture none of the assets, properties, rights or privileges described in Paragraph I of this order shall be sold or transferred, directly or indirectly, to any person who is at the time of divestiture an officer, director, employee or agent of, or under the control or **[103]** direction of Liggett & Myers Incorporated or any of its subsidiaries or affiliate corporations, or who owns or controls, directly or indirectly, more than one (1) percent of the outstanding shares of common stock of Liggett & Myers Incorporated, or to any purchaser who is not approved in advance by the Federal Trade Commission.

III

No method, plan or agreement of divestiture to comply with this order shall be adopted or implemented by Liggett & Myers Incorporated save upon such terms and conditions as first shall be approved by the Federal Trade Commission.

IV

Pending divestiture, the assets and business acquired from Perk Foods, Inc. shall be operated as a separate corporation, with separate books of account, separate management, separate assets, and separate personnel.

V

Pending divestiture, no substantial property or other assets of the separate corporation referred to in Paragraph IV herein shall be sold, leased, otherwise **[104]** disposed of or encumbered, other than in the normal course of business, without the consent of the Federal Trade Commission, and Liggett & Myers Incorporated shall not commingle any assets owned or controlled by such separate corporation with any assets owned or controlled by Liggett & Myers Incorporated.

VI

For a period of three years from the date this order becomes final, no individual employed by Perk Foods, Inc. or the separate corporation referred to in Paragraph IV herein shall be employed by Liggett & Myers Incorporated.

VII

Pending divestiture, the merchandising, purchasing, pricing and manufacturing policies of the separate corporation referred to in

Paragraph IV herein and Liggett & Myers Incorporated shall be conducted independently of each other.

VIII

Pending divestiture, Liggett & Myers Incorporated shall, by all means consistent with prudent business judgment, maintain the separate corporation referred to in Paragraph IV herein as an independent entity **[105]** and take no steps to impair such corporation's economic and financial position, so as to permit prompt divestiture and reestablishment of such corporation as an independent enterprise of competitive strength comparable to that which Perk Foods, Inc. enjoyed at the time of the acquisition.

IX

For ten (10) years from the date this order becomes final, Liggett & Myers Incorporated shall cease and desist from acquiring, directly or indirectly, without the prior approval of the Federal Trade Commission any part of the share capital or assets of any corporation engaged in the manufacture and/or sale of dog food in the United States.

The provisions of this Paragraph IX shall include any arrangements pursuant to which Liggett & Myers Incorporated acquires the market share, in whole or in part, of any concern, corporate or noncorporate, which is engaged in the manufacture and/or sale of dog food (a) through such concern's discontinuing the manufacture, production, marketing, distribution and/or sale of any of said dog food under its own trade name or labels and thereafter distributing such products **[106]** under Liggett & Myers Incorporated's trade name or labels, or (b) by reason of such concern's discontinuing the manufacture, production, marketing, distribution and/or sale of such products and thereafter transferring to Liggett & Myers Incorporated customer lists or in any other way making available to Liggett & Myers Corporation access to customers or customer accounts.

X

Liggett & Myers Incorporated shall within sixty (60) days after the date of service of this order, and every ninety (90) days thereafter until Liggett & Myers Incorporated 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 Liggett & Myers Incorporated intends to comply, is complying, or has complied with this order. All compliance reports shall include, among other things that may from time to time be required, a summary of all contacts and negotiations with potential purchasers of Perk Foods, Inc., the identity of all such potential purchasers, and copies of all written communications to and from such potential purchasers. [107]

XI

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

Opinion of the Commission

By Nye, *Commissioner:*

I. Introduction

A. Issues.

[1] This matter is before the Commission on appeal by respondent Liggett & Myers Incorporated ("L&M") from the initial decision of the administrative law judge.[1]

The complaint in this matter alleges that L&M's January 1969 acquisition of the capital stock of the Ready Foods Corporation ("Ready Foods") violated Section 7 of the [2] Clayton Act[2] because the effect of the acquisition may be substantially to lessen competition or to tend to create a monopoly in the production, distribution, and sale of dog food in the United States.

The administrative law judge found that the challenged acquisition was in violation of Section 7 of the Clayton Act and ordered divestiture of Ready Foods. Respondent appealed, contending that the administrative law judge erred both in his determination of the lines of commerce appropriate to testing the acquisition and in his assessment of the acquisition's effects.

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[1] For convenience, the following abbreviations are used in this opinion:

I.D.—Initial decision of administrative law judge (Findings cited by paragraph number; conclusions cited by page number).

Tr.—Transcript of testimony

CX—Commission exhibit

RX—Respondent exhibit

R. Br.—Brief on Appeal of respondent

C. Br.—Answering Brief of complaint counsel

Rep. Br.—Reply Brief of respondent

RPF—Respondent's proposed findings

CPF—Complaint counsel's proposed findings

[2] 15 U.S.C. §18.

B. THE COMPANIES INVOLVED.

1. *Liggett and Myers, Incorporated.*

At the time of the challenged acquisition, L&M was ranked by Fortune magazine 219th among the nation's largest industrial corporations, with 1968 sales of approximately $617,000,000, of which approximately 35 percent derived from its non-tobacco business (Answer of respondent, para. 4).

Of special interest, L&M's Allen Products subsidiary ("Allen") was—and is—a major manufacturer of dog food. In the year preceding the challenged acquisition, Allen sold $66,137,594 of canned dog food under its "Alpo" label (I.D. 86; CX 270(a)).

[3] There are three major types of dog food: canned; dry; and semi-moist (I.D. 12). Respondent asserts that canned dog food must be divided into at least three further categories— premium, regular, and economy. Employing these categories for the moment, Allen's 1968 sales represented 55.71 percent of all "premium" canned dog food sales (I.D. 99; RX 123), 22 percent of all canned sales combined (I.D. 98; CX 95q), and 10.99 percent of all dog food sales combined (I.D. 92; CX 323).

Allen had sought to broaden its product line in recent years. By the time hearings were held in this matter, in 1975, Allen had made three attempts at selling dry dog food (Tr. 1375, 1384-1385, 1791-1794, 1804-1820; CX 35(a)-(d); CX 335(d) and (e)).

2. *Perk Foods Corporation.*

On January 29, 1969, L&M acquired — for approximately $29,500,000 — all the stock and assets of Ready Foods and changed Ready Foods' name to Perk Foods Company, Inc. (I.D. 4). We will hereinafter refer to the acquired corporation as "Perk."

At the time of its acquisition, Perk manufactured canned dog food under its "Perk" and "Vets" labels, dry dog food under the "Vets Nuggets" label, and a small amount of semi-moist dog food under the "Vets Burger" label (I.D. 5). Its wholesale sales under those labels amounted to $20,680,000 in 1968 (I.D. 87).

[4] In that year, Perk held 32.14 percent of "economy" canned sales (I.D. 100), 4 percent of all canned (I.D. 98; CX 95q), about 4 percent of dry (CX 25(k)), and an infinitesimal share of semi-moist (CX 25(k)), all of which added up to 4.41 percent of total dog food sales (I.D. 93).

While Perk did not market a "premium" canned dog food, it manufactured such foods for both Allen and Safeway (I.D. 6; Tr. 1829-1830, 2001, 2023, 2101) and packed every major type of dog food for various chain stores and dog food companies (I.D. 6; Tr. 2093-2099; CX

25). At the time of its acquisition, Perk had in preparation a "premium" canned product for sale under Perk's own "Vets" label (CX 25).

II. Lines of Commerce

A. ALL DOG FOOD AS A LINE OF COMMERCE.

Respondent contends that "premium" canned dog food and "economy" canned dog food cannot be grouped within the same product market and, thus, the acquisition of Perk, a marketer chiefly of "economy" products, by L&M-Allen, a marketer chiefly of "premium" products, could not have had a prohibited effect upon any line of commerce.

This issue must be resolved against respondent. The Supreme Court in *Brown Shoe Co.* v. *U.S.*, 370 U.S. 294 (1962), set down straightforward criteria for defining the most inclusive relevant lines of commerce in Section 7 cases: where products are either reasonably interchangeable in use or where there is cross-elasticity of demand between [5] the products, the products must usually be included within the same product market. 370 U.S. at 325. The court in *Brown Shoe* also indicated that cross-elasticity of production facilities may be an important factor in defining the relevant product market. 370 U.S. at 325, n. 42.

The *Brown Shoe* criteria have been used to delineate lines of commerce cutting across industry boundaries[3] and frequently across product groupings based on price, quality, and other product characteristics.[4] Nor is it necessary that two firms be in direct, daily competitive

[3] *U.S.* v. *Continental Can Co.*, 378 U.S. 441 (1964), (finding of "interindustry competition" between glass and metal containers). *See also, U.S.* v. *Grinnell Corp.*, 384 U.S. 563 (1966), (In testing a Sherman Act charge, central station water flow detection services, fire alarm services, and burgular alarm services should be grouped within the same line of commerce since each had a "single use, *i.e.*, the protection of property, through a central station that receives signals." 384 U.S. at 572).

[4] *Brown Shoe Co.* v. *U.S.*, 370 U.S. 294 (1962); *U.S.* v. *Aluminum Co. of America*, 377 U.S. 271 (1964) (insulated aluminum conductor, while it is "intrinsically inferior" to insulated copper conductor and 50 to 65 percent lower in price and constitutes a submarket apart from copper, can be grouped together with copper in a single product market. 377 U.S. at 275-276 (dictum)); *U.S.* v. *Continental Can Co.*, 378 U.S. 441 (1964), ("Moreover, price is only one factor in a user's choice between one container or the other. That there are price diffentials between the two products or that the demand for one is not particularly or immediately responsive to changes in the price of the other are relevant matters but not determinative of the product market issue. Whether a packager will use glass or cans may depend not only on the price of the package but also upon other equally important considerations. The consumer, for example, may begin to prefer one type of container over the other and the manufacturer of baby food cans may therefore find that his problem is the housewife rather than the packer or the price of his cans. This may not be price competition but it is nevertheless meaningful competition between interchangeable containers." 378 U.S. at 455-456); *U.S.* v. *Joseph Schlitz Brewing Co.*, 253 F. Supp. 129 (N.D. Cal.), *aff'd per curiam*, 385 U.S. 37 (1966), (Although beer may be classed into heavily advertised, high priced premium brands, more popularly priced regional brands, and less heavily advertised, inexpensive store brands, and although some customers will make purchases only within one class, all beer may be grouped into one line of commerce); and *FTC* v. *Procter & Gamble Co.*, 386 U.S. 568, 572 (1967). *See also, U.S.* v. *E. I. duPont de Nemours & Co.*, 351 U.S. 377 (1956); and *Mogul* v. *General Motors Corp.*, 391 F. Supp. 1305, 1313 (E.D. Penn., 1975), (For the purpose of the Sherman Act, Cadillac automobiles compete not only with other luxury cars but with less expensive automobiles in serving the public's transportation needs).

confrontation [6] in order to find a line of commerce inclusive of their products—competition should be viewed dynamically, and measured over a sensible period of time.[5]

In light of this authority there is no question but that all dog food should be grouped within a single line of commerce. All or nearly all dog foods, L&M-Allen's and Perk's products included, are meant to supply a dog's nutritional needs (I.D. 14 and 15). Indeed, Perk's products since before the acquisition, and Allen's products since at least 1970 have met the National Research Council's standards for a well balanced main meal for dogs (I.D. 14). In short, dog food of every type, including Perk's "economy" canned and Allen's "premium" canned, is interchangeable for the same use—keeping a dog fed.

Moreover, as mentioned above, and elaborated upon below, Perk in fact manufactured substantial quantities of Allen's own premium dog food. No more perfect elasticity [7] of production facilities can be imagined. L&M has argued that this production elasticity must be discounted since Perk was not a successful marketer of premium products. All the same, Perk was a well-established seller of canned dog food with a substantial "premium" production capability: this we believe is more than sufficient to find substantial supply side flexibility.

Based upon either the interchangeability of use between Perk's and Allen's products or upon Perk's supply side flexibility we could and do find sufficient cause to hold that Perk and L&M were participants within the same lines of commerce at the time of Perk's acquisition.

B. ADDITIONAL EVIDENCE OF COMPETITIVE CONFRONTATION.

In addition to application of the *Brown Shoe* tests, evidence of competitive confrontation between firms may confirm that those firms are properly viewed as participants within the same line of commerce. *U.S.* v. *Continental Can Co.*, 378 U.S. 441, 453-456 (1964). Although such evidence is not required to support our finding an all dog food product market, since the dog food market's boundaries do not cross industry lines and since those boundaries are defined by a strikingly direct interchangeability in use of the market's products, such evidence is abundantly available in the record and was discussed in detail by the administrative law judge. In summary of some of the evidence of competitive confrontation and of conditions conducive to competition between "premium" and "economy" canned dog food, and among [8] all dog food generally, we note:

1. L&M-Allen's original growth in sales was perceived by the dog

[5] *U.S.* v. *Continental Can Co.*, 378 U.S. 441, 465-466 (1964).

food industry as having been at the expense of less expensive canned dog food (I.D. 45). More recently, L&M-Allen's sales have in turn suffered from the entry of a canned product more expensive than its own (I.D. 71). At the same time, perhaps due to changes in consumer tastes, the size of dogs now popular to own, and the recent recession, the sales of cheap dry dog food have grown substantially, while sales of expensive canned products have had little or no growth (I.D. 76 and 83(k); Tr. 1049-1059).

2. The administrative law judge made extensive findings concerning the state of brand loyalty in the dog food market, among them the finding that there is an influx of new dog food customers each year who have no previously established brand loyalty (I.D. 77; CX 93c).

3. While a relatively wide price gap exists between L&M-Allen's and Perk's products, that gap narrowed between 1968, when Allen's prices averaged 2.92 times as much as Perk's (with an absolute price gap of 18.65 cents, and 1973, by which time the ratio had fallen to 2.55 (with an absolute gap of about 19.39 cents). Since then, the relative gap appears to have narrowed still more (I.D. 17 and 18).

4. This moderate trending together of price has been accompanied by a slight trending together in product characteristics. "Economy" products such as Perk contain [9] cereal (I.D. 16), while at one time Allen's "premium" food was all meat and meat by-products. Since 1973, however, under the pressure of high meat prices, Allen has also included vegetable matter in its products (Tr. 1770-1772).

5. We have already noted above that both Perk and L&M-Allen have marketed dry dog foods and that Perk packed premium food for Allen. Other industry members have also had the ability to manufacture and market several types of dog food and have done so, often in imitation of Allen's "Alpo"(I.D. 5, 6, 26 and 50; Tr. 1925). It is common in the industry to use the same management, research, and sales personnel and facilities to support manufacture and marketing of the different types of dog food (Tr. 972-975, 1104-1105, 1149-1150, 1709, 1808-1809, 2165, 2321-2322, 2235).

6. At various times L&M-Allen's advertising agency has spoken of Perk as a competitor, referred to an all dog food market and an all-canned dog food market and has measured Allen's marketing successes against sales in these markets (I.D. 83 and 84). Other industry members have done much the same (I.D. 45 and 80-84). One member, Ralston Purina—an industry giant—concluded from its marketing research that "maintenance" (*i.e.*, "economy") canned food played a "major role" in the purchases of "specialty [*i.e.*, "premium"] type buyer families," and that premium canned food tended to play a

similar role in the purchases of "maintenance type buying families" (I.D. 75).

[10] 7. All dog foods compete for shelf space in the supermarket (I.D. 29). In this contest for shelf space L&M-Allen has specifically promoted itself to retailers against Perk (and against other brands including dry and semi-moist brands) (I.D. 30; CX 935; Tr. 1957-1958). Likewise, Perk has specifically promoted itself against Allen and other brands and types of food, including dry and semi-moist (CX 149).

8. Most revealing, however, is the competitive advertising the dog food industry has addressed to consumers, a subject thoroughly treated by the administrative law judge (I.D. 28-84). Allen and other dog food makers, including proprietors of dry and semi-moist products, have engaged in heavy advertising campaigns attacking one another's themes and product attributes (I.D. 35-49 and 51-52). At varying times L&M-Allen has attacked dry dog foods (in one advertisement depicting a cow chewing on Purina Chow (I.D. 49(e); CX 344(a); Tr. 1435-1436, 1844-1848)), and products containing "meat-by-products, soybean meal, cracked barley, wheat middings * * *" (CX 352), an ingredient list virtually identical to that of Perk's products (I.D. 16; Tr. 2026). A clear delineation of the boundaries of the dog food market is contained in one of L&M-Allen's own advertisements, run in September 1974 (Tr. 2369). The text of the advertisement reads: **[11]**

Why you should add ALPO when your dog needs more energy

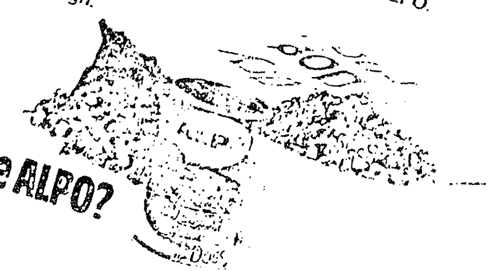
ALPO. When you add ALPO to your dog's dry food you know he's getting the real high quality beef he loves. ALPO Beef Chunks Dinner has more beef than any of the top 10 dog foods—and not a speck of cereal. But do the following foods give him the meat you expect?

CHEAP CANNED. If you add a cheap canned dog food to a dry, you may be adding cereal to cereal. And some cheap canned dog foods have no meat at all. But with ALPO you know you're adding real beef to the dry and no cereal. Dogs prefer it that way.

BURGER TYPE. Some burgers have no meat. If you add a burger type dog food, you're adding a food that may be up to 20% sugar. So much sugar and other ingredients that you would need up to 8 burgers to equal the meat by-products and beef your dog loves in ALPO. All those burgers on top of his dry would make a very heavy dog.

TABLE SCRAPS. Table scraps, hamburger, meat from a butcher or other "table" foods are meat. But they may unbalance the vital ratio of certain minerals in the dry food because these "table" foods are unfortified. With ALPO you know you're adding a fortified, balanced diet with soy, vitamins and minerals.

During hunting season your dog needs at least twice his normal energy. When you want him to have meat, add the meat by-products and beef in ALPO. It's one good way to help give him the energy he needs when his dry food alone is not enough.



Doesn't your dog deserve ALPO?

(CX 353).[6] Within the four corners of this advertisement, Allen competitively strives against "cheap canned" of Perk's products' description, semi-moist food, and dry food, which sometimes "is not enough."

The picture that emerges from the foregoing is one of a single arena in which every type of dog food competes. There have been long term shifts in the market shares of the various types of dog foods, a constant influx of new customers, perceptions by some industry members of competitive relationships among the various types of products, and striving among the products for the attention of retailers and the public. L&M-Allen and Perk have challenged one another by **[12]** name, and Allen has specifically advertised on television against canned foods of Perk's product's description and in magazine advertisements against every type of dog food, "cheap canned" included. There is thus abundant evidence of a dynamic, competitive confrontation among every type of dog food and between Allen and Perk specifically.

C. Respondent's Arguments Against An All Dog Food Line Of Commerce; Differentiation of Submarkets.

Respondent advances two arguments against our finding of an all dog food line of commerce. The first is that evidence in the record of a lack of cross-elasticity of demand between Perk's and Allen's products preclude their inclusion within the same line of commerce. The second is, in effect, that following the *Brown Shoe* criteria for determining *submarkets*, no overall *market* can be found in this case which includes both Perk and L&M-Allen products. We find neither argument persuasive.

1. *Cross-Elasticity of Demand.*

Respondent argues that where a lack of cross-elasticity of demand between two products is demonstrated, those products cannot be included within the same line of commerce. **[13]** This contention is erroneous. The authorities cited to us by respondent are clearly distinguishable.[7] When a similar question was presented to the Court of Appeals for the Seventh Circuit in *L.G. Balfour Co.* v. *FTC*, 442 F.2d

[6] Other advertisements were similar, *see* CX 340(a) and (b), CX 94(a) and (b).

[7] For example, *Times-Picayune Publishing Co.* v. *U.S.*, 345 U.S. 594 (1953), is a Sherman Act case well predating *Brown Shoe*, which adopted an elasticity test by way of a footnote but then cited nonstatistical evidence as a measure of "elasticity." 345 U.S. at 612 n. 31.

Respondents place extraordinary weight not only on our decision in *Golden Grain Macaroni Co.*, 78 F.T.C. 63 (1971), *modified*, 472 F.2d 882 (7th Cir. 1972), *cert. denied*, 412 U.S. 918 (1973), but also upon the arguments of complaint counsel in that matter. *Golden Grain* employed elasticity data to isolate the line of commerce—dry paste products— in which competition would most immediately be affected by the alleged illegal acquisition. The decision did not hold that paste products could not also be one submarket within a wider line of commerce. This fundamental

(Continued)

1 (1971), a case alleging restraint of trade in the fraternity insignia and class ring markets in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, the Court observed:

> A member of one fraternity has no demand for the insignia-bearing products of another fraternity. Thus, the price of goods for one fraternity would be unaffected by the price of goods for any other fraternity.
>
> Yet, this would be true of any market where there is a substantial degree of product differentiation. If the elasticity demand test were a required standard for market definition in every case, then no market in which there were inelastic demand curves could be delineated. Such a result would preclude [14] analysis of markets with inelastic demand and would deny the realities of the market situation. In this case, the petitioners would have us conclude that each national college fraternity should be considered a separate market, even though the evidence indicates that the sales and distribution systems of the sellers and the organization of the fraternities and interfraternities is on a national level. We believe that if the Commission utilized the elasticity of demand test strictly, there could be no sensible market analysis or market definition. While the use of the cross-elasticity of demand test has been cited with approval in monopoly cases, we believe that the Commission was not in error in rejecting its use in this case. (442 F.2d at 10-11.)

Given all dog food products' complete interchangeability of use, Perk's substantial supply side flexibility, and the evidence of substantial competitive confrontation among all members of the dog food industry and between Perk and Allen specifically, even had respondent introduced conclusive evidence of a total lack of cross-elasticity of demand between premium and economy canned foods, the finding of an all dog food market inclusive of both Perk and Allen would not be precluded.

In fact, however, respondent's elasticity data are limited and inconclusive. The data were derived from a market test in which some 480 families were asked to order their dog food needs during a six-week period from test catalogues (Tr. 2495-2496 and 2767). Prices listed in the catalogues varied by 10 percent from the average prices measured in certain, but not all, stores in the test families' areas (Tr. 2500-2501 and 2508). While 10 percent is not an insignificant variation, in the context of dog food prices it represents a [15] maximum variation of three or four cents from the store price for premium food, and one or two cents for economy food (RX 175; Tr. 1774-1755, 1981 and 2039).

Given these facts, it is not surprising that respondent's test detected no significant cross-elasticities. Six weeks is a very short time for a

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distinction between market and submarkets is discussed below at Section III.A. In *United Brands Corp.*, 3 CCH Trade Reg. Rep. ¶20,611 (1974) we made clear that elasticity data were but one factor in distinguishing a lettuce submarket from the wider produce market. 3 CCH Trade Reg. Rep. ¶ 20,506. [83 F.T.C. 1614].

family to notice that a catalogue price varies from the store price they normally pay, then determine to change their buying habits even though only a few weeks remain in the experiment, proceed to sample some small quantities of alternative foods and, finally, make a significant switch in their purchase behavior.

A price change of a few cents which the experimental subjects realize will last only for a few weeks is not much motivation for those subjects to change their buying habits for the duration of the test. Moreover, if those subjects believe that a change in food requires a difficult retraining of their dogs to the new food, as knowledgeable witnesses testified (Tr. 1958, 2240-2242), one would anticipate no response at all to a price change known by the subjects to be temporary and artificial, whatever the real world elasticities.[8]

Thus, respondent's elasticity test was not an adequate measure of even short term cross-elasticity between premium and economy foods. And, of course, this six-week test in no way measured the longer term competition the abundant evidence of which has been discussed above. (One pertinent example [16] being the shift in demand to expensive products in the late 1960's and early 1970's and the retreat to cheap dry products with the declining economic condition of the middle 1970's, (*supra*, Section II.B.). Competition manifested over a period of months or years is fully as significant and worthy of the protection of the antitrust laws as competition which can be demonstrated in a day-to-day context.[9]

In summary, respondent's elasticity test is inconclusive on the question of short term cross-elasticity and silent as to long term elasticities.[10] Its results are, therefore, entitled to little weight in measuring the boundaries of the dog food product market.[11] [17]

2. *Interchangeability of Use and Application of Submarket Criteria.*

The second of respondent's contentions on the market definition question is, in essence, that *Brown Shoe's* criteria for the delineation of submarkets[12] should be applied in this proceeding to define mutually exclusive markets for premium and economy canned foods. This

[8] Note further in this regard Tr. 3071-3075.

[9] *Cf. U.S.* v. *Continental Can Co.*, 378 U.S. 441 (1964): "Thus, though the interchangeability of use may not be so complete and the cross-elasticity of demand so immediate as in the case of most intraindustry mergers, there is over the long run the kind of customer response to innovation and other competitive stimuli that brings the competition between these two industries within Section 7's competition-preserving proscriptions." 378 U.S. at 455.

[10] There is in fact some direct evidence that there are long term elasticities between economy and premium-canned dog food, in that these prices have tended to move together over time. Respondent's own brief notes that the same general ratio of cheap prices to expensive prices has prevailed for many years. R. Br. p. 46.

[11] Moreover, the test did not measure the effect of price competition on new dog owners who have no previous experience in the market—a not insignificant number of consumers.

[12] "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the

(Continued)

contention is plainly wrong. Rather, in the words of the Supreme Court in *U.S.* v. *Phillipsburg National Bank,* 399 U.S. 350 (1970), "* * * submarkets are not a basis for the disregard of a broader line of commerce that has economic significance." 399 U.S. at 360.[13]

[18] Respondent further contends that a finding of reasonable interchangeability of use must rest upon a showing of actual competition between the products found interchangeable. This too is an attempt to stand *Brown Shoe* on its head. Had the Supreme Court meant so dispositive a rule when it articulated the *Brown Shoe* market definition criteria, it certainly would **[19]** have said so. To the contrary, interchangeability is a legal test for the detection of competition, not *vice versa.* Further, even were this contention a correct statement of the law, it could not effect our finding of an all dog food market in this matter, for, as we have noted above, the record below is replete with evidence of actual competitive confrontation and supply side elasticity.

Respondent discusses at great length evidence that it believes precludes the finding of an all dog food market. Although much of this evidence is pertinent only to respondent's erroneous arguments concerning the applicability of submarket criteria to the definition of the market and the need for evidence of actual competition in order to establish product interchangeability, some of the evidence does directly

cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. Because Section 7 of the Clayton Act prohibits any merger which may substantially lessen competition 'in *any* line of commerce,' (emphasis supplied) it is necessary to examine the effects of a merger in each such economically significant submarket to determine if there is a reasonable probability that the merger will substantially lessen competition. If such a probability is found to exist, the merger is proscribed." 370 U.S. at 325 (citations omitted).

[13] *See also, U.S.* v. *Continental Can Co.,* 378 U.S. 441 (1964), ("Glass and metal containers were recognized to be two separate lines of commerce. But given the area of effective competition between these lines, there is necessarily implied one or more other lines of commerce embracing both industries." 378 U.S. at 456-457); and *U.S.* v. *Greater Buffalo Press, Inc.,* 402 U.S. 549, 553 (1971).

The authorities cited by respondent hold no differently— at issue in each was whether a given line of commerce, a submarket, might be carved out of a wider line of commerce. Indeed, some on their faces flatly contradict respondent's assertion. For example, *U.S.* v. *American Technical Industries, Inc.,* 1974-1 Trade Cases ¶74,873 (M.D. Pa. 1974) declared, "In the instant case there is little doubt that the outer perimeter of the relevant product market, when measured in terms of cross-elasticity of demand and interchangeability of use is artificial *and* natural trees." 1974-1 Trade Cases at ¶ 95,872 (emphasis in original). *U.S.* v. *Pennzoil Co.,* 252 F. Supp. 962 (W.D. Pa. 1965), while finding Penn grade crude a line of commerce, noted "* * * crude oil in general in an appropriate case may constitute a line of commerce * * *." 252 F. Supp. at 973. *Crown Zellerbach Corp.* v. *FTC,* 296 F.2d 800 (9th Cir. 1961), *cert. denied,* 370 U.S. 937 (1962) stood merely for the proposition that "All that the Commission was required to do was to ascertain and find *a* product line sufficiently inclusive to be meaningful in terms of trade realities." 296 F.2d at 811. (emphasis added).

In a sense, the *Brown Shoe* submarket criteria could be used to distinguish markets, but their use in this fashion would be a singularly eccentric and empty exercise. For example, the dog food market can be distinguished from the market for dogs on the basis of public recognition; quite distinct production facilities; and so forth, though in fact they have identical customers. The point is that the *Brown Shoe* submarket criteria are designed for and best adopted to carving out narrow areas of more direct competition from wider areas of relatively less direct competition, which wider areas, defined by the limits of interchangeability and elasticity, may, all the same, also be pertinent lines of commerce.

bear on the question of market definition and all of it bears on the question of submarket definition, so we will review it in some detail.

Respondent organized the presentation of its arguments under headings derived from the *Brown Shoe* submarket criteria; since those criteria are clearly pertinent to determining whether submarkets exist within the dog food market, we shall discuss this evidence under those same headings. **[20]**

(a)(i). "* * * *The product's peculiar characteristics* * * *"

"Premium" and "economy" canned dog food products vary in their appearance and ingredients (I.D. 16),[14] and the broader dry, semi-moist and canned categories do, of course, vary from one another in their ingredients, general form, and packaging (I.D. 12). There may be differences in palatability among the various dog foods as well (I.D. 22; Tr. 537, 1019).[15] These differing characteristics are sufficient to satisfy the applicable submarket criterion and isolate "premium" canned, "economy" canned, all canned foods combined, dry, and semi-moist foods as separate lines of commerce.[16] However, one need only compare the vastly greater differences between glass and metal containers, **[21]** (which differences include constituent materials, susceptibility to breakage, chemical reactivity, and ease of resealing), which the Court in *Continental Can* found not to detract from a single line of commerce, to see that the differing characteristics of dog foods are not pertinent to the determination of, and in no event can preclude the finding of, a single line of commerce encompassing dog food of every type and designation.[17]

(a)(ii). "* * * *and uses* * * *"

One of respondent's more direct challenges to a finding of competitive interchangeability between "premium" and "economy" dog foods arises from the argument that "psychological" qualities differentiate the products. In asserting the relevance of psychological factors to measuring the limits of the product market, respondent relies in part on *U.S.* v. *Columbia Pictures Corp.*, 189 F. Supp. 153

[14] Footnote 13 of I.D. 16 should, however, be cited to Tr. 1770-1772.

[15] However, there is considerable evidence in the record of overlaps in each of these characteristics other than packaging. Various brands of dry, semi-moist, "premium" and "economy" canned food have at times contained combinations of meat and grain; palatability can be varied as well (I.D. 22 & 25). The formula for "Alpo" itself has changed over time (Tr. 1770-1772).

[16] *Cf. U.S.* v. *Lever Bros. Co.*, 216 F. Supp. 887 (S.D.N.Y. 1963), where the court found that while cleaning agents might be a line of commerce, and heavy duty detergents a proper submarket of that line, that the difference between low and high sudsing heavy duty detergents supported finding a yet narrower line of commerce consisting only of low sudsing heavy duty detergents. *See also U.S.* v. *Pennzoil*, 252 F. Supp. 962 (W.D. Pa. 1965); and *A.G. Spalding & Bros. Inc.* v. *FTC*, 301 F.2d 585 (3rd Cir. 1962).

[17] *U.S.* v. *Continental Can*, 378 U.S. 441, 445 n. 3, 446 n. 4 (1964). *See also U.S.* v. *E. I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956).

(S.D.N.Y. 1960), where the district court noted that products may fail to compete "* * * even because of psychological or other factors." 189 F. Supp. at 185.[18]

[22] However, *Columbia Pictures* in fact rejected a narrow product market, and its brief discussion of "psychological" factors, while perhaps pertinent to defining the extent of a submarket, is not persuasive on the issue of market definition presented here. Far more persuasive is *Continental Can,* where the Court noted traditional consumer preferences for a given type of container for a given type of use—for example, glass containers being heavily favored by consumers for baby foods, 378 U.S. 450-451 — yet had no difficulty combining glass and metal containers in a single line of commerce.

Moreover, the "psychological" factors respondent in fact relies upon to distinguish premium from economy food amount to no more than varying perceptions of price and apparent quality. Thus, respondent literally argues that the use of an economy food is, "in the mind of the dog owner," the provision of "a low cost subsistence diet for dogs" (R. Br. 45), while the use of Alpo "premium" dog food is provision of "a meaty, highly palatable meal for the dog to enjoy and to give his owner the satisfaction of feeling the dog has been treated as a member of the family." (R. Br. 45).

These separate "uses" asserted by respondent are no more than imaginatively described price and quality distinctions. "Premium" dog foods are not tranquilizer drugs. They are not purchased when a consumer has a need to feel well. Rather, they are purchased when a consumer needs to feed a dog and, in fact, they are *used* to feed a dog. [23] (And, since both "Alpo" and "Vets" meet the NRC nutritional standards for feeding dogs, they appear to be wholly interchangeable for that use). Likewise, whatever sense of added satisfaction "premium" food affords its user, that satisfaction, as respondent accurately describes, is experienced when the product is *used to feed a dog.* Moreover, no one has suggested, and we would hardly believe, that were a "premium" canned dog food unavailable, that even the most loyal of "premium" users would let their dogs starve rather than use an "economy" canned dog food, regardless of the psychological discomfort in doing so. The defining use for a dog food is, thus, feeding dogs. The "uses" respondent notes are but corollary benefits that may only be experienced in the course of such use.

These differing feelings of satisfaction, these differing perceptions of the quality of various dog foods are no different from those arising

[18] Respondent's other cited authority offers less support for this contention. In *International Boxing Club* v. *U.S.*, 358 U.S. 242 (1959), a case predating *Brown Shoe*, the Court in effect was delineating the boundaries of a championship contest submarket from the wider market of professional boxing. *U.S.* v. *Paramount Pictures*, 334 U.S. 131 (1948), a yet earlier case, also concerns what would generally be considered a submarket.

from the distinctions among shoes of different prices and quality, *Brown Shoe Co.* v. *U.S.*, 370 U.S. 294 (1962), or consumption of beers of different price and apparent quality, *U.S.* v. *Jos. Schlitz Brewing Co.*, 253 F. Supp. 129 (N.D. Cal.), *aff'd per curiam* 385 U.S. 37 (1966), or ownership of a Cadillac instead of a Chevette, *Mogul* v. *General Motors Corp.*, 391 F. Supp. 1305 (E.D. Pa. 1975). Indeed, the price and quality difference and, no doubt, the differing senses of psychological [24] gratification are comparable or even greater for all of these product categories than for dog food. Yet, as noted, each of these product lines has been found to be a single line of commerce, the price and quality distinctions notwithstanding. The lesson often repeated in these cases is that price and quality differences cannot be used to hide the underlying line of commerce. When a consumer with a need to feed his dog enters the market place and is offered a low price by one dog food and a high quality image by another dog food, simple, direct price-and-quality competition occurs and nothing more. To be sure, the differing price and quality grades demonstrated by respondent do support finding separate submarkets here, but the submarkets are closely associated in one market. In short, dog food is dog food.

(b). "* * * *unique production facilities* * * *"

Respondent argues that there is little genuine supply side flexibility present in this matter, since there is only limited interchangeability between the production facilities used to manufacture "premium" food and those used for "economy" food. In fact, there is only limited, albeit some, interchangeability in the facilities used to produce the various types of canned food, (I.D. 23-24; Tr. 2002-2012). Moreover, there is almost no interchangeability at all among those used for canned, dry and semi-moist foods (I.D. 25; Tr. 2012-2018). However, this argument overlooks the fact that Perk not only possessed both types of machinery, (I.D. 24; Tr. 2002-2012), but actually manufactured premium food for [25] sale under L&M-Allen's own label. (*See supra*, Section I. A. 2.) Thus, Perk was a direct supply side counterpart of L&M-Allen.

In any event, on the separate question of whether Perk and Allen can also be found to be competitors because their product lines were in competition, the issue of production facilities is irrelevant. Production facilities in no way bear upon either the elasticity of demand or interchangeability of use. One can hardly imagine more distinctly different production facilities than those for working metal as opposed to those for working glass, or those for manufacturing cellophane from those for manufacturing aluminum foil, yet glass and metal containers were grouped in a single market in *U.S.* v. *Continental Can Co.*, 378

U.S. 441 (1964), and flexible wrappings were grouped together in *U.S. v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956).

The cases respondent cites to us purportedly in support of the proposition that separate production facilities indicate separate markets in fact merely apply the *Brown Shoe* submarket criteria to define appropriate *submarkets.*[19] And thus, **[26]** as respondent's own arguments demonstrate, premium and economy canned dog foods and all canned, dry and semi-moist foods as well, may be separated into separate submarkets within, however, the wider market in which all dog food ultimately competes.

(c). "* * * *distinct customers* * * *"

Respondent argues that differing clusters of "demographic qualities" are associated with the purchasers of the differing grades of canned dog food. It is apparent from respondent's own citation to the record that the dominant "demographic quality" correlated to the type of dog food purchased is family income (CX 88(b)-(c), *see also* Tr. 1776, 1946-1949, 1958; CX 44(f), CX 95(l)). Since we would expect ability to pay to correlate with the price of product purchased, respondent in effect is merely making the argument again, which we rejected above, that products of different prices should be placed in wholly different markets.

Moreover, these demographic differences, represent only *tendencies;*[20] there is no rigid dividing line between groups (I.D. 63 and 65). Indeed, these demographic clusters have changed over time (I.D. 65).

[27] Thus, we do not have here truly distinct groups of customers — say, *e.g.*, millers of steel and miners of salt — going their separate ways to separate products.[21] Rather we have only an ordinary case of price and apparent quality competition where, as one might expect, higher

[19] *Cf. General Foods Corporation* v. *FTC*, 386 F.2d 936 (3d Cir.), *cert. denied*, 391 U.S. 919 (1968) ("It is urged that *Brown Shoe* enumerates seven factors to be considered when evaluating the relevant product market, and that the Commission erred by ignoring the significance of the inapplicability to this case of two of the seven *Brown* criteria * * *. In fact, there is at least one case where a well-defined submarket was held to exist where only three of the *Brown* criteria were present," 386 F.2d 941: and *Abex Corp.* v. *FTC*, 420 F.2d 928 (6th Cir.), *cert denied*, 400 U.S. 865 (1970). ("Petitioner presents three claims: (1) The FTC order defining a 'submarket' of sintered metal friction materials is not supported by substantial evidence * * *." 420 F.2d 929). That portion of *Sterling Drug Inc.*, 80 F.T.C. 477 (1972) cited by respondent concerns an application of a supply side test similar to the cross-elasticity of production facilities criterion and in no way concerns an interchangeability of use test. 80 F.T.C. at 583-595.

[20] Note even RPF 179(i) and (ii) for this usage.

[21] And even if we did, the existence of a common market would not be precluded. *Cf. U.S.* v. *Continental Can Co.*, 378 U.S. 441 (1964).

Respondent cites no authority to the contrary. Thus, in *A.G. Spalding & Bros.* v. *FTC*, 301 F.2d 585 (3rd Cir., 1962), the Court of Appeals for the Third Circuit affirmed a finding of an all-athletic-goods-industry market, despite its also finding separate submarkets. Moreover, the principal dividing factor between the submarkets was the type of *use* the particular submarket best served—references to particular types of customers were descriptive of the classes of end use, such as use in professional competition or in children's games. *Reynolds Metals Co.* v. *FTC*, 309 F.2d 223 (D.C. Cir. 1962) concerned the isolation of a submarket; and *U.S.* v. *Phillipsburg National Bank*, 399 U.S. 350 (1970), as we have noted above, expressly admonishes "* * * submarkets are not a basis for the disregard of a broader line of commerce that has economic significance." 399 U.S. at 360.

priced products tend to be purchased by people who are more able to pay for them.

(d). "* * * *distinct prices, sensitivity to price changes* * * *"

We have already noted at some length above that showings of distinct prices and price inelasticity cannot overcome the finding of a product market that is defined by reference to interchangeability of use, supply side elasticity, and extensive evidence of competitive confrontation in the market place. (*Supra*, Section II.C.1.).

We have also noted that the prices of economy and premium canned dog foods have not only risen together but are slowly converging. (*Supra*, Section II.B.)

[28] We also note that those prices are, however, still quite distinct, the prices of premium and economy being at a ratio of 2.55 in 1973. (*Supra*, Section II.B) Thus, price analysis does support the finding of separate, albeit closely related, submarkets for "premium" and for "economy" canned dog foods.

(e). "* * * *and specialized vendors.*"

A finding of specialized vendors, or for that matter, as respondent urges, of specialized methods of marketing is relevant to submarket definition, but does not carry weight against a market defined by interchangeability of use and competitive confrontation and, in the case of Perk, supply side flexibility.

Respondent wastes little time arguing that the dog food industry is divided among specialized vendors—and no wonder, since the very subject matter of this case is respondent's attempt to become by acquisition of Perk the vendor of both "economy" and "premium" products. We may ourselves note, however, that although the dog food market has witnessed a considerable despecialization of its manufacturers, the tendency is still for different product groups to be dominated by different manufacturers (I.D. 95-100). This clustering of firms supports the finding of submarkets in the various types of food, although as the diversification efforts of the firms illustrate, the submarkets are closely associated in one market.

[29] Respondent spends considerably more time arguing the pertinency of distinct marketing methods to the task of market definition. While useful to determining the degree to which submarkets may be isolated from the wider competitive market,[22] distinct marketing methods are quite unpersuasive on the larger issue of

[22] It is on this issue that respondents cited authority bear, *U.S.* v. *The Federal Co.*, 1975-2 Trade Cases ¶60,397 (W.D. Tenn., 1975) excepted. The Federal Co. found a "lack of substantial competition" between advertised and unadvertised flour brands based on a variety of circumstances: respondent's assertions to the contrary, distinct

(Continued)

market definition. From the facts of this case, we find that the "distinct" methods are particularly unpersuasive in that they amount to little more than a showing that expensive products are placed at "eye-level" on supermarket shelves and are backed by television advertising which economy products cannot afford. Moreover, the methods are rather indistinctly "distinct:" Perk considered using television and radio advertising prior to its acquisition (CX 25n), and L&M at the time of the hearing was planning to back both Perk economy canned and dry with network television advertising (I.D. 79; Tr. 1980-1981, 1987). We also note that Strongheart, an economy canned food, spent (at least in 1967) most of its promotional budget on spot television (CX 162(d)). Moreover, the fact remains that dog food products of every type are promoted to consumers in some fashion, and **[30]** all dog food ultimately ends up for sale in the dog food section of the supermarket, and, as we have discussed above often having passed through the same broker's hands, and having been manufactured by the same firm. (*Supra,* Section II.B.) The supermarkets' tendency to group dog food products of different price, grade and type on different shelves only illustrates, rather vividly, that the products fall into separate submarkets. That those same supermarkets position those shelves together within the same "gondolas" illustrates just as vividly that these submarkets are but subdivisions of one market.[23]

(f). "* * * *industry or public recognition of the submarket as a separate economic entity* * * *."

We come at last to the very first criterion of *Brown Shoe:* industry or public recognition of the submarket. Again we make the point that — as the very quotation from *Brown Shoe* makes clear — industry and public recognition may aid in the determination of submarket boundaries but does not limit market boundaries. Indeed, as one witness pointed out, "manufacturer's terms" may not accurately reflect the realities of competition in the market place (Tr. 324).[24]

[31] Witnesses commonly testified that products with a given cluster of attributes belonged in the same price class (*Cf.* Tr. 1571-1573). This

marketing methods were not among those factors. Rather, in the passages quoted by respondent, the references to marketing methods concern the lack of the influence of promotions for one grade of flour on the sales of the other grade of flour. 1975-2 Trade Cases at ¶ 66,756.

[23] The view that the supermarket shelf arrangement for dog food reflects an all dog food competitive market was expressed by Mr. Harriman, head grocery buyer and assistant director of grocery operations for a major supermarket chain (Tr. 1465-1481 & 1502-1510).

[24] Compare *U.S.* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576 (S.D.N.Y. 1958): "Equating the language of section 7 to the concept of the market does not, however, mean that the section 7 market is the same as the market for purposes of other sections of the antitrust laws. Nor is the section 7 market necessarily the same as the economist's concept of market. Whatever difference there may be between legal scholars and economists in their respective definition of terms used in the antitrust laws, obviously the Congressional standard is controlling upon, and serves as the guide to, the Court." 168 F. Supp. at 588.

is nothing more than one would expect to occur in a competitive market—that the higher the apparent quality of a product, the better the price it may command. That there may be discontinuities on the price-quality gradient does not bar finding a single market. Where a finite number of products compete, we would expect to find some clustering of products at the minimum level of quality adequate to fulfill the product's intended use, with additional tendencies to cluster around leading products, or at the next quantum level of quality—such as an all meat content. In fact, although there is evidence of price clustering in canned dog food, the record does not indicate that these clusters represented sharp, inflexible discontinuities, rather, the record shows that even respondent's own statisticians had some trouble determining just how many clusters there are (I.D. 61; Tr. 3167-3180).

We would also expect—indeed the whole premise of submarket analyses suggests—that the most intensive competition a given product receives comes from other products within its submarket, but that over the longer run the members of all submarkets compete for the market's business.

[32] Examining the direct testimony of industry witnesses, we find that a great deal in fact expresses the view that there clearly is an all dog food market, albeit one divisible into submarkets or price clusters, and that the sales of various type and price grades of dog food products have grown at the expense of other type and price grades of dog food. The best example of the testimony concerning the long-term competitive relationships in the dog food market occurs at Tr. 1049-1059, where the growth of premium dog food in the late 1960's is described. There are more examples in the record (*see, inter alia,* Tr. 274-276; 532-537; 727; 759; 778; 791-792; 808-809; 837-841; 968-970; 1480-1481; 1502-1510; 1553-1557).

The testimony cited to us by respondent does not change our view. We note, for example, that Mr. Seelert, portions of whose testimony have been cited by respondent at length, expressed his views that Perk's "Vets" and L&M-Allen's "Alpo" would not likely compete "head to head" (Tr. 547-548), but he also expressed the belief that there is one dog food market, which is divisible into "spectrums" (Tr. 530) or "submarkets" (Tr. 531) and that, for example, while a given dry dog food primarily competes with other dry dog foods, it secondarily competes with all other types of dog food (Tr. 531).

Another pertinent example is directly drawn from testimony of Mr. Beldo who viewed Perk's and L&M-Allen's products as "* * * by and large * * * basically * * *" in different markets. [33] Mr. Beldo came to this conclusion, however, "excluding the sense they are both on the shelf and you have exposure to both, that a woman may be parsimonious one day and flush with money the next * * *." (Tr. 1320-1321).

It is precisely the factors expressly excluded by Mr. Beldo from the bases for his view—availability "on the shelf" for the same end use, and appeal to the shopper's ability to spend, *i.e.*, price competition—that are the fundamental indicia of a recognizable market. Mr. Beldo's exceptions are literally the exceptions that prove the rule that an all dog food market exists.

We must conclude that although industry and expert testimony is not necessarily pertinent to the task of market definition, it is in this case in fact supportive of a unified market for all dog food, which market can also be viewed in terms of a number of closely related submarkets for dry, semi-moist, and canned foods and with canned foods further divided into at least three price grades, including "premium" and "economy."

D. CONCLUSION

The authorities and evidence reviewed above establish the existence of a single, all dog food market, definable by the interchangeability of use of all dog food products, and confirmed by the actual competitive confrontations within the market place among all manufacturers of dog food and specifically between Perk and L&M-Allen, and, by considerable [34] supply side flexibility, especially on Perk's part. Examination of respondent's elasticity data and of the evidence running to the *Brown Shoe* submarket criteria, which criteria are inapplicable to market definition, further supports the finding of an all dog food market and its division into submarkets of dry, semi-moist, and canned products, with the further division of canned at least into "economy" and "premium" submarkets. [35]

III. EFFECTS OF THE ACQUISITION

A. MARKET AND SUBMARKET ANALYSIS.

In analyzing the effects of a merger, we must be aware that competition can occur with varying degrees of intensity. The dog food market provides an apt illustration. We have found that it consists of one market that is, however, divided into several submarkets. What this means is that one would expect the greater part — though not necessarily the totality — of day to day competition to occur among products within each submarket. This is because, over the short run, a consumer who is dissatisfied by the price or quality of his customarily purchased product is likely first to turn to the most nearly similar competing products to find a new product. For example, a consumer who prefers the convenience of a cellophane packaged semi-moist product is likely to shop the price and quality of semi-moist products before he considers some completely different form of dog food. Depending on how valuable to the customer a given cluster of product attributes is (*e.g.*, palatability, appearance, convenience, quality image), there may be a considerable range of price and quality through which the submarket as a whole may move before a substantial net loss of customers to other submarkets occurs. However, the fortunes and interests of every customer, and the Nation as a whole, are subject to change. Prices may rise, consumer magazines may run informative articles on dog food, a given dog food may persuasively **[36]** advertise, or the consumer may acquire a second dog to feed, may be hard hit by inflation, or, on the other hand, find his income augmented or expenses reduced, or simply change his mind as to how much he wants to spend for dog food, or how much inconvenience he is willing to put up with. Then the consumer may look for a cheaper product or a better product, or a more convenient product beyond the limits of the submarket, *i.e.*, the cluster of price, quality, and characteristics, he has theretofore patronized. This is, of course, when the presence of market-wide competition is manifested.

In any market, it is the constant competitive pressure of the products in alternative submarkets that keeps each submarket in competitive tension. Beyond a certain point, the members of a given submarket cannot raise prices or drop quality lest there be a net loss of customers to products of other submarkets interchangeable for the market's end use. For example, the fear of further loss of business to products with a better quality image will motivate sellers of cheap products to create new, better, but still inexpensive products, or keep their own prices very attractively low, or educate consumers in the adequacy of cheap dog food to keep a dog well fed.

[37] The law wisely recognizes these economic realities: Section 7 of the Clayton Act prohibits acquisitions "where in *any* line of commerce in *any* section of the country, the effect of such action *may be* substantially to lessen competition, or to *tend to* create a monopoly." (15 U.S.C. § 18 (emphasis added)).

We may, therefore, analyze the effects of an acquisition in every pertinent line of commerce, the market and each of the market's submarkets alike: We would be in error either to miss the forest for the trees or the trees for the forest.[25]

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[25] *See*, for example, *U.S.* v. *Phillipsburg National Bank*, 399 U.S. 350 (1970); *U.S.* v. *Continental Can Co.*, 378 U.S. 441 (1964); *U.S.* v. *Aluminum Co. of America*, 377 U.S. 271 (1964); *A.G. Spalding & Bros., Inc.* v. *FTC*, 301 F.2d 585 (3rd Cir. 1962); *U.S.* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576 (S.D.N.Y. 1958); compare, *U.S.* v. *Pabst Brewing Co.*, 384

(Continued)

B. TESTS OF ILLEGALITY.

As we have just noted, Section 7 prohibits acquisitions the effect of which *may be* substantially to lessen competition. [38] It is therefore authority to arrest acquisitions when the threat to competition is still in its incipiency; and the concern of Congress in first enacting and later broadening Section 7 was with probabilities, not certainties. *Brown Shoe Co.* v. *U.S.*, 370 U.S. 294, 317-327 (1962).

Brown Shoe teaches that the assessment of an acquisition's potential affects must normally be made within the context of the particular industry, including, most especially, the industry's concentration and tendency towards dominance by a few leading firms, and the ease of access of suppliers to the market and the existence of entry barriers. 370 U.S. at 321-322.

From among these factors, however, *Brown Shoe* selected statistics reflecting the industry's concentration and the share of the acquired and acquiring firm as the primary index of market power. 370 U.S. 322 n. 38.

Moreover, the relatively extensive analysis of market history and structure contemplated by *Brown Shoe* is not necessary in every case: at times concentration statistics alone may suffice. Thus, in *U.S.* v. *Philadelphia National Bank,* 374 U.S. 321 (1963), the Court stated a simplified test of illegality:

> [39] * * * [a] merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects. (374 U.S. at 363).

This test has been refined by the Court since *Philadelphia Bank.* In *U.S.* v. *General Dynamics Corp.*, 415 U.S. 485 (1974), the Court summarized the "undue" concentration approach, saying:

> The effect of adopting this approach to a determination of a "substantial" lessening of competition is to allow the Government to rest its case on a showing of even small increases of market share or market concentration in those industries or markets where concentration is already great or has been recently increasing, since "if concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great." (415 U.S. at 497).[26]

Applying this learning to the market structure of the dog food industry we find that concentration is great in the dog food market

U.S. 546 (1966) an example of a analysis using overlapping geographical markets, including (1) the Nation, (2) the three State Wisconsin, Illinois and Michigan area, and (3) Wisconsin alone.

[26] *See also U.S.* v. *Aluminum Co. of America,* 377 U.S. 271, 279-281 (1964).

and greater still in many of its submarkets, and that L&M's acquisition of Perk unduly increases both L&M's share and the leading firms' shares within these several lines of commerce. In the present matter, then, an elaborate analysis of the acquisition's effects is unnecessary: the statistical data discussed below are sufficient causes to hold illegal L&M's acquisition of Perk. [40]

C. APPLICATION OF THE STATISTICAL TEST.

Perk's acquisition occurred on January 29, 1969. Noted below are the concentration ratios, firm rank orders and percent of change in share for the all dog food market in 1968 and 1969:

	1968	*Percent Increase*	*1969*
Four Firm	54.44	8.39	59.01
Eight Firm	71.96	6.36	76.54
L&M-Allen (rank)	10.99 (No. 4)	43.40	15.76 (No. 2)
Perk (rank)	4.41 (No. 6)		
	(I.D. 92-93)		

The top eight firms and their shares in 1968-1969 period for all dog food were:

1968		*1969*	
General Foods	16.79	General Foods	16.98
Ralston Purina	14.82	L&M	15.76
Quaker Oats	11.84	Ralston Purina	14.19
L&M	10.99	Quaker Oats	12.08
Carnation	5.11	Mars	5.20
Perk	4.41	Carnation	5.04
Mars	4.40	Associated	3.70
Associated	3.60	National Can	3.59
(I.D. 93)			

Also pertinent is data on the canned dog food submarkets. Shares in the all-canned submarket in 1968 and 1969 were, by brand names (grouped, where possible, by manufacturer): [41]

Brand (Manufacturer) Share (Source I.D. 98; CX 95q)

	1968	*1969*	
Alpo (L&M)	22.2	29.0	Alpo/Vets (L&M)
Ken-L-Ration (Quaker Oats)	18.1	17.0	Ken-L-Ration (Quaker Oats)
Kal Kan (Mars)	11.5	11.5	Kal Kan (Mars)
Rival (Associated)	7.2	6.9	Rival (Associated)
Vets (Perk)	4.4	6.6	Ladie Boy/Skippy/Dr. Ross (National Can)
Skippy/Dr. Ross (National Can)	4.1	3.6	Friskies (Carnation)
Friskies (Carnation)	3.7	2.7	Strongheart (Doric)
Strongheart (Doric)	2.6	2.0	-ue Mountain*
Ladie Boy (National Can after Oct. 1968)	2.5	1.7	Dash
Dash	2.2	1.5	Calo
Calo	2.2	1.5	Cadillac
-ue Mountain*	1.8	1.1	Red Heart
2 firm	40.3	46.0	
4 firm	59.0	64.4	
8 firm	73.8	79.2	
12 firm	82.5	85.0	

* This brand is partially obscured in CX 95q. The record shows that a "Blue Mountain" brand was acquired by Associated in 1965 (Tr. 797; CX 337c). If the obscured name is indeed "Blue Mountain", then the concentration ratios should be as follows: in 1968, four firm at 60.8, eight firm at 75.6, and twelve firm at 83.9; in 1969, four firm at 66.4, eight firm at 80.9, and twelve firm at 86.0.

[42] Finally, one should note that in "premium" canned, in 1968, L&M-Allen alone held 55.71 percent of the market, and, *a fortiori*, ranked first (RX 123), while in "economy" canned, Perk likewise ranked first, (CX 25K), with a 32.14 percent share (RX 123).

We will lay this data against data from a selection of cases in which the Court found sufficiently undue concentration such that a more elaborate analysis of the acquisition's effects was not necessary to find the acquisition illegal. These include: *U.S.* v. *Philadelphia National Bank*, 374 U.S. 321 (1963); *U.S.* v. *Aluminum Co. of America*, 377 U.S. 271 (1964); *U.S.* v. *Continental Can Co.*, 378 U.S. 441 (1964); *U.S.* v. *Von's Grocery Co.*, 384 U.S. 270 (1966); *U.S.* v. *Pabst Brewing Co.*, 384 U.S. 546 (1966); and *U.S.* v. *General Dynamics Corp.*, 415 U.S. 486 (1974).

In *Philadelphia Bank*, the first case employing this simplified test, one line of commerce in one geographical area was examined. Although the Court gave brief mention to the difficulties of entry into the market and noted a trend to concentration, it stated as its controlling rule, as we have noted above, that an acquisition which vests an undue share of the market in the acquirer and causes a significant increase in the concentration of firms is presumptively illegal. The Court specified as numbers satisfying its test, the [43] acquisition of a control of in excess of 30 percent of the market, with a 33 percent increase in the two firm concentration ratio, resulting in a two firm share of 59 percent. 374 U.S. 364-305.[27]

In *Alcoa*, mention was made of the market's history and the character of the firms involved, but again a direct statistical analysis was the basis for finding the acquisition illegal. In its analysis, the Court noted existence of an all-conductor market, inclusive of copper and aluminum conductors, but analyzed the effects of Alcoa's acquisition of Rome Cable in the narrower frame of the all-aluminum-conductor (AAC) submarket.[28] Thus, it is particularly appropriate to compare *Alcoa's* figures not only to the all dog food market's figures, but to those prevailing within the narrower canned dog food submarket as well: [44]

Preacquisition shares (rank)

	Alcoa (Source: 377 U.S. at 278)			*L&M* (Source: I.D. 94 & 98; CX 59q)	
	AAC	*BAC*	*IAC*	*Canned Dog Food*	*All Dog Food*
Acquirer	27.8 (No. 1)	32.5 (No. 1)	11.6 (No. 3)	22.2 (No. 1)	10.99 (No. 4)
Acquiree	01.3 (No. 9)	0.3	04.7 (No. 8)	04.4 (No. 5)	04.41 (No. 6)
Combined share	29.1		16.3	26.6	15.40
Nine firm	95.7		88.2	76.3	73.37
Five firm			65.4	63.4	59.55
Four firm	76			59.0	54.44

[45] We note that in *Continental Can* the Court's analysis rested upon the shares of the acquirer and acquiree in their separate "homebase" submarkets of metal and glass, respectively, and upon their shares in a line of commerce consisting of these two submarkets combined, even though at least a third submarket—that of plastic containers—may have competed in an all-container market. In contrast, the "all canned" submarket (and, *a fortiori*, the "all dog food" market) that we employ in our present analysis includes not only Perk's and L&M-Allen's own submarkets, but other submarkets as well. Thus our concentration figures tend to be lower than those which

[27] The Court also noted that, measuring the acquisition's results in share of assets, the acquirer had gained a 36 percent share, while the two firm share rose to 59 percent, the four firm share to 78 percent and seven firm share to about 90 percent. 374 U.S. 331.

[28] The Court also noted, albeit with less emphasis, Alcoa's and Rome's shares of the bare aluminum conductor (BAC) and insulated aluminum conductor (IAC) segments of the AAC submarket. For the sake of completeness these figures have been included in the comparison chart set out below.

would result if a line of commerce more closely tailored to Perk's and Allen's products were employed after the fashion of *Continental Can.* All the same, the data in this case when laid against that of *Continental Can* supports our finding the Perk acquisition illegal: **[46]**

Share (rank)*

	Continental Can (Source: 378 U.S. at 445-446, 459-460)		*L&M (Source: I.D. 94 & 98; CX 95q)*		
	Chief Submarket	*Combined Metal & Glass Market*	*Chief Submarket*	*Combined Canned Market*	*Total Food Market*
Acquirer	33 (No. 2)	21.9 (No. 2)	55.7 (No. 1)	22.2 (No. 1)	10.99 (No. 4)
Acquiree	9.6 (No. 3)	3.1 (No. 6)	32.1 (No. 1)	4.4 (No. 5)	4.41 (No. 6)
Combined share		25%		26.6	15.40

* For the sake of completeness, it may be noted that the Court found a metal container submarket two-firm concentration ratio of 71 percent and a three-firm ratio of 76 percent. For glass containers the corresponding figures were 45.8 percent and 55.4 percent (378 U.S. at 445-446). In the two submarkets combined, four firms held. 63.7 percent and six firms held 70.1 percent (378 U.S. at 461).

[47] Far lower concentration ratio and market shares have sufficed to create a presumption of illegality. Thus, in *Von's* the Court found illegal the acquisition of the sixth largest supermarket chain in the Los Angeles area by the third largest chain where the resulting combined share was 7.5 percent.[28a]

[48] Although *Von's* laid stress upon the decline in numbers of independent grocery stores in the years preceding the challenged acquisition, while the evidence of such a trend in the present case is slight,[29] the trend in leading firm's concentration ratios in *Von's*, noted in the concurring opinion of Mr. Justice White, 384 U.S. 280-281, for

[28a] The concurring opinion of Mr. Justice White in *Von's*, 384 U.S. at 280-281, explored the underlying statistical data in far greater detail than did the opinion for the Court. The following chart employs the data reported in that concurrence.

Share (rank)

	Von's (Source: 384 U.S. at 281 (concurrence))		L&M (Source: I.D. 94 & 98; CX 95q)			
			All Dog Food		Canned Dog Food	
	Pre-acquisition	Including Effects of Acquisition	Pre-acquisition	Including Effects of Acquisition	Pre-acquisition	Including Effects of Acquisition
Acquirer	4.7 (No. 3)		10.99 (No. 4)		22.2 (No. 1)	
Acquiree	4.2 (No. 6)		4.41 (No. 6)		4.4 (No. 5)	
Four firm	24.4	28.8	54.44	58.85	59.0	63.4
Eight firm	40.9	44	71.96	74.01	73.8	76.3
Twelve firm	48.8	50	78.94	80.30	82.5	83.9

[29] Little data on concentration trends in the dog food industry was adduced during the hearings. The administrative law judge rejected complaint counsel's argument that there has been a significant preacquisition trend (I.D. 117). However, testimony was heard that the number of economy canners was declining (Tr. 2216), and that concentration has increased since 1969 (Tr. 1093). Although the latter testimony was but an unsupported assertion in

(Continued)

the period of 1948 to 1958 is comparable to the changes in the dog food market occurring in the far shorter period of 1967-1969, and the canned submarket between 1965 and 1969. Moreover, the actual degree of concentration is far greater in this case than in *Von's*:

	Von's (Source; 384 U.S. at 280-281)		*L&M (Source I.D. 94&98; CX95q)*			
			(all dog food)		*canned dog food*	
	1948	*1958*	*1967*	*1969*	*1965*	*1969*
Four firm	25.9	24.4	52.93	59.01	54.2	64.4
Eight firm	33.7	40.9	69.47	76.54	72.7	79.3
Twelve firm	38.8	48.8	79.21	83.68	N.A.	85.1

We may also compare the relevant share data in *Pabst* to that for the dog food industry: **[49]**

Share (rank)

	Pabst (Source: 384 U.S. at 550-551)			*L&M (Source: I.D. 94 & 98; CX 95q)*	
	U.S.	*Tri-State*	*Wisconsin*	*all dog food*	*canned*
Acquirer	(No. 10)	5.48 (No. 7)	(No. 4)	10.99 (No. 2)	22.2 (No. 1)
Acquiree	(No. 18)	5.84 (No. 6)	(No. 1)	4.41 (No. 6)	4.4 (No. 6)
Resulting share (rank)	4.49 (No. 5)		23.95 (No. 1)		

Again, while a comparison cannot be made with the sharp decline in the numbers of brewers noted by the Court in *Pabst*, a comparison in concentration among the top firms can be made:

	Pabst (Source: 384 U.S. at 550-551)		*L&M (Source: I.D. 95&98; CX95g)*			
			all dog food		*canned*	
	1957	*1961*	*1967*	*1969*	*1965*	*1969*
Four firm	47.74 Wisconsin	58.62	52.93	59.01	54.2	64.4
Eight firm	58.93 Tri-State	67.65	69.47	76.54	72.8	79.3
Ten firm	45.06 U.S.	52.60	74.61	80.61	N.A.	82.5

[50] Thus, although the present record does not support a finding of substantial changes in concentration among the smaller members of the industry, the data for the larger firms---and only two very large firms were involved in this case---shows concentration much greater than that in the *Von's* and *Pabst* cases, where the acquisitions of far smaller market shares than that acquired in the present case were found illegal.

Finally, for the sake of thoroughness, we may consider the recent *General Dynamics* case. Here again the Court found data sufficient to

itself entitled to little weight, the evidence of little new entry and of declining numbers of independent producers, discussed below at Section III.D., lends some credence to this testimony.

create a presumption of illegality. Although the Court further found sufficient evidence to overcome that presumption---evidence of a type not presented by respondent here---comparison of the *General Dynamics* figures to those for the dog food market may be instructive.

Laying *General Dynamics* data concerning the ranks and market shares of the acquirer and acquiree in the pertinent geographical market and submarket against the data for Perk's acquisition, and we find that the data in our case demonstrate a substantially greater impact than that noted in *General Dynamics:*

Share (Rank)

	General Dynamics *(Source: 415 U.S. at 496)*		*L&M* *(Source: I.D. 94 & 98; CX 95q)*	
	Market	Submarket	All Food	Canned Food
Acquirer	7.6 (No. 2)	15.1 (No. 2)	10.99 (No. 4)	22.2 (No. 1)
Acquiree	4.8 (No. 6)	8.1 (No. 5)	4.41 (No. 6)	4.4 (No. 5)
Combined	12.4 (No. 2)	23.2 (No. 1)	15.40 (No. 2)	26.8 (No. 1)

[51] Turning to the data on market concentration in years preceding and following the challenged acquisitions,[30] we see the following:

	General Dynamics *(Source: 415 U.S. at 494)*				*L&M* *(Source: I.D. 94 & 98; CX 95q)*			
	Market		*Submarket*		*All Food*		*Canned*	
	1957	1967	1957	1967	1967	1969	1967	1969
Two firm	29.6	48.6	37.8	52.9	32.46	32.74	38.1	46.0
Four firm	43.0	62.9	54.5	75.2	52.93	59.01	58.4	64.4
Ten firm	65.5	91.4	84.0	98.0	74.61	80.61	80.3	82.5

Since *General Dynamics* included trend data running eight years past the time of the challenged acquisition, while in our case the eighth anniversary of Perk's acquisition will not come until 1977, a comparison of similar trend data is not possible, but the preacquisition shares in the present case are as great as their counterparts in *General Dynamics*.

General Dynamics also employed an analysis of the acquisition's impact upon two-firm concentration both for the year of acquisition and eight years later, presumably because the acquirer in that case was the second ranked firm prior to the acquisition. In the present case, L&M was the leading firm in canned food, and the fourth largest firm in all dog food. Thus direct comparisons cannot be made. All the same, the firm data in each case for the year of acquisition is sufficiently similar that we must consider the comparison supportive of our

[30] The acquisition challenged in General Dynamics occurred in 1959, L&M's acquisition of Perk occurred in January 1969.

conclusion that Perk's acquisition must be presumed illegal. (Again, since the eighth anniversary of Perk's acquisition has yet to come, comparable trend data is unobtainable: [52]

	General Dynamics (Source: 415 U.S. at 495)				*L&M (Source: I.D. 94 & 98; CX 95q)*	
	Year of acquisition		*eight years later*		*Year preceding month of acquisition*	
	Market	*Submarket*	*Market*	*Submarket*	*All Food*	*Canned Food*
Top 2 but for acquisition	33.1	36.6	45.0	44.0	31.61	40.3
Top 2 including acquisitions	37. 9	44.3	48.6	52.9	32.19	44.7
Percent increase	14.5	22.4	8.0	20.2	1.8	10.9

[53] Needless to say, in the light of the comparisons set out above, the share data for the leading firms and for both L&M-Allen and Perk, measured against either the total dog food market or the narrower canned submarket are more than adequate to establish the illegality of Perk's acquisition by L&M, absent evidence from respondent sufficient to establish that a substantial lessening of competition cannot occur nor a monopoly result as a consequence of the acquisition. This is particularly true when we recall that none of the preceding cases establishes a minimum threshold which must be passed before the presumption of illegality arises. Rather, they provide examples in which the actual data happened to be sufficient by an unspecified degree to establish a *prima facie* case of illegality.

D. NONSTATISTICAL EVIDENCE OF THE EFFECTS OF THE ACQUISITION AND RESPONDENT'S REBUTTAL EVIDENCE.

1. *Introduction*

When we proceed beyond the statistical test performed above and—in the fashion contemplated by *Brown Shoe* prior to *Philadelphia Bank*—engage in a full examination of the dog food market and the circumstances of Perk's acquisition, and when we consider respondent's proferred rebuttal evidence, [54] we can only find that the conclusion of illegality derived from the statistical data is not rebutted, but confirmed. Indeed, as a result of this analysis, we further find that even apart from the presumption of illegality arising from the concentration data, an adequate case has been made to rule the acquisition illegal.

Before beginning our inquiry, we should indicate what value we will attribute to post-acquisition evidence and to the testimony of industry witnesses.

Beyond doubt, post-acquisition evidence can aid in understanding the effects of an acquisition upon competition (*Cf. The Budd Co.*, 3 Trade Reg. Rep.¶20,998 (F.T.C. Sept. 18, 1975)).

However, a crucial element in weighing such evidence, is whether it shows that, because of factors beyond the control of the acquirer, anticompetitive effects are incapable of occurring or rather the evidence merely shows an absence of such effects, an absence which is conceivably only a product of the acquirer's self-restraint. Post-acquisition evidence of the latter sort is valueless, for

> If a demonstration that no anticompetitive effects had occurred at the time of trial or of judgment constituted a permissible defense to a § 7 divestiture suit, violators could stave off such actions merely by refraining from aggressive or anticompetitive behavior when such a suit was threatened or pending. (*U.S.* v. *General Dynamics Corp.*, 415 U.S. 486, 504-505 (1974) (footnote omitted)).

Moreover, the Supreme Court has stressed that the fact that no concrete anticompetitive symptoms have occurred does not itself imply that competition has not already been affected, **[55]** "for once the two companies are united no one knows what the fate of the acquired company and its competitors would have been but for the merger." (*Id.* at 505).

We thus give no weight to respondent's argument that since it has to this point kept Perk and Allen apart and operated them as separate "profit centers," no anticompetitive effects can flow from Perk's acquisition. We have no guarantee Perk will continue to retain whatever freedom a "profit center" has, nor do we have any way of knowing what the effect of being held separate as a "profit center" is. Does Perk have as much access to capital from its parent corporation, does it have as much positive pressure on it to develop new products and defend its old products, does it have as much an infusion of aggressive managerial talent as it might have were it still in the hands of its former owners or of an acquirer with whom it did not compete? Rather, in this case, where the acquisition of Perk eliminated an aggresive independent bent upon breaking out of the status quo, the subsequent preservation of the status quo is, if anything, direct evidence of an anticompetitive effect.

As for testimony by industry witnesses, this too must be evaluated with care. Industry testimony is hardly disinterested. Lessened competition may well benefit every or at least many industry members who will share in the security and profits concentration often affords. *See U.S.* v. *Philadelphia National Bank*, 374 U.S. 321, 367 n. 43 (1963). **[56]** Furthermore, industry witnesses may have made, or may wish to preserve as an option in the future the making of, acquisitions similar to that concerning which their testimony is taken.[31] For these reasons, the various assertions by industry witnesses that they had detected no anticompetitive effects arising from Perk's acquisition carry little weight with us when we contrast those assertions against the more objective evidence discussed below.

2. *Entry Barriers and History of Attempted Entry.*

With these principles in mind, we may begin a direct analysis of the dog food market, starting with the market's entry barriers and recent history of attempted entry. While the relevance of entry barriers to a Section 7 analysis is indisputable when that analysis is not based upon a statistical showing of undue concentration such as we have made above, a showing of high entry barriers is not the *sina qua non* for finding an acquisition illegal. Rather, as we observed in *Ekco Products,* 65 F.T.C. 1163 (1964) *aff'd* 347 F.2d 745 (1965):

> Ease of entry may, to be sure, cause the market power of established firms to be eroded by the advent of significant new competitors; but this is likely to be at best a long-term affair. Ease of entry may also induce the firms active in the relevant market to keep their prices down to an entry-discouraging level; but that does not mean that such an entry-discouraging price level is **[57]** likely to be as low as the level that would prevail if there were actual competition in the market. (65 F.T.C. at 1208, citation omitted).

In the present case, we do find very high barriers to entry into the dog food market. The chief of these barriers is the extraordinary high volume of advertising necessary to sell dog food products. The significance of this type of entry barrier was recognized by the Supreme Court in *F.T.C.* v. *Procter & Gamble Co.*, 386 U.S. 568 (1967). The record in this case establishes that, much like liquid bleach, dog food must be "pre-sold" by heavy advertising.(*Cf.* 386 U.S. at 600).

Simply to sample the numerous examples in the record, we may note that as early as 1958, a new dry dog food's introduction reportedly included advertising expenses running to 1.8 million dollars (I.D. 102). L&M-Allen's own expansions into new geographical markets has entailed high advertising to sales ratios—running, for example, at 20.8 percent in San Francisco and 23 percent in Los Angeles (I.D. 104). The record includes testimony that a "premium" canned dog .food introduction into the all-U.S. market in 1969 would have required 7.5 to 10 million dollars in advertising and other promotion (I.D. 113).

[31] We note in the present case Mr. Vick's and Mr. Costello's companies (Doric and National Can respectively) were among those named by complaint counsel as having participated in acquisitions causing undue concentration in the dog food market (*Cf.* CX 337). Mr. Barsky's company, for further example, held a packing contract from L&M-Allen at the time of his testimony (Tr. 2227-2230).

Semi-moist dog food is no easier to introduce. Perk found that $100,000 in Chicago was insufficient to obtain successful entry for its product (Tr. 1187-1189; I.D. 108). Quaker Oats, already a giant in semi-moist, planned to spend about 7 million dollars on advertising and other promotions in 1974-75 to launch a new semi-moist product (I.D. 108).

[58] Companies already in the market will fight hard to discourage new entry (I.D. 107). For example, the president of respondent's advertising agency testified that Ralston Purina literally gave its dry product away to prevent L&M from obtaining in test market an accurate measure of L&M's new dry product's appeal (Tr. 1375-1377).

While entry at less than a national level is conceivable, it involves substantial inefficiencies since one must then forego the substantial discounts and the considerable cost per viewer efficiencies of network-wide advertising (Tr. 977, 1343; I.D. 40).

Advertising expenditures on a product that fails to succeed in the market represents money almost completely wasted; there remains none of the possible residual value of a production plant, only bills from the media. Moreover, given the lack of collateral, advertising is undoubtedly more difficult to finance than, for example, a production plant. Thus the examples discussed above and the others contained in the record of the high advertising expenses necessary to enter the dog food market represent a very substantial entry barrier indeed.

Respondent argues that whatever the barriers to entry for other types of dog food, advertising plays only a minor role in selling "economy" canned dog foods. This argument is unpersuasive. It speaks to conditions in only one segment of a very large industry, and it overlooks the evidence in the record that advertising might become a factor in marketing [59] "economy" canned—in part due to L&M's own plans for advertising Perk's products (I.D. 79; Tr. 1980-1981 & 1987).

In addition to the substantial advertising necessary to support product introduction, there is the related barrier created by the difficulty of finding a unique product niche to occupy. It has long been this Commission's experience that in heavily advertised categories of consumer goods, a product's advertised "image" and its appearance of differentiation from otherwise competing products is often of as great or greater importance to its success than price competition, *cf., The Procter & Gamble Co.*, 63 F.T.C. 1465, 1538-1539 (1963), *rev.* 358 F.2d 74 (6th Cir. 1966), *aff'd* 386 U.S. 568 (1967). Our views are confirmed by the record in this case. Thus, respondent's president testified with respect to L&M's entry attempts into dry dog food that "for a product to be successful in this category where there are only, really, basically two competitors, if you don't have a significant product difference, I don't think you really have much of a chance to succeed" (Tr. 1809). To similar effect, the executive vice president of Rival Pet Foods testified that his dog food had been given an unusual *shape* because,

> * * * if somebody else is yelling at the top of their voice about $8 million that were all meat then you'd better yell about something else that nobody else is talking about. (Tr. 835).

Moreover, certain patents controlled by General Foods add a further barrier to entry in the semi-moist category (I.D. 109).

[60] Finally, note should be made of the administrative law judge's findings that attainment of a profitable level of sales for a new product may take many years (I.D. 106; I.D. 114). For example, L&M anticipated that its own dry "Beef Bites" product would run in the red from four to five years after its introduction (Tr. 1810). This is in itself a barrier, and it renders the market particularly susceptible to anticompetitive effects, for it assures a substantial period in which high profits may be realized before a new entrant's product can obtain enough sales to be self-supporting and provide competitive discipline within the market.

Turning from the barriers to entry to the history of entry, we not surprisingly discover that there has been very little entry into the dog food market. Only one notable entry has been made by a company completely new to the dog food market—Campbell Soup with its "Recipe" brand (I.D. 114 & 116). And quite significantly, although that entry was backed by as much as 25 or 30 million dollars in advertising and other promotion in its first year, witnesses at the hearing could not agree on whether Campbell's product had successfully entered (compare Tr. 1393 to Tr. 1977; *see also* I.D. 114).

Other entry, by companies expanding from within the market from one submarket to another, are discussed below. It should be kept in mind, however, that while this type of intercategory expansion may enhance competition, it has no impact on the market's total concentration, which in this case, as we have noted above, is quite high.

[61] This lack of *de novo* entry is all the more significant in light of the rapid expansion of the dog food industry, from 1963 sales of $530 million to 1974 sales of $1.4 to 1.6 billion (I.D. 116). So rapidly expanding a market would be reasonably expected to elicit substantially more entry than has in fact occurred, were not entry barriers prohibitively high.

We have to this point examined the statistical concentration of the all dog food market and the barriers to entry for the market as a whole and each of its submarkets. We next turn to an examination of the effects of the acquisition viewed in the context of the two submarkets—"premium" and "economy" canned—dominated by L&M-Allen and Perk at the time of Perk's acquisition. Our purpose in doing so is two-fold: First, the examination should highlight the impact of the acquisition upon competition within the narrower arena of each of these submarkets. Secondly, this examination should explain what adverse effects on competition in the all-dog food market may arise both from the endangering of competition between the "premium" and "economy" canned submarkets and from the elimination of Perk as an independent participant in these and other of the dog food submarkets. **[62]**

3. *The "Premium" Canned Dog Food Submarkets.*

Beginning with L&M-Allen's home base, the "premium" canned dog food submarket, one finds an extraordinary degree of concentration—L&M alone at the eve of the acquisition held 55.71 percent of this line of commerce. In light of this extraordinary concentration, Perk's history prior to its acquisition is quite pertinent. In the early 1960's Perk had attempted to enter the premium submarket, and at the time of its acquisition had not only the production plant necessary to enter "premium" canned food, but was in fact packing "premium" food for both L&M-Allen and Safeway Stores (I.D. 6).

Moreover, Perk also had in the wings plans for a new product, one which might combine many of the desirable attributes of "premium" foods with the low cost ingredient base of an "economy" food (I.D. 124; Tr. 1992-1998; CX 25o). Perk thus had a new premium product idea, a premium product production plant, an established reputation in the business, a network of distribution, a history of attempted entry into the highly concentrated "premium" market and a desire to do so again.

[63] Ironically, when Perk went looking for an acquirer to back its already substantial resources with more money (Tr. 1992-1993), its acquirer turned out to be the 55.71 percent shareholder of the very same "premium" submarket Perk hoped to enter.

We thus find that in acquiring Perk, L&M-Allen not only eliminated the sixth largest dog food manufacturer, but also eliminated a major supply-side competitor and potential marketing-side competitor within Allen's immediate "premium" canned dog food submarket, and acquired direct control over an increased capacity to produce Allen's own products. Rarely does a Section 7 case afford more striking evidence of a likelihood of lessened competition.

Against this evidence, respondent's argument that Perk lacked "premium" marketing expertise carries very little weight. Nothing in the record suggests that premium dog food marketing is so arcane a science that Perk could not have succeeded in a new attempt to expand its product line **[64]** into the premium field with its unique, lower cost product. Whatever uncertainty Perk's asserted lack of marketing expertise may create, a defense to Perk's acquisition does not thereby also arise: Section 7 is concerned with probabilities, not certainties *Brown Shoe Co.* v. *U.S.*, 370 U.S. 294 at 323 (1962).

Respondent argues that following Perk's acquisition, competition intensified within the "premium" submarket due to a number of new entries. Only one of these entries, however, was by a company new to the dog food market, the rest (*e.g.*, Wayne, National Can, Carnation, and General Foods) were expansions by companies established in other dog food submarkets. Moreover, the evidence on these entries' successes is sketchy at best — only for Carnation's "Mighty Dog" was there solid indication of success (RX 170; Tr. 1394; 1795-76; 1892-1893; 3010-3011), while witnesses could not agree whether Campbell's 25 to 30 million dollar effort was "in trouble" or a success (Tr. 1393 & 1977).

Respondent also argues that between 1966 and 1973 its share of premium canned dog food fell from 61 percent to 48 percent (RX 121, 123, Tr. 1892-1893; 3010-3012). To place these figures in perspective, however, one must remember that the premium share of the total dog food market has grown enormously in the same time period—thus in the period 1966-1972, Allen's "Alpo" sales rose from 35.6 million dollars to 121.2 million dollars (CX 270a).

[65] Respondent's lost share argument fails to establish a defense to the acquisition of Perk; rather, it demonstrates all the more persuasively the illegality of that acquisition. Despite several entry attempts backed by enormous advertising expenditures, respondent has more than tripled its sales since 1966 and retained nearly half its submarket—a share that alone amounts to extreme concentration. This illustrates how important to competition it was to maintain the independence of Perk, with its production capabilities, new product idea, interest in renewed entry, distribution network and reputation, and how much the removal of Perk is therefore likely substantially to lessen competition.

In short, even were respondent correct in its contention that premium canned dog food must be viewed as a wholly separate product market this acquisition eliminated an independent supply-side competitor, which, moreover, had concrete plans to market its own premium product again. When this potential for direct competition is set against the extraordinarily high concentration and entry barriers of the premium segment, its destruction constitutes a violation of Section 7 and is in itself sufficient ground for the entry of a divestiture order in this matter.[32] **[66]**

4. *"Economy" Canned Dog Food Submarket and Perk As An Independent Force In The All Dog Food Market.*

When we look to the other end of the canned spectrum, "economy" canned dog food, we find even more substantial and compelling evidence that through the acquisition of Perk, L&M-Allen has achieved substantial power to impair the **[67]** competitive health of the "economy" canned dog food submarket, and thereby both lessen competition within that submarket and reduce the likelihood of that submarket successfully competing with L&M-Allen's home base: the "premium" canned submarket.

The "economy" canned sector has been heretofore characterized by no-frills price competition, unfettered by much advertising. The acquisition of Perk has intruded into this backwater of modern merchandizing a major conglomerate with vast resources, a heavy advertising budget, and a line of more expensive products competitive with those of the economy submarket. Nor did L&M enter in a small way; rather, it acquired the largest firm in this sector, which, with its 32.14 percent share of the submarket (I.D. 100), was, under the standards of *Philadelphia Bank* and its progeny, already unduly dominant in this economy submarket. This type of acquisition, even had it not been among direct competitors, would have raised the likelihood of a violation of the antitrust laws. (*Cf., FTC* v. *Procter & Gamble Co.,* 386 U.S. 568, 579 (1967); *American Tobacco Co.* v. *U.S.,* 328 U.S. 781, 797 (1946)).

[68] Respondent suggests that its entry by acquisition into the economy canned submarket cannot have anticompetitive effects because the intensity of price competition in the submarket, the allegedly increasing number of private label offerings, and the number

[32] Moreover, in view of the extremely high concentration ratios and entry barriers prevailing in the dog food market and each of its submarkets (further discussion of which occurs below), and in further view of Perk's history and expansion plans at the time of its acquisition, we must reject respondent's argument, premised on *U.S.* v. *The Federal Co.,* 1975-2 Trade Cases ¶60,397 (W.D. Tenn. 1975), that even if Perk and Allen were competitors, the importance of their actual competition should be discounted in view of the various factors that differentiate their chief products into separate submarkets. Even were we substantially to discount the degree of direct and indirect competition between Perk and Allen, we could not condone this acquisition. On the contrary, where concentration is as great as it is in the dog food market and submarkets, the importance of preserving even the slightest residuum of competition is also great. *U.S.* v. *Philadelphia National Bank,* 374 U.S. 321, 365 n. 42 (1963); *U.S.* v. *Aluminum Co. of America,* 377 U.S. 271 (1964). But indeed we do not at all discount the degree of competition between Perk and L&M-Allen. Both dominated their respective submarkets and Perk possessed premium production facilities, had attempted entry into premium in the past, and was preparing to do so again. Unsuccessful bidders are no less competitors than successful ones. *U.S.* v. *El Paso Natural Gas Co.,* 376 U.S. 651, 661 (1964). Indeed, that the majority of Perk's and L&M-Allen's sales were in separate submarkets is not reason to discount the degree of competition between them. Rather, each being a leader in submarkets specializing in different combinations of price and quality, each afforded an important competitive alternative to consumers. Their diversity prior to Perk's acquisition thus, if anything, *enhanced* competition. *Cf. U.S. Continental Can Co.,* 378 U.S. 441, 464-465 (1964).

of strong regional competitors preclude development by L&M-Perk of any real market power. However, respondent's evidence in support of these assertions is thin. For example, respondent cites Mr. Barsky's testimony that Allied Foods is an expanding, aggressive competitor in the submarket—yet in the same breath, Mr. Barsky notes that "quite a few" of his former competitors have left the market (Tr. 2216-2217). Witnesses at the hearings stated their general beliefs that the number of store brands is expanding, but we have no specific indication of the degree of that expansion or even whether it is a nationwide phenomenon. We do know, however, that Perk has been a major supplier of store labeled foods in the past (Tr. 2098). We also know that although the sales of "economy" canned dog food have risen with the overall rise in the dog food market, "economy" canned's share of the market is declining (Tr. 1682). Respondent itself concedes that "economy" brands tend not to have nationwide distribution because their profit margins are narrow and their freight costs must be kept to a minimum (RPF 158(iv)).

[69] Perk, in contrast, enjoyed high profits prior to its acquisition and had nearly national distribution.[33]

While respondent supports its assertion that Perk was not a significant competitive force at the time of its acquisition by citing testimony that Perk was "going down and out of business" (*cf.* Tr. 1629-30, 1633), such testimony is belied by Perk's profitability in this period and L&M's own assessment of Perk's viability, which we discuss below. And, of course, even were Perk in serious competitive trouble, which it does not appear to have been, its acquisition by a major competitor is hardly justifiable and, indeed, respondent does not explicitly attempt to make out a "failing company" defense.

In further support of its assertion that no prohibited effect could flow from the acquisition, respondent argues that rather than entrenching its position, Perk is losing market share, and has fallen from 33 percent in 1966 to 18 percent in 1973. We must first note that this is precisely the type of occurrence that may be influenced by the restraint of an acquirer pending challenge of the acquisition and, as we have discussed at length above, is thus entitled to little or no weight. But even this point aside, this bit of information tells us both too little and too much for respondent **[70]** to prevail. It certainly does not tell us what might have occurred had not L&M intervened, nor does it tell us what L&M will do once this matter has come to its conclusion. On the one hand, L&M's backing may have preserved for Perk its still very substantial market share against a greater loss from free competition.

[33] Only in the Deep South was Perk restricted to limited coverage (CX 25L) and Perk estimated that nationwide it was on the shelves of 25,000 of the 30,000 "Grade A" supermarkets (CX 25e).

On the other hand, it may well prove that L&M is doing precisely what one might fear an acquirer would do to the leading firm in a rival submarket—turn its production plant to the acquirer's own ends while letting the firm itself slowly wither. Thus, we note that Perk lost only 1.12 percent of its share in the three years before its acquisition, but dropped a preciptious 14.10 percent in the five years following its acquisition (RX 123). It hardly appears, then, that L&M is preserving Perk as a vigorous, independent force in the dog food market.

In summary, we have before us a picture of a weak and declining submarket, vulnerable to the exercise of power by a major, competing conglomerate which may either entrench Perk as the submarket leader, or further accelerate the decline of that submarket by holding Perk, an otherwise likely defender of that submarket, silent.

Against this dismal background, Perk stands out all the more as having been an unusually strong company, since it was nearly national in its operations, had a full product line, a wide range of private label accounts to spread its costs, supply side flexibility, and aggressive plans for **[71]** the future, including introduction of an economy ingredient based product with attributes appealing to the "premium" customer. Perk's acquisition has thus removed from independent competition a firm that could have successfully revitalized the "economy" segment of the dog food industry. All this is particularly pertinent when we recall that a major purpose of Congress in enacting the Clayton Act was to preserve the benefits flowing from a decentralized market *Brown Shoe* v. *U.S.*, 370 U.S. 294, 344 (1962), and that when an acquisition eliminates the independence of a firm which prior to its acquisition was engaged in efforts to diversify its product line in ways offering more intense competition with its acquirer, the tendency of the acquisition to lessen competition is enhanced. *U.S.* v. *Continental Can Co.*, 378 U.S. 441, 464-465 (1964).

Small but aggressive independents are the prototype of the firms Congress intended to preserve by enactment of Section 7. *U.S.* v. *Aluminum Co. of America*, 377 U.S. 271, 281 (1964). Perk was just such a small but aggressive independent. In addition to the factors we have just noted above, we also note that Perk was the largest dog food manufacturer not owned by a major conglomerate. Unlike even its acquirer, it produced a full line of dog food products under its own or others' labels in the dry, semi-moist, **[72]** premium canned and economy canned submarkets.[33] In 1967 it reported a return on average net worth of 22.3 percent and a return on capital of 17.9 percent. In

[33] As we have discussed above at Section I.B.2., Perk has sold both dry and semi-moist foods under its own label and manufactured them for sale under the labels of others. We note that both the dry and semi-moist submarkets are extraordinarily concentrated: two firms control 66 percent of the dry submarket (Tr. 538) and 95 to 100 percent of the semi-moist submarket (Tr. 1008). Given the high concentration of the total dog food market and the extraordinary

(Continued)

July 1968, seven months prior to its acquisition, Perk had realized a 7 percent increase in its sales for the first half of 1968 over the same period in 1967 with a corresponding increase in net income of 33 percent, and a projected year end increase in sales over 1967 of 3.4 million dollars to a total of 35.9 million (I.D. 125; CX 25(e)(t) & (z7)).[34]

On this record, viewing the effects of this acquisition in each of the dog food submarkets we have examined and in the dog food market as a whole, the acquisition must be condemned and the order of the administrative law judge be affirmed. [73]

IV. Profits Divestiture

Finally, we note that complaint counsel urged that the administrative law judges erred in refusing to allow discovery pertinent to the issue of whether a "divestiture of profits" should accompany the traditional divestiture order in this matter. Although no mention of profits divestiture was made in the Notice of Contemplated Relief,* complaint counsel argue that the portion of the Notice reading, in part "* * * the Commission may order such relief as is* * *necessary* * * including, but not limited to * * * 3) Any other provisions appropriate to correct or remedy the anticompetitive practices engaged in by respondent, * * *" was sufficient warrant to open the record to consideration of profits divestiture.

The notice language cited to us by complaint counsel is, indeed, sufficiently broad in meaning that it would have been within the discretion of the administrative law judge, on his own or complaint counsel's motion, to consider a proposed remedy such as profit divestiture during the hearings, although, since such a remedy would be both major and novel, he would need extended specific notice to the parties that such was his intention and then afford adequate opportunity to the parties to introduce evidence and brief authorities relevant to this proposed remedy prior to the entry of an order. However, where following the issuance of complaint, so novel and major a remedy as profit divestiture is for the first time specified by complaint counsel, only in the [74] rare course of events would we find fault with an administrative law judge's exercising the discretion conferred upon him by the general Notice language quoted to us to

concentration in the dry and semi-moist segments of that market, it is further cause to hold illegal the acquisition challenged in this matter, that the acquisition placed Perk, an independent competitor in each of these submarkets (albeit apparently more successful a competitor on the supply side than on the marketing side) under the control of L&M, already one of the dominant firms in the concentrated total market, and itself an entrant in the dry submarket (Tr. 1791-1794; 1804-1814).

[34] L&M, itself, based on its trade relationship with Perk and its preacquisition study of Perk, found Perk to be a well-run company with a solid franchise in the "economy" sector (Tr. 1978-1979).

* Not reproduced herein.

refuse consideration of the proposed remedy. We certainly find no such fault here.

On the question of the theoretical propriety of profits divestiture in the future, a question also posed by complaint counsel, we do not find the issue ripe for comment and accordingly will stand silent and attach no precedential weight to the initial decision's comments on the same question.

Final Order

Respondent's appeal from the initial decision in this matter having been heard by the Commission upon briefs and oral argument by respondent and complaint counsel; and the Commission for the reasons stated in the accompanying opinion having concluded that the appeal should be denied;

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