FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS, AND ORDERS, JANUARY 1, 1969, TO JUNE 30, 1969

IN THE MATTER OF

BURLINGTON INDUSTRIES, INC.

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

Docket C-1473. Complaint, Jan. 2, 1969—Decision, Jan 2, 1969

Consent order requiring the Nation's largest textile manufacturer with headquarters in Greensboro, N.C., to cease acquiring any textile mill product corporation for a period of 10 years without prior approval of the Commission.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondent has violated the provisions of Section 7 of the Clayton Act, as amended (15 U.S.C. Section 18) and that a proceeding in respect thereof would be in the public interest, issues this complaint, stating its charges as follows:

I

Definitions

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

(a) "Textile mill product" means any of the following named products at any stage of processing, dyeing, finishing, treating, fabrication, or manufacture: (1) yarn, (2) thread, (3) braids, (4) twine, (5) cordage, (6) broad woven fabric (fabric over 12 inches in width, (7) narrow woven fabric (fabric of 12 inches or less in width), (8) knit fabric, (9) carpets and rugs, (10) felt goods, (11) lace goods, (12) bonded fabrics, or (13) miscellaneous products manufactured from fiber by knitting, weaving, braiding or tufting.

(b) "Textile mill products industry" means those business enterprises which process or manufacture and sell one or more textile mill products, as defined above, and in addition, those business enterprises known as "converters," which buy one or more textile mill products in the gray, have such products finished on contract, and sell such products at wholesale.

II

Respondent Burlington Industries, Inc.

2. Respondent Burlington Industries, Inc. (hereinafter referred to as "Burlington") is, and has been, a corporation organized and existing under the laws of the State of Delaware with its office and principal place of business located at 301 North Eugene Street, Greensboro, North Carolina.

3. Burlington is engaged in the manufacture and sale of a wide variety of textile mill products including, but not limited to, apparel fabrics, hosiery products, fabrics and products for the home (such as broadloom carpets and rugs, and sheets and pillowcases), yarns and industrial fabrics.

4. In the course and conduct of its business, as aforesaid, Burlington is engaged in commerce as "commerce" is defined in the Clayton Act and has been continuously so engaged under its present and prior names at least since 1950.

5. For the fiscal year ended September 30, 1967, Burlington had net sales of approximately $1,364,552,000, substantially all of which consisted of sales of textile mill products. As of September 30, 1967, the total assets of Burlington amounted to approximately $1,027,564,000.

6. Burlington's development has been characterized through the years by continuous growth. As the surviving corporation of variously-named predecessor corporations, Burlington's net sales increased from approximately $27,196,000 for the year ended December 31, 1938, to approximately $360,839,261 for the year ended October 3, 1953.

7. Since 1953, this growth has continued and has been accelerated by the acquisition of the stock and assets of corporations manufacturing and selling a variety of textile mill products.

8. Burlington is the world's largest and most diversified manufacturer of textile mill products. By the end of 1967, Burlington employed 74,000 people, operated 127 plants in the United States, and had international operations in nine foreign countries.

III

Erwin Mills, Inc., The Acquired Corporation

9. Prior to January 19, 1962, Erwin Mills, Inc. (hereinafter referred to as "Erwin") was a corporation organized and existing under the laws of the State of North Carolina, with its office and principal place of business located at Durham, North Carolina.

10. Erwin owned and operated plants located in Durham, North Carolina, Erwin, North Carolina, Cooleemee, North Carolina and Stonewall, Mississippi.

11. Erwin was engaged in the manufacture and sale of a variety of textile mill products including finished cotton textile fabrics for work clothing, twills, sportswear, bedford cord fabrics and denims, and sheets and pillowcases.

12. In the course and conduct of its business, as aforesaid, Erwin was engaged in commerce as "commerce" is defined in the Clayton Act, and had been continuously so engaged at least since 1960.

13. For the fiscal year ended September 30, 1961, Erwin had net sales of approximately $67,697,000 substantially all, if not all, of which consisted of sales of textile mill products. As of September 30, 1961, the total assets of Erwin amounted to approximately $40,736,000.

14. Erwin's development had been characterized through the years by continuous growth. For the year ended December 31, 1949, Erwin had net sales of approximately $49,097,000. For the year ended September 30, 1961, its net sales amounted to approximately $67,697,000.

IV

The Acquisition

15. On or about January 19, 1962, Burlington acquired a majority of the common stock of Erwin. Subsequently, through a tender offer, Burlington acquired substantially all of the remaining stock so that by December 4, 1962, Burlington had acquired approximately ninety-nine percent of the common stock of Erwin.

V

The Nature of Trade and Commerce

16. The textile mill products industry in the United States is

substantial in terms of total dollar sales, as well as in terms of extensive domestic end usage of its finished products and extensive intermediate usage by other industries.

17. Historically, the textile mill products industry in the United States has been characterized by a substantial number of small competitive entities performing a limited variety of functions in connection with a limited number of textile mill products.

18. Since 1950, a significant change in the structure of the textile mill products industry in the United States has been taking place in that a limited number of integrated enterprises processing and manufacturing a wide variety of textile mill products have been moving toward dominant positions in the industry.

19. This change has been contributed to, in substantial part, by numerous mergers and acquisitions of textile mill products companies.

20. Since 1950, there has been a substantial increase in concentration in the textile mill products industry in the United States which has been effectuated by the consolidation of all sizes and types of concerns in that industry.

22. In 1963, the year after the acquisition of Erwin, Burlington continued to rank first in the textile mill products industry in the United States with net sales of approximately $1,085,000,000.

VI

Adverse Competitive Effects

23. The effect of the acquisition by Burlington of Erwin may be substantially to lessen competition or to tend to create a monopoly in the textile mill products industry in the United States, in the following ways, among others:

(a) Actual competition between Burlington and Erwin has been eliminated.

(b) Potential competition between Burlington and Erwin has been eliminated.

(c) A substantial independent factor has been eliminated.

(d) Competitive advantages over other members of the industry have been increased substantially.

(e) Concentration has been increased substantially.

(f) Barriers to entry have been increased substantially.

(g) The structure of the industry has been altered to the actual or potential detriment of a substantial segment of the industry.

(h) A serious trend toward concentration through merger by industry segments may be accelerated.

VII

The Violation Charged

24. The acquisition by Burlington of the stock of Erwin constitutes a violation of Section 7 of the Clayton Act, as amended (15 U.S.C. Section 18).

SEPARATE STATEMENT

JANUARY 2, 1969

BY MACINTYRE, *Commissioner:*

Commissioner MacIntyre noted for the attention of all concerned that the Commission's consideration of guidelines for the textile industry will receive further consideration of the Commission on January 22, 1969.

DISSENTING STATEMENT

JANUARY 2, 1969

BY JONES, *Commissioner*:

By acceptance of the consent order in this case the Commission has apparently concluded that Burlington's acquisition of Erwin Mills violates Section 7 of the Clayton Act, but that the anticompetitive consequences of this acquisition are not sufficient to require divestiture.

Yet the Commission has simultaneously concluded that concentration in the textile mill products industry which has resulted from the "large number of horizontal, vertical and product extension mergers undertaken by the leading firms" has become sufficiently anticompetitive to warrant what amounts to the imposition of a virtual ban on all future mergers in this industry at least when engaged in by the top four and perhaps by the top eight firms.[1]

[1] The Commission's guidelines identify the mergers which will be "examined" by the Commission. These include mergers between companies whose combined sales or assets exceed $300 million and for which the sales or assets of the smaller firm exceed $10 million. Also identified by the guidelines are those mergers in which the combined firms rank among the top four in the industry or have a combined market share in excess of 5 percent of any submarket in which the top four firms account for 35 percent.

The Commission asserted in its guideline statement that the concentration with which it is so concerned has been triggered by the acquisitions of the top four firms in the industry and to some extent by the top eight, establishing in turn, an increasing size disparity between the leading firms and other members of the industry. The Commission also asserted that the firms making the acquisitions have principally been those which have both the production and marketing knowhow and the resources necessary to enter industries by internal expansion. If the mergers described in the guidelines will give rise to possible anticompetitive consequences in the future when engaged in by the rest of the industry, all of whom rank well below Burlington in asset and sales value, I cannot understand how the Commission can conclude that identical mergers entered into by Burlington during the past decade do not also give rise to anticompetitive consequences or to the likelihood of such consequences.

Throughout the last decade Burlington has had assets in excess of the guideline criterion of $300 million. Indeed its industry sales reached $1.3 billion for the year ending in October 1966 while its nearest competitor's sales were $805 million. At least six acquisitions made by Burlington in the past ten years involved companies with assets in excess of $10 million and hence on asset value alone would currently require "examination" under the Commission's Textile guidelines.[2] Moreover, one of these acquisitions gave Burlington a combined market share of 15 percent, and two of them moved Burlington into a position as one of the top four firms in each of the markets in which the acquired companies were active.[3] Thus Burlington has made at least six mergers, two since 1960, which would violate the Commission's own guidelines.

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[2] Burlington's 1954 acquisition of Pacific Mills put together Pacific, a manufacturer of cotton, rayon, cotton synthetic blend fabrics, and woolen and worsted fabrics with 1953 sales of $121.2 million and assets of $79.1 million, with Burlington whose 1953 pre-acquisition assets were $300 million. Likewise its merger with Goodall-Sanford, also in 1954, added to Burlington's already guideline-"violating" asset figure of $300 million a firm which produced mohair-blended fabrics for men's, boys', and women's wear, as well as miscellaneous lines, and had 1954 assets and sales of $37.6 and $49.7 million respectively, well in excess of the $10 million guideline figure. Burlington's 1955 acquisition of Ely and Walker Dry Goods Company, a cotton fabrics manufacturer and dry goods seller, also "violates" the $300 million–$10 million guideline, as Burlington with pre-acquisition assets of $382 million (and sales much higher) acquired Ely and Walker which had 1954 sales of $117.4 million and assets of $82.1 million. Burlington's 1962 acquisitions of Fabrex Corp., a textile fabric converter, "violates" the $10 million acquired firm guideline as Fabrex had 1961 sales of $35.5 million.

[3] The James Lees merger gave Burlington 8.7 percent of a market in which it had previously enjoyed 1.75 percent, with top four industry concentration over 35 percent. The Erwin Mills Co. merger gave Burlington a 15 percent market share in an industry where the top four accounted for 55 percent of total 1963 sales.

It of course could be argued that these Burlington acquisitions did not have the same serious anticompetitive consequences at the time they were consummated that they would have if consummated now in an industry whose competitive atmosphere has darkened through overall increased concentration. However, in fact in publishing its textile guidelines, the Commission described structural characteristics which fit the Burlington acquisitions perfectly and, by positing that anticompetitive consequences are now likely to follow from such structural characteristics, has implicitly admitted that Burlington's past acquisitions are also *now* likely to have those same anticompetitive consequences. For example, the increased concentration in the overall textile mill products industry from 1958–1963 pointed out in the Commission's guideline statement indicates that the Fabrex, Lees and Erwin mergers (1960–62) took place in the self-same darkening atmosphere of increased concentration which posited the anticompetitive consequences which the Commission points to as constituting the major rationale for the industry guidelines.

Therefore, I cannot justify the Commission's apparently double enforcement standard being applied here—one standard for Burlington and another for the balance of the industry. There are seven other companies in this industry whose sales exceed $300 million and whose mergers therefore will automatically be "examined" under the guideline criterion of size alone. To be safe, each of these companies must now plan its future expansion programs in terms of internal growth. Yet Burlington who ranks first in the industry is permitted by the Commission to keep the fruits of its merger expansion program by means of which it was enabled to become number one in the industry.

I realize that whenever the Commission determines that concentration in a given industry is showing anticompetitive potential, an attempt to deflect or arrest its future enhancement will have some inequitable impact as between those mergers already accomplished which contributed to the creation of the anticompetitive situation and those still in the planning stage or even as yet uncontemplated. Nevertheless, to validate past mergers of the number one company in an industry and foreclose the merger path to growth on the part of its competitors strikes me as unfair and unjustified.

If the Commission's guidelines represent sound policy, then it seems to me that Burlington's acquisitions described above should have been challenged and divestiture sought. Instead the

Commission here accepts a consent order which forecloses the possibility of definitely determining this anticompetitive issue and at the same time issues guidelines which foreclose comparable acquisitions on the part of Burlington's competitors. It is this type of inconsistency in the enforcement of the antitrust laws which renders compliance with them so difficult. Business is entitled to some degree of certainty and predictability. This cannot be achieved unless enforcement action is consistent, equitable and intelligent.

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Restraint of Trade proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of Section 7 of the Clayton Act, as amended; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34 (b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Burlington Industries, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 301 North Eugene Street, in the city of Greensboro, State of North Carolina 27420.

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

ORDER

I

It is ordered, That, for the purposes of this Order, the following definitions shall apply:

(a) "Textile Mill Product Corporation" means any corporation which at any stage processes, dyes, finishes, treats, fabricates, or manufactures one or more of the following named products: (1) yarn, (2) thread, (3) braids, (4) twine, (5) cordage, (6) broad woven fabric (fabric over 12 inches in width), (7) narrow woven fabric (fabric of 12 inches or less in width), (8) knit fabric, (9) carpet and rugs, (10) felt goods, (11) lace goods, (12) bonded fabrics, or (13) miscellaneous products manufactured from fiber by knitting, weaving, braiding or tufting. In addition, the definition of "Textile Mill Product Corporation" shall include any corporation which buys one or more of the aforesaid products in the gray, has such products finished on contract, and sells such products to purchasers other than end-users, such type of business operations being hereinafter referred to as "converting."

(b) "Textile Mill Product Assets" means assets, rights and privileges, tangible or intangible (other than non-exclusive licenses), including, but not restricted to, properties (other than real property, the disposition of which does not affect the continuation by the seller of the business in which such real property was used), plants machinery or equipment (other than machinery or equipment, the disposition of which does not affect the continuation by the seller of the business in which such machinery or equipment was used), inventories (other than products regularly and customarily purchased and sold in the ordinary course of business), contract rights, trade-marks, trade names or goodwill, of any person, partnership or corporation which are located, or have been located, in the United States or which are used in the United States, or which have been used in the United States, directly or indirectly, in or in connection with the processing, dyeing, finishing, treating, fabricating, manufacturing, or "converting" of one or more of the following named products: (1) yarn, (2) thread, (3) braids, (4) twine, (5) cordage, (6) broad woven fabric (fabric over 12 inches in width), (7) narrow woven fabric (fabric of 12 inches or less in width), (8) knit fabric, (9) carpet and rugs, (10) felt goods, (11) lace goods, (12) bonded fabrics, or (13) miscellaneous products manufactured from fiber by knitting, weaving, braiding or tufting.

II

It is further ordered, That, for a period of ten (10) years following the effective date of this order, Burlington Industries, Inc., shall cease and desist from acquiring directly or indirectly, through subsidiaries or otherwise, without the prior approval of the Commission the whole or any part of the stock or other share capital of any Textile Mill Product Corporation doing business in the United States and shall cease and desist from acquiring, directly or indirectly, through subsidiaries or otherwise, without the prior approval of the Commission any Textile Mill Product Assets. As used in this Paragraph, the acquisition of Textile Mill Product Assets includes any arrangement by respondent with any other party, pursuant to which such other party discontinues manufacturing any Textile Mill Products under a brand name or label owned by such other party and thereafter distributes any of said products under any of respondent's brand names or labels.

III

It is further ordered, That within sixty (60) days after the effective date of this Order and at such further times as the Commission may require Burlington Industries, Inc., shall submit written reports to the Federal Trade Commission setting forth in detail the manner and form in which it intends to comply, is complying, or has complied with this order.

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

IN THE MATTER OF

AUTOMATION MACHINE TRAINING CENTER, INC., ET AL.

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

Docket C-1474. Complaint, Jan. 6, 1969—Decision, Jan. 6, 1969

Consent order requiring a Kansas City, Mo., data processing school to cease falsely representing the employment opportunities of its enrollees, the financial assistance and refund provisions afforded, that it operates dormitories, and that it teaches computer programming.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Automation Machine Training Center, Inc., a corporation, and Emmett R. Davis, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Automation Machine Training Center, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its principal office and place of business located at 611 West 39th Street, Kansas City, Missouri.

Respondent Emmett R. Davis is an individual and an officer of said corporation. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and have been for more than three years last past, engaged in the offering for sale, sale and distribution of courses of instruction intended to prepare students thereof for employment in various positions in the field of electronic data processing. Said courses are pursued by correspondence through the United States mails and by resident training at respondents' place of business in Kansas City, Missouri.

PAR. 3. In the course and conduct of their business as aforesaid, respondents now cause, and for some time last past have caused, the correspondence portion of their courses, when sold, to be shipped from their place of business in the State of Missouri to purchasers thereof located in various other States of the United States. Respondents also receive from and transmit to such purchasers, contracts, checks and other instruments of a commercial nature pertinent to the sale of such courses. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said courses of instruction in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, as aforesaid, and for the purpose of inducing the purchase of their courses, respondents publish or have caused to be published, in newspapers distributed through the United States mails and by other means, advertisements respecting job offers, salaries and training.

Among and typical, but not all inclusive, of such advertisements are the following:

HELP
WANTED
IBM
AUTOMATION
SALARY $350–$750

SOLID SECURITY OPPORTUNITY FOR BOTH YOUNG MEN AND WOMEN . . . AGES 18–49.

Short Training period.
Send Your Name, Address,
Phone, Education Today to:
Director of IBM Automation Development,
Box 665 c/o Sedalia Democrat-Capital.

CAREER
OPPORTUNITY
IBM OPERATORS
SERIOUSLY NEEDED
$350–$700

This is a future in a big industry for men and women age 18–49. Short training period required; all inquiries acknowledged. Reply to Directive IBM Automation, Box No. 4, care of Aberdeen American-News, giving name, address, age and phone No.

YOUR KEY TO GREATER SUCCESS
BUSINESS — INDUSTRY — GOVERNMENT
URGENTLY NEED MEN & WOMEN
WITH

IBM Machine Training
in key punch, computers,
tab wiring & programming

Persons accepted can be trained in a program which need not interfere with their present job. If you qualify, training can be financed.
For FREE BOOKLET on your future in IBM DATA PROCESSING, write today. Please include age, address and home phone number.

A.M.T.C.
Director of Development

PAR. 5. By and through the use of the statements and representations appearing in the advertisements set forth in Paragraph Four hereof and various other statements and representations of similar import and meaning but not set forth herein, respondents represent, and have represented, directly or by implication, that:

1. Inquiries are being solicited for the purpose of offering employment to qualified applicants who will be trained to operate various machines manufactured or distributed by the International Business Machines Corporation (IBM);

2. By virtue of having received such training, persons will receive starting salaries of at least $350 per month;

3. The training offered includes computer programing.

PAR. 6. In truth and in fact:

1. Inquiries are solicited not for the purpose of offering employment; but for the purpose of obtaining leads to persons interested in purchasing respondents' courses.

2. Persons who complete courses offered by respondents do not by virtue of such training receive starting salaries of at least $350 per month.

3. Respondents do not offer training in computer programing.

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

PAR. 7. In the further course and conduct of their business, as aforesaid, respondents cause prospective purchasers of their courses to be visited by sales representatives who endeavor to sell and do sell respondents' said courses of instruction to said persons. For the purpose of inducing the sale of said courses, respondents' sales representatives make many statements and representations, directly and by implication, regarding said courses, both orally and by means of brochures and other printed material furnished by respondents and displayed to such persons.

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

1. Respondents have a placement service which guarantees and assures each graduate placement in a job for which he has been trained;

2. Graduates of respondents' course will be placed in jobs in the geographical area of their choice;

3. After the initial payment of respondents' courses is made, the remainder of the payments may be deferred until after the student has completed the course and obtained employment;

4. Respondents will provide part-time employment to assist students attending the resident training in making payments on the balance of their tuition;

5. Respondents own or supervise residence facilities for students attending the resident training portion of respondents' courses, and such residence facilities are within easy walking distance of respondents' school.

6. Interest free tuition loans are available which will enable the recipient thereof to pay the cost of respondents' courses in installments without any additional cost for that privilege.

7. Immediate employment is available to those students working on the correspondence portion of their courses if they will pay the balance of their tuition in full and attend the resident training as soon as possible.

8. Until a student has received written notification of the acceptance of his or her enrollment by respondents, the student may withdraw his or her enrollment and respondents will make a full refund of any money theretofore paid by or on behalf of said student.

9. Respondents will, at any time and upon request by or on behalf of an enrolled student who is unwilling or unable to complete respondents' course cancel said student's training contract and refund all money theretofore paid by or on behalf of said student.

PAR. 8. In truth and in fact:

1. Respondents do not have a placement service which guarantees or assures any graduate of placement in any job;

2. Graduates of respondents' courses are not placed in jobs in the geographical area of their choice;

3. Respondents do not permit students to defer the remainder of their payments until after the courses have been completed and employment obtained;

4. Respondents do not provide part-time employment to assist students attending the resident training in making payments on the balance of their tuition;

5. Respondents do not own or supervise any residence facilities for students attending the resident training, and such residence facilities as may be available are not within easy walking distance of the school;

6. Respondents do not provide loans of any kind. Although respondents may permit the cost of their courses to be paid in installments, the cost when paid in that manner is $70 more than the cost when paid in cash in full at the time of enrollment.

7. Immediate employment is not available to those students working on the correspondence portion of their courses if they will pay the balance of their tuition in full and attend the resident training as soon as possible. The real purpose of the representation is to induce the accelerated payment of outstanding tuition balances.

8. Respondents do not permit prospective students to withdraw their enrollment applications prior to receipt of written notification of acceptance of such enrollments and do not refund any money theretofore paid by or on behalf of said prospective students.

9. Respondents neither cancel the training contracts of enrolled students who are unwilling or unable to complete respondents' courses and request cancellation nor refund any money theretofore paid by or on behalf of said students.

Therefore, the statements and representations as set forth in Paragraph Seven hereof were, and are, false, misleading and deceptive.

PAR. 9. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been, and now are, in substantial competition, in commerce, with corporations firms and individuals engaged in the sale of courses of instruction covering the same or similar subjects.

PAR. 10. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices, has had, and now has, the tendency and capacity to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and to induce a substantial number thereof to purchase respondents' courses by reason of said erroneous and mistaken belief, and to make accelerated payment therefor.

PAR. 11. The aforesaid acts and practices of the respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

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

The Commission having considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Automation Machine Training Center, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business located at 611 West 39th Street, Kansas City, Missouri.

Respondent Emmett R. Davis is an officer of said corporation and his address is the same as that of said corporation.

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

ORDER

It is ordered, That respondents Automation Machine Training Center, Inc., a corporation, and its officers, and Emmett R. Davis, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of courses of study, training or instruction in the field of electronic data processing or any other subject in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication, that:

1. Inquiries are solicited for the purpose of offering employment to qualified applicants when the real purpose is to secure leads to prospective purchasers of respondents' courses.

2. Upon completion of respondents' courses and by virtue thereof, graduates will obtain employment with a starting salary of $350 per month or any other specific salary or range of salaries: *Provided, however,* It shall be a defense in any enforcement proceeding instituted hereunder for respondents to establish that the represented starting salary or salaries are typical of those obtained by such persons; or misrepresenting, in any manner, the earnings of persons completing respondents' courses.

3. Respondents offer training in computer programing; or misrepresenting, in any manner, the subjects covered by or the nature of respondents' courses.

4. Respondents guarantee or assure the placement of graduates in jobs for which they have been trained; or graduates will be placed in jobs in the geographical area of their choice; or misrepresenting, in any manner, respondents' efforts, ability or facilities for assisting graduates in obtaining employment.

5. After paying the initial enrollment or registration fee, a student or other party who has agreed to pay on behalf of the student the balance of the cost of respondents' courses, may defer the payment of such balance until after the student has completed the course and obtained employment; or respondents will provide part-time employment to assist students attending the resident training portion of respondents' courses in making payments on the balance of the cost of said courses; misrepresenting, in any manner, the arrangements which may be made to aid or assist students in paying the cost of respondents' courses.

6. While attending the resident training portion of respondents' courses, students will be assigned to dormitories or other residence facilities owned or supervised by respondents or that such facilities will be within easy walking distance of respondents' place of business; or misrepresenting, in any manner, the character or location of residence facilities available to respondents' students.

7. Respondents provide interest free tuition loans or that payment of the cost of respondents' courses in installments or by deferred payments will involve no interest or other costs in addition to the cash price of the course.

8. Immediate employment is available to persons upon completion of the payment of their tuition and attendance at the resident training portion of respondents' courses; or misrepresenting, in any manner, the availability of employment to persons completing respondents' courses.

9. Respondents will permit a prospective student to withdraw his or her enrollment application at any time prior to being notified in writing by respondents of the acceptance of his or her enrollment and respondents will make a full refund of money theretofore paid to respondents by or on behalf of said student: *Provided, however,* It shall be a defense in any enforcement proceedings instituted hereunder for respondents to establish that in every instance in which such a request for withdrawal of the enrollment application is made, respondents do permit such a withdrawal and do refund all

money theretofore paid respondents by or on behalf of said students.

10. Respondents will cancel any training contract or make any refund when requested to do so by or on behalf of a student who is unwilling or unable to complete respondents' course: *Provided, however,* That it shall be a defense in any enforcement proceedings instituted hereunder for respondents to establish that in every instance in which a request for cancellation or refund is made, respondents cancel the student's training contract and make the refund in conformity with the representation or representations made.

B. Failing to abide by and promptly fulfill all representations made to students or prospective students with respect to cancellation of contracts and granting of refunds.

C. Failing to deliver a copy of this order to all present and future salesmen or other persons engaged in the sale of respondents' courses and failing to secure from each salesman or person a signed statement acknowledging receipt of said order.

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

IN THE MATTER OF

WILLIAM GARLAND CHASTAIN DOING BUSINESS AS THE WASHINGTON SERVICE BUREAU

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

Docket C-1475. Complaint, Jan. 6, 1969—Decision, Jan. 6, 1969

Consent order requiring a Tucson, Ariz., seller of correspondence courses on Civil Service preparation to cease falsely representing that Civil Service examinations will be given in any particular area, that completion of his course will enable enrollee to obtain a designated position, that he will continue to train enrollee until job placement, and that he is affiliated with United States Government.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that William Garland Chastain, an individual doing business as The Washington Service Bureau, hereinafter referred to as the respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent William Garland Chastain is an individual doing business as The Washington Service Bureau, with his office and principal place of business located at 3201 North First Avenue, in the city of Tucson, State of Arizona. The individual respondent formulates, directs, and controls the acts and practices of the said business including those hereinafter set forth.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the sale and distribution of a course of study and instruction purporting to prepare purchasers thereof for United States Civil Service examinations and positions with the Unitied States Government. Said course is pursued by correspondence through the United States mail.

PAR. 3. In the course and conduct of his said business, respondent now causes, and for some time last past has caused, said course to be transported from his aforesaid place of business in the State of Arizona to purchasers thereof located in various other States of the United States, and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said course in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of his aforesaid business, for the purpose of inducing the purchase of his course, the respondent has made, and is now making, numerous statements and representations in advertising and promotional material and by and through the oral presentations of his salesmen respecting United States Civil Service examinations and positions, the kind, quality and duration of training and instruction afforded, selection of enrollees and connection with the United States Government.

Typical and illustrative of said statements and representations, contained in advertising and promotional material, but not all inclusive thereof, are the following:

(a) In newspaper advertisements:

MEN & WOMEN
URGENTLY NEEDED
to train for
U.S. CIVIL SERVICE
Examination
For Forestry, Border Patrol, Fish and Game, U.S. Clerks, etc.
For list of positions and salary, write
WASHINGTON
SERVICE BUREAU
c/o Independent Press-Telegram
Box W 4176

(b) In sales and promotional material:

Now is the most opportune time to start preparing—every day that you delay, you are making it that much harder on yourself. Don't wait until examinations are announced to decide. They are posted on short notice and we could not possibly give you adequate training in a few weeks.

* * * * * * *

The information presented in this folder is believed to be correct at time of printing but is subject to change by the United States Government.

* * * * * * *

Are the examinations difficult to pass? Not for one who prepares—by enrolling in a training such as ours.

(c) In enrollment agreement:

Your enrollment agreement entitles you to:

II SPECIAL STUDIES

If, upon completion of your course and taking your first Civil Service examinations, you do not receive a passing grade, or do not receive an appointment within six months after the completion of your course, you will receive additional preparatory material in the same subjects or specifically in those you feel you need special training, the subject to be selected by the student, provided that you takeup to two examinations within a period of six months after the completion of your course.

III TUITION SERVICE

Each set of lessons contains practice problems and one or more review tests. After completing the practice problems, you answer the questions in test and mail it to INSTRUCTION DEPARTMENT, P.O. Box 1549, Tucson, Arizona. A qualified instructor will review and grade your papers on lines similar to those used by government grading officers in grading actual Civil Service examinations. These graded papers will be returned to you with notes or suggestions, if the instructor feels that suggestions are called for.

PAR. 5. By and through the use of the above-quoted statements and representations, and others of similar import and meaning but not expressly set out herein, separately and in connection with the oral statements and representations of respondent's salesmen to prospective purchasers and purchasers of said course of instruction, the respondent has represented, and is now representing, directly or by implication, that:

1. Civil Service examinations are imminent for all of the positions listed in the brochure in the areas in which the advertisements set out in Paragraph Four are circulated.

2. The completion of the course of instruction offered by respondent will enable a person to pass the Civil Service examinations for the aforesaid positions and persons passing the examination are assured of obtaining United States Civil Service positions.

3. The respondent trains enrollees for the aforementioned position or positions of Border Patrol, Forester, Mail Clerk-Carrier and others.

4. The course is sold only to those who qualify.

5. The respondent will continue to instruct persons who have completed said course of instruction until they are appointed to a Civil Service position.

6. Respondent, his agents and representatives are connected with the United States Civil Service Commission or a branch thereof, or some other agency of the United States Government.

PAR. 6. In truth and in fact:

1. Civil Service examinations had not been announced for any of the positions listed in the brochure in many of the areas in which said advertisements were circulated.

2. The completion of the respondent's course of instruction enables few, if any persons, to pass the Civil Service examination for the aforementioned positions and not all persons who pass Civil Service examinations receive appointments to positions.

3. Respondent has only one general clerical course, and it does not train persons for the position of Border Patrol, Forester, Mail Clerk-Carrier or any particular position.

4. Respondent will sell said course to virtually anyone and has no requirement that any qualifications be met other than subscribing and paying for the course.

5. Respondent does not continue to instruct those who have completed the course of instruction until they have been appointed to a Civil Service position.

6. Respondent, his agents and representatives, are not connected with the United States Civil Service Commission, a branch thereof, or any other agency of the United States Government.

PAR. 7. In the course and conduct of his aforesaid business, and at all times mentioned herein, respondent has been, and now is, in substantial competition, in commerce, with corporations, firms and individuals in the sale of correspondence courses of the same general kind and nature as those sold by respondent.

PAR. 8. The use by respondent of the aforesaid false, misleading and deceptive statements, representations, and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were, and are, true and to induce a substantial number thereof to subscribe and to purchase said course of instruction.

PAR. 9. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent William Garland Chastain is an individual doing business as The Washington Service Bureau, with his office and principal place of business located at 3201 North First Avenue, Tucson, Arizona.

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

ORDER

It is ordered, That respondent William Garland Chastain, an individual doing business as The Washington Service Bureau or under any other trade name or names, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of any materials or course of instruction, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication, that:

(1) Civil Service examinations for particular positions have been announced or are about to be given in or for any geographical or United States Civil Service area: *Provided however,* That it shall be a defense in any enforcement proceeding instituted hereunder for respondent to establish that examinations actually have been announced or are about to be given in or for such area and adequate time remains for the filing of applications to participate in such examinations and to prepare to take such examinations.

(2) The completion of any series of materials or course of instruction will enable a person to pass the Civil Service examination for the position selected by such person.

(3) Persons completing said materials or course of instruction and passing a Civil Service examination are assured of or will obtain Civil Service positions.

(4) Respondent's materials or course of instruction provide training for Civil Service positions or desig-

nated Civil Service positions: *Provided however,* That it shall be a defense in any enforcement proceeding instituted hereunder for respondent to establish that solely by virtue of having completed said course persons are qualified and competent to discharge the duties and responsibilities of such position.

(5) Persons solicitied to purchase respondent's materials or course of instruction are examined or screened as to their qualifications for positions to be sought before they are permitted to purchase such materials or course; or that said materials or course are sold only to those who qualify for the particular Civil Service position covered thereby.

(6) Respondent will continue to train or instruct persons who have completed a purchased series of materials or course of instruction until they are appointed to a Civil Service position; or misrepresenting, in any manner, the extent or nature of instruction given to purchasers.

(7) Respondent is a part of or affiliated with the United States Government; or misrepresenting, in any manner, respondent's affiliation with or relation to any person or private or public corporation or organization.

B. Failing to deliver a copy of this order to all present and future salesmen or other persons engaged in the sale of respondent's course and to secure from each salesman or person a signed statement acknowledging receipt of said order.

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

IN THE MATTER OF

WALTER DAN CROSS DOING BUSINESS AS DELAWARE VALLEY SEWING CENTER

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

Docket C–1476. Complaint, Jan. 6, 1969—Decision, Jan. 6, 1969

Consent order requiring a Broomall, Pa., retailer of new and used sewing machines to cease using bait advertisements, fictitious pricing and savings claims, and deceptive guarantees in the sale of its merchandise.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Walter Dan Cross, an individual, formerly trading as Capitol Sewing Machine Sales of Delaware Valley, and now doing business as Delaware Valley Sewing Center, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Walter Dan Cross is an individual formerly trading as Capitol Sewing Machine Sales of Delaware Valley, and now doing business as Delaware Valley Sewing Center, with his office and principal place of business located at 2908 West Chester Pike, in the city of Broomall, State of Pennsylvania. He has also used the name Capitol Sewing Machine Credit Department.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribution of new and used sewing machines, sewing machine cabinets and related products to the public.

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

PAR. 4. In the course and conduct of his aforesaid business, and for the purpose of inducing the purchase of said products, respondent has made, and is now making, numerous statements and representations in the oral sales presentations by his salesmen to prospective purchasers and to purchasers and in advertisements inserted in newspapers of general circulation with respect to the kind, quality, prices, savings, guarantees and credits of his merchandise and the nature of his business.

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

A 1967 SINGER ZIG ZAG cabinet model slightly used. Fancy stitches, over casts, blind hems, dresses, wind bobbins automatically, makes buttonholes, sews on buttons. No attachments needed. 5 year parts and services guaranteed.
(BALANCE $53.20)
or terms of $5.10 per mo. Call Capitol Machine, Credit Dept. 658–2304 'TIL 9.

* * * * * * *

Sewing Machine 1967 Singer Console
Zig Zag slightly used, beautiful walnut cabinet, good condition, does everything without attachments (hems fancy stitches, buttonholes, monograms). Complete price $64.90 or assume payments of $6.25 monthly. For free home demo. call Capitol Sewing Machine credit manager til 9 p.m. 956–3314. If out of town call collect.

* * * * * * *

1966 Singer Zig-Zag. Cabinet Model 5 months old. Makes buttonholes, monograms, does fancy work with no attachments needed, blind hem stitches. 5 year parts and services.
UNPAID BALANCE—$66.20
or terms of $5.00 and $5.00 per month. Call Capitol Machine Credit Dept. 377–2184. Call until 9 p.m U.F.N.

PAR. 5. By and through the use of the above-quoted statements and representations, and others of similar import and meaning but not expressly set out herein, separately and in connection with oral statements and representations of his salesmen and representatives, respondent has represented, and is now representing, directly or by implication:

1. Through the use of the phrases and words "unpaid balance," "Balance," "assume payments" separately and in connection with the words "Credit Dept." and "credit manager" and other words and phrases of similar import, that sewing machines, partially paid for by a previous purchaser, have been repossessed and are being offered for sale for the unpaid balance of the purchase price.

2. That their principal business is that of lending money or providing credit to purchasers of merchandise, and buying, selling or otherwise dealing in commercial paper incident to the purchase of merchandise on credit.

3. That they are making a bona fide offer to sell repossessed sewing machines, as described in said advertisements, for reason of default in payment by the previous purchaser and on the terms and conditions stated.

4. Through the use of the phrases and words "cabinet," "cabinet model," "console model," and other words and phrases of

similar import, that purchase of the advertised sewing machine includes the cabinet.

5. That respondent's merchandise is being offered for sale at special or reduced prices, and that savings are thereby afforded to purchasers from respondent's regular selling prices.

6. That the advertised machines are guaranteed for 5 years and that the new Domestic sewing machines are guaranteed for 20 years without limitation or condition.

PAR. 6. In truth and in fact:

1. In most instances, said products are not repossessed sewing machines being offered for the unpaid balance of the original purchase price.

2. Respondent's principal business is not that of lending money or providing credit to purchasers of merchandise or of buying, selling or otherwise dealing in commercial paper incident to the purchase of merchandise on credit. Respondent is engaged in the business of retailing sewing machines and other products to the public.

3. Respondent is not making bona fide offers to sell repossessed sewing machines on the terms and conditions stated; but said offers are made for the purpose of obtaining leads as to persons interested in the purchase of sewing machines. After obtaining leads through response to said advertisements, respondent or his salesmen call upon such persons but make no effort to sell said advertised sewing machines. Instead, they exhibit sewing machines which are in such poor condition as to be unusable or undesirable, and disparage the advertised product to discourage its purchase, and attempt, and frequently do, sell much higher priced sewing machines.

4. In most instances, the purchase of the advertised sewing machine does not include the cabinet but only the sewing machine head.

5. Respondent's merchandise is not being offered for sale at special or reduced prices, and savings are not thereby afforded respondent's customers because of a reduction from respondent's regular selling prices. In fact, respondent does not have a regular selling price but the price at which respondent's merchandise is sold varies from customer to customer depending upon the resistance of the prospective purchaser.

6. Said advertised machines and new Domestic sewing machines are not unconditionally guaranteed in every respect without limitation or condition for a period of five or twenty years,

respectively. Such guarantees as may be furnished in connection therewith, are subject to numerous terms, conditions and limitations and fail to set forth the nature and extent of the guarantee, the identity of the guarantor and the manner in which the guarantor will perform thereunder.

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

PAR. 7. In the course and conduct of his aforesaid business and at all times mentioned herein, respondent has been and now is, in substantial competition, in commerce, with corporations, firms, and individuals engaged in the sale of sewing machines of the same general kind and nature as those sold by respondent.

PAR. 8. The use by respondent of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondent's products by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of the respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Walter Dan Cross is an individual formerly trading as Capitol Sewing Machine Sales of Delaware Valley, and now doing business as Delaware Valley Sewing Center, with his principal office and place of business located at 2908 West Chester Pike, Broomall, Pennsylvania.

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

ORDER

It is ordered, That respondent Walter Dan Cross, an individual, formerly trading as Capitol Sewing Machine Sales of Delaware Valley, and now doing business as Delaware Valley Sewing Center or under any other name or names, and respondent's agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of sewing machines, sewing machine cabinets and related products or other products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that sewing machines or other products have been repossessed or are being offered for sale for the unpaid balance of the original purchase price: *Provided, however,* That it shall be a defense in any enforcement proceeding instituted hereunder for respondent to establish that said advertised products actually were repossessed and offered for sale and sold for the balance of the unpaid purchase price.

2. Representing, directly or by implication, that respondent is engaged in the business of lending money or providing credit to purchasers of merchandise or of buying, selling or otherwise dealing in commercial paper incident to the purchase of merchandise on credit; or misrepresenting, in any manner, the nature or status of respondent's business.

3. Representing, directly or by implication, that any products are offered for sale when such offer is not a bona fide offer to sell said products on the terms and conditions stated; or using any sales plan or procedure involving the use of false, deceptive or misleading statements to obtain leads or prospects for the sale of other merchandise.

4. Advertising or offering any product for sale, unless the product shown or demonstrated to the prospective purchaser does in all respects conform to the representations and description thereof as contained in the advertisement or offer.

5. Disparaging, in any manner, or discouraging the purchase of any products advertised or displayed to prospective purchasers.

6. Representing, directly or by implication, that purchase of the advertised sewing machine includes a cabinet: *Provided, however,* That it shall be a defense in any enforcement proceeding instituted hereunder for respondent to establish that a cabinet was included with purchase of the advertised sewing machine whenever such representation was made.

7. Misrepresenting, in any manner, the number or kind of units or parts or items included in any offer.

8. Representing, directly or by implication, that any price for respondent's products is a special or reduced price, unless such price constitutes a significant reduction from an established selling price at which such products have been sold in substantial quantities by respondent in the recent regular course of his business; or misrepresenting, in any manner, that any savings or a stated amount of savings are available to purchasers.

9. Representing, directly or by implication, that respondent's products are guaranteed unless the nature, extent and duration of the guarantee, the identity of the guarantor, and the manner in which the guarantor will perform there-

under are clearly and conspicuously disclosed in immediate conjunction therewith.

10. Failing to deliver a copy of this order to cease and desist to all present and future salesmen or other persons engaged in the sale of respondent's products or services, and failing to secure from each such salesman or other person a signed statement acknowledging receipt of said order.

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

IN THE MATTER OF

MARQUETTE CEMENT MANUFACTURING COMPANY

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

*Docket 8685. Complaint, May 20, 1966—Decision, Jan. 7, 1969**

Order requiring the Nation's seventh largest manufacturer of portland cement with headquarters in Chicago, Ill., to divest itself of three affiliated ready-mixed concrete companies in the New York City area, which it acquired in 1964, and not to acquire any cement consumers for the next 10 years without prior approval of the Commission.

COMPLAINT**

The Federal Trade Commission, having reason to believe that the above-named respondent has violated the provisions of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. §§ 18, 45, and that a proceeding in respect thereof would be in the public interest, issues this complaint, stating its charges as follows:

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* Order staying effective date of final order and granting 30 days to reply to respondent's request to reopen record, issued April 1969.

Proceedings reopened and modified Sept. 8, 1969, 76 F.T.C. 361.

** Reported as amended by Hearing Examiner's order of June 26, 1967, by amending paragraphs 7, 8, and 10 of Part III, "so as to give effect to the fact that the acquisition by respondent of certain assets of Cooney Bros., Inc., also involved the assets of certain other companies controlled by the Cooney family, *viz,* Plaza Concrete Corporation and Mamaroneck Stone Corp."

I. DEFINITIONS

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

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

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

c. "The New York City Area" consists of the five boroughs of the city of New York and the New York Counties of Nassau, Suffolk and Westchester.

II. MARQUETTE CEMENT MANUFACTURING COMPANY

2. Marquette Cement Manufacturing Company, hereinafter referred to as "Marquette," is a corporation organized and existing under the laws of the State of Illinois with its principal offices located at 20 North Wacker Drive, Chicago, Illinois.

3. Marquette, the seventh largest portland cement manufacturing company in the United States, operates twelve portland cement manufacturing plants and twenty distribution terminals located in eighteen different States. In 1964, Marquette had sales of approximately $80 million, assets of about $148 million and net income of about $7.3 million.

4. In the State of New York, Marquette presently operates a portland cement manufacturing plant at Catskill and a distribution terminal at Flushing; a second manufacturing plant at Howes Cave was sold during 1964. The total shipments of portland cement from these two plants, in 1964, amounted to approximately 1.6 million barrels; about 405,000 barrels, or approximately 25 percent, were shipped to customers located in the New York City Area.

5. Marquette, through its wholly owned subsidiary, Lawrence Concrete Corporation, is engaged in the production and sale of ready-mixed concrete in the New York City Area. In 1964, the total shipments of ready-mixed concrete by this subsidiary amounted to over 50,000 cubic yards.

6. Marquette is and for many years has been engaged in the shipment of portland cement across State lines. Marquette is

engaged in commerce, as "commerce" is defined in the Clayton Act.

III. COONEY BROS., INC., PLAZA CONCRETE CORPORATION, AND MAMARONECK STONE CORP.

7. Cooney Bros., Inc., Plaza Concrete Corporation and Mamaroneck Stone Corp. (hereinafter collectively called "Cooney") were each corporations organized and existing under the laws of the State of New York, each having its principal office and place of business at 129 Main Street, Tarrytown, New York. The above three corporations were each owned and operated by the same members of the Cooney family.

8. At the time of the acquisition, Cooney was engaged in the production and sale of ready-mixed concrete in the New York City Area. A substantial amount of such production and sales was in the Westchester County portion of the New York City Area. At the time of the acquisition, Cooney operated seven ready-mixed concrete plants, of which Cooney Bros., Inc., operated five, and Plaza Concrete Corporation and Mamaroneck Stone Corp. each operated one such plant. In 1964, Cooney constituted the sixth or seventh largest producer of ready-mixed concrete in the New York City Area. In 1964, Cooney made the following sales of ready-mixed concrete:

	Cubic yds	*Dollar value*
Cooney Bros., Inc.	135,377	$2,263,993.13
Plaza Concrete Corp.	59,221	1,020,150.52
Mamaroneck Stone Corp.	35,243	573,307.74
Total	229,841	$3,857,451.39

In 1964, Cooney consumed the following amounts of cement:

	Barrels
Cooney Bros., Inc.	163,084.97
Plaza Concrete Corp.	70,642.32
Mamaroneck Stone Corp.	36,487.52
Total	270,214.81

9. Cooney was, at the time of the acquisition, engaged in commerce, as "commerce" is defined in the Clayton Act.

IV. THE ACQUISITION

10. On or about November 16, 1964, Marquette through its wholly owned subsidiary, Lawrence Concrete Corporation, acquired the ready-mixed concrete assets of Cooney, as well as assets of other related corporations owned by the Cooney family, for a total consideration of about $2.2 million. The acquisition of

Cooney by Marquette was an act or practice in commerce within the meaning of the Federal Trade Commission Act.

V. NATURE OF TRADE AND COMMERCE

11. Portland cement is a material which in the presence of water binds aggregates, such as sand and gravel, into concrete. Portland cement is an essential ingredient in the production of ready-mixed concrete. There is no practical substitute for portland cement in the production of concrete.

12. The portland cement industry in the United States is substantial. In 1964, there were about 52 cement companies in the United States operating approximately 181 plants. Total shipments of portland cement in that year amounted to approximately 365 million barrels, valued at about $1.1 billion.

13. Cement manufacturers sell their portland cement to consumers such as ready-mixed concrete companies, concrete products companies, and to contractors and building materials dealers. However, on a national basis, approximately 57 percent of all portland cement is shipped to firms engaged in the production and sale of ready-mixed concrete.

14. In recent years, there has been a significant trend of mergers and acquisitions by which ready-mixed concrete companies in major metropolitan markets in various portions of the United States have become integrated with portland cement companies. Since 1959, there have been at least 35 such acquisitions.

15. In the New York City Area the trend toward vertical integration is well advanced. The acquisition of Cooney is the fourth acquisition of a substantial portland cement consumer by a portland cement manufacturer in this area since 1959. More than 20 percent of the market for portland cement in the New York City Area has been potentially foreclosed as a result of vertical acquisitions.

16. Each vertical merger or acquisition which occurs in the portland cement industry potentially forecloses cement manufacturers from a segment of the market otherwise open to them and places great pressure on competing manufacturers likewise to acquire portland cement consumers in order to protect their markets. Thus, each such vertical acquisition may form an integral part of a chain reaction of such acquisitions—contributing both to the share of the market already foreclosed, and to the impetus for further such acquisitions.

VI. VIOLATION OF SECTION 7

17. The effect of the acquisition of Cooney by Marquette, both in itself and by aggravating the trend of vertical mergers and acquisitions, may be substantially to lessen competition or to tend to create a monopoly in the manufacture and sale of portland cement and ready-mixed concrete in the United States as a whole and various parts thereof, including the State of New York and the New York City Area, in the following ways, among others:

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

b. The ability of Marquette's non-integrated competitors effectively to compete in the sale of portland cement and ready-mixed concrete have been and/or may be substantially impaired.

c. The entry of new portland cement and ready-mixed concrete competitors may have been and/or may be inhibited or prevented.

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

Now therefore, the acquisition of Cooney by Marquette is in violation of Section 7 of the Clayton Act, as amended, and constitutes an unfair act or practice in commerce in violation of Section 5 of the Federal Trade Commission Act.

Mr. Alan C. Schneeberger, Mr. A. Roy Lavik, and *Mr. Thomas W. Farquhar* supporting the complaint.

Norman, Engelhardt, Franke & Lauritzen, by *Mr. Ralph Miller* and *Mr. William P. O'Keefe* of Chicago, Illinois, for respondent.

INITIAL DECISION BY JOHN LEWIS, HEARING EXAMINER

FEBRUARY 27, 1968

INDEX

FINDINGS OF FACT—Continued

STATEMENT OF PROCEEDINGS

The Federal Trade Commission issued its complaint against the above-named respondent on May 20, 1966, charging it with having violated Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, by the acquisition, on or about November 16, 1964, through its wholly owned subsidiary, Lawrence Concrete Corporation, of the ready-mixed concrete portion of the assets of Cooney Bros., Inc., a company principally engaged in the production and sale of ready-mixed concrete in the Westchester County portion of the New York City area.

Following service of said complaint upon it, respondent moved for the dismissal thereof or, in the alternative, to stay all further proceedings on the grounds that, (1) complaints in two other proceedings involving acquisitions of ready-mixed concrete producers in the same market area had been dismissed after hearing by the examiner, and (2) the Commission was then conducting an industrywide hearing on vertical integration in the cement industry. Said motion was denied by the examiner, by order dated July 11, 1966. However, by order issued July 27, 1966, the Commission granted, in part, respondent's request for permission to file an interlocutory appeal on the question of the alleged unfairness arising from the Commission's conduct of hearings in the cement industry while this adjudicative proceeding was pending. The Commission's order also provided for a stay of all proceedings before the examiner in this matter until further order by it. Following the completion of its industrywide hearing, and the issuance of its statement of "Enforcement Policy With Respect To Vertical Mergers In The Cement Industry," the Commission, by order issued February 6, 1967, denied respondent's interlocutory appeal and remanded this proceeding back to the hearing examiner.

Respondent thereafter filed its answer on March 20, 1967, in which it admitted making the challenged acquisition, but denied that such acquisition was made in violation of law, as charged. Upon joint motion and stipulation of the parties, the complaint and answer were amended by order of the examiner, dated June 26, 1967, so as to give effect to the fact that the acquisition by respondent of certain assets of Cooney Bros., Inc., also involved the assets of certain other companies controlled by the Cooney family, *viz*, Plaza Concrete Corporation and Mamaroneck Stone

Corp. Prehearing conferences were convened herein in Washington, D.C., on April 7, June 7, and July 25, 1967, at which there was some definition and narrowing of issues, and at which substantially all Government exhibits were marked for identification and received in evidence. The parties also reached agreement on a stipulation incorporating into the record of this proceeding various portions of the findings of the examiner in his initial decision in *United States Steel Corporation,* Docket No. 8655 [71 F.T.C. at 399]. The transcripts of said conferences were, by agreement of the parties, made a part of the public record, and the results of said conferences were embodied in the examiner's Prehearing Orders Nos. 1 to 3.

Hearings for the reception of testimony and other evidence were held in New York, New York, and Washington, D.C., between September 25, 1967, and October 2, 1967. All parties were represented by counsel, participated in the hearings, and were afforded full opportunity to be heard and to examine and cross-examine witnesses. At the close of all the evidence, and pursuant to leave granted by the undersigned, proposed findings of fact and conclusions of law, together with supporting briefs, were filed by the parties on December 1, 1967, and replies thereto were filed on December 14, 1967.

After having carefully reviewed the evidence in this proceeding and the proposed findings and conclusions submitted by the parties,[1] and based on the entire record, including his observation of the witnesses, the undersigned makes the following:

FINDINGS OF FACT [2]

I. Identity and Business of Respondent and Acquired Companies

A. *The Respondent*

1. Marquette Cement Manufacturing Company (sometimes referred to herein as "Marquette"), is a corporation organized and

[1] Proposed findings not herein adopted, either in the form proposed or in substance, are rejected as not supported by the evidence or as involving immaterial matters. References to proposed findings and briefs are made with the following abbreviations: "CPF" (for complaint counsel's proposed findings); "RPF" (for respondent's proposed findings); "CB" (for complaint counsel's brief); "RB" (for respondent's brief); "CR" (for complaint counsel's reply); and "RR" (for respondent's reply).

[2] References are hereinafter made to certain portions of the record in support of particular findings. Such references are to the principal portions of the record relied upon by the examiner, but are not intended as an exhaustive compendium of the portions of the record reviewed and relied upon by him. The following abbreviations are used in referring to the record: "Tr." (for transcript of testimony), "CX" (for complaint counsel's exhibits), "RX" (for respondent's exhibits), and "PHO" (for examiner's prehearing orders).

existing under the laws of the State of Illinois, with its principal office located at 20 North Wacker Drive, Chicago, Illinois (Adm., Ans., par. 2; PHO No. 1, par. 2).

2. Marquette is principally engaged in the manufacture of portland cement. It is the seventh or eighth largest portland cement manufacturing company in the United States. In 1964 it operated 12 portland cement manufacturing plants and 20 distribution terminals located in 18 different States (Adm., Ans., par. 3; PHO No. 1, par. 3). As of 1965, it distributed its products in 29 States (CX 18, p. 1). In the years 1962 to 1966 its net sales and net income were as follows (CX 17, p. 19; CX 19, p. 6):

Year	*Net Sales*	*Net Income*
1962	$82,021,366	$9,560,592
1963	79,086,700	8,807,619
1964	79,972,832	7,303,553
1965	83,295,163	5,894,447
1966	83,832,126	2,851,307

3. In New York State, Marquette presently operates a portland cement manufacturing plant at Catskill, New York, and a distribution terminal at Flushing, Queens, New York (Adm., Ans., par. 4). The Catskill plant has been operated by Marquette since 1961, when it took over operation of the plant as a result of its acquisition of North American Cement Company. Prior to 1961 Marquette did not operate any plants in the Northeastern United States (Tr. 533–534). Beginning in 1964, Marquette undertook a modernization and expansion of the Catskill plant, which resulted in closing some of the kilns, and it purchased substantial quantities of cement from other cement companies to fill the requirements of its own customers. During 1964 Marquette shipped 1,940,598 barrels of cement, both manufactured by it or purchased from other cement companies, to customers located in the Northeastern United States. Of this amount 405,530 barrels or 20.9% was shipped to customers in the New York metropolitan area (Adm., Ans., par. 4; CX 22–A, 102–A, 103).

B. *Lawrence Concrete Corporation*

4. In 1964 Marquette organized Lawrence Concrete Corporation (sometimes referred to herein as "Lawrence"), as a wholly owned subsidiary, to conduct business as a ready-mixed concrete producer. Lawrence was incorporated under the laws of Delaware on June 11, 1964, with its office and principal place of business

at Whitestone, Queens, New York. Two of Lawrence's three directors were also directors of respondent. The site and ready-mixed concrete equipment used by Lawrence in its business were leased from a bankrupt ready-mixed concrete producer. Lawrence began the sale of ready-mixed concrete on August 4, 1964, and undertook to serve adjacent areas of New York City and western Nassau County (CX 20 A, C–D; Tr. 504).

C. *The Cooney Companies*

5. On November 16, 1964, Lawrence, acting with the approval and financial assistance of Marquette, acquired certain of the assets of three corporations controlled by members of the Cooney family. These were Cooney Bros., Inc., Plaza Concrete Corporation, and Mamaroneck Stone Corp., each of which was engaged in the production and sale of ready-mixed concrete. At the time of the acquisition, the Cooney interests owned seven ready-mixed concrete plants, of which four were located in Westchester County (at Tarrytown, Verplanck, Mamaroneck, and Yonkers), two in Orange County (at Pellets Island and Newburgh), and one in Broome County (at Binghamton). The Pellets Island plant was not in operation due to insufficient demand, and the Binghamton plant served only a single highway project. The sales area of the Cooney companies consisted of Orange and Broome Counties outside of the New York City metropolitan area (sometimes referred to herein as the NYMA), and Westchester and Bronx Counties within the New York City metropolitan area (CX 20 B–C, 25 A–D; Adm., Amended Ans., par. 7, 8).

6. Prior to their acquisition, the three Cooney companies were the fifth or sixth largest consumers of portland cement, among ready-mixed concrete companies, in the NYMA (CX 105–A). Set forth below is a table showing the purchases of portland cement, for the period 1962–1966, by the Cooney companies (up to 1964), and by the Cooney plants acquired by Lawrence (after 1964). Such table reflects both the total purchases of cement by these plants and the portion thereof consumed by the plants located in the NYMA (CX 29–32):

Purchases of Portland Cement by Cooney Companies or Plants

	Total no. bbl. purchased	*No. bbl. consumed in NYMA*
1962	295,100	235,429
1963	262,162	207,046
1964	270,214	208,008
1965	349,664	244,997
1966	428,687	268,293

7. The Cooney companies, as a group, operated at a profit in only one of the three years prior to the acquisition of their assets by Lawrence. Set forth below is a table reflecting the net sales and net income (or loss) of the Cooney companies for the fiscal years 1962 to 1964 (RX 29):

Net Sales and Income of Cooney Companies

	Sales	*Income (loss)*
1962	$8,175,045	($85,671)
1963	8,974,121	(24,885)
1964	7,662,552	192,611

8. The net sales and income of the Lawrence operations, which began in August 1964, including those derived from the operation of the Cooney plants after November 16, 1964, are set forth in the table below (RX 29):

Net Sales and Income of Lawrence

	Sales	*Income (loss)*
1964	$988,073	($104,698)
1965	7,913,488	(47,642)
1966	8,686,567	(721,472)

9. For some years prior to, and at the time of, the acquisition of their assets, the Cooney companies made substantial purchases of portland cement from sources located outside the State of New York, and such purchases were shipped to the Cooney companies from points outside the State of New York (CX 29–31). During 1962 to 1964, the Cooney companies sold all of the ready-mixed concrete manufactured by them within the State of New York (CX 25 A–B).

II. The Acquisition

A. *Events Leading to Acquisition*

10. During the period from 1962 to 1964, Marquette suffered a substantial drop in its sales of cement in the NYMA, from 780,970 barrels in 1962 to 405,530 barrels in 1964. This drop of over 375,000 barrels was due largely to a decline in sales to its principal customer, Colonial Sand & Stone Co., Inc., from 404,027 barrels in 1962 to 87,621 barrels in 1964. Colonial, which was not originally in the cement business, erected its first cement plant in 1959 and, as a result of a doubling of its productive capacity in 1963, had become three-fourths self-sufficient by 1964. During the period 1962–64, Marquette also sustained a substantial loss of sales to another large customer, Certified Industries, Inc., which was acquired by Universal Atlas Cement

Division of United States Steel Corporation in early 1964. Marquette's sales to Certified declined from a peak of 145,884 barrels in 1962 to 5,830 barrels in 1964 (CX 21; Stip., par. 90, 94, 109; Tr. 107–108, 113).

11. Since it felt that its loss of market position was due in large part to the growth of vertical integration in the NYMA, particularly on the part of Colonial Sand & Stone Co., Inc., Marquette decided to enter the ready-mixed concrete business itself. Its first effort in this direction was the formation of Lawrence Concrete Corporation in June 1964. As the successor of a bankrupt ready-mixed concrete producer, Lawrence was a very minor consumer of cement, purchasing only 24,000 barrels of cement during the period from August to December 1964. Consequently, when Marquette learned that the Cooney organization's ready-mixed concrete business might be for sale, it authorized Lawrence to enter into negotiations with the Cooney representatives (Tr. 503–505; CX 20–E, H, I).

12. The Cooney organization consisted of six or seven separate corporations, of which three were in the ready-mixed concrete business and the balance were in such other businesses as the manufacture of concrete blocks, the operation of asphalt producing plants, asphalt pavement contracting, and the installation of underground electric and telephone lines, gas mains, storm drains, and water mains. The founder and principal owner of these operations, Frank D. Cooney, died on March 2, 1964. Due to the lesser profitability of the ready-mixed concrete operations as compared to the balance of their business, financial pressures stemming from estate taxes and other estate financial needs, labor problems in the ready-mix operations, lack of sufficient executive personnel, and concern with their ability to compete with the larger, vertically integrated ready-mixed concrete producers, the Cooney family was interested in disposing of the ready-mixed concrete portion of their business (CX 25 C–D; RX 1).

B. *The Cooney Acquisition*

13. Negotiations for the acquisition of the Cooney family's ready-mixed concrete interests were begun on or about August 18, 1964, and was concluded on November 16, 1964, with the sale of certain of the assets of Cooney Bros., Inc., Plaza Concrete Corporation, Mamaroneck Stone Corp., and several other Cooney-controlled corporations which owned or leased trucks

and other equipment devoted to the ready-mixed concrete business. The transfer involved the Cooney family's interest in the seven ready-mix plants previously referred to and in a number of motor vehicles, including 92 ready-mix trucks owned or leased by the Cooneys. The total consideration paid was $2,155,943, of which $805,943 involved a cash payment advanced to Lawrence by Marquette, and the balance of $1,350,000 was represented by notes of Lawrence, for which Marquette made the necessary financing arrangements. The transaction also involved the employment of several members of the Cooney family by Lawrence in an executive capacity for a period of three to five years (CX 20 B–C, 33, 34, 36, 39, 40, 79, 80).

14. Following the acquisition of the Cooney ready-mixed concrete interests by Lawrence, the three Cooney companies, Cooney Bros., Inc., Plaza Concrete Corporation, and Mamaroneck Stone Corp. ceased to operate as separate corporate entities and became part of Lawrence Concrete Corporation. In addition to its own plant at Whitestone (Corona), Lawrence took over the operation of the former Cooney plants at Newburgh, Tarrytown, Verplanck, and Mamaroneck. It ceased operation of the latter plant in May 1967, when it sold the site to the city of Mamaroneck. Lawrence never put into operation four former Cooney portable plants located at Stilesville, Pellets Island and Peekskill (CX 20 C–B, 22–B; Tr. 517).

III. Market Conditions

A. *The Product Markets*

1. *Portland Cement*

15. "Portland Cement" is a material which in the presence of water binds aggregates, such as sand and gravel, into concrete. For purposes of this proceeding, it includes Types I through V of "portland cement," as specified by the American Society for Testing Materials. It does not include masonry or white cement. Portland cement is an essential ingredient in the manufacture of ready-mixed concrete. There is no practical substitute for portland cement in the manufacture of concrete (Adm., Ans., par. 1, 11; PHO No. 1, par. 1, 11).

2. *Ready-Mixed Concrete*

16. "Ready-Mixed Concrete" is a material which is processed from portland cement and aggregates, and is delivered to purchasers in a plastic and unhardened state. It includes central-

mixed concrete, shrink-mixed concrete and transit-mixed concrete (Adm., Ans., par. 1; PHO No. 1, par. 1).

B. *The Industries*

1. *Portland Cement*

Customers

17. Portland cement is sold to (a) producers of ready-mixed concrete, (b) manufacturers of concrete products, (c) building material dealers and (d) construction contractors. Cement companies, as a rule, depend on a large number of such customers as outlets for the production of their manufacturing plants (Stip., par. 61; Tr. 98).

18. Firms engaged in the production of ready-mixed concrete are the principal customers for portland cement. In 1964, ready-mixed concrete producers consumed over 215 million barrels of portland cement and accounted for approximately 59% of total industry shipments. In 1965, ready-mixed concrete producers consumed about 221 million barrels of portland cement and accounted for approximately 59.1% of total industry shipments. In the Northeastern part of the United States (which includes plants in the area from New York State to Maine), shipments to ready-mixed concrete customers accounted for over 65% of the total shipments from that area (Stip., par. 62; Tr. 98).

Structure

19. In 1964, the portland cement industry in the United States consisted of 51 companies operating 181 manufacturing plants. In that year, total shipments of portland cement by such plants amounted to 366,304,000 barrels, having a value of approximately $1.2 billion. In 1965, the portland cement industry's 181 manufacturing plants shipped a total of 374,086,000 barrels valued at about $1.2 billion. Imports of foreign cement into the United States amounted to 3,633,000 and 5,505,000 barrels in 1964 and 1965, respectively (Stip., par. 63; Tr. 98–99; CX 14, pp. 4, 17).

20. In recent years, the cement industry has operated with substantial excess capacity. In the years 1963 to 1965, the percent of capacity utilized by cement companies in the United States was 73.8%, 76.9%, and 77%, respectively (Stip., par. 64; Tr. 99; CX 14, p. 7).

21. While the degree of concentration in the cement industry in the United States is substantial, it does not appear to be excessively high in comparison to other manufacturing industries. Although the degree of concentration increased somewhat

between 1947 and 1958, there was a decline in concentration in 1963 (the latest year for which there are data available in the record), in terms of the four largest and eight largest companies. Set forth below is a table reflecting concentration ratios in the United States for the years 1947, 1958, and 1963 (CX 98):

Concentration Ratios in Cement Industry

	Percent of value of shipments accounted for by—		
	4 largest companies	*8 largest companies*	*20 largest companies*
1947	30	45	70
1958	32	50	78
1963	29	49	82

22. In recent years there have been a substantial number of mergers or acquisitions in the cement industry. During the period from 1956 to 1963, there were 25 acquisitions of cement companies by other companies, most of the acquiring companies being cement producers. During the same period only 10 new companies entered the cement industry. Since 1963, there have been six additional entrants into the industry. In 1963, there were 55 cement manufacturing companies in the United States, as compared to 62 in 1958, 67 in 1954, and 73 in 1947 (CX 100, 101, 98; RX 25).

23. Prior to 1959 there were relatively few ready-mixed concrete companies which were affiliated with cement companies. Only four ready-mixed concrete producers had been acquired by a cement company prior to 1959. During the period from 1959 to 1965, there were over 30 acquisitions of ready-mix firms by cement companies in the United States (Stip., par. 67; Tr. 99).

Market Characteristics

24. The effective marketing area of a cement manufacturer is generally limited to a regional area around its cement plant or distribution terminal. This is dictated by such factors as the homogeneous nature of the product, transportation costs, and the necessity of providing prompt delivery service (Stip., par. 68; Tr. 99).

25. Portland cement is a fairly standardized product for which consumers will not generally pay a higher price than the lowest price prevailing at a given destination. Although varying prices are sometimes quoted by cement companies, based on a mill price plus freight charges to the destination, most companies reserve the right to meet the lowest delivered price of any cement supplier, and delivered prices in a given area tend to be uniform.

This frequently requires a manufacturer to absorb all or part of transportation costs (Stip., par. 69; Tr. 99–100, 160, 234, 366).

26. Where price and quality are equal, consumers of portland cement tend to favor suppliers which provide the most prompt delivery service. This has resulted in the increased use of truck delivery for cement shipments. Shipments by truck accounted for 68.6% of cement shipments in 1965 and 65.9% in 1964, as compared to 47.1% in 1960 (Stip., par. 70; Tr. 100).

27. The growth of truck delivery has been accompanied by an increase in the use of distribution terminals to serve heavily populated local areas and enable cement suppliers to provide the required rapid delivery. The number of distribution terminals has increased from approximately 175 in 1963 to approximately 235 in 1965 (Stip., par. 71; Tr. 100).

2. *Ready-Mixed Concrete*

Customers

28. Ready-mixed concrete is sold principally to construction contractors and subcontractors for use in the construction of commercial buildings, schools, residential structures, foundations, sidewalks, sewers, bridges and roads (Stip., par. 72; Tr. 100).

Structure

29. In 1963, the ready-mixed concrete industry in the United States consisted of approximately 4,600 establishments. Most of these were small establishments with less than 20 employees. There were 1,020 ready-mixed concrete establishments with 20 or more employees in 1963, as compared to 944 such establishments in 1958 (Stip., par. 73; Tr. 100–101).

30. As the above figures suggest, the ready-mixed concrete industry in the United States is highly fragmented. In 1958, the four largest firms accounted for only 2% of total industry shipments, while the 20 largest firms accounted for only 6% and the 50 largest accounted for 11%. In 1963, the four largest firms accounted for 4% of total industry shipments while the 20 largest firms accounted for 13% and the 50 largest firms accounted for 21%. However, in certain large metropolitan areas, the four largest firms accounted for between 34% to 100% of total shipments in the various areas for which data are available in the record (Stip., par. 74; Tr. 101; RX 28; CX 99). Of 21 selected metropolitan areas for which concentration data are available for the years 1958, 1963 or 1964, the median of the market share controlled by the four largest ready-mixed concrete producers was 56% (RX 28).

Market Characteristics

31. The marketing area of ready-mixed concrete is limited to an area within a relatively narrow radius of the ready-mix batching plant, due to the nature of the product. Ready-mixed concrete will set or harden within a relatively short time, and it is relatively expensive to transport it for any considerable distance (Stip., par. 75; Tr. 101).

32. Ready-mixed concrete is generally priced on an individual quotation basis. Among the principal factors determining the price are the size of the job, the strength of the concrete required, and the distance of the job from the batching plant. A small differential on a large job may cause a purchaser to favor one ready-mix supplier over another (Stip., par. 76; Tr. 101). However, there are occasions when a builder or contractor will specify a particular ready-mix producer's concrete for a job because of satisfaction with the producer's product or services or a long standing relationship with him (Tr. 288–289, 345, 430, 464).

C. *Conditions in the Relevant Markets*

1. *Portland Cement*

a. *The Northeastern United States*

Dimensions and Structure

33. The New York City metropolitan area is served principally by cement companies with manufacturing plants located in the Hudson River Valley of New York, and the Lehigh Valley of Pennsylvania. In 1964 and 1966 there were, respectively, 18 and 17 cement-producing companies serving the New York City metropolitan area from plants located in either the Hudson River Valley or the Lehigh Valley, or in both areas.[3] In 1964, six of these companies also maintained distribution terminals within the New York City metropolitan area. In 1966, 10 of the cement-producing companies had distribution terminals from which cement was shipped into the New York City metropolitan area. In addition to these cement manufacturing companies, there are several distributors of imported cement who sell or have sold in the New York City metropolitan area from terminals located in or near the area (Stip., par. 77; Tr. 102).

34. Plants located in the Lehigh Valley distribute their cement principally in southeastern New York, eastern Pennsylvania,

[3] The reduction in the number of companies between 1964 and 1966 is accounted for by the fact that one of the cement companies, Nazareth Cement Co., became a subsidiary of Coplay Cement Manufacturing Co., on December 10, 1965.

New Jersey, lower Connecticut, Delaware and part of Maryland. Plants located in the Hudson River Valley distribute their cement principally in eastern New York, eastern Pennsylvania, northern New Jersey and lower New England, including Connecticut, Rhode Island, Massachusetts, southern New Hampshire and Vermont. Distributors of imported cement supplying the New York City metropolitan area sell such cement principally in the New York City metropolitan area and adjacent areas in lower Connecticut (Stip., par. 78; Tr. 102–103, 157–158, 206, 233–234).

35. Total shipments of portland cement by all cement plants serving the New York City metropolitan area and by the principal distributors of imported cement serving the area were as follows for the years 1960 through 1966 (Stip., par. 79; Tr. 103; CX 102 A–B):

	Barrels (000)
1960	39,320
1961	39,986
1962	44,206
1963	48,355
1964	48,549
1965	54,042
1966	52,873

36. The extent of concentration, and the trend thereof, in the northeastern section of the United States may be gauged by comparing the shipments of the top four companies with the total shipments of all northeastern cement plants and the principal distributors serving the NYMA. The percentage of shipments accounted for by the top four companies in the Northeast serving the NYMA was 36.9% in 1960 and increased to 42.5% in 1964 and to 44.1% in 1966 (CX 102).

37. At no time from 1960 to 1966 did respondent rank among the top four northeastern companies which ship cement into the NYMA. In 1960, it was the seventh ranking company, with 6.4% of shipments. By 1964, it had dropped to tenth ranking, with 4.0% of shipments. In 1965 and 1966, its position improved somewhat to the eighth and ninth ranking company, respectively, and it accounted for 4.3% and 4.2% of shipments, respectively (CX 102).

b. *The NYMA*

Dimensions and Structure

38. The New York City metropolitan area (referred to herein

as the NYMA) includes the five counties comprising New York City (New York, Bronx, Queens, Kings and Richmond), plus the Long Island counties of Nassau and Suffolk to the east of New York City and Westchester County to the north. At least eight of the cement companies supplying this area maintain or have maintained separate distribution terminals within this geographic area. In 1966, 10 cement producing companies each maintained a distribution terminal serving the NYMA and one importer, Cilco Cement Corp., shipped cement into the area from two distribution terminals. It has been stipulated, and the examiner finds, that the NYMA is a distinct market or submarket for cement (Stip., par. 82; Tr. 103–104).

39. Between 1960 and 1966, cement shipments into the NYMA by most companies serving the area represented between 20% and 30% of the total shipments of their plants serving the area (Stip., par. 83; Tr. 104). Marquette's shipments into the area represented the following percentages of the total shipments from its Catskill, New York plant (RX 19):

	%
1962	30.1
1963	25.9
1964	24.6
1965	17.1
1966	20.1

40. In 1964, the NYMA was served by approximately 19 suppliers of portland cement from 24 cement plants and seven distribution terminals. In 1966, the NYMA was served by approximately 18 suppliers of portland cement from 23 cement plants and 12 distribution terminals.[4] (Stip., par. 85; Tr. 104–105; CX 102.)

41. In terms of the share of the NYMA market accounted for by the larger cement shippers, the degree of concentration is moderately high, and the share of the market accounted for by such companies has increased between 1962 and 1966. Set forth below is a table reflecting the share of the NYMA cement market accounted for by the four largest and eight largest shippers into the area (CX 103):

[4] The decline in the number of suppliers of cement between 1964 and 1966 is due to the acquisition of Nazareth Cement Co. on December 10, 1965, by Coplay Cement Manufacturing Company, another shipper into the NYMA.

Concentration Ratios Among Cement Companies Serving NYMA (1962–1966)

	Percent of shipments accounted for by—	
	4 largest companies	8 largest companies
1962	44.5	67.2
1963	48.5	71.0
1964	53.4	70.5
1965	56.9	75.1
1966	59.9	77.8

42. The top ranking company in the sale of cement in the NYMA from 1960 to 1966 was Colonial Sand & Stone Co., Inc., a vertically integrated ready-mixed concrete and cement company. Between 1960 and 1966, Colonial accounted for from 21% to 36% of cement shipments into the area (Stip., par. 89; Tr. 105). During the period from 1960 to 1963, Colonial's share of the market was fairly stable, ranging between 21% and 23%. However, following the expansion of its Hudson, New York plant, its share increased substantially, to 31% in 1964 and 36% in 1966 (CX 103).

43. During the period from 1960 to 1966, respondent Marquette did not rank among the top four companies in the sale of cement in the NYMA except for 1961, but it did rank among the top eight companies (out of approximately 19 cement suppliers) in each year other than 1964. However, its sales represented a relatively small fraction of the total cement sales in the NYMA, and its relative market position was a declining one during most of the period. Set forth below is a table reflecting Marquette's market share and relative rank, as a shipper of cement into the NYMA, between 1960 and 1966 (CX 103):

Market Position of Marquette in Cement Shipments in NYMA (1960–1966)

	Percent of shipments (percent)	Relative rank
1960	5.5	6
1961	5.5	4
1962	5.7	6
1963	4.8	7
1964	3.5	9
1965	4.0	8
1966	4.4	7

44. Prior to 1959, there were no cement companies in the NYMA which were affiliated with a ready-mixed concrete company or other consumer of cement. The first instance of a cement-ready-mixed concrete, vertically integrated operation in the

NYMA occurred in November 1958, when Colonial Sand & Stone Co. erected its own cement-producing facilities at Kingston, New York, in the Hudson River Valley. Colonial was, and is, the largest consumer of cement in the NYMA. As a result of prior acquisitions, it then enjoyed partial vertical integration, having its own aggregate-producing and towing facilities. With the erection of its own cement plant under the name of Hudson Cement Company, it became a fully integrated company, although it continued to purchase substantial quantities of cement from other cement producers for several years (Stip., par. 90; Tr. 105–106). During 1966, Colonial became further integrated, vertically, by acquiring the assets of a manufacturer of concrete pipe in the NYMA (RX 31, p. 3).

45. The next instance of cement-ready-mixed concrete, vertical integration to occur in the NYMA, and the first to come about through acquisition, took place in January 1960, when American Cement Corporation acquired M. F. Hickey Company, Inc., of Brooklyn, New York. The Federal Trade Commission thereafter issued a complaint against American Cement, charging it with having violated Section 7 of the Clayton Act by virtue of the M. F. Hickey acquisition. Based on a consent agreement entered into with American Cement, the Commission issued its decision and order on January 20, 1964, under which American Cement was ordered to divest itself of Hickey. Hickey's plant and assets were sold on June 30, 1964, to Ajax Block Corporation, which continued the Hickey operation under the same name. In 1964, the present Hickey Company purchased 91% of its cement requirements from Hercules Cement Division of American Cement, to which it is indebted under a purchase money mortgage of $3.2 million. In 1966, Hickey purchased 79% of its cement requirements from the Hercules Cement Division of American Cement (Stip., par. 91; Tr. 106).

46. The next cement company to become vertically integrated with a ready-mixed concrete company was National Portland Cement Company, which acquired the Ryan Ready-Mixed Concrete Corp. and N. Ryan Company in September 1963. As of December 31, 1966, National Portland Cement Company voluntarily divested itself of the Ryan companies by selling the companies back to the Ryan family (Stip., par. 92; Tr. 106–107). In 1964, National Portland Cement Company was the sixth largest shipper of portland cement into the NYMA. In 1966, it was the ninth largest shipper of portland cement into the

NYMA (CX 103). Ryan Ready-Mixed Concrete Corporation was the fourth largest ready-mixed concrete operator in the NYMA in both 1964 and 1966 (CX 105–A).

47. The next instance of vertical integration between a cement manufacturer and a ready-mixed concrete company was the U.S. Steel (UAC)-Certified Industries, Inc., combination, which took place in April 1964 (Stip., par. 92; Tr. 107). In 1964, the Universal Atlas Cement Division of U.S. Steel Corp. was the second largest shipper of portland cement into the NYMA. In 1965 and 1966, it was the third ranking shipper of portland cement into the NYMA (CX 103). Certified Industries, Inc., was the second largest ready-mixed concrete operator in the NYMA in both 1964 and 1966 (CX 105–A). United States Steel Corp. continues to own and operate Certified Industries, although a Federal Trade Commission action for divestiture is now pending.

48. The latest instance of vertical integration in the NYMA between a cement manufacturer and a ready-mix producer involves the establishment of Lawrence Concrete Corporation by respondent in June 1964, and the latter's acquisition of the Cooney interests in November 1964 (Stip., par. 93; Tr. 107). There have been no further instances of vertical integration between a cement manufacturer and a ready-mix producer since November 1964 and the close of the record in this proceeding (Tr. 529–530).

Recent Market Conditions and Trends

49. As previously found, the cement industry, nationally, has operated with substantial excess capacity. This condition has been particularly pronounced among the northeastern producers supplying the NYMA. In the late 1950's and early 1960's, the cement companies supplying the NYMA experienced substantial competition from distributors importing foreign cement. Despite foreign competition, an increase in the demand for cement in the NYMA during the early 1960's made it possible for cement companies to maintain prices at a level sufficient to enable them to operate profitably. However, beginning around the latter part of 1962, the demand for cement, particularly from ready- mixed concrete companies, began to slacken, and this condition has continued to the present. Thus, shipments of cement into the NYMA declined from a peak of 13.6 million barrels in 1962 to 10.3 million barrels in 1966, and consumption of cement

by ready-mix firms declined from 9.5 million barrels to 7.2 million barrels during the same period. This decline in cement consumption was aggravated by the fact that Colonial Sand & Stone, which consumed between 30% and 40% of the cement in the area, and was an important outlet for the cement of a number of cement producers, had become vertically integrated and, by 1964, was producing over three-fourths of its cement needs. Also affecting the situation was the entry into the market of a new and aggressive cement company, Atlantic Cement Company, late in 1962, which, within two years after entering the market, became the largest cement supplier in the northeastern market and an important supplier in the NYMA (Stip., par. 94; Tr. 107–108, 365; CX 102, 103).

50. The decline in the demand for cement resulted in considerable pressure on cement prices, as cement companies began to compete aggressively for the available business. This resulted in the decline or prices in the New York City area from approximately $3.85—$4.00 a barrel in 1961–1962, to around $3.09 in 1965. Price competition among cement companies resulted in prices in the NYMA which were the lowest in the northeast, despite the fact that transportation costs to the area were higher than to certain other areas served by these cement companies. As a result, the profits of some of the cement companies began to decline around 1962, and at least one of the smaller ones began to operate at a loss (Stip., par. 95; Tr. 108). During 1967 there was some improvement in conditions, as prices increased to about $3.40 a barrel in New York City and slightly higher in the suburban counties (Tr. 161–162, 189, 208, 235–236, 366, 382, 492).

51. Accompanying the increase in price competition in the NYMA was an increase in the extension of credit by cement companies to ready-mix companies. Normally, customers are expected to pay for their cement purchases within 30 days and, if they desire to avail themselves of the normal 20-cents-per barrel "cash" discount, they have to do so by the tenth of the month following delivery. However, beginning around 1962, cement companies began extending long-term credits to their ready-mix customers and permitting them to avail themselves of the cash discount on current purchases. This practice was more prevalent in the NYMA than in other areas of the northeast (Stip., par. 96; Tr. 109).

52. Cement prices within the NYMA are, and have been, fairly uniform, despite the differing production and transportation costs of the cement companies supplying the area. There have been a number of price reductions in the area since 1962. Within a relatively short period, a price reduction initiated by one company has been met by other companies serving the area. Prices in the NYMA are generally lower than those charged by cement companies in other areas of the northeast, despite the fact that transportation costs to the NYMA are higher than to certain other portions of the northeast (Stip., par. 84; Tr. 104). Cement prices prevailing in the counties falling within the City of New York are somewhat lower than those in the other counties lying within the NYMA. Thus, in early 1967 the standard delivered price in New York City was $3.40 per barrel, while in Nassau, Suffolk, and Westchester Counties it ranged from $3.50 to $3.70, depending on the distance from New York City (Tr. 161–162, 300, 347, 366, 407–408, 433).

c. *Westchester County* [5]

Structure

53. Westchester County is served by substantially the same group of cement companies as serves the NYMA as a whole. During the period from 1963 to 1966, the cement shipments of such companies entering the Westchester County area ranged from 1.5% to 2.1% of the total shipments of their plants serving the NYMA, and from 5.8% to 8.8% of their shipments into the NYMA (CX 102–104).

54. In 1963, prior to the acquisition of the Cooney companies, Marquette's shipments of cement into Westchester County represented 2.5% of its total shipments in the northeastern United States, and 9.8% of its shipments into the NYMA. In 1965 and 1966, following the acquisition of the Cooney companies, its shipments of cement into Westchester County increased to 11.5% and 10.9%, respectively, of its total northeastern shipments, and to 67.2% and 54.1%, respectively, of its NYMA shipments (CX 102–104).

55. In 1963 and 1964, Marquette was the fifth and fourth rank-

[5] Complaint counsel have proposed certain findings with respect to Westchester County, as an appropriate market or submarket separate and apart from the NYMA as a whole. Respondent questions the propriety of this effort since the complaint makes no allegation that Westchester County is a relevant market. The examiner will reserve the resolution of this legal issue for the portion of this decision entitled "CONCLUSIONS." However, he will at this point make appropriate findings as to competitive conditions in Westchester County, for such bearing as they may have on the resolution of the factual issues in this proceeding.

ing shipper of cement into Westchester County, with 8.1% and 8.2%, respectively, of total shipments into the county. In 1965, it became the first ranking shipper with 34.0% of total cement shipments into the county. However, in 1966, it dropped to second rank, with 27.6% of total shipments into the county (CX 104).

56. Colonial Sand & Stone Co., Inc., was the second ranking shipper of cement into Westchester County in the years 1963 and 1965, and the first ranking shipper in both 1964 and 1966. Its share of total cement shipments into the county increased from 10.9% in 1963 to 34.0% in 1964. In 1965, its share of the market declined to 28.8%, but increased in 1966 to 42.9% (CX 104). It should be noted that the foregoing figures do not fully reflect Colonial's position as a supplier of cement which is ultimately used in Westchester County, since they do not include substantial shipments by Colonial to its nearby Bronx plants, where they are converted into ready-mixed concrete and then shipped into Westchester County (RX 33–A; CX 24; Tr. 287).

Competitive Conditions

57. Competitive conditions in Westchester County have pretty much paralleled those prevailing elsewhere in the NYMA, except that in the NYMA as a whole cement shipments and construction activity began to decline in 1963, whereas in Westchester County the decline occurred after 1964. Likewise, while the decline in construction activity was fairly general throughout the NYMA, in Westchester County it was more pronounced in the lower portion of the county than in the upper portion (CX 103, 104; Tr. 269–270, 277, 323–325).

58. As the demand for cement lessened, cement prices began to decline. Prices charged for cement in Westchester County have closely paralleled those in the NYMA as a whole, except that they have tended to be about 10¢ higher, per barrel, due to additional transportation costs. Cement prices in Westchester County have moved in a fairly fixed ratio to the rise and decline of prices in the NYMA as a whole. When prices in the NYMA, which had dropped to as low as $3.17 a barrel, increased to $3.40 a barrel in early 1967, those in Westchester County increased to about $3.50 a barrel. Such prices are subject to the usual 20¢-per-barrel cash discount which has prevailed throughout the area (Tr. 161–162, 188–189, 208, 235, 366, 408, 433).

2. *Ready-Mixed Concrete*

a. *The NYMA Market*

Dimensions and Structure

59. The parties are in agreement that the eight-county New York City metropolitan area, heretofore found to be an appropriate geographic market for portland cement, is also an appropriate geographic market for ready-mixed concrete (CPF No. 69; RPF No. 78). The prices paid by ready-mix producers for their cement, and the prices charged by them for ready-mixed concrete, are fairly uniform throughout the area (Stip., par. 84, 103–104; Tr. 104, 110–111).

60. The NYMA is served by over 50 ready-mixed concrete producers. The great bulk of these are small producers, who operate a single batch plant and serve a relatively narrow geographic area of 15 to 20 miles from their plant. However, there are six or seven larger companies with multiple plants, which serve all or large portions of the NYMA. In addition to the regular ready-mixed concrete producers, there are a number of small distributors of ready-mixed concrete referred to in the industry as "gypsies," who purchase their ready-mixed concrete from other producers. They generally operate a single truck and serve the smaller construction projects. There are a considerable number of these operators serving the Long Island counties (Stip., par. 97; Tr. 109).

61. While the record contains no overall data on sales of concrete by ready-mix producers in the NYMA, it does contain data on the cement purchases of the principal ready-mix producers in the area (CX 105). Since substantially all of the cement purchased by such firms is used in the production of ready-mixed concrete, the cement-consumption data in the record provides a reliable basis for computing concentration ratios and market shares in the NYMA. It should be noted that any comparisons which may be made are limited to the ready-mix producers since the record contains no data on other categories of cement consumers. However, since ready-mix producers are the principal users of cement, accounting for about 70% of cement consumed in the NYMA (Tr. 209, 237, 367), the data for such category of users provide a meaningful basis for comparing concentration ratios and market shares in the NYMA.

62. The extent of concentration in the NYMA is reflected in

the two tables set forth below, showing the proportion of the cement consumed in the NYMA which is accounted for by the two, four and six largest ready-mix companies. In the first table, the shares of the larger ready-mix firms are computed as a percentage of the cement consumed by all users of cement in the area. In the second table, the shares of the larger firms are computed as a percentage of cement consumption by ready-mix firms only.[6] As indicated in the tables, there is a significant degree of concentration among ready-mix firms, but the extent thereof has declined between 1963 and 1966 (CX 103, 105).

Concentration Ratios Among Ready-Mix Firms, NYMA, in Terms of Total Cement Consumption (percent)

	2 largest	*4 largest*	*6 largest*
1963	39.9	53.4	58.4
1964	38.1	47.6	51.4
1965	35.2	44.8	50.5
1966	35.4	44.0	49.9

Concentration Ratios Among Ready-Mix Firms, NYMA, in Terms of Total Consumption by Ready-Mix Firms (percent)

	2 largest	*4 largest*	*6 largest*
1963	57.0	76.3	83.5
1964	54.4	68.0	73.4
1965	50.3	63.5	72.1
1966	50.6	62.9	71.3

63. The parties are in disagreement as to the most meaningful way to determine and compare the market shares of individual ready-mix firms in the NYMA. Respondent contends that market shares should be determined by comparing the cement consumption of the individual companies with the total consumption of all cement users in the area. Complaint counsel contend that the consumption of the individual firms should be compared with the total consumption of ready-mix firms only. In the opinion of the examiner both of the methods suggested are proper, depending on the purpose for which the figures are used, *i.e.*, whether they are used to show probable injury at the cement-producing level or at the ready-mix level. At the cement-producing level, the theory of the complaint is that competitors of the acquiring company, Marquette, are being deprived of access to a segment

[6] The record contains no actual figures of total cement consumption by all ready-mix firms. The universe figure for such firms, on which the shares of the larger firms have been computed, has been derived by multiplying the figures of total cement consumption in the NYMA (CX 103), by the estimated percentage of consumption by ready-mix firms, *viz*, 70% (Tr. 209, 237, 367).

of the market for cement (Complaint, par. 17a.). Any injury to cement producers which may occur will result from their loss of access to a substantial portion of the entire cement market, irrespective of the class of customer involved, since the primary concern of cement producers is to dispose of a certain portion of their cement within the market, rather than to sell any given percentage to a particular class of customer. Consequently, the most meaningful figures, for purposes of determining competitive impact at the cement-producer level, are the market shares of the ready-mix customers as a percentage of total cement consumption within the market. On the other hand, at the cement-consuming level, where the alleged injury is among the ready-mix firms who compete with the acquired companies, rather than with all cement consumers, the shares of the market held by the individual companies, as a percentage of the ready-mix market, are the more meaningful figures.

64. Set forth below are two tables reflecting the market shares and relative positions of the principal ready-mix firms in the NYMA. In the first table, market shares have been computed by comparing the cement consumption of the individual firms with the total consumption of cement in the NYMA by all users. In the second table the market shares of the individual companies have been computed by comparing each company's cement consumption with the estimated consumption of all ready-mix firms (CX 103, 105).[7]

Market Shares of Principal Ready-Mix Firms, NYMA, in Terms of Total Cement Consumption (percent)

	1963	*1964*	*1965*	*1966*
Colonial Sand & Stone	31.6	31.3	28.7	28.9
Certified Industries	8.9	6.8	6.5	6.5
Transit Mix Concrete	7.3	5.1	6.0	4.9
Ryan Ready-Mixed Concrete	6.2	4.5	3.2	3.7
M. F. Hickey	3.4	.9	2.5	2.2

[7] As in the case of the second table showing concentration ratios among ready-mix firms (par. 62, *supra*), the universe figure used in the second table above has been derived by applying the percentage, 70, to the total figures of cement consumption in the NYMA. It may be noted that, while most cement company witnesses estimated that ready-mix firms accounted for at least 70% of their sales (Tr. 209, 237, 367), one witness fixed this figure at about 60% (Tr. 197). However, the actual figures of cement consumption by 32 out of over 50 ready-mix firms in the NYMA (CX 105) reveal that such firms accounted for between 62% and 68% of the total cement consumed in the NYMA between 1963 and 1966. It seems reasonable to assume, therefore, that 70% is a reasonably accurate figure for the proportion of cement consumed by all ready-mix firms in the NYMA. Of course, to the extent that the actual percentage is less than 70%, the above market share figures would be somewhat understated.

	1963	1964	1965	1966
Cooney Plants[8]	1.6	1.8	2.4	2.6
Acme Concrete	.8	1.2	1.6	2.0
Principe-Danna	1.1	1.3	1.8	1.2

Market Shares of Principal Ready-Mix Firms, NYMA, in Terms of Cement Consumption by Ready-Mix Producers (percent)

	1963	1964	1965	1966
Colonial Sand & Stone	45.2	44.7	41.0	41.3
Certified Industries	11.8	9.7	9.3	9.3
Transit Mix Concrete	10.5	7.2	8.5	7.0
Ryan Ready-Mixed Concrete	8.8	6.4	4.6	5.3
M. F. Hickey	4.9	1.3	3.5	3.2
Cooney Plants[9]	2.3	2.5	3.5	3.7
Acme Concrete	1.1	1.7	2.3	2.8
Principe-Danna	1.6	1.8	2.5	1.7

Market Conditions

65. Like cement companies, for which they are the principal customers, ready-mix firms have suffered from a declining demand for their product beginning around the end of 1962 or early 1963, and continuing at least through 1965. Prior to that period, there was a fairly brisk demand for concrete due to, (a) an increase in building construction and modification activity within New York City in anticipation of certain changes in the New York City building code, (b) the demands of the World's Fair, and (c) construction activity on Long Island. However, construction activity in the NYMA began to decline around the end of 1962, with a resultant decline in the demand for ready-mixed concrete and for cement, as already noted (par. 49, *supra*). The figures of cement consumption by the principal ready-mix companies provide a reliable indicator of the extent of the decline in the demand for concrete during this period. Thus, cement purchases by the principal ready-mix companies declined by about 26% between 1963 and 1965, from 8.6 million barrels to 6.4 million barrels (Stip., par. 102; Tr. 109–110).

66. The declining demand for concrete and the resultant increase in competition among ready-mix companies for the avail-

[8] The above figures for Cooney do not include the original Lawrence plant in Queens. If the cement consumption by this plant were included, the plants controlled by respondent would account for 2.2%, 3.6%, and 3.6% of the cement consumed in the NYMA in 1964, 1965, and 1966, respectively.

[9] The above figures for Cooney do not include the original Lawrence plant in Queens. If the cement consumption by this plant were included, the plants controlled by respondent would account for 3.2%, 5.1%, and 5.1% of cement consumed by ready-mix firms in the NYMA in 1964, 1965, and 1966, respectively.

able business, brought about a substantial drop in the prices of ready-mixed concrete. Illustrative of the decline is the price charged for concrete of 3,000 p.s.i. quality (*i.e.*, concrete with a strength sufficient to withstand a pressure of 3,000 pounds per square inch). The price on such concrete declined from about $16.00 per cubic yard in 1962 to $14.50 in 1963 and then to $13.00 in 1964–65. The price charged for the lowest quality concrete used in construction, 2,000 p.s.i., declined from about $14.00 in 1962 to a general range of $10.00 to $12.75 in 1964, with some concrete being sold as low as $9.50 a cubic yard. While cement prices also declined during this period, the drop was not sufficient to offset the decline in the prices of ready-mixed concrete (Stip., par. 103; Tr. 110–111). There has been some firming of ready-mixed concrete prices during the past year (Tr. 302–303, 437).

67. The decline in construction activity in the NYMA was accompanied by an increasing slowness on the part of building contractors and subcontractors in meeting their payments to suppliers, including those owing to suppliers of ready-mixed concrete. Whereas it had been customary for customers to make payment for concrete by the tenth of the month following delivery, competitive conditions forced a gradual liberalization in credit terms, with the time for payment being gradually extended to 30 days, then to 45–60 days, and in some instances to 90 days or longer (Stip., par. 104; Tr. 111).

68. The decline in ready-mixed concrete prices and the problems in collection of accounts receivable have subjected ready-mix firms to a cost-price squeeze and adversely affected the profits of many ready-mixed concrete firms in the NYMA. A number of ready-mix firms in the NYMA have been operating at a loss for the past few years (Stip., par. 105; Tr. 111).

69. Unfavorable economic conditions in the construction industry in the NYMA during the past few years have been responsible for a number of ready-mix firms going out of business. While there have been some new entrants into the market, a number of these firms merely took over the facilities of departing operators. Lawrence was one of the new entrants into the ready-mixed concrete market, taking over the facilities of a bankrupt operator, and consuming 113,725 barrels of cement in 1965 and 102,665 barrels of cement in 1966 at its Whitestone (Corona) plant (CX 32). However, for the most part, the new entrants were small, fringe operators. Many of them were so-called

"gypsies," *i.e.*, one-man, non-union organizations, operating one or two trucks. A number of ready-mix operators still in business have cut down substantially on the number of trucks operated by them in an effort to retrench (Stip., par. 106; Tr. 111–112).

70. Some of the ready-mix companies have sought to improve their ability to compete and to survive by affiliating with a cement company. Several of the cement companies, facing similar problems at their level, have sought to affiliate with a ready-mix company in order to insure themselves of a regular outlet for their cement. As previously noted (par. 45–48, *supra*), the early 1960's saw the following cement-ready-mix combinations come into being in the NYMA: American-Hickey, National-Ryan, U.S. Steel (UAC)-Certified, and Marquette-Lawrence (Cooney). Other cement companies have given considerations to becoming affiliated with a ready-mix firm (Stip., par. 107; Tr. 112).

71. Preceding these combinations was that previously alluded to (par. 44, *supra*): Colonial-Hudson, which was established by internal expansion around the end of 1958. Colonial is one of the few ready-mix operators in the NYMA which has been able to consistently operate at a profit. Its sales increased from $42 million in 1958 to approximately $52 million in 1964, and its net income increased from $1.4 million to $3.8 million in the same period. During 1965 Colonial's sales and net income declined to $43 million and $3.6 million, respectively. In 1966, its sales increased to $46 million, but its earnings declined to $1 million. Colonial is far and away the largest ready-mix firm in the NYMA, operating a fleet of 472 transit-mix trucks in 1966. No other ready-mix firm operated more than 65 trucks in 1966. No other ready-mix firm operated more than 65 trucks, and most operated less than 25 trucks (Stip., par. 108; Tr. 112–113; RX 30, 31).

72. Prior to the erection of its own cement plant, Colonial was an important customer for a number of the cement companies supplying the NYMA. Its purchases from outside sources declined significantly beginning around 1960 and, by 1964, they reached a small fraction of their former volume. Its plant at Kingston was initially insufficient in size to supply all of Colonial's cement needs but, by 1964, the capacity of its plant was doubled and Colonial sharply reduced its outside purchases of cement. Thus, its purchases of cement declined from approximately 2.1 million barrels in 1960 to 657,114 barrels in 1966.

Colonial's total consumption of cement in 1966 was 3.6 million barrels (Stip., par. 109; Tr. 113).

b. *Westchester County* [10]

73. There are only seven ready-mix companies with plants located in Westchester County. Of these only two, Cooney and Colonial, operate multiple plants with locations in more than one section of the county. The plants of the remaining five ready-mix producers are dispersed throughout the county. Two of them are located in the southern portion of the county, within a short distance of Bronx County, and two are located in the extreme northern section of the county adjacent to Putnam County. The plant of the remaining company is located in the eastern portion of the county, near the Connecticut State line. The companies whose plants are located in the lower part of Westchester County sell a portion of their ready-mixed concrete in Bronx County, and there are ready-mix companies with plants in Bronx County or elsewhere in the NYMA which sell concrete in Westchester. There is also some competition between the concrete companies located in northern and eastern Westchester County, with concrete companies in Putnam County and in Connecticut (CX 23–25; Tr. 262, 271, 278, 297, 313, 335, 344).

74. The evidence in the record as to competitive conditions in the Westchester County area involves mainly the ready-mix companies whose plants are located in the lower portion of the county near Bronx County. Such companies compete with one another and with ready-mix companies whose plants are located in Bronx County. The two largest ready-mix companies serving Westchester County are Colonial and Cooney (now Lawrence). Colonial operates three plants in Westchester County (located in the central and northern part of the county), and three in Bronx County, one of the latter being located near the Westchester County line a short distance from the plant of one of the two Westchester County ready-mix producers who testified in this proceeding. Cooney operated four plants in Westchester County in 1964, but one of these (Mamaroneck) is now closed. Of the remaining two Westchester producers as to which there is evidence in the record, one operates two plants in Mt. Vernon,

[10] As in the case of the cement product line, complaint counsel contend that Westchester County is a relevant submarket for ready-mixed concrete, while respondent contends this issue may not be properly raised under the pleadings. Resolution of the legal question involved will be reserved for the "CONCLUSIONS" portion of this decision. At this point the examiner will consider only the factual aspects of the matter.

and the other operates a single plant in New Rochelle, both of these communities being located a short distance from the Bronx County line (Tr. 262, 278, 281, 297, 313; CX 23–24).

75. There is no reliable statistical evidence in the record as to the respective market shares and relative positions of the various ready-mix companies operating in the Westchester area. The only reliable statistical evidence in the record indicative of the market position of ready-mixed concrete firms is in terms of cement consumption by ready-mix firms in the NYMA as a whole. However, based on such data, and data as to the amount of cement sold in Westchester County by cement companies, plus a series of estimates as to the amount of cement consumed in Westchester County by ready-mixed firms, complaint counsel have sought to extrapolate the market shares of the individual ready-mix firms. Aside from the dubious nature of a number of the assumptions and estimates made by complaint counsel, the figures used by them suffer from the fatal infirmity of failing to make proper adjustments in the figures of the largest consumer in Westchester County, Colonial Sand & Stone, in that they have failed to include in the Westchester County universe figure and in the figures of cement consumption by Colonial, (a) Colonial's cement purchases from cement companies other than its affiliate, Hudson, and (b) cement delivered to Colonial's Bronx plants which was later sold in Westchester County after being converted into ready-mixed concrete. There is every reason to believe that the omissions from the data used by complaint counsel involve substantial quantities of cement.[11] The unrealistic nature of the statistics proposed by complaint counsel is made apparent by the fact that they purport to disclose Cooney to be, by far, the largest consumer of cement in Westchester County, whereas the testi-

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[11] RX 33, which contains the cement consumption figures of Colonial used by complaint counsel, states that the tabulation therein reflected, for the various counties of the NYMA, "shows the total amount of Portland cement *produced by Colonial* and shipped into each of the relevant counties" (emphasis supplied). The same exhibit also indicates that "[i]n addition to the Portland cement referred to above, all of which emanated from the Hudson Division plant of Colonial [it] purchased Portland cement from other sources." The exhibit does not indicate the amount of such purchased cement which was consumed in Westchester County. However, it does indicate that the amount of such cement consumed within the NYMA, as a whole, ranged from 1.5 mililon barrels in 1963 to 557,000 barrels in 1966. The same exhibit shows shipments of cement into Bronx County by Hudson, ranging from 400,000 to 500,000 barrels in each year but one. Since Colonial's Westchester County ready-mix plants were located in the central and northern sections of the county, it seems evident that it must have served the more populous lower part of the county from one or more of its Bronx plants (one of which was located just south of the county line). The testimony of the principal ready-mix witnesses from Westchester County indicates that they were in substantial competition with Colonial operating from its Bronx plant (Tr. 287–288, 271, 318).

mony of their own witnesses and the statistical evidence of cement shipments offered in evidence by them indicate that Colonial was, by far, the largest consumer and shipper of cement in the area (CX 104; Tr. 248, 285, 318).[12] While it seems evident that Colonial and Cooney were the two largest ready-mix firms operating in Westchester County, the record contains no adequate basis for determining the market shares and ranking of the various Westchester County producers.

76. The record indicates that market and competitive conditions in Westchester County are similar to those in the NYMA generally. There has been a decline in construction activity in the lower portion of the county, particularly in the field of residential construction. This decline was accompanied by a softening of concrete prices and a liberalization in the practice of extending credit by cement suppliers. During the past year there has been some improvement in ready-mix concrete prices and some increase in construction activity, particularly in commercial construction (Tr. 269–270, 277, 325–326; CX 104).

77. Complaint counsel suggest that the price structure in Westchester is different "from that in other areas of the NYMA" because the prices of concrete tend to be higher (CPF No. 80). While there is some evidence that the price of ready-mixed concrete in Westchester County is between 50¢ and $1.00 higher than in other areas of the NYMA, this is due largely to the additional cost of cement (the principal ingredient of concrete), and to additional transportation costs. However, the trend in the movement of concrete prices has tended to follow that in the rest of the NYMA (Tr. 439, 442, 465).

IV. The Alleged Competitive Impact

A. *Cement Company Level*

1. *Foreclosure*

78. In 1963, the last full year in which they were under independent ownership, the Cooney companies were the sixth

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[12] According to the figures proposed by complaint counsel, Cooney's cement consumption in Westchester County was approximately 50% greater than Colonial's in 1966, *viz*, 40.4% versus 28.2%. However, the statistical exhibit which they offered in evidence, showing actual shipments into Westchester County by the various cement companies, indicates that Colonial's shipments were 50% greater than those of respondent, *viz*, 42.9% versus 27.6% (CX 104). It is reasonable to infer that the bulk of the cement consumed by Cooney and Colonial, in the form of concrete in Westchester County, was made from cement supplied by their cement affiliates since the record establishes that Colonial purchased over 80% of its cement in the NYMA from its affiliate Hudson in 1966, and that Cooney purchased over 86% of its cement from respondent in 1966 (RX 26).

largest consumer of cement among ready-mix firms in the NYMA. In 1964, they became the fifth ranking company as a result of a decline in the relative position of M. F. Hickey Company, following that company's divestiture by American Cement Company in June 1964. Hickey and the former Cooney plants alternated as the fifth and sixth ranking consumers of cement in the NYMA in the years 1965 and 1966 (CX 105).

79. The Cooney plants' consumption of cement in the NYMA declined from approximately 235,000 barrels in 1962, to 207,000 and 208,000 barrels in 1963 and 1964, respectively. Following their acquisition by respondent in late 1964, the consumption of the Cooney plants increased somewhat to 245,000 in 1965 and 268,000 barrels in 1966 (CX 105, 29–32). During the years 1963 and 1964, the Cooney plants accounted for 1.6% and 1.8%, respectively, of the cement consumed in the NYMA by all users of cement. In 1965 and 1966, the purchases of the former Cooney plants increased to 2.4% and 2.6% of the cement consumed by all users in the NYMA. In terms of the cement consumed by ready-mix companies, the purchases of the Cooney plants represented 2.3% and 2.5% of such purchases in 1963 and 1964, respectively. In 1965 and 1966, their purchases amounted to 3.5% and 3.7% of the cement purchased by ready-mix firms in the NYMA. In terms of the broader northeastern market served by the cement companies supplying the NYMA, the purchases of the Cooney plants represented 0.43% in both 1963 and 1964, and 0.45% and 0.50% in 1965 and 1966, respectively (CX 102, 103, 105, 29–E, 30–B, 31–D, and 32).

80. At the time of the acquisition of the Cooney plants in late 1964, three vertically integrated ready-mix companies, Colonial, Certified and Ryan, accounted for 42.6% of the cement consumption in the NYMA, with Colonial alone accounting for 31.3% of such purchases. In 1965, the cement purchases of these three vertically integrated companies represented 38.4% of the total cement consumed in the NYMA, with Colonial accounting for 28.7% of this amount. Adding the purchases of the Cooney plants in these two years would increase the share of vertically integrated companies by 1.8% in 1964, and 2.4% in 1965, to a total of 44.4% and 40.8%, respectively. In 1966, the share of total cement consumption in the NYMA accounted for by vertically integrated ready-mix companies was 41.7%, of which 28.9% represented purchases by Colonial. At the end of that year

Ryan, which accounted for 3.7% of the market, was voluntarily divested by its cement affiliate.

81. A vertically integrated ready-mix firm tends to buy the bulk of its cement from the cement company with which it is affiliated. To the extent it makes a small portion of its purchases from other cement companies, it does so because a particular contractor-customer has specified another company's cement or because its affiliated company does not make a particular type of cement used by the ready-mix firm for a portion of its production. Non-integrated ready-mix firms, on the other hand, generally purchase their cement from multiple suppliers. While they enjoy relatively long-term relationships with some of their suppliers, the proportion of their purchases from any one supplier rarely approaches the proportion to total purchases which exists between vertically integrated companies. Moreover, the non-affiliated cement companies must eternally satisfy their customers as to price, quality, and service if they hope to continue the existing relationship. This is obviously not true where a "captive" relationship exists (Stip., par. 117; Tr. 113–114, 264, 407, 433).

82. While vertical integration affords a cement company a "captive" market which is not subject to challenge by competing cement companies on the basis of the usual competitive inducements of price, quality and service, such a relationship also has certain disadvantages. There are a number of ready-mix firms which will not purchase cement from a vertically integrated cement company because they "prefer not to give business to a company that [they] have to compete with" (Tr. 347, 408). Other ready-mix companies have no objection to purchasing from integrated companies (Tr. 284, 334, 433, 456).

83. During the period from 1964 to 1966, Colonial purchased approximately 85% of its cement from its affiliated company, Hudson. During the same period Universal Atlas Division of U.S. Steel supplied between 85% and 94% of the cement requirements of its affiliate, Certified, and National Portland supplied between 78% and 85% of the cement requirements of its affiliate, Ryan. Despite its divestiture of Hickey in June 1964, American Cement supplied around 80% of Hickey's cement requirements in 1965 and 1966 (RX 26).

84. During 1962 and 1963, the four largest suppliers of cement to the Cooney plants were Lone Star, Lehigh, Universal Atlas and Marquette's subsidiary, North American. To a lesser degree,

the Cooney organization purchased cement from 15 other cement companies serving the area. In 1964, the largest supplier to the Cooney plants was Colonial's affiliate, Hudson Cement, from which the Cooney organization purchased 208,636 barrels, or 77.2% of its cement requirements, with the balance being supplied by nine other cement companies (CX 29, 30, 31; RX 3).

85. In the years 1962, 1963, and 1964, the Cooney organization purchased the following percentages of its cement requirements from respondent's subsidiary, North American Cement Company: 4.9%, 7.6% and 7.2%, respectively. In the years 1965 and 1966, respondent's subsidiary supplied the following percentages of the cement requirements of the former Cooney plants: 99.9% and 83.7%. The only other supplier to the Cooney plants in 1965 was Universal Atlas Cement Division of U.S. Steel, and the only other supplier in 1966 was Colonial's Hudson Cement Division (CX 29–32; RX 3).

2. *Barriers to Entry, and Decline in Selling Activity by Existing Companies*

86. The only evidence in the record as to the cost of entry by a cement company into the NYMA is the testimony of an official of a cement company called by complaint counsel, to the effect that it would cost approximately $16 million to build a two-million barrel cement plant to serve the NYMA, and an additional $16 million to "acquire enough ready-mix facilities to use this two million barrels, and successfully compete in this market" (Tr. 251). The testimony cited by complaint counsel cannot be deemed to support their position that "the cost of entry has doubled as a result of the NYMA's vertical integration" (CPF No. 106). The witness' testimony must be interpreted as relating to a plant which will serve the entire northeastern area, and not merely the NYMA, since none of the plants as to which there is evidence in the record serves only the NYMA and, except for Colonial, none of them sells as much as two million barrels in the NYMA (CX 102–103). Furthermore, the witness' testimony is based on the assumption that in order to enter the market it will be necessary to control ready-mix facilities sufficient to consume the entire output of the cement plant. This assumption is apparently based on the same witness' testimony that "roughly 75 percent, 70 percent, perhaps, of the cement consumed [in the NYMA] is consumed by ready-mix companies that are vertically integrated," leaving only 25% to

30% of the market for the remaining companies to compete for (Tr. 244). However, the record does not support this assumption since at the end of 1966 the four vertically integrated ready-mix companies (including the now divested Ryan) accounted for 41.7%, and not 70% to 75% of the cement consumed in the NYMA. Furthermore, in terms of the whole northeastern market served by cement companies selling in the NYMA, the four vertically integrated ready-mix companies accounted for only 8.3%, and not 70% to 75% of the market.

87. The only new cement company to enter the NYMA in recent years (aside from the Hudson Cement Division of Colonial) has been Atlantic Cement Company. Atlantic's plant was constructed in the Hudson River Valley between 1960 and 1962. At the time it undertook to construct its plant, the only vertically integrated companies were Colonial and American, Colonial's cement plant having started production in 1959 and American having acquired Hickey in January 1960. While Atlantic, which had conducted feasibility studies prior to proceeding with erection of its plant, was somewhat concerned with the growth of vertical integration, it nevertheless decided to proceed with its plans to enter the NYMA. In order to facilitate its entry into the market, it entered into a contract in the fall of 1962 with Triangle Cement Company, an established distributor of imported cement, whereby the latter became Atlantic's exclusive distributor in the NYMA (Stip., par. 120; Tr. 114–115).

88. In 1962, Triangle was the second largest shipper of cement into the NYMA, accounting for 1.08 million barrels, compared to 2.96 million barrels by Colonial (the largest shipper), and 1.03 million barrels by Lone Star Cement (the third largest shipper). In 1963, the first full year in which it operated under the contract with Atlantic, Triangle's shipments into the NYMA amounted to 1.5 million barrels, making it the second largest shipper after Colonial, which accounted for 2.7 million. In 1964, during which the Atlantic-Triangle contract was terminated in June, Triangle's cement shipments into the NYMA were 291,000 barrels and Atlantic's own shipments were 354,000. Their combined shipments of 645,000 barrels made them the third largest shipper after Colonial, with 3.6 million barrels, and Universal Atlas Cement Company, with 1.3 million barrels. In 1966, Atlantic shipped 170,000 barrels into the NYMA (Stip., par. 121; Tr. 115). While Atlantic dropped from the ranks of the top companies serving the NYMA in 1966, it retained second rank

within the northeastern market as a whole, with 7.25 million barrels shipped, compared to 7.55 million barrels shipped by the top ranking company, Universal Atlas (CX 102).

89. Several cement companies have undertaken modernization and expansion of existing plants serving the NYMA. Marquette began a construction program in 1965 to increase the capacity of the former North American Catskill plant from 1.6 million barrels to 3.3 million barrels. Whitehall Cement Company undertook a modernization program for its Lehigh Valley plant in 1964, in an effort to lower its production costs and put itself in a better position to compete in a declining market (Stip., par. 122; Tr. 115–116).

90. Several of the companies distributing cement in the NYMA have curtailed their operations or ceased selling in the area. Thus, in October 1964, Alpha Portland Cement Company closed its terminal at Port Washington, Long Island, from which it had previously distributed, in portions of the NYMA, cement manufactured at its plant in the Hudson River Valley. This terminal was closed because the decline in Alpha's volume in the NYMA, resulting from the loss of one of its largest customers in the area, Certified, no longer justified the expense of maintaining a terminal. Triangle Cement Corporation, which, as previously noted, had been a substantial distributor of cement (both imported and Atlantic's), closed its terminal at Brooklyn, New York, when its contract with Atlantic was terminated in June 1964. It leased the terminal to Atlantic and ceased to distribute cement in the NYMA. Triangle was Certified's third largest supplier in 1963, but sold it no cement in 1964 (Stip., par. 123; Tr. 116–117).

91. Complaint counsel suggest that vertical integration of cement companies with ready-mix firms has been a major factor in discouraging new entrants into the NYMA and in causing a number of the existing cement companies to withdraw from, or lessen their activity within, the NYMA. In support of their position, complaint counsel cite the opinions expressed by several cement company officials, including that of the witness previously referred to (par. 86, *supra*), who gave as the reason for his opinion that the NYMA was a "[v]ery unattractive" market, the fact that 70 to 75% of the cement in the market was consumed by vertically integrated companies (Tr. 244). As previously noted, the share of the NYMA accounted for by vertically integrated ready-mix companies in 1966 was 41.7% and not

the vertically-integrated portion of the market of Cooney's 1.8% share of cement consumption, was hardly a factor of such magnitude as to adversely affect the decisions of Marquette's actual or potential competitors in the NYMA.

96. It is clear from the testimony of the four cement company officials on whom complaint counsel rely to support their position, that any problems which these companies may have had as a result of vertical integration in the NYMA cannot be attributed to the Cooney acquisition. Two of the companies, Whitehall and Giant, had never been substantial suppliers to Cooney prior to its acquisition (Tr. 170, 186, 215; RX 3). Both of them specifically attributed their decline in sales in the NYMA to the vertical integration of Colonial, which had been one of their more substantial customers (Tr. 183–184, 220–221). While a third cement company, Alpha, had been a somewhat larger supplier to Cooney (selling it between 19,000 and 25,000 barrels in 1963 and 1964), its decision to close its distributional terminal in New York occurred prior to the Cooney acquisition and was due to Alpha's loss of one of its largest customers, Certified (Stip., par. 123; Tr. 116). Moreover, while Alpha's sales in the NYMA as a whole declined between 1963 and 1965, its sales in the Westchester County area served by Cooney increased during the same period (CX 103, 104). The fourth cement company, Atlantic, whose representative attributed his company's decline in sales to vertical integration, had never been a substantial supplier to Cooney (RX 3). It is also clear from his testimony that the decline in cement consumption of approximately 3 million barrels of cement, accompanied by the softening of cement prices, were the major factors in his company's decision to withdraw from the NYMA (Tr. 380–382, 396, 402–403).

B. *Ready-Mix Level*

97. Complaint counsel contend that a vertically integrated ready-mix company has a competitive advantage over non-integrated companies, in that the former are able to offer lower prices and extend better credit terms than their non-integrated competitors. Counsel suggest that the use of such competitive practices by Lawrence since the acquisition of the former Cooney plants has placed non-integrated competitors at a competitive disadvantage (CPF Nos. 114, 117).

98. Of the five ready-mix firms whose representatives were

called as witnesses by complaint counsel, only three competed directly with the former Cooney plants, *viz,* Petrillo Builders, Frost Sand & Gravel, and Airway Transit-Mix. Of these three firms, only the first two were in competition with the Cooney plants in their main area of operation, Westchester County. The third firm, Airway, is located in the Bronx and its competition with the Cooney plants involves principally that portion of its business (approximately one-fourth) which consists of sales in Westchester County (Tr. 441, 458).

99. While Cooney's competitors claimed that they had lost some jobs to Cooney because of lower prices or the extension of liberal credit terms, the record is lacking in reliable and substantial evidence that the decline in sales by these companies was due, in any significant degree, to price cutting or overly liberal extension of credit by Cooney or its successor, Lawrence. In fact, with one exception, the record is lacking in reliable evidence as to the prices at which Cooney was able to obtain business and as to what credit terms, if any, it granted to customers.

100. Petrillo Builders attributed the loss of only one job to Cooney, and did not know the price at which Cooney obtained the job (Tr. 271–272). Its representative conceded that the concrete subcontractor to whom the cement was sold by Cooney was one which Cooney had been serving at a number of other locations (Tr. 290). It is significant that the major decline in Petrillo's sales occurred between 1963 and 1964, prior to respondent's acquisition of Cooney (CX 105–B). It is clear from the testimony of the Petrillo representative that the major factor in the loss of sales by his company has been the decline of construction activity in the lower Westchester County area which it serves. His testimony also reveals that his company only competes in a limited way with the larger companies, such as Colonial and Cooney, since it is unable to handle the larger jobs (Tr. 270).

101. The representative of Frost Sand & Gravel testified that price was "the all-important thing" in obtaining ready-mix business, and attributed his company's loss of four jobs in early 1966 to Cooney's lower prices. However, in only one instance was there any evidence that the Cooney price was actually lower than the bid submitted by Frost (Tr. 306, 307). While price may have played a part in some of Frost's loss of business to Cooney, the major factor appears to have been that after Cooney's

acquisition by Lawrence, the latter put a number of additional salesmen into the territory and began to compete aggressively for business in an area of Westchester County where it had previously been less active (Tr. 313–314). With the closing of the former Cooney plant at Mamaroneck, Lawrence has been less active as a competitor of Frost (Tr. 316). Even during the earlier period when Cooney was more active in the area, Frost's principal competition was Colonial (Tr. 318).

102. The representative of Airway, whose principal sales area is the Bronx rather than Westchester County, attributed the loss of a single job to Cooney's successor, Lawrence, due to a lower price bid by the latter. However, the record contains no reliable evidence as to Lawrence's price on this job (Tr. 443). It may be noted that Airway's business, as reflected in its cement purchases, doubled between 1963 and 1964, and while there was some decline in 1965 and 1966, such decline was commensurate with the decline experienced by most of the major companies in the NYMA (CX 105 A–B).

103. The principal advantage attributed to integrated ready-mix companies by some of their non-integrated competitors was the fact that they were able to buy their cement cheaper and could thus underbid their non-integrated competitors for ready-mix jobs (Tr. 274, 417, 447). However, according to the uncontradicted and credited testimony of the president of Lawrence's principal supplier, Marquette, Lawrence paid the going market price for its cement and received no special discounts which were not available to ready-mix firms generally (Tr. 508, 514, 538). Insofar as the liberality in the extension of credit is concerned, such practice by Lawrence was limited to the area served by its Queens plant and involved mainly the period when it was trying to gain entree into the ready-mix business in 1964 and 1965 (Tr. 509, 516).

104. The record contains no reliable evidence as to what barriers, if any, exist to the entry of new ready-mix firms into the NYMA. Complaint counsel cite the testimony of representatives of two of the cement companies, to the effect that they did not regard the NYMA as an attractive market for potential entrants into the ready-mix business (Tr. 245, 375). However, these officials were not shown to have any expertise concerning the financial requirements for entry into the ready-mix business, and there was no evidence adduced on this subject through the

representatives of five ready-mix companies who testified in this proceeding.

CONCLUSIONS

I. Interstate Commerce

A. *The Acquiring Companies*

1. The complaint alleges, the answer admits, and the record establishes that respondent Marquette is, and has been for many years, engaged in the shipment of portland cement across State lines. It is clear, therefore, that by reason of such shipment of portland cement across State lines respondent Marquette is, and was at all times material herein, engaged in "commerce" within the meaning of the Clayton Act.

2. Respondent, while not disputing Marquette's engagement in commerce, contends that the Commission has no jurisdiction over it since the acquisition here involved was not made by it but by Lawrence which is not a party to this proceeding. Despite the fact that the latter was a wholly owned subsidiary, respondent contends that it was not a mere "alter ego" of Marquette, but must be deemed to be an independent company whose acts cannot be attributed to Marquette (RPF, at 54; RB, at 12–13).

3. As heretofore found, Lawrence was formed by Marquette in June 1964 as a vehicle for the latter's entry into the ready-mix business, and was wholly owned by Marquette. The decision to acquire the Cooney interests, through Lawrence, was made by Marquette, and the latter supplied the financial assistance which made the acquisition possible. Lawrence's activities in the conduct of the ready-mix business were financed by Marquette (Tr. 505, 510). Two of Lawrence's three directors at the time of the Cooney acquisition were also directors of Marquette (CX 17, p. 24, CX 20–C). Under these circumstances, it is the conclusion and finding of the examiner that the acquisition of the Cooney interests by Lawrence may, in contemplation of law, be regarded as having been made by Marquette. Since Lawrence itself, at the time of the acquisition of the Cooney interests, purchased substantial quantities of cement from cement companies with plants located in Pennsylvania (CX 20–E), it too may be regarded as having been engaged in commerce, within the meaning of the Clayton Act.

B. *The Acquired Companies*

4. The record establishes that the Cooney companies purchased cement from cement companies with plants located outside of New York State prior to the time of the acquisition. During 1962 and 1963, such purchases of out-of-State cement were very substantial. However, during 1964, the year in which the acquisition was made, such out-of-State purchases declined to approximately 500 barrels because Cooney purchased most of its cement from Colonial's Hudson plant. For this reason, respondent apparently contends there was no substantial engagement in commerce (RB, at 13). Considering the pattern of Cooney's purchases of cement during the years prior to the acquisition, it is the conclusion and finding of the examiner that, despite a decline in out-of-State purchases in 1964, the Cooney companies may be regarded as having been engaged in commerce, within the meaning of the Clayton Act, at the time of their acquisition.

II. The Product Markets

A. *Portland Cement*

5. Complaint counsel contend, respondent concedes, the record establishes, and the examiner concludes and finds, that portland cement, as hereinbefore defined (par. 15, FINDINGS, *supra*), constitutes an appropriate product market for purposes of this proceeding, and is a relevant line of commerce within the meaning of Section 7 of the Clayton Act, as amended.

B. *Ready-Mix Concrete*

6. Complaint counsel contend, respondent concedes, the record establishes, and the examiner concludes and finds, that ready-mixed concrete, as hereinbefore defined (par. 16. FINDINGS, *supra*), constitutes an appropriate product market for purposes of this proceeding, and is a relevant line of commerce within the meaning of Section 7 of the Clayton Act, as amended.

III. The Geographic Markets

A. *Portland Cement*

The Northeastern Market

7. Complaint counsel contend, respondent concedes, the record establishes, and the examiner concludes and finds, that the northeastern section of the United States served by cement plants

located in the Lehigh Valley of Pennsylvania and the Hudson River Valley of New York, as hereinbefore described (par. 34, FINDINGS, *supra*), constitutes a geographic market area for the sale of portland cement, and is an appropriate section of the country within the meaning of Section 7 of the Clayton Act, as amended.

The NYMA

8. Complaint counsel contend, respondent concedes, the record establishes, and the examiner concludes and finds, that the New York City metropolitan area, as hereinbefore defined (par. 38, FINDINGS, *supra*), constitutes a geographic market or submarket for the sale of portland cement, and is in an approprite section of the country within the meaning of Section 7 of the Clayton Act, as amended.

Westchester County

9. Complaint counsel contend that the Westchester County portion of the NYMA is also an appropriate section of the country, within which to determine the probable competitive impact of the Cooney acquisition (CPF, at 17–20; CB, at 9–10). Respondent opposes such contention on the grounds that (a) the complaint fails to allege that Westchester County is a separate geographic market area, and (b) the record fails to establish that it is an economically significant market for cement (RR, at 8, 27).

10. The smallest geographic area referred to in the complaint as a market area is the New York City metropolitan area. Paragraph One of the complaint, defining the relevant geographic areas and product lines, specifically describes the boundaries of the New York City metropolitan area. No reference is made therein to Westchester County as a separate market area. While Paragraph Eight of the complaint alleges that Cooney was engaged in business "principally" in Westchester County, it refers to the county as a "portion of the New York City Area." Paragraph 15 of the complaint, alleging the trend toward vertical integration, refers to the market area in which this occurred as "the New York City Area," and alleges that "the market for portland cement in the New York City Area has been potentially foreclosed as a result of vertical acquisitions." Paragraph 17 of the complaint, the so-called "'effects" allegation, describes the situs of the alleged adverse effect of the Cooney acquisition as

being "the United States as a whole and various parts thereof, including the State of New York and the New York City Area."

11. No contention was made by complaint counsel during prehearing procedures that Westchester County was a proper market or submarket for cement. The smallest geographic area referred to in pretrial was the New York City metropolitan area (PHO No. 1, par. 1, 4, 15). A stipulation entered into by counsel during pretrial, and incorporated into the record, made reference to and described the northeastern geographic area served by the plants selling cement in the New York City metropolitan area and, while not conceding that the broader area was a relevant market, it specifically stated, with reference to the New York City area, that: "The NYMA is a distinct market or sub-market for cement" (Stip., par. 82, 77–78; Tr. 102–104).

12. No reference to the Westchester County area as an appropriate geographic market having been made in the pleadings, and no contention having been advanced during the prehearing phase of this proceeding or during the trial thereof, that the Westchester County area was an appropriate market area, it would, in the opinion of the examiner, be a denial of due process to allow complaint counsel to assert such a contention at this time.

13. Aside from the fact that the issue has not been timely raised in this proceeding, it is the opinion of the examiner that the record does not support the position of complaint counsel that Westchester County may be considered to be an appropriate market area for portland cement. The position of complaint counsel that Westchester County is an appropriate market area for cement is based on their contention that Westchester County, (a) is a "commercially significant market," (b) is considered to be a market by cement companies, and (c) has characteristics "distinct" from the rest of the NYMA (CPF, at 17–20; CB, at 9). None of these contentions, in the opinion of the examiner, is sustained by the record.

14. The contention of complaint counsel that Westchester County is a "commercially significant market" is based on the fact that cement shipments into Westchester County represented between 5.8% and 8.8% of all cement shipped into the NYMA between 1963 and 1966 (CPF No. 57). The examiner finds it unnecessary to determine whether these are significant amounts of cement since, in his opinion, the proper universe figure for comparing Westchester County shipments is the northeast as a

whole, and not the NYMA. The essential charge in this proceeding, as far as the cement product line is concerned, is that cement producers have been foreclosed from a substantial part of their market. The primary market of these shippers, and the one which determines the economic feasibility of maintaining these plants, is the northeastern section of the United States served by them. Complaint counsel have asserted, and correctly so, that the New York City metropolitan area is an important part of this primary market because, among other things, it accounts for around one-fourth of the cement produced by these plants. It may, therefore, be regarded as an appropriate subdivision or submarket of the primary northeastern market. If the Westchester County area is also to be considered a proper submarket, it must be because, among other things, it accounts for a substantial part of the cement sold in the primary market. A comparison on such a basis reveals that between 1963 and 1966 cement shipments into Westchester County represented between 1.5% and 1.7% of the total shipments of the northeastern plants, except for the year 1964 when they were 2.1%. While these shipments cannot be said to be of de minimis proportions, they are not, in the opinion of the examiner, of such an order of magnitude as to justify characterizing Westchester County as a "commercially significant market" for the northeastern producers.

15. The contention of complaint counsel that Westchester County is considered by cement companies to be a separate market for cement has not the slightest support in the record (CPF No. 59). The testimony of the four cement company officials relied upon by complaint counsel was focused on whether they regarded the area as holding any future for cement companies, and not on whether they regarded it as economic market, separate and distinct from the NYMA as a whole. To the extent that any of them may have used the word "market," in referring to Westchester County, they did so in the context of the question asked by complaint counsel: "[H]ow would you characterize Westchester County as a market for cement *in terms of potential volume* [emphasis supplied]" (Tr. 172, 215, 243, 371). However, it is clear from their testimony as a whole that they did not intend, in responding to complaint counsel's question, to express any opinion as to whether Westchester County was a distinct economic market for cement. On the contrary, the testimony of several of the witnesses indicates that they regarded Westchester

County as being a part of, and as being characterized by substantially similar conditions as, the rest of the NYMA.[13]

16. The contention of complaint counsel that Westchester has "distinct [market] characteristics" which distinguish it from the rest of the NYMA is based on the fact that, (a) prices for cement in Westchester are "slightly higher" than in other areas of the NYMA, and (b) there is a higher degree of vertical integration in Westchester County (CPF Nos. 60–62). Neither of the facts asserted, in the opinion of the examiner, establishes that market conditions in Westchester County differ essentially from those in the NYMA as a whole.

17. While the price of cement in Westchester County is usually about 10¢ a barrel higher than the price in New York City, this is not due to any basic difference in the price structure, but results from additional delivery costs to the suburban area. A similar differential exists in the Long Island suburban counties, with such differential graduating upward as the distance from the city increases. However, the basic price structure is essentially the same throughout the NYMA, and the prices in the suburbs move up and down in a fixed relationship to the New York City prices (Tr. 161–162, 188–189, 366).

18. Complaint counsel's argument that Westchester County "is distinct from the rest of the NYMA" because it is "dominated by the two integrated firms, Colonial and respondent" involves an exercise in bootstrap pulling. Certainly one cannot use the degree of economic integration resulting from an acquisition as an indicia of the fact that the geographic area where it occurred is a distinct market. If the extent of integration in a market were a proper factor to be considered in determining the geographic confines of the market, it would be more appropriate to determine the confines of the market as it existed in its pristine form, before it was disturbed by the acquisition. On this basis, complaint counsel's argument would be self-defeating, since there was only one integrated company in the Westchester County area prior to the Cooney acquisition, compared with four in the NYMA as a whole.

[13] One of the witnesses testified that "construction activity in Westchester County pretty much holds pace with construction activity generally in the five boroughs [of New York]" (Tr. 173). Another testified that "Westchester [County] will have as good a future as any of the rest of the market," referring specifically to "New York City" (Tr. 377–378). The same witness, in responding to complaint counsel's question as to whether he would characterize Westchester County "as a potential market for cement" testified that "there is every reason to think that Westchester County will continue to be as good a cement market as the immediate environment," obviously referring to New York City (Tr. 371).

19. Aside from all other considerations, complaint counsel's contention that Westchester County is a separate market or submarket for cement is largely academic since the record contains no reliable or meaningful market share data, in terms of Westchester County. Complaint counsel's case, insofar as the cement product line is concerned, is based on the fact that the Cooney acquisition resulted in substantial foreclosure of access to a cement market by other cement companies. However, as previously noted (par. 75, FINDINGS, *supra*), the record contains no reliable data as to cement consumption by ready-mix firms within Westchester County.

B. *Ready-Mixed Concrete*

The NYMA

20. Complaint counsel contend, respondent concedes, the record establishes, and the examiner concludes and finds, that the New York City metropolitan area, as hereinbefore defined (par. 38, 59, FINDINGS, *supra*), constitutes a geographic market for ready-mixed concrete, and is an appropriate section of the country within the meaning of Section 7 of the Clayton Act, as amended.

Westchester County

21. As in the case of the cement product line, complaint counsel contend that Westchester County is a submarket of the NYMA and is, therefore, an appropriate section of the country for purposes of determining the competitive impact of the Cooney acquisition (CPF, at 25–29). Respondent opposes such contention for essentially the same reasons as it opposes complaint counsel's position that Westchester County is an appropriate submarket for cement, *viz,* (a) that the complaint failed to allege that Westchester County was a separate geographic market, and (b) that the record fails to establish it is, in fact, an approrpiate market (RR, at 8–9, 14–17).

22. The examiner finds it unnecessary to discuss the matter of the complaint's failure to allege that the Westchester County area is an appropriate market or submarket for ready-mixed concrete. The examiner's comments, heretofore made with respect to the complaint's failure to refer to Westchester County as a market or submarket for cement, are equally applicable with respect to the ready-mixed concrete product line. As noted there, the smallest geographic area in which it is charged that the present acquisition will have an adverse impact is the New York

City metropolitan area. What has previously been stated with respect to compliant counsel's failure to assert, during the prehearing phase of this proceeding or during the trial thereof, that the Westchester County area is an appropriate submarket for cement is also applicable to the ready-mixed concrete product line.

23. Aside from any failure to properly raise the issue prior to or during the trial, the position of complaint counsel as to why Westchester County should be considered "a relevant submarket for ready-mix concrete" is without merit. Complaint counsel's argument that Westchester County is an appropriate submarket is based, essentially, on the fact that, (a) ready-mixed concrete prices are higher in Westchester County than elsewhere in the NYMA, and (b) there are fewer and different companies competing in Westchester County, than in other parts of the NYMA. In the opinion of the examiner, none of the facts cited by the complaint counsel justifies considering the Westchester County area a separate geographic submarket for ready-mixed concrete.

24. While there is some evidence that the price of concrete in Westchester County is between 50 cents and $1 a cubic yard higher than in other portions of the NYMA, this is due largely to the additional cost of cement, and to additional transportation costs that may be involved (Tr. 442, 465). However, the differences in question are not of such magnitude as to suggest, without more, that Westchester County is a market separate and distinct from the rest of the NYMA.

25. Complaint counsel's argument based on differences in the number and distribution of ready-mix firms is likewise unpersuasive. While there are only seven ready-mix firms in Westchester County, the record fails to establish that they regularly compete with each other, and not with other companies elsewhere in the NYMA. On the contrary, the record indicates that there is little competition between the ready-mix companies in upper Westchester County with those in lower Westchester, and that the latter compete with ready-mix firms elsewhere in the NYMA, particularly those in the Bronx (Tr. 262, 271, 278, 281, 287, 297, 313, 335, 352, 432, 441, 446, 458). The record establishes, as complaint counsel concede, that only two of the Westchester producers (both located in the lower part of the county) compete to any significant extent with Cooney (CB at 9). The situation is thus one in which complaint counsel, contrary to the intention of Congress, are seeking to establish a "community" as being

a section of the country, and to protect "*competitors*" rather than "*competition*" (*Brown* v. *U.S.*, 370 U.S. 291, at 320).

26. Aside from all other considerations, complaint counsel's contention that Westchester County is a separate submarket for concrete is largely academic since, as previously noted, the record contains no reliable or meaningful market share data for ready-mix firms in Westchester County. The only reliable market share data for such firms which is in the record is for the NYMA as a whole.

IV. Competitive Impact

A. *Portland Cement*

27. The position of complaint counsel that the instant acquisition is in violation of Section 7 of the Clayton Act is based, essentially, on their contention that it has, (a) occurred in the setting of a cement market which is highly concentrated, (b) resulted in substantial foreclosure of respondent's competitors, particularly in the NYMA, (c) contributed to the "critically high" degree of foreclosure resulting from all vertical combinations in the NYMA, and (d) raised a further barrier to entry into the market by cement companies and caused a number of existing companies to curtail their operations within the market (CPF, at 29–40; CB, at 12–17). In the opinion of the examiner, the record does not support complaint counsel's version of the facts, and none of the facts of record, either separately or in combination, supports the conclusion that respondent's acquisition of the Cooney plants constitutes a violation of Section 7 of the Clayton Act.

28. Whether, as complaint counsel contend, it is proper to characterize the NYMA as "highly concentrated at the cement supply level" (with which characterization respondent strenuously disagrees), it cannot be gainsaid that a degree of concentration among the top four cement companies, of 44.5% in 1962 and 59.9% in 1966, cannot be regarded as insubstantial. However, more important than the bare figures themselves, is the allocation of the market shares between the various cement companies reflected in them. Thus, an analysis of the figures discloses that, (a) two of the top four ranking companies in 1962 were no longer among the top four ranking companies in 1966 (*viz*, Alpha and Triangle), (b) two of the top four ranking companies in 1966 were not among the top four ranking companies in 1962 (*viz*, Cilco and Universal Atlas), (c) the fourth

ranking company in 1966 (Cilco) is a non-integrated importer of cement, (d) the second ranking company in 1966 (Lone Star) is also a nonintegrated producer in the NYMA, and (e) while the share of the top four companies in creased by approximately 15% between 1962 and 1966, this increase resulted almost entirely from the increase in the market share of one company, Colonial, which managed to maintain first rank throughout the period. It is thus apparent that while the top four companies account for a substantial share of the NYMA and that this share has increased since 1962, there has been a considerable shifting in rank among the companies doing business in the area, that non-integrated as well as integrated companies occupy top rank, and that one company has consistently occupied first rank and its share in the market has been responsible for the apparent increase in the share of the top four companies. It is also worthy of note that the acquiring company (Marquette) was not among the top four companies in the market, except in 1961, and that its market share has been a relatively small and declining one (from 5.5% in 1960 to 4.4% in 1966). The fact that it ranked seventh to ninth in the market, hardly makes it a leading company, considering that there were only 18 companies in the market and several of these were of insignificant size.

29. A similar picture is revealed by an analysis of the figures purporting to show the "critically high" degree of foreclosure by vertically integrated cement companies. Thus, of the 45.3% of cement consumption in the NYMA accounted for by the five ready-mix firms which were vertically integrated with a cement company during all or part of 1964, *viz,* Colonial, Certified, Ryan, Hickey and Cooney, Colonial alone accounted for 31.3% of the purported foreclosure. In 1966, four integrated companies, Colonial, Certified, Ryan and Cooney accounted for 41.7% of the cement consumed in the NYMA, with Colonial alone accounting for 28.9%. Thus, the proportion of cement consumed by vertically integrated ready-mix firms actually declined between 1964 and 1966. It may also be noted that their share was further reduced to 38% at the end of 1966 as a result of Ryan's voluntary divestiture.

30. Even if the alleged foreclosure represented by the other acquisitions which occurred between the time of Colonial's vertical integration and that of respondent's acquisition of Cooney, may be regarded as substantial, it is the opinion of the examiner that the latter acquisition cannot be regarded as resulting

in any substantial additional foreclosure. While the cumulative effect of such acquisitions is, as counsel argue, a proper factor to be considered, an acquisition which in itself involves a very minor portion of the market, cannot be considered to be substantial merely because it comes at the end of a number of substantial acquisitions. In the opinion of the examiner, the amount of cement consumed by Cooney, representing between 1.6% and 1.8% of the cement consumed in the NYMA in 1963 and 1964, and 0.43% of the cement consumed in the northeast, is of such minor proportions as not to justify the conclusion that its acquisition may result in substantial foreclosure of markets to other cement companies.

31. Complaint counsel suggest that, despite the relatively small proportion of the market involved, the acquition represented a substantial amount of cement since the volume was large in comparison to that sold to any single customer by other cement companies. Thus, complaint counsel note that the annual cement purchases of Cooney's plants in the NYMA, amounting to around 200,000 barrels, involved a greater quantity of cement than that sold to any single customer by most of the cement companies whose officials testified in this proceeding (CPF No. 88). Complaint counsel's argument overlooks the fact that, with rare exceptions, nonintegrated ready-mix companies do not purchase all or substantially all of their cement from a single supplier. Consequently, in the normal course of events the individual cement suppliers would have access to only a fraction of Cooney's total cement requirements. In any event, even considering Cooney's entire volume, the acquisition thereof cannot be considered as representing substantial foreclosure to other cement companies in the NYMA.

32. In terms of raising further barriers to entry or causing the withdrawal of other cement companies from the market, it is the opinion of the examiner that the record fails to establish that the Cooney acquisition has had or may have this impact. The principal factor raising any barrier to entry by new companies, or causing any withdrawal from the market by existing cement companies, has been the excess capacity and uninviting price structure resulting from the substantial decline in building activity. Aggravating this condition has been the escalation in the loss of access to the business of the largest ready-mix consumer in the market, *viz,* Colonial, which consumed almost one-third of the cement sold in the NYMA. When the Cooney ac-

quisition is considered in this light, it seems evident that it can hardly be considered to have been a significant factor in discouraging new entries or the withdrawal of existing cement companies.

B. *Ready-Mixed Concrete*

33. Complaint counsel's position with respect to the ready-mix product line is, essentially, that (a) nonintegrated ready-mix firms are at a competitive disadvantage vis-a-vis their vertically integrated competitors, in terms of their ability to grant lower prices and extended credit terms, and (b) respondent's acquisition of Cooney, in a market in which over half the volume was accounted for by vertically integrated ready-mix firms, was bound to adversely affect its competitors and discourage new entrants into the market (CPF Nos. 113–115).

34. The principal factor in causing lower prices and the extension of longer credit terms was the excess capacity in the market in relation to the demand, rather than any action of vertically integrated ready-mix companies. While it may be assumed that the better financed companies are able to offer lower prices or better credit terms, the record fails to establish that vertically integrated firms, as such, or that Cooney in particular, have been responsible for lower prices and longer credit terms in the NYMA.

35. While the share of the NYMA ready-mix market accounted for by the three vertically integrated firms (Colonial, Certified and Ryan) was high, *viz*, 60.8%, when the Cooney acquisition occurred, the bulk of this, 45% was accounted for by Colonial alone, and the share of the Cooney plants, 2.5%, was hardly of such an order of magnitude as to justify any inference, absent other persuasive evidence, that it may have an adverse impact on its competitors. The record fails to establish that the integrated ready-mix companies have a decisive advantage over nonintegrated companies. Indicative of the fact that vertical integration does not necessarily confer an undue advantage on a ready-mix company is the fact that the market shares of the top two vertically integrated companies, Colonial and Certified, had declined by 1966, and that at the end of 1966 one of the other integrated companies, Ryan, saw fit to divorce itself from the cement company with which it was formerly affiliated. Thus, at the end of 1966, the share of the market accounted for by

vertically integrated ready-mix firms had been reduced to 54.3%, of which Colonial alone accounted for 41.3%.

C. *Conclusions as to Impact*

36. Complaint counsel's case rests principally on, (a) statistical evidence as to the extent of concentration and vertical integration in the relevant markets, and (b) testimony of officials of cement and ready-mix companies as to alleged difficulties in competing with vertically integrated competitors. The latter evidence involved largely complaints about problems allegedly created by vertical integration in general, rather than competitive difficulties with respondent or Cooney as a result of the instant acquisition. While there was some testimony by ready-mix witnesses about difficulties in competing with Cooney after its acquisition, much of it was unreliable or insubstantial, and failed to establish that any decline in business sustained by these companies was due, in any substantial degree, to Cooney's vertical integration. With respect to the testimony of competitors complaining generally about vertical integration, it placed exaggerated emphasis on vertical integration as the cause of industry problems in the NYMA. The root cause of the industry's problems (at both the cement and ready-mix levels) has been the decline in construction activity, which has brought about serious price deflation. A recent increase in construction activity was soon reflected in an improved market outlook. To the extent vertical integration has aggravated the industry's problems in the NYMA, it has resulted principally from the integration of the largest consumer in the market, Colonial Sand & Stone.

37. Vertical integration, by its very nature, involves some loss of access to a customer by competitors of the acquiring company. However, not every loss of access is illegal. In determining whether a particular acquisition will have the proscribed statutory effect on competition "an important consideration * * * is the size of the market foreclosed" (*Brown Shoe Co.* v. *U.S.*, 370 U.S. 294, at 328). It is recognized, of course, that except in cases where the quantities involved are "of monopoly or *de minimis* proportions, the percentage of the market foreclosed * * * cannot itself be decisive" (*Brown Shoe* v. *U.S.*, *supra*, at 329). It thus becomes necessary to view the industry setting of the acquisition, including the extent and trend of concentration and of vertical integration in the market. However,

in considering the industry background sight must never be lost of the basic principle that the "statute prohibits a given merger only if the effect of *that* merger may be substantially to lessen competition" (*Brown Shoe* v. *U.S.*, *supra*, at 332). Consequently, the mere fact that concentration and vertical integration in a market may be high does not justify condemnation of all vertical combinations, no matter how insignificant.

38. While the degree of concentration and vertical integration in the NYMA is statistically substantial, the market structure revealed by the statistics is not a rigid one and, except for Colonial Sand & Stone, the vertically integrated companies do not occupy a position of market dominance. The acquiring company here involved (Marquette), while a substantial company, is not and has not been a leading company in the market. The acquired company (Cooney), while larger than many of its competitors (most of which were miniscule in size), was a relatively small factor in the NYMA. The fact that it was the fifth or sixth ranking company means little in terms of the issue of foreclosure since the percentage of cement consumed by it in the NYMA was small and, in the larger northeastern market served by the affected cement producers, it was almost negligible.

39. Complaint counsel suggest that Cooney's share of the cement consumption market at the time it was acquired, 1.6% to 1.8%, was of an order of magnitude comparable to that which the Court in *Brown Shoe* considered to involve substantial foreclosure, *viz*, 1.6% (CB, at 3). However, the situation in the two cases is hardly comparable. In *Brown Shoe* the Court was considering a national market, rather than a local one, and 1.6% of the market involved annual sales in excess of $42 million, compared to Cooney sales within the NYMA of $3 million in 1963 and cement purchases of $773,425 (CX 26–31). Furthermore, despite the relatively small percentage involved in *Brown*, the acquired company was the largest independent shoe retailer in the entire United States. Likewise, the acquiring company, Brown, was the fourth largest manufacturer in the national market. The acquisition was part of a national trend, in which Brown was a leading figure, to take over retail shoe outlets and, unless the challenged acquisition was stopped, it would encourage other acquisitions. Respondent here is not a leading factor in the NYMA or the northeast, and the acquisition of Cooney can hardly be deemed to encourage acquisitions elsewhere. As far as the NYMA is concerned, the trend appears to

have run its course and there is no evidence that acquisitions in one local cement market lead to acquisitions in other markets. It must also be borne in mind that *Brown Shoe* also involved a horizontal aspect, with the two companies being in substantial competition in a number of local markets.

40. Considering, (a) that the problems of the NYMA have been caused largely by factors other than vertical integration, (b) that to the extent vertical integration has been a factor in any competitive difficulties which may exist in the market, it has resulted chiefly from the vertical integration of Colonial Sand & Stone Co., Inc., (c) that respondent has occupied a relatively small and generally declining position in the market, and made the present acquisition in an effort to maintain a viable position in the market, and (d) the fact that the Cooney companies were a relatively small factor in the NYMA and were themselves experiencing financial and competitive problems in the market, it is the conclusion and finding of the examiner that complaint counsel have failed to sustain the burden of proving that the effect of respondent's acquisition of certain assets of the Cooney companies may be substantially to lessen competition, or to tend to create a monopoly in the NYMA or in any other section of the country, in either the portland cement or ready-mixed concrete product lines.

FINAL CONCLUSIONS OF LAW

1. Respondent Marquette Cement Manufacturing Company, and Cooney Bros., Inc., Plaza Concrete Corporation, and Mamaroneck Stone Corp., were at all times material herein, corporations engaged in commerce, as "commerce" is defined in the Clayton Act, as amended.

2. Counsel supporting complaint have failed to sustain the burden of establishing, by substantial, reliable and probative evidence, that the acquisition of certain of the assets of Cooney Bros., Inc., Plaza Concrete Corporation, and Mamaroneck Stone Corp., by respondent Marquette Cement Manufacturing Company was in violation of Section 7 of the Clayton Act, as amended, or of Section 5 of the Federal Trade Commission Act.

ORDER

It is ordered, That the complaint in the above-entitled proceeding be, and the same hereby is, dismissed.

OPINION OF THE COMMISSION

JANUARY 7, 1969

BY ELMAN, *Commissioner:*

This matter is before the Commission on the appeal of complaint counsel from the initial decision of the hearing examiner, filed February 27, 1968. Respondent is charged with having violated Section 7 of the Clayton Act, as amended, by acquiring through its wholly owned subsidiary, Lawrence Concrete Corporation, the assets of a group of firms engaged in the production and sale of ready-mixed concrete.[1] After five days of hearings and on the basis of a record much of which was stipulated, the hearing examiner entered an order dismissing the complaint, principally on the ground that the challenged merger would have little, if any, anticompetitive impact.

I

There is no substantial dispute concerning the basic evidentiary facts in this case. Except to the extent that they are inconsistent with this opinion, the findings of the hearing examiner are amply supported by the record and are adopted as the findings of the Commission. Respondent, an Illinois corporation, is primarily engaged in the manufacture of portland cement. Nationally it is the seventh or eighth largest cement manufacturing company, operating 12 manufacturing plants in the year of the merger and 20 distribution terminals in 18 different States.[2] Marquette operated a cement manufacturing facility at Catskill, New York [3] and a distribution terminal at Flushing, New York. In the years 1960 through 1966, respondent shipped an average of 549,000 barrels of cement per year in the New York Metropolitan Area (NYMA) out of an average total shipment

[1] The companies whose assets were acquired were known as Cooney Bros., Inc., Plaza Concrete Corp., and Mamaroneck Stone Corp. All three firms were controlled by the Cooney family and they are hereinafter referred to collectively as "Cooney."

[2] By 1965, respondent distributed its products in 29 different States. Sales and net income from 1962–66 were as follows:

Year	Net sales	Net income
1962	$82,021,366	$9,560,592
1963	79,086,700	8,807,619
1964	79,972,832	7,303,553
1965	83,295,163	5,894,447
1966	83,832,126	2,851,307

(Initial decision p. 40 herein).

[3] A substantial modernization and expansion of the Catskill plant was begun in 1964 or 1965. Compare R. 115–16 with initial decision p. 40 and CX 22.

of almost 11,470,000 barrels each year by all suppliers.[4] Measured by the number of barrels it shipped into the NYMA, Marquette was the fourth largest cement shipper into the NYMA in 1961, declined to a low of ninth in 1964, the year of the merger, and rose to eighth in 1965 and seventh in 1966. Its market share dropped from 5.7 percent in 1962, to 3.5 percent in 1964 but had grown to 4.4 percent by 1966.[5]

In 1964 Marquette organized Lawrence Concrete Corporation, a wholly owned subsidiary, to conduct business as a ready-mixed concrete producer. Lawrence began selling concrete in August of that year. On November 16, 1964, acting on a decision made by Marquette and using that firm's financial resources to consummate the deal, Lawrence acquired the Cooney firms. We agree with the examiner that the evidence overwhelmingly supports the conclusion that this acquisition should, for purposes of Section 7, be regarded as having been made by Marquette.[6]

Cooney was at the time of the merger the fifth ranking ready-mixed company, measured by cement consumption, in the NYMA, and it was the second largest independent ready-mixed firm in that market—*i.e.*, unaffiliated with any cement manufacturer. Cooney's purchases of cement in the years 1962–66 were as follows: [7]

	Purchases of Portland Cement by Cooney Plants in NYMA (in 000's of barrels)	*Total Purchases of Portland Cement by All Cooney Plants (in 000's of barrels)*
1962	235	295
1963	208	262
1964	234	270
1965	245	350
1966	268	429

Prior to the merger, Cooney purchased cement from a number of sources, including Marquette, with no one supplier dominating until 1964, the year of the merger, when the Colonial Sand & Stone Co., the leading firm in the market, supplied over 75 percent of Cooney's needs, the balance coming from nine smaller suppliers. In 1965 and 1966, after the merger, Marquette supplied 99.9 percent and 83.7 percent of Cooney's requirements. The balance was supplied by a cement producing subsidiary of the United States Steel Corp. in 1965, and by Colonial in 1966.[8]

[4] See, *e.g.*, CX 103.

[5] Initial decision p. 51.

[6] Initial decision p. 76.

[7] The chart is based on CX 29, 30, 31, 32, 105. The Lawrence-Cooney combination consumed 359,000 and 371,000 barrels of cement in the NYMA in 1965 and 1966.

[8] Initial decision p. 68.

II

The examiner found, and the parties apparently agree, that the NYMA is the principal relevant geographic market in which the competitive effects of the Marquette-Cooney acquisition may be identified.[9] It is perhaps the most important market for cement in the United States involving annual shipments with a value of from $30–50 million. For purposes of measuring competition at the cement manufacturer level, the examiner also looked at the broader geographic area defined as the northeastern United States. There is sharp disagreement, however, as to whether there is a legally significant Westchester County submarket within the NYMA. Respondent argues, and the hearing examiner found, that the issue of a Westchester County submarket was not timely raised in this proceeding and that, in any event, the evidence does not show that Westchester is a commercially or legally significant market for cement or ready-mixed concrete. Under the broad test laid down by the Supreme Court in *United States* v. *Pabst Brewing Co.,* the relevant "section of the country" need not be delineated "by metes and bounds as a surveyor would lay off a plot of ground" and "proof of the section of the country where the anticompetitive effect exists is entirely subsidiary to the crucial question in this and every § 7 case which is whether a merger may substantially lessen competition anywhere in the United States." [10] However, because the question has become involved in a procedural snarl which it would serve little purpose to unravel and because, in the view we take of the case, it is unnecessary to examine the effects of the Marquette-Cooney merger in Westchester County, we see no need to consider the question whether Westchester County is a distinct and relevant submarket.

The structure of the NYMA cement and ready-mixed concrete markets is set out at length in the initial decision and only a few salient highlights need be repeated here. In 1964, the NYMA was served by some 19 or 20 suppliers of portland cement operating approximately 24 cement plants and seven distribution terminals.[11] In 1966, the market was served by 18 suppliers

[9] There is no question that "portland cement" and "ready-mixed concrete" as defined in the initial decision (pp. 44, 45) are the relevant product markets.

[10] 384 U.S. 546, 549–50 (1966).

[11] Initial decision p. 50; CX 102. Where price and quality are equal, as is often the case, consumers of portland cement prefer the supplier which offers the promptest delivery service. This has led to an increased use of truck delivery for cement shipments. The growth of truck delivery has in turn led to an increase in the use of distribution terminals to facilitate service in heavily populated areas.

with 23 plants and 12 distribution terminals.[12] These figures, however, give a misleading picture of the structure of the NYMA cement market.

In fact, the market is highly concentrated and concentration has increased steadily and markedly since 1962. The percent of shipments accounted for by the four largest firms increased from over 44 percent in 1962 to nearly 60 percent in 1966; the share of the eight largest firms moved from 67 percent to nearly 78 percent in the same years.[13] At the same time, concentration among ready-mixed firms declined slightly but remained extremely high.[14] Thus, in 1962 the two largest ready-mixed companies consumed 57 percent of all the cement consumed by such companies, the four largest consumed over 76 percent and the six largest over 83 percent; in 1966 the figures were 51 percent, 63 percent and 71 percent.[15]

The NYMA was therefore characterized by significant concentration at both the cement producer and ready-mix levels. At the same time, a trend to vertical integration, usually by merger, was developing. Until late in 1958 there was no cement company in the NYMA affiliated with a concrete company or other cement consumer. In November 1958 Colonial Sand & Stone, the largest ready-mixed firm and the largest cement consumer in the NYMA, built its own cement producing facilities. Colonial continued to purchase some of its cement requirements from other producers for a few years but by 1966 it was shipping more cement into the NYMA than its ready-mixed plants consumed.[16]

In January 1960 the American Cement Corp. acquired M. F. Hickey, Inc., in a transaction challenged by the Commission. Four years later, American Cement divested itself of Hickey. However, the reconstituted Hickey Company remains indebted under a purchase money mortgage to American Cement and purchased 91 percent of its cement requirements from American in 1964 and 70 percent in 1966. The fourth largest ready-mixed

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[12] *Ibid.*

[13] *Ibid.*

[14] Although approximately 50 ready-mixed firms were active in the NYMA, six or seven large, multiplant companies accounted for most of the ready-mixed shipments and consumed most of the cement used in the NYMA.

[15] Initial decision p. 58. Measured in terms of total cement consumption in the NYMA, by ready-mixers, construction contractors, building material dealers, and others, the amounts consumed by the two, four and six largest ready-mixers were 40, 53, and 58 percent of the total in 1962, and 35, 44, and 50 percent in 1966. *Ibid.*

[16] Compare CX 103 with CX 105.

concrete operator in this market, Ryan, was acquired by National Portland Cement Company, the sixth largest shipper into the NYMA, in 1963. National voluntarily divested itself of Ryan in 1966.

In April 1964 United States Steel, through its Universal Atlas Cement subsidiary which was the second ranking firm in the NYMA, acquired Certified Industries, Inc., the second largest ready-mixed company in the market. The Commission recently entered an order requiring Universal Atlas to divest Certified. Finally, the instant acquisition was consummated in June 1964. As of the date that the record in this proceeding was closed there had been no further movement toward vertical integration by merger in the NYMA.

III

What was the probable competitive impact of this merger? The hearing examiner found that Cooney's purchases of cement represented only 1.6 to 1.8 percent of total cement consumption in the NYMA, that neither Marquette nor Cooney was an important factor in the NYMA, and that the percentage of the market foreclosed by this merger was relatively insubstantial. He concluded that while this percentage of the market was the same or slightly greater than that foreclosed by the merger in the *Brown Shoe* case,[17] that decision involved different factual circumstances rendering it inapplicable here.

We do not regard the *Brown Shoe* case as stating a *per se* rule of illegality but we do find the facts concerning foreclosure in the instant case far more compelling than did the examiner. To view this merger in isolation, as a solitary occurrence, is to overlook or ignore the important structural changes that were taking place in the NYMA. As the Court said in *Brown Shoe:*

> Another important factor to consider is the trend toward concentration in the industry. It is true, of course, that the statute prohibits a given merger only if the effect of *that* merger may be substantially to lessen competition. But the very wording of § 7 requires a prognosis of the probable *future* effect of the merger.
>
> The existence of a trend toward vertical integration, which the District Court found, is well substantiated by the record. Moreover, the court found a tendency of the acquiring manufacturers to become increasingly important sources of supply for their acquired outlets. The necessary corollary of these trends is the foreclosure of independent manufacturers from markets otherwise open to them. And because these trends are not the product

[17] *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962).

of accident but are rather the result of deliberate policies of Brown and other leading shoe manufacturers, account must be taken of these facts in order to predict the probable future consequences of this merger.[18]

In the present case, at the time of the merger over 42 percent of the cement shipped into the NYMA, a substantial and important market for cement, was consumed by integrated ready-mixed companies.[19] Existing independent cement manufacturers and potential new entrants had no real access to this portion of the market regardless of whether they lowered their prices, improved their quality, or offered unusually prompt delivery. Nor is it necessary to speculate about this since here, as in *Brown Shoe,* the record makes clear that integrated firms did in fact supply all or almost all their own cement requirements, making few, if any, purchases on the open market.[20]

Assuming, moreover, that these tied ready-mixed companies might be willing to entertain offers from other suppliers, outside suppliers would still be at a disadvantage. The vertically integrated cement companies had placed themselves in the desirable position of being able to "clinch a sale as long as they matched the best terms offered by anyone else (and maybe even if they did not)." [21] In effect the unintegrated cement companies would be able to compete only for the remaining segment of the market which was itself subject to further shrinkage as the vertical merger movement proceeded. It is not unreasonable to expect

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[18] 370 U.S. at 332–33; see, *e.g., United States* v. *Kimberly-Clark Corp.,* 264 F. Supp. 439 (N.D.Calif. 1967); *cf. Standard Oil Co.* v. *United States,* 337 U.S. 293 (1949); Blake & Jones, *The Goals of Antitrust: A Dialogue on Policy,* 65 Colum. L. Rev. 363, 443–44 (1965); Lockhart & Sacks, *The Relevance of Economic Factors in Determining Whether Exclusive Arrangements Violate Section 3 of the Clayton Act,* 65 Harv. L. Rev. 913, 924 (1952).

[19] Initial decision pp. 59, 60 & n. 8. Since nonintegrated cement manufacturers could sell to other sources besides ready-mixers—for example, construction contractors, building material dealers, and manufacturers of concrete products—it is necessary for purposes of determining the extent of the market from which manufacturers were foreclosed to measure purchases by ready-mixers against total purchases by all users of cement in the NYMA and not just against purchases by other ready-mixers.

It should be noted that from 1964 to 1966 the M. F. Hickey Company, although having been divested by the American Cement Company, remained indebted to that firm under a purchase money mortgage and continued to purchase substantially all of its cement requirements from American Cement. If Hickey is considered as part of the tied market, the share of the total market for cement tied to particular producers was about 45 percent for the years 1964 to 1966. *Ibid.*

[20] For example, in 1965 Marquette supplied 99.9 percent of Cooney's requirements. Initial decision p. 68. Other integrated companies supplied between approximately 80 and 94 percent of their own cement needs. *Ibid.*; see RX 26.

[21] Blake & Jones, *supra* note 18, at 455; see *United States* v. *DuPont & Co.,* 353 U.S. 586, 595 (1957); *United States* v. *DuPont & Co.,* 366 U.S. 316, 318–19 (1961). But *cf.* Liebeler, *Toward A Consumer's Antitrust Law: The Federal Trade Commission and Vertical Mergers in the Cement Industry,* 15 U.C.L.A.L. Rev. 1153, 1157–58 & n. 15 (1968); Dean & Gustus, *Vertical Integration and Section 7,* 40 N.Y.U.L. Rev. 672, 702 (1965).

that some may have withdrawn from the NYMA, preferring to ship their cement to other adjacent markets where substantial foreclosure was less of a problem. Those that remained would have been marginal competitors at best, content for the most part to follow the competitive strategies and pricing policies set by the ruling oligopoly.

At the same time, the restraints imposed on the leading firms in the market by potential competitors would have been considerably diminished. After this merger, in excess of 42 percent of the market for cement was "captive." That this development had an adverse impact on entry barriers in the cement industry should be manifest. Any firm considering entering the NYMA as a cement supplier would now have to enter at two levels, both as supplier and consumer, in order to be sure of finding an outlet for its cement. The increased capital costs and the greater risks that entry at both levels would entail substantially increased barriers to entry in this market, a fact that was made clear by the testimony of cement company officials to the effect that it was the total cumulative vertical integration in the NYMA that made the market an unattractive one.[22]

The Marquette-Cooney merger added momentum to this trend which, like the trend toward vertical integration in the *Brown Shoe* case, was "not the product of accident but was rather the result of deliberate policies" of respondent and other cement manufacturers. At the time of the merger, Cooney's purchases in the NYMA of some 234,000 barrels represented some 3.5 percent of the available—that is, unintegrated—market and made it the second largest unaffiliated cement consumer in the NYMA.[23] Had Cooney remained independent, its purchases in the NYMA, which were increasing in 1965 and 1966, would have constituted over four percent of the free market. Instead, however, Cooney's purchases became part of the market foreclosed to new or independent suppliers and the segment of the market thus insulated from competition remained above 40 percent in those years.[24]

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[22] See, *e.g.*, R. 177, 216–17; Blake & Jones, *supra* note 18, at 461–63. C. Kaysen & D. F. Turner, *Antitrust Policy* 120 (1959): cf. Wilk, *Vertical Integration in Cement Revisited: A Comment on Peck and McGowan*, 13 Antitrust Bull. 619, 628–31, 642–45 (1968); see generally, J. Bain, *Barriers to New Competition* ch. 3, 5 (1956). But see Peck & McGowan, *Vertical Integration in Cement: A Critical Examination of the FTC Staff Report*, 12 Antitrust Bull. 505, 526–27 (1967).

[23] Cooney made some additional purchases for consumption outside the NYMA. These are not included in the 234,000 barrel figure.

[24] *Cf. United States* v. *Kimberly-Clark Corp.*, 264 F. Supp. 439, 446–48, 463 (N.D.Calif. 1967). We find no merit in the suggestion that because Cooney had purchased most of its requirements from Colonial, the leading firm in the NYMA, in 1964 the merger in effect

These percentages alone do not give an accurate picture of Cooney's significance. Its purchases of cement would be enough to make it the principal customer or one of the principal customers of every firm in the NYMA and would alone be sufficient to sustain some of the smaller cement producers serving the NYMA. Cooney was one of the two largest remaining independent ready-mixed firms; only Transit Mix Concrete Corp. was larger. Excepting Transit Mix, no other acquisition would have involved as large a degree of foreclosure of cement suppliers as was accomplished by the purchase of Cooney. For the most part, the remaining ready-mix outlets were far smaller than Cooney and Transit Mix and, since they were so fragmented and unable to compete for larger construction projects, they constituted inferior outlets for cement.[25]

The purpose of this merger is clear. It was intended to guarantee Marquette an outlet for its cement, to secure a foothold for Marquette in the NYMA, where its market share had been declining.[26] By merging, Marquette accomplished this purpose without bearing the greater capital costs and risks that internal expansion would have entailed, and without adding to the ready-mixed capacity in the NYMA. It may be, as the hearing examiner suggests, that the merger was defensive, a reaction to the trend toward vertical integration in the NYMA, that it was helpful in maintaining Marquette's market position, and that it aided Marquette in competing with its dominant rival, Colonial Sand & Stone Co. This explanation proves too much. It would justify almost any merger, vertical or horizontal, by any of the other firms in the market.[27] There has been no showing that vertical

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forecloses only Colonial from obtaining Cooney as a customer. The facts are that Cooney's reliance on Colonial in 1964 was a marked change from its prior policy of not purchasing an overwhelming percentage of its requirements from any one source, even in that year Cooney dealt with several other suppliers, and there is nothing in the record establishing that Cooney's reliance on Colonial would have continued indefinitely but for the merger. On the contrary, the record supports the proposition that, until the merger, Cooney was part of the market for which unintegrated cement producers were free to compete.

[25] S:e, *e.g.*, Staff Report to the Federal Trade Commission, *Mergers and Vertical Integration in the Cement Industry* 104–05 (1966) (hereinafter cited as "Cement Report").

[26] See Wilk, *supra* note 22, at 630; *cf. United States* v. *Kimberly-Clark Corp.*, 264 F. Supp. 439 (N.D.Calif. 1967); *United States* v. *Kennecott Copper Corp.*, 231 F. Supp. 95, 98 (S.D.N.Y. 1964), *aff'd per curiam*, 381 U.S. 414 (1965).

[27] Compare *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576, 618 (S.D.N.Y. 1958):

"The merger offers an incipient threat of setting into motion a chain reaction of further mergers by the other but less powerful companies in the steel industry. If there is logic to the defendants' contention that their joinder is justified to enable them, in their own language, to offer 'challenging competition to United States Steel * * * which exercises dominant influence over competitive conditions in the steel industry * * *' then the remaining large producers in the 'Big 12' could with equal logic urge that they, too, be permitted to join forces and to integration by merger was a technological or economic necessity for survival in the NYMA. On the contrary, what little evidence there is on this issue points the other way. Asked about the attractiveness of the NYMA as a market for cement after Colonial's vertical expansion but before the burst of vertical merger activity in the early 1960's, one witness, the president of Atlantic Cement, testified:

> We did recognize [that Colonial might increase its initial 2 million barrel cement producing capacity]. We did consider the total size of the market, and we did assume that Colonial might at some point increase their initial capacity. I just don't recall the dates and how it tied into our planning, but we were aware of it. That left a great deal of the market, however, available to us.
>
> It is an attractive market in the sense that it is close to our producing facility. I think, as I recall, we calculated the market at something in the neighborhood of twelve million barrels of consumption, of which Colonial perhaps represented around a third of it. So even discounting completely their cement requirements, there was still a great deal of cement to be sold in the market at that time.[28]

The hearing examiner's finding that the only vertical integration injurious to competition in the NYMA was Colonial's is therefore suspect, as is his conclusion that the decline in construction activity in the NYMA was the "root cause" of the industry's problems at both the cement and ready-mixed levels.[29] We cannot find that declining demand rather than vertical integration was the "root cause" of the substantial foreclosure in this market making it unattractive from the point of view of prospective entrants and unintegrated firms. Moreover, assuming for the moment that the examiner is correct in this finding, he does not explain why the remedy for a temporary [30] dislocation in demand is the radical and permanent restructuring of the

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concentrate their economic resources in order to give more effective competition to the enhanced 'Big 2'; and so we reach a point of more intense concentration in an industry already highly concentrated—indeed we head in the direction of triopoly."

[28] R. 376. The hearing examiner dismissed this testimony as unimportant on the ground that Atlantic's decision to enter the market occurred before Colonial had expanded its cement producing capacity and before the decline in cement consumption in the NYMA. It is clear from the cited testimony that Atlantic did take into account Colonial's potential expansion and nevertheless concluded that entry into the NYMA would be desirable. It was only the cumulative foreclosure that was caused by the subsequent vertical mergers in the NYMA that made the market unattractive. It is also clear that the decline in cement prices in the NYMA was not a permanent development as the examiner implies but was temporary. See note 30, *infra*.

[29] Compare initial decision p. 88 with R. 244, 371–74.

[30] That the diminution in demand was not permanent is implicit in the examiner's finding that "a recent increase in construction activity was soon reflected in an improved market outlook." *Id.* at 23. It is clear, in any event, that the condition was temporary and that demand for cement in the NYMA has again increased.

market implicit in the vertical merger movement. If the vertical merger movement had been permitted to continue unchallenged, when demand again increased, the market would have been dominated by a small oligopoly consisting of the few integrated producers—that is, those who had been able to acquire the substantial ready-mix firms in the market—barriers to entry would have been substantially increased since new entrants would have had to enter at two levels, an expensive and time-consuming proposition,[31] and the prospect of restoring competition to one of the most important markets for cement in the United States would have been dim or nonexistent.

IV

It has been argued that the impact of vertical integration need not have been so adverse, that vertical mergers in this industry permit cement companies to make selective price cuts, not readily visible and not readily matched by unintegrated cement companies, which in fact benefit consumers. Unintegrated cement manufacturers will frequently be unable to match price cuts by their integrated rivals at the concrete level because "such a cut [in cement prices] would place greater downward pressure on prices in the general cement market than would result from a cut in the price of ready-mixed concrete. The threat of large revenue losses following a general decline in cement prices will inhibit cement price cuts more than cuts in the price of ready-mixed concrete."[32] Curbing the vertical merger movement is, therefore, regarded as curtailing aggressive competition and not being in the best interests of the consumer.[33]

The likely impact of the vertical merger movement on consumers has been described as follows:

> A short run response to foreclosure in a market might be more aggressive competitive tactics to preserve or expand sales to remaining customers and thereby compensate for any losses in sales due to integration. From the standpoint of the ultimate user of cement and concrete such a consequence might be desirable if this effect persisted. Whether it would persist is problematical, however, because as the market shrinks with the extension of vertical integra-

[31] See, *e.g.*, R. 245, 251; Cement Report 105–06 (explaining that even internal expansion by cement producers into ready-mixed concrete is so costly and time-consuming as not to be attractive).

[32] Liebeler, *supra* note 21, at 1161.

[33] See *id.*, at 1160–67; *cf.* Dean & Gustus, *supra* note 21, at 694–97. But see Cement Report 108–09 (suggesting that the ability of integrated manufacturers to make hidden price cuts is not necessarily conducive to competition); Wilk, *supra* note 23, at 645.

tion, the risks associated with aggressive competition intensify. It is conceivable that a market could become so extensively tied through vertical integration that nonintegrated suppliers would simply withdraw on the grounds that the rewards to be gained from its cultivation are too small to justify the cost. In this instance, vertical integration may cause a diminution in the number of effective competitors seeking to supply the market and thereby reduce the intensity of competition. Since most suppliers serve a series of markets, they have the option of reducing or avoiding aggressive competitive efforts in those markets which have been substantially diminished by vertical integration. If they are inclined to pursue risky aggressive marketing strategies, they are more likely to pursue them in markets which are not already substantially foreclosed. Unintegrated cement consumers, operating in markets that are to a significant extent integrated, for this reason may find suppliers reluctant to engage in aggressive rivalry in serving their needs.[34]

Even if vertical integration had no other consequence than to facilitate selective price reductions, this result could be achieved by less drastic means not involving a permanent restructuring of the market. Be that as it may, the Marquette-Cooney merger was apparently not consummated with the idea of fostering price competition. The decline in demand in the NYMA had triggered intense price and service competition which forced cement profits down to more competitive levels.[35] There is evidence in the instant case that cement producers in the NYMA, including Marquette, seized on vertical integration as a device for stabilizing prices and mitigating the downward pressure on prices generated by temporarily declining demand and, perhaps, by overcapacity.

In any event, it is clear that there are predictable anticompetitive consequences flowing from this merger, and from the vertical merger movement in the NYMA in general, which cause it to violate Section 7. We have already discussed the foreclosure of existing and prospective cement suppliers from an important segment of this market, the raising of entry barriers that such exclusion portends, and the likelihood that aggressive competition by cement manufacturers will be lessened. It remains to consider the foreseeable effect of the merger on competition at the ready-mixed level.

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[34] Cement Report 107. It should also be noted that vertical mergers diminish competitive confrontation in the cement market by replacing the buying and selling of cement in an open market—with prices determined in bargaining between suppliers and users—with closed, intra-firm transactions, thus reducing "the number of open-market transactions through which final prices to consumers are determined." Brodley, *Oligopoly Power Under the Sherman and Clayton Acts—From Economic Theory to Legal Policy*, 19 Stan. L. Rev. 285, 315 (1967).

[35] Initial decision p. 54.

In this connection what is significant is the leverage enjoyed by the integrated firms which among themselves have tied up over 40 percent of the total market for cement and over 60 percent of the ready-mixed market.[36] By narrowing the margin between the price at which they sell cement on the open market and the price at which they sell ready-mixed concrete, the integrated firms can limit the profits and growth of the ready-mixed firm, many of which are small, local companies operating only in the NYMA, or perhaps even drive them out of business.[37] It is, of course, unlikely that the integrated companies would utilize their leverage to drive independent ready-mixed firms out of the market.[38] This kind of overt exercise of market power is unnecessary; nor is it essential that ready-mixed firms be kept in a state of complete dependency.[39] All that is required is that unintegrated firms and prospective entrants be made aware of the ability of the integrated oligopoly group—whether acting collectively or simply in "follow-the-leader" fashion—to utilize its leverage. The net effect would be to keep any of the independents from competing too aggressively, to maintain prices above competitive levels, to keep out new entrants—in short, to permit the ready-mixed market to function as a highly concentrated oligopoly.[40]

[36] Initial decision pp. 59, 60.

[37] See, *e.g.*, Kaysen & Turner, *supra* note 22, at 122; J. Bain, *Industrial Organization* 360–62 (1968); Adelman, *Integration and Antitrust Policy*, 63 Harv. L. Rev. 27, 44–45 (1949); Hearings on the Impact Upon Small Business of Dual Distribution and Related Vertical Integration, 88th Cong., 1st Sess. 50 (1963) (testimony of Prof. J. W. Markham) [hereinafter cited as 1963 Hearings]; Cement Report 109–10.

[38] See, *e.g.*, Adelman, *supra* note 37, at 45; *cf.* Dean & Gustus *supra* note 22, at 699; *United States* v. *Kennecott Copper Corp.*, 231 F. Supp. 95, 103–04 (S.D.N.Y. 1964), *aff'd per curiam*, 381 U.S. 414 (1965); *United States* v. *Alcoa*, 233 F. Supp. 718, 727–28 (E.D.Mo. 1964).

[39] See, *e.g.*, Bain, *supra* note 37, at 361–62. It has been suggested that "Unintegrated cement consumers, operating in markets that are to a significant extent integrated . . . may find suppliers reluctant to engage in aggressive rivalry in serving their needs." Cement Report 107.

[40] See, *e.g.*, Adelman, *supra* note 37, at 45; Stigler, *Mergers and Preventive Antitrust Policy*, 104 U. Pa. L. Rev. 176, 183 (1955); compare Blake & Jones, *supra* note 18, at 464–65:

"We grant that in moving from our 'fully integrated' model to the conditions of real life it is difficult to know when an industry reaches that point of vertical integration at which the prospective single-stage entrants begin to feel the whip. One may suppose that it is likely to be reached when competitive forces succumb to the allurements of oligopoly pricing, and all or most of the oligopoly group are vertically integrated. At that stage the price-determining group would find it worthwhile to see that their distributing or supplying subsidiaries forego, or threaten to forego, whatever profits accrue from dealing with any aggressive newcomers hanging at the edge of the market. And in such a situation it would be advantageous to discipline any 'independent' outlets or distributors who proposed to deal with a single-stage entrant, by cutting them off from the major firms which comprise the oligopoly group. This group has a market position to protect and can readily sustain short-term losses to achieve long-term gains. Moreover, the large firm can 'spread' the cost of one disciplinary measure to numerous other situations as 'educational.' As in the defense of certain classes of lawsuits, it makes good economic sense for a firm faced with many prospective troublemakers to 'invest' more than the reasonable value of victory in a 'disciplinary' tactic whose vigor is well noted by the others." (Footnotes omitted.)

We readily concede that, if both the cement and ready-mixed concrete markets were relatively unconcentrated, vertical integration might not have these results; leverage or market power would be lacking. [41] It is also true that there is no yardstick for determining the precise point at which vertical integration becomes anticompetitive and socially harmful, a vehicle for applying market power, and is therefore proscribed by Section 7 if accomplished by merger. [42] However, in the present case the evidence establishes that after this merger some 60 percent of the ready-mixed market was controlled by four integrated firms. In these circumstances it is reasonable to suppose both that the integrated firms had leverage vis-a-vis their unintegrated ready-mixed competitors, and that the anticompetitive consequences attributable to such leverage would be to stimulate further vertical integration in the NYMA entrenching the market power of the integrated firms,[43] to reduce the number of competitors and potential competitors in the NYMA or at least to encourage nonaggressive, follow-the-leader competitive tactics, and thus to aggravate the oligopoly structure of that market. [44]

V

This opinion neither states nor applies a *per se* rule of illegality. We do not hold that any vertical merger involving a supplying firm having 3.5 or 4.8 percent of its market with a purchasing firm having 1.6 or 1.8 percent of its market is illegal. We recognize that vertical integration does not of itself create market power and that it may in some cases effect significant economies and efficiencies. Whether a particular vertical merger is illegal

[41] See, *e.g.*, Brodley, *supra* note 34, at 317–18; *cf.* Dean & Gustus, *supra* note 21, at 699 & n. 51.

[42] See, *e.g.*, 1963 Hearings at 50.

[43] Compare Kaysen & Turner, *supra* note 22, at 122–23, Blake & Jones, *supra* note 18, at 464–66, Brodley, *supra* note 34, at 319, Wilk, *supra* note 22, at 629–31, 1963 Hearings at 40–51, 55, with Liebeler *supra* note 21, at 1166 (acknowledging that further vertical integration would be likely but denying that consumers would be injured).

[44] *Cf. United States* v. *Kimberly-Clark Corp.*, 264 F. Supp. 439 (N.D.Calif. 1967); *United States* v. *Kennecott Copper Corp.*, 231 F. Supp. 95, 102–05 (S.D.N.Y. 1964), *aff'd per curiam*, 381 U.S. 414 (1965). Compare *Permanente Cement Co.*, F.T.C. Docket No. 7939, April 24, 1964 (footnote omitted) [65 F.T.C. 410, 492]:

"The extent to which vertical integration may have seriously anti-competitive consequences depends, in general, on the degree of market power possessed by the integrated firms at one or another of the levels on which they operate. 'Except in empirically unimportant cases, there is no reason to expect that vertical integration has any monopolistic implications so long as every stage of production is competitive. * * * [But] vertical integration loses its innocence if there is an appreciable degree of market control at even one stage of the production process. It becomes a possible weapon for the exclusion of new rivals by increasing the capital requirements for entry into the combined integrated production processes, or it becomes a possible vehicle of price discrimination.' Stigler, *Mergers and Preventive Antitrust Policy*, 104 U. Pa. L. Rev. 176, 183 (1955)."

depends on the facts and the market setting in which it occurs. Section 7 does not require proof that the challenged merger will lead inevitably and inexorably to a diminution of competition. Under the statute we are concerned with probabilities not certainties.

In the instant case, there has been no showing that the long-range impact of the vertical restructuring of the NYMA would be anything other than to raise entry barriers at both the cement producing and ready-mixed levels and facilitate oligopoly pricing. The Marquette-Cooney merger was not an isolated occurrence but was part of a broader movement that had insulated over 40 percent of the market for cement in the NYMA from competition and that had seen some 60 percent of all ready-mixers in the NYMA tie themselves to cement producers. What evidence there is suggests that this merger was intended to secure an outlet for Marquette's cement and was in fact a response to increased competition and declining prices in the cement market. It was thus, in its essential nature and purpose, anticompetitive.

In sum, the record amply supports the conclusion that the effect of the merger may be substantially to lessen competition. The best means for redressing the injury to competition is to restore Cooney as an effective competitor and cement consumer. Accordingly, our order requires Marquette to divest itself of its interest in Cooney, and that it be reconstituted as a going concern and an independent competitor in the NYMA. In view of the trend toward competitively injurious vertical mergers in the industry, and in view of respondent's participation in this movement, we are also ordering respondent not to make any other acquisitions of cement consumers, for a period of ten years, without the prior approval of the Commission.

The appeal of complaint counsel is granted. The initial decision and order of the hearing examiner are vacated to the extent inconsistent with this opinion. An appropriate order will be entered.

Commissioner MacIntyre did not participate in the foregoing action.

ORDER

This matter has been heard by the Commission on the appeal of complaint counsel from the initial decision of the hearing examiner filed on February 27, 1968. The Commission has rendered its decision granting complaint counsel's appeal and adopting the findings of the hearing examiner to the extent consistent with the opinion accompanying this order. Other findings of fact and conclusions of law made by the Commission are contained in that opinion. For the reasons therein stated, the Commission has determined that the order entered by the hearing examiner should be vacated and a new order issued by the Commission as its final order. Accordingly,

It is ordered, That respondent, Marquette Cement Manufacturing Company, a corporation, and its subsidiaries, officers, directors, agents, representatives, employees, affiliates, successors and assigns, within one (1) year from the date that this order becomes final, shall divest absolutely and in good faith, all stock, assets, properties, rights and privileges, tangible or intangible, including but not limited to all properties, plants, machinery, equipment, raw material reserves, trade names, contract rights, trade-marks, and good will acquired by Marquette Cement Manufacturing Company as a result of its acquisition of the stock and/or assets of Cooney Bros., Inc., Plaza Concrete Corporation, and Mamaroneck Stone Corp., together with all plants, machinery, buildings, land, raw material reserves, improvement, equipment and other property of whatever description that have been added to or placed on the premises of the former Cooney Bros., Inc., Plaza Concrete Corporation, and Mamaroneck Stone Corp., so as to restore said companies as going concerns and effective competitors in the lines of commerce and geographic markets in which they were engaged at the time of the acquisitions.

It is further ordered, That pending divestiture, respondent shall not make any changes in any of the plants, machinery, buildings, equipment or other property of whatever description of the former Cooney Bros., Inc., Plaza Concrete Corporation, and Mamaroneck Stone Corp., which shall impair their present capacity for the production, sale and distribution of ready-mixed concrete, aggregates and concrete products, or other products produced, or their market value.

It is further ordered, That in accomplishing such divestiture, none of the assets, properties, rights, or privileges, described in paragraph 1 of this order, shall be sold or transferred directly or indirectly, to any person who is at the time of the divestiture an officer, director, employee, or agent of, or under the control or direction, of Marquette Cement Manufacturing Company or any subsidiary or affiliated corporations of Marquette Cement Manufacturing Company, or who owns or controls, directly or