IN THE MATTER OF

WEST COAST CREDIT CORPORATION t/a FIDELITY FINANCE CO., INC.

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

Docket C-2600. Complaint, Nov. 19, 1974 - Decision, Nov. 19, 1974

Consent order requiring a Seattle, Wash., money lender, among other things to cease instituting collection lawsuits except in the county where the defendant either resides or where the contract was signed, and using promissory notes, etc., containing provisions governing the choice of forum county in the event of suit.

Appearances

For the Commission: *Randall H. Brook.*

For the respondent: *Betty B. Fletcher* and *Jonathan Blank, Preston, Thorgrimson, Ellis, Holman & Fletcher*, Seattle, Wash.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondent West Coast Credit Corporation, a corporation doing business as Fidelity Finance Co., Inc., has violated Section 5 of the Federal Trade Commission Act, and that a proceeding in respect thereof would be in the public interest, issues this complaint.

PARAGRAPH 1. Respondent is a Washington corporation with its principal office located at 2005 Fifth Ave., Seattle, Wash.

PAR. 2. Respondent is engaged in the business of extending loans to consumers at various offices located throughout the State of Washington. Allegations below of respondent's present acts and practices include past acts and practices.

PAR. 3. In the course of its business, respondent extends loans to persons resident in Wash. and Idaho, and receives payments from, pursues collection activities against, and institutes legal actions against, debtors resident in Wash., Idaho, Oreg. and other states. Thus respondent maintains a course of business in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course of collecting allegedly defaulted obligations, respondent regularly resorts to use of judicial process in matters not resolved by private settlement. The defendant debtors in such cases are

predominantly low-income or middle-income persons not represented by counsel. Respondent usually obtains default judgments.

PAR. 5. Respondent commences collection lawsuits in the Superior Court of King County, Wash. In many such suits defendants reside, and have incurred the underlying obligations, outside of King County, in places up to 300 or more miles from the court. Courts located in the county where defendants reside or where they signed the contracts sued upon could be used for these suits. Through this use of distant or inconvenient forum, respondent effectively deprives defendants of a reasonable opportunity to appear, answer and defend the lawsuits. Therefore, such use of a distant or inconvenient forum is unfair.

PAR. 6. Almost all the defendants described in Paragraph Five would be entitled under state venue laws to be sued in the county of their residence and to move for a change of venue to that county, except for them having previously waived this right. Respondent elicits and causes such waiver by requiring borrowers to sign a form promissory note containing the following "venue waiver" provision:

> The undersigned agree the venue of any action instituted hereon, at election of payee hereof, may be laid in King County.

PAR. 7. The venue waiver provision is not a bargained-for part of the promissory note and is not generally understandable to persons without legal background or experience. By requiring borrowers to waive statutory venue provisions, respondent effectively deprives them of rights otherwise available to move for a change of forum. Therefore, such use of venue waiver provisions is unfair.

PAR. 8. For its superior court lawsuits, respondent uses confusingly worded summonses which give defendants inadequate and misleading directions as to the proper procedure for responding. These summonses have the tendency to mislead defendants into defaulting. Thus respondent effectively deprives defendants of a reasonable opportunity to appear, answer and defend the lawsuits. Therefore, such use of confusingly worded summonses is unfair and deceptive.

PAR. 9. The acts and practices alleged above are all to the prejudice and injury of the public and constitute unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereto with violation of the Federal Trade Commission Act, and the respondent having been

served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The 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 complaint to issue herein, 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 considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent West Coast Credit Corporation, a corporation doing business as Fidelity Finance Co., Inc., is a Washington corporation with its principal office located at 2005 Fifth Ave., Seattle, Wash.

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 respondent West Coast Credit Corporation, a corporation doing business as Fidelity Finance Co., Inc., and its successors, assigns, officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the extension or collection of credit obligations of consumers, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Instituting suits except in the county where the defendant resides at the commencement of the action, or in the county where the defendant signed the contract sued upon. This provision shall not preempt any rule of law which further limits choice of forum or which requires, in actions involving real property or fixtures attached to real property, that suit be instituted in a particular county. The term "county" includes the equivalent political subdivision where no county exists.

2. Using promissory notes or other contracts containing any provision which governs or purports to govern choice of forum county in the event of suit.

It is further ordered, That, where respondent learns subsequent to institution of a suit that Paragraph 1 above has not been complied with, it shall forthwith terminate the suit and vacate any default judgment entered thereunder. In lieu of such termination, respondent may effect a change of forum to a county permitted by Paragraph 1; Provided, That respondent gives defendant notice of such action and opportunity to defend equivalent to that which defendant would receive if a new suit were being instituted. In all cases respondent shall provide defendants with a clear explanation of the action taken and of defendants' rights to appear, answer and defend in the new forum.

It is further ordered, That, where respondent terminates a suit or vacates a judgment pursuant to the preceding paragraph, it shall give notice to such termination or vacation to each "consumer reporting agency," as such term is defined in the Fair Credit Reporting Act (15 U.S.C. Section 603), which respondent has been informed or has reason to know has recorded the suit or judgment in its files. Additionally, respondent shall furnish such notice to any other person or organization upon request of the defendant.

It is further ordered, That when respondent institutes suit in any superior court in Washington State, it shall attach, to any summons served upon defendants, a notice or explanation to defendants which gives clear and adequate directions as to the proper procedure for responding to the summons without defaulting. The notice or explanation shall use clear and unconfusing language, and shall appear clearly, conspicuously, and in type at least as large as typewriter pica type. Should superior court rules or procedures change respondent shall forthwith modify the notice accordingly. The initial form of the notice, and any modifications thereof, shall be subject to approval by the Seattle Regional Office or other authorized representative of the Federal Trade Commission.

It is further ordered, That respondent prepare and maintain a summary of Washington superior court suits instituted, pending, terminated, or acted upon subsequent to judgment. This summary shall contain each defendant's 1) name, 2) address, and 3) county of residence; 4) county where the contract sued upon was signed by the defendant, if the suit was not instituted in the residence county; 5) date served; 6) date filed; 7) docket number; 8) name and location of court in which filed; 9) amount claimed; and 10) whether a default judgment has been entered. Where a suit has been instituted in a county other than where

defendant resides or signed the contract, the reason for this choice of forum shall be explained. This summary shall cover a continuous two-year period commencing with service upon respondent of this order. A summary of suits instituted in King County Superior Court shall be prepared for the year immediately prior to this service, including only items 1-4 and 10, above. A copy of this summary shall be submitted to the Federal Trade Commission on a semiannual basis except that the summary of activity for the year preceding service of this order upon respondent shall be submitted within sixty days after service.

It is further ordered, That respondent shall forthwith deliver a copy of this order to each of its branches, subsidiaries, and operating divisions.

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

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

IN THE MATTER OF

DILLINGHAM DEVELOPMENT COMPANY

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

Docket C-2601. Complaint, Nov. 19, 1974 - Decision, Nov. 19, 1974

Consent order requiring a Los Angeles, Calif., developer and seller of recreational land in Calif., and Nev., among other things to cease violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

Appearances

For the Commission: *Jon R. Calhoun.*
For the respondent: *Pro se.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Truth in Lending Act, and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Dillingham Development Company, a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Acts, and the implementing regulation promulgated under the Truth in Lending 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 Dillingham Development Company is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Nevada with its principal office and place of business located at 10850 Wilshire Boulevard, Suite 800, Los Angeles, Calif.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the development and sale of recreational land in California and Nevada.

PAR. 3. In the regular course and conduct of its business as aforesaid respondent regularly arranges for the extension of consumer credit or offers to extend or arrange for the extension of such credit as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, in extending or arranging for such consumer credit, respondent made certain cost of credit disclosures, including the actual interest rate to be charged, but failed to comply with the disclosure requirements of the Truth in Lending Act as defined and set forth in Regulation Z, in that respondent:

a) Failed to make the required disclosures clearly, conspicuously, and in meaningful sequence, as prescribed by Section 226.6(a) of Regulation Z.

b) Failed, in the course of disclosing the cost of credit expressed as a percentage rate, to use the term "annual percentage rate," as prescribed by Section 226.8(b)(2) of Regulation Z.

c) Failed to set forth the number, amount, due dates or periods of payments scheduled to repay the indebtedness and the sum of such payments using the term, "total of payments," and to identify the amount of any "balloon payment" and state the conditions, if any, under

which a "balloon payment" may be refinanced if not paid when due, as prescribed by Section 226.8(b)(3) of Regulation Z.

d) Failed to describe the method of computing unearned portions of finance charges and amounts deducted from any rebate or credit to the customer of such charges in the event of prepayment of the obligation, as prescribed in Section 226.8(b)(7) of Regulation Z.

e) Failed, in the course of disclosing the sales price to use the term "cash price," as prescribed by Section 226.8(c)(1) of Regulation Z.

f) Failed to use the term "unpaid balance of cash price" to describe the difference between the cash price and the total down payment, as prescribed by Section 226.8(c)(3) of Regulation Z.

g) Failed to disclose and itemize on a timely basis all other charges included in the amount financed, but which are not part of the finance charge, as prescribed by Section 226.8(c)(4) of Regulation Z.

h) Failed to use the term "unpaid balance" to describe the sum of the unpaid balance of cash price and all other charges which are included in the amount financed but which are not part of the finance charge, as prescribed by Section 226.8(c)(5) of Regulation Z.

i) Failed to use the term "amount financed" to describe the difference between the unpaid balance and any amounts required to be deducted under Paragraph (e) of Section 226.8 of Regulation Z, as prescribed by Section 226.8(c)(7) of Regulation Z.

j) Failed to disclose and itemize the total amount of the finance charge using the term "finance charge," as prescribed by Section 226.8(c)(8)(i) of Regulation Z.

k) Failed to use the term "deferred payment price" to describe the sum of the cash price, all other charges which are included in the amount financed but which are not part of the finance charge, and the finance charge as prescribed by Section 226.8(c)(8)(ii) of Regulation Z.

l) Failed, in any consumer credit transaction to make all disclosures, determined in accordance with Sections 226.4 and 226.5 of Regulation Z, in the manner, form and amount required by Sections 226.6, 226.8, 226.9, and 226.10 of Regulation Z.

PAR. 5. By the aforesaid failure to make disclosures, respondent has failed to comply with the requirements of Regulation Z, the implementing Regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System. Pursuant to Section 103(q) of the Truth in Lending Act, respondent's aforesaid failure to comply with Regulation Z constitutes violations of that Act and, pursuant to Section 108 thereof, respondent has thereby violated 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 Los Angeles Regional Office 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 of the Truth in Lending 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 Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Dillingham Development Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Nevada, with its office and principal place of business located at 10850 Wilshire Boulevard, Suite 800, Los Angeles, Calif.

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, Dillingham Development Company, a corporation, its successors and assigns, and respondent's officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with any extension or arrangement for the extension of consumer credit, or any advertisement to aid, promote or assist, directly or indirectly, any

extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 C.F.R. §226) of the Truth in Lending Act (Pub. L. 90-321, 15 U.S.C. 1601 *et seq.*), do forthwith cease and desist from:

1. Failing to make the required disclosures clearly, conspicuously, and in meaningful sequence, as prescribed by Section 226.6(a) of Regulation Z.

2. Failing to set forth the finance charge expressed as an annual percentage rate, using the term "annual percentage rate," as prescribed by Section 226.8(b)(2) of Regulation Z.

3. Failing to set forth the number, amount, due dates or periods of payments scheduled to repay the indebtedness and the sum of such payments using the term, "total of payments," and to identify the amount of any "balloon payment" and state the conditions, if any, under which a "balloon payment" may be refinanced if not paid when due, as prescribed by Section 226.8(b)(3) of Regulation Z.

4. Failing to describe the method of computing unearned portions of finance charges and amounts deducted from any rebate or credit to the customer of such charges in the event of prepayment of the obligation, as prescribed in Section 226.8(b)(7) of Regulation Z.

5. Failing to use the term "cash price" to describe the cash price of the property purchased, as prescribed by Section 226.8(c)(1) of Regulation Z.

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

7. Failing to disclose and itemize on a timely basis all other charges included in the amount financed, but which are not part of the finance charge, as prescribed by Section 226.8(c)(4) of Regulation Z.

8. Failing to use the term "unpaid balance" to describe the sum of the unpaid balance of cash price and all other charges which are included in the amount financed but which are not part of the finance charge, as prescribed by Section 226.8(c)(5) of Regulation Z.

9. Failing to use the term "amount financed" to describe the difference between the unpaid balance and any amounts required to be deducted under Paragraph (e) of Section 226.8 of Regulation Z, as prescribed by Section 226.8(c)(7) of Regulation Z.

10. Failing to disclose and itemize the total amount of the finance charge using the term "finance charge," as prescribed by Section 226.8(c)(8)(i) of Regulation Z.

11. Failing to use the term "deferred payment price" to describe the sum of the cash price, all other charges which are included in the amount financed but which are not part of the finance charge, and the finance charge as prescribed by Section 226.8(c)(8)(ii) of Regulation Z.

12. Failing, in any consumer credit transaction to make all disclosures, determined in accordance with Sections 226.4 and 226.5 of Regulation Z, in the manner, form and amount required by Sections 226.6, 226.8, 226.9, and 226.10 of Regulation Z.

It is further ordered, That the respondent corporation shall establish and maintain at its offices copies of relevant executed documents for all future and post-January 1, 1973, sales of real property for inspection and review upon request by the Federal Trade Commission. Such documents shall include, where appropriate, copies of the initial Purchase Agreement, Note Secured by Deed of Trust, Deed of Trust and Truth in Lending Disclosure Form.

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

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

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

IN THE MATTER OF

MONTGOMERY WARD & CO., INCORPORATED

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

Docket C-2602. Complaint, Nov. 19, 1974 - Decision, Nov. 19, 1974

Consent order requiring a Chicago, Ill., general merchandise and catalog retailer, among other things to cease instituting collection lawsuits in distant or inconvenient courts. The suit must be filed in the county where the defendant either lives or the contract was signed.

Appearances

For the Commission: *Randall H. Brook.*
For the respondent: *Edward S. Berger*, Chicago, Ill.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondent Montgomery Ward & Co., Incorporated, has violated Section 5 of the Federal Trade Commission Act, and that a proceeding in respect thereof would be in the public interest, issues this complaint:

PARAGRAPH 1. Montgomery Ward & Co., Incorporated, is an Illinois corporation with its principal office located at 619 West Chicago Ave., Chicago, Ill.

PAR. 2. Respondent is a general merchandise and catalog retailer, engaged in the advertising, offering for sale, sale and distribution of clothing, household goods, appliances, tools, tires and various other articles of merchandise. Allegations below of respondent's present acts or practices include past acts or practices.

PAR. 3. Respondent sells, ships and distributes its products throughout the United States, and is thus in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course of its business, respondent regularly extends credit (hereinafter referred to as retail credit accounts) for the purpose of facilitating consumers' purchases of respondent's products.

PAR. 5. In the course of its collection of retail credit accounts, respondent regularly sues, directly or through collection agencies, allegedly defaulting purchasers in courts located far from where the purchaser defendants reside or from where they signed the contracts sued upon. Courts located closer to where defendants reside or where they signed the contracts sued upon could be used for these suits. In Alaska, for example, many defendants are low income Alaskan natives who reside in small villages five hundred or more miles from the forum court. The distance, cost and inconvenience of defending such suits place a virtually insurmountable burden on defendants. Respondent thus effectively deprives many defendants of a reasonable opportunity to appear, answer and defend. Therefore, such use of distant or inconvenient forum is unfair.

PAR. 6. In its pursuit of post-judgment remedies in Alaska, respondent regularly causes orders for judgment debtor examinations to be issued. Through these orders, respondent requires defendants to appear in person in Anchorage, at their own expense, to testify as to their

assets. Such orders have been issued in midwinter against defendants residing in northern Alaska, five hundred or more miles from Anchorage. Such defendants could readily be examined by local magistrates or through sworn written interrogatories. Thus, the use of such burdensome orders against distantly-residing defendants is unfair.

PAR. 7. The aforesaid acts and practices of respondent are all to the prejudice and injury of the public and constitute unfair acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

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

The 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 complaint to issue herein, 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 considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Montgomery Ward & Co., Incorporated, is an Illinois corporation with its principal office located at 619 West Chicago Ave., Chicago, Ill.

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 respondent Montgomery Ward & Co., Incorporated, a corporation, and its successors, assigns, officers, agents, repre-

sentatives and employees, directly or through any corporation, subsidiary, division or other device, including any collection agency, in connection with the collection of retail credit accounts in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Instituting suits except in the county (or, in Alaska, in the court closest to) where defendant resides at the commencement of the action, or in the county (or, in Alaska, in the court closest to) where the defendant signed the contract sued upon. If defendant cannot be located by diligent efforts, suit may be instituted in the county of defendant's last known residence. These provisions shall not preempt any rule of law which further limits choice of forum or which requires, in actions quasi in rem or involving real property or fixtures attached to real property, that suit be instituted in a particular county.

Provided, That, with respect to collection suits filed on behalf of respondent by any third party relating to accounts assigned for collection to that third party prior to the date of service of this order, failure of such third party to bring such suits in the appropriate location as set forth above shall not constitute noncompliance with this paragraph.

For purposes of this order, in open end credit transactions (for example, "revolving charge accounts"), the "contract sued upon" is the document (commonly called "sales slip" or "purchase order") evidencing the actual credit sale.

2. Causing the issuance of any order for judgment debtor examination which requires the personal appearance of a defendant, unless the appearance may be made in the county of the defendant's residence or, in Alaska, in a location no more distant from the defendant's residence than the nearest court.

It is further ordered, That, where respondent learns subsequent to institution of a suit that Paragraph 1 above has not been complied with, it shall forthwith terminate the suit and vacate any default judgment entered thereunder. In lieu of terminating a suit, respondent may effect a change of forum to a county or court permitted by the preceding Paragraph 1, provided that respondent gives defendant notice of such action and opportunity to defend equivalent to that which defendant would receive if a new suit were being instituted. *Further*, Where respondent learns that Paragraph 2 above has not been complied with, it shall forthwith vacate the judgment-debtor examination order. In all cases respondent shall provide defendants with a clear explanation of the action taken and of defendants' rights to appear, answer and defend in the new forum. Compliance with this paragraph, where suit has been

instituted in the county appearing from respondent's business records to be where defendant resides, shall be considered compliance with the preceding Paragraph 1.

It is further ordered, That, where respondent terminates a suit or vacates a judgment pursuant to the preceding Paragraph, it shall give notice of such termination or vacation to each "consumer reporting agency," as such term is defined in the Fair Credit Reporting Act (15 U.S.C. Section 603), which respondent has been informed or has reason to know has recorded the suit or judgment in its files. Additionally, respondent shall furnish such notice to any other person or organization upon request of the defendant.

It is further ordered, That respondent prepare and maintain a summary of suits instituted, pending, terminated, or acted upon subsequent to judgment. This summary shall contain each defendant's (1) name, (2) address, and (3) county of residence; (4) county where the contract sued upon was signed by the defendant, if the suit was not instituted in the residence county; (5) county where served; (6) date served; (7) date filed; (8) docket number; (9) name and (10) location of court in which filed; (11) name of plaintiff (if a collection agency suing in its own name); (12) amount claimed; and (13) disposition (including garnishment or execution, if any). Where a suit has been instituted in a county other than where defendant resides or signed the contract sued upon, the reason for this choice of forum shall be explained. This summary shall cover a continuous two-year period commencing with service upon respondent of this order. A summary of suits instituted by respondent's principal collection counsel for its Central Credit Units in Oakland, Los Angeles, Kansas City, Chicago, Albany, and Baltimore shall also be prepared for a year period immediately prior to such service, with information limited to items 1, 3, 4 and 10 above, and a notation of whether a default judgment has been entered. A copy of this summary shall be submitted to the Federal Trade Commission on a semiannual basis except that the summary of activity for the year preceding service of this order upon respondent shall be submitted within sixty days after service.

It is further ordered, That respondent shall forthwith deliver a copy of this order to each of its subsidiaries and operating divisions, to each collection agency currently collecting any of respondent's retail credit accounts, and to any other collection agency prior to referral to it of any of respondent's retail credit accounts. Respondent shall obtain and preserve signed and dated statements from each collection agency, acknowledging receipt of the order and willingness to comply with it.

It is further ordered, That respondent notify the Commission at least thirty days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, or any other change in the corporation, including the creation or dissolution of subsidiaries, which may affect compliance obligations arising out of the order.

It is further ordered, That the respondent 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

TRU-VIEW PLASTICS, INC., ET AL.

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

Docket C-2603. Complaint, Nov. 19, 1974 -- Decision, Nov. 19, 1974

Consent order requiring a Brooklyn, N. Y., retailer and distributor of plastic slip covers, among other things to cease using misleading sales plans; misrepresenting guarantees; disparaging advertised merchandise and using bait and switch tactics.

Appearances

For the Commission: *Carol H. Katz.*
For the Respondents: *Arthur Teichberg,* New York, N. Y.

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 Tru-View Plastics, Inc., a corporation, and Martin Simon and Dennis Simon, individually and as officers 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 Tru-View Plastics, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 5606 Church Avenue, Brooklyn, N. Y.

Respondents Martin Simon and Dennis Simon are individuals and are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of plastic slip covers to members of the purchasing public at retail.

PAR. 3. Respondents, in the course and conduct of their business, as aforesaid, have caused and now cause the dissemination of certain advertisements concerning their products and services in commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to, advertisements inserted in newspapers of interstate circulation for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase of their merchandise by residents of New Jersey and other surrounding states.

PAR. 4. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of plastic slip covers to members of the purchasing public at retail in the metropolitan New York-New Jersey area.

PAR. 5. In the course and conduct of their business, as aforesaid, respondents' sales representatives call upon prospective customers at their places of residence in the States of New York and New Jersey and thereat have engaged in the offering for sale and sale of respondents' merchandise.

PAR. 6. In the further course and conduct of their business, respondents have caused their merchandise when sold to be delivered to residents in the States of New York and New Jersey.

PAR. 7. By virtue of the aforesaid acts and practices, respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 8. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their merchandise, respondents have made, and are now making, numerous statements and representations in advertisements inserted in newspapers of general interstate circulation and by oral statements and representations of their sales representatives and agents with respect to said merchandise and services.

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

SPECIAL OFFER!-3 PIECE SECTIONAL OR SOFA & 2 CHAIRS-29.95
10 YEAR WEAR GUARANTEE
10 YEAR GUARANTEE-SEAMS AND WORKMANSHIP WARRANTEED
10 YR WRITTEN GUARANTEE
10 YEAR WRITTEN GUARANTEE ON WORKMANSHIP

PAR. 9. By and through the use of said above quoted statements and representations, and others of similar import and meaning but not expressly set out herein, respondents have represented and are now representing directly or by implication that:

1. Respondents are making a bona fide offer to sell the advertised merchandise at the price and on the terms and conditions stated in the advertisements.

2. Respondents' merchandise is unconditionally guaranteed for various periods of time, such as ten (10) years.

PAR. 10. In truth and in fact:

1. Respondents' offers are not bona fide offers to sell said merchandise at the price and on the terms and conditions stated in the advertisements. To the contrary, said offers are made for the purpose of obtaining leads to persons interested in the purchase of plastic slip covers. Members of the purchasing public who respond to said advertisements are called upon in their homes by respondents or their salesmen who make little or no effort to sell to the prospective customer the advertised merchandise. Instead, they exhibit what they represent to be the advertised merchandise which, because of its poor appearance and condition, is frequently rejected on sight by the prospective customer. Higher priced merchandise of superior quality is thereupon exhibited, which by comparison disparages and demeans the advertised merchandise. By these and other tactics, purchase of the advertised merchandise is discouraged, and respondents, through their salesmen, attempt to sell and frequently do sell the higher priced merchandise.

2. Respondents' plastic slip covers are not unconditionally guaranteed for the period of time represented in respondents advertisements or as orally represented by the respondents' salesmen. To the contrary, such written guarantees, as they have provided to their customers, are subject to conditions and limitations not disclosed in respondents' advertisements or in respondents' representatives' oral representations.

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

PAR. 11. In the course and conduct of their business as aforesaid, and at all times mentioned herein, respondents have been, and now are, in substantial competition in commerce, as "commerce" is defined in the

Federal Trade Commission Act, with corporations, firms and individuals engaged in the sale of merchandise of the same general kind and nature as the aforesaid merchandise sold by respondents.

PAR. 12. The use by respondents of the aforesaid false, misleading and deceptive statements, representations, acts 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 such advertisements and representations were and are true, and into the purchase of substantial quantities of respondents' said merchandise by reason of said erroneous and mistaken beliefs.

PAR. 13. The aforesaid acts and practices of respondents as herein alleged were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition 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 the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

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

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

1. Respondent Tru-View Plastics, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 5606 Church Avenue, Brooklyn, N. Y.

Respondents Martin Simon and Dennis Simon are officers of said corporation. They formulate, direct and control the policies, acts and practices of said corporation, and their principal office and place of business is located at the above stated address.

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 Tru-View Plastics, Inc., a corporation, its successors and assigns, and its officers, and Martin Simon and Dennis Simon, individually and as officers of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device in connection with the advertising, offering for sale, sale and distribution of plastic slip covers or other merchandise to the public at retail, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using, in any manner, a sales plan, scheme, or device wherein false, misleading, or deceptive statements or representations are made in order to obtain leads or prospects for the sale of plastic slip covers or other merchandise or services.

2. Making representations, directly or indirectly, orally, visually, or in writing, purporting to offer merchandise for sale when the purpose of the representation is not to sell the offered merchandise but to obtain leads or prospects for the sale of other merchandise at higher prices.

3. Disparaging in any manner, or discouraging the purchase of any merchandise or services which are advertised or offered for sale.

4. Representing, directly or indirectly, orally or in writing, that any merchandise or services are offered for sale when such offer is not a bona fide offer to sell such merchandise or services.

5. Failing to maintain and produce for inspection and copying for a period of three years adequate records to document for the entire period during which each advertisement was run and for a period of six weeks after the termination of its publication in press or broadcast media:

a. The cost of publishing each advertisement including the preparation and dissemination thereof;

b. The volume of sales made of the advertised product or service at the advertised price; and

c. A computation of the net profit from the sales of each advertised product or service at the advertised price.

6. Representing, orally or in writing, directly or by implication, that any product or service is guaranteed unless the nature and extent of the guarantee, the identity of the guarantor, and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed; and respondents deliver to each purchaser, prior to the signing of the sales contract a written guarantee clearly setting forth all of the terms, conditions and limitations of the guarantee fully equal to the representations, orally or in writing, directly or by implication, made to each such purchaser, and unless respondents promptly and fully perform all of their obligations and requirements under the terms of each such guarantee.

It is further ordered, That respondents shall maintain for at least a one (1) year period, following the effective date of this order, copies of all advertisements, including newspaper, radio and television advertisements, direct mail and in-store solicitation literature, and any other such promotional material utilized for the purpose of obtaining leads for the sale of plastic slip covers and other merchandise, or utilized in the advertising, promotion or sale of plastic slip covers and other merchandise.

It is further ordered, That respondents, for a period of one (1) year from the effective date of this order, shall provide each advertising agency utilized by respondents and each newspaper publishing company, television or radio station or other advertising media which is utilized by the respondents to obtain leads for the sale of plastic slip covers and other merchandise, with a copy of the Commission's News Release setting forth the terms of this order.

It is further ordered, That respondents deliver a copy of this order to cease and desist to all present and future personnel of respondents who are engaged in the offering for sale and sale of respondents' products, or in any aspect of preparation, creation, or placing of advertising and that respondents secure a signed statement acknowledging receipt of said order from each such person and that respondents distribute a copy of this order to each of their operating divisions.

It is further ordered, That respondents maintain full and complete records of all complaints and correspondence received from customers,

or any memoranda in connection therewith, for a period of two years after receipt.

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

It is further ordered, That the individual respondents named herein promptly notify the Commission of the discontinuance of their present business or employment and of their affiliation with a new business or employment. Such notice shall include respondents' current business addresses and a statement as to the nature of the business or employment in which they are engaged as well as a description of their duties and responsibilities.

It is further ordered, That no provision of the order shall be construed in any way to annul, invalidate, repeal, terminate, modify or exempt respondents from complying with agreements, orders or directives of any kind obtained by any other agency or act as a defense to actions instituted by municipal or state regulatory agencies. No provision of this order shall be construed to imply that any past or future conduct of respondents complies with the rules and regulations of, or the statutes administered by the Federal Trade Commission.

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

ITT CONTINENTAL BAKING COMPANY

ORDER AND OPINION IN REGARD TO SHOW CAUSE PROCEEDING TO EXTEND FOR A FIVE-YEAR PERIOD THE CEASE AND DESIST ORDER ISSUED UNDER THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket 7880.
Order to Show Cause, Dec. 12, 1973-Order & Opinion, Nov. 26, 1974

Order dismissing an Order to Show Cause why the proceeding should not be reopened and the cease-and-desist order issued against Continental Baking Company May 11, 1962, 60 F.T.C. 1183, be extended for an additional five years to prohibit respondent from acquiring any firm engaged in the production and sale of bread and bread-type rolls without prior permission of the Commission. The order to show cause was found not to be in the public interest.

Appearances

For the Commission: *Rafe H. Cloe, James E. Corkey, Stephen Miller, Edward W. Abramowitz* and *Robert W. Rosen.*

For the respondent: *Roy M. Anderson*, Rye, N. Y. for ITT Continental Baking Company. *John H. Schafer* and *David J. Cynamon, Covington & Burling*, Wash., D.C.

CERTIFICATION OF RECORD AND RECOMMENDATIONS ON ORDER TO SHOW CAUSE BY ALVIN L. BERMAN, ADMINISTRATIVE LAW JUDGE

DECEMBER 12, 1973

PRELIMINARY STATEMENT

On May 11, 1962, the Commission issued a consent order against Continental Baking Company ("Continental") requiring, *inter alia*, that for a period of ten years, it not acquire any interest in, or the assets of, any concern engaged in the production and sale of bread and bread-type rolls. [1] On Sept. 13, 1968, Continental was merged into a successor corporation, ITT Continental Baking Company ("ITT Continental"), a newly incorporated, wholly-owned subsidiary of International Tele-

[1] The pertinent portion of the order (Section III) reads as follows: *It is further ordered*, That for a period of ten (10) years from the date of issuance of this order by the Federal Trade Commission respondent shall cease and desist from acquiring, directly or indirectly, through subsidiaries or otherwise, the whole or any part of the stock, share capital, or assets of any concern, corporate or non-corporate, engaged in any state of the United States in the production and sale of bread and bread-type rolls unless the Commission, on petition for modification of this Section III of this order, permits such an acquisition by respondent, said modification to be within the sole and final discretion of the Federal Trade Commission.

phone and Telegraph Corporation ("ITT"). On Apr. 27, 1972, the Commission issued its Show Cause Order requiring respondent ITT Continental to show cause why the public interest or changed conditions of fact, or both, did not require that the Commission reopen the proceeding and modify the moratorium-on-acquisitions provision recounted above by extending the proscription on such acquisitions until Apr. 13, 1977.

The Commission, on Aug. 1, 1972, denied a motion of respondent to set aside the Show Cause Order and directed that the matter be assigned to a hearing examiner "for the purpose of receiving evidence in support of and in opposition to the question of whether the public interest requires that the proceeding be reopened and the Commission's order of May 11, 1962, be altered, modified, or set aside in accordance with" its Show Cause Order. Accordingly, the matter was assigned to Hearing Examiner Eldon P. Schrup on Aug. 11, 1972. Subsequently, on Aug. 29, 1972, prior to any action having been taken, the matter was reassigned to Administrative Law Judge David H. Allard. Various preliminary matter were resolved by Judge Allard, including discovery and clarification of the issues, and he presided over a number of prehearing conferences extending from Sept. 28, 1972 through Mar. 8, 1973. On Apr. 10, 1973, the matter was reassigned to the undersigned as Judge Allard was leaving the Commission's staff of administrative law judges.

Upon assignment of this case, the undersigned familiarized himself with the entire record up to that point. Additional prehearing conferences were held on Apr. 23 and June 7, 1973. The latter conference was held primarily to dispose of requests for admissions made by respondent of Commission counsel. Hearings commenced on June 12, 1973, and the last evidence was received on Oct. 25, 1973, upon which date the record was closed.

The matter thus is before the undersigned for the purpose of making recommended findings, conclusions and disposition. In making such recommendations, the entire record has been carefully considered, including proposed findings of fact and conclusions and briefs filed by counsel. Those findings not adopted, either in the form proposed or in substance, are rejected as not supported by the evidence or as involving immaterial matters.

The recommendations that follow, including recommended findings, [2] conclusions and disposition, are made after hearing and observing the witnesses and reviewing the entire record, [3] including the proposed findings, conclusions and briefs submitted by the parties as well as their responses.

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[2] Recommended findings of fact are made in the numbered paragraphs that follow.

[3] References to the record are made in parentheses. Certain abbreviations are used as follows: Tr. - Transcript page; CX - Commission exhibit; and RX - Respondent exhibit.

I. Authority of Commission to Modify Consent Order

Respondent, from the outset, has challenged the Commission's authority to modify a consent order without the permission of the other party and has argued further that, since the ten-year moratorium on acquisitions expired on May 11, 1972, there is no longer an order in effect which can be extended. These issues, however, were considered by the Commission and ruled upon adversely to respondent in the Commission's Aug. 1, 1972, Order Directing Hearings For Receipt of Evidence. The undersigned, therefore, does not address himself further to these contentions of respondent.

II. Recommended Findings and Conclusions Relative to Liability of ITT Continental to Consent Order

1. On June 12, 1968, after protracted arms-length negotiations, a merger plan or agreement was entered into between Continental, a publicly held Delaware corporation, ITT, a publicly held Delaware corporation, and ITT Continental, a Delaware corporation. ITT Continental was and is a wholly-owned subsidiary of ITT (CX 26E).

2. Pursuant to the agreement, on Sept. 13, 1968, Continental ceased to exist as a corporation. Since that date, the business previously carried on by Continental, including the production and distribution of bread and bread-type rolls, has been carried on by ITT Continental (CX 26E).

3. Prior to the merger, ITT Continental had no assets or employees. Continental's officers continued to hold their respective positions with ITT Continental immediately after the merger, although there have been changes in management personnel since that time. Immediately after the merger, the assets of ITT Continental were the same as the assets of Continental prior to the merger (CX 26F).

4. After the merger, ITT Continental continued to operate the same plants and facilities and with the same organization previously used by Continental. ITT Continental continued to sell and distribute the same products, in the same manner and to the same customers as Continental had previously (CX 26F).

5. Since the merger, and as a result thereof, 100 percent of ITT Continental's common stock has been owned by ITT (CX 26F).

6. The merger was not entered into or consummated for the purpose of evading the consent order in any way. However, at the time of the merger, ITT knew of the existence of the outstanding consent order against Continental and in Continental's "Notice of Special Meeting of Stockholders", dated Aug. 6, 1968, it was stated that "[t]he business conducted by Continental prior to consummation of the transaction [the

575-956 O-LT - 76 - 86

merger] will be continued thereafter by New Continental, a new wholly-owned subsidiary of ITT which will be named ITT Continental Baking Company" and that "New Continental will assume all the liabilities of Continental." (CX 26G). So far as is known, ITT Continental at no time identified Continental's liability under the consent order as one of the liabilities being assumed (Tr. 461-63).

Discussion of, and Recommended Conclusion as to, ITT Continental's Liability under the Consent Order

From the foregoing, it is clear that, except for the change of name and ownership of stock, the business entity after the merger was in all respects identical to that which existed prior to the merger. The assets were the same; the management, employees and organization were the same; the plants and facilities operated were the same; and the same products were produced and distributed in precisely the same manner to the same customers as before.

The consent order does not in so many words bind successors and assigns to its provisions. However, it has long been established that successors and assigns may be subject to an administrative order, when appropriate, irrespective of whether the order specifically uses the words "successors and assigns." *Regal Knitwear* v. *NLRB*, 324 U.S. 9 (1945). Respondent, relying upon *United States* v. *Armour & Co.*, 402 U.S. 673 (1971), asserts that the absence of words purporting to hold "successors and assigns" in a *consent order* conclusively precludes liability of a successor corporation to such an order.

Armour is inapposite. It involved a consent decree which prohibited Armour from dealing directly or indirectly in certain specified commodities. The action was one to enjoin another corporation, which did deal in the specified commodities, from acquiring the stock of Armour. The case, therefore, simply construed a consent decree as to whether it went so far as to prohibit a particular type of company, unnamed and not a party, from acquiring the stock of a corporation that was party to the consent decree. Unlike the instant case, *Armour* did not pertain to the liability of a successor corporation. Further, as pointed out by the Court, 402 U.S. at 674-75, this was not an action seeking modification of the decree, as is the instant case. In short, *Armour* involved an interpretation of what the consent decree prohibited--not whether its proscriptions would apply to a successor corporation.

The Court, in *Armour*, further considered whether a particular Paragraph Five of the consent decree, which ran against named stockholders, would apply to future owners of the stock of the corporation. The

Court relied upon the provisions of that particular paragraph as reinforcing its overall interpretation of the intent of the consent decree. In this regard, it pointed out that Paragraph Five ran only against named stockholders and did not specify their successors and assigns. In view of the fact that other provisions of the consent decree expressly ran against the corporations and their "successors and assigns," the Court held that the absence of the phrase "successors and assigns" from Paragraph Five was intentional. It is clear, therefore, that *Armour* has no application here.

In *Regal Knitwear*, 324 U.S. at 14-15, the Court recognized that a successor or assign could be held bound by a Labor Board order depending upon an appraisal of its relations and behavior with the prior corporation and quoted with approval from *Walling* v. *Reuter*, 321 U.S. 671, 674 (1944), as follows:

> We have also said of an injunction to restrain violation of the Fair Labor Standards Act, which is somewhat analogous to Labor Board orders, that "Not only is such an injunction enforceable by contempt proceedings against the corporation, its agents and officers and those individuals associated with it in the conduct of its business, but it may also, in appropriate circumstances, be enforced against those to whom the business may have been transferred, *whether as a means of evading the judgment or for other reasons*." (Emphasis supplied)

And in *Walling* v. *Reuter*, the Court continued (at pp. 674-75), "The vitality of the judgment in such a case survives the dissolution of the corporate defendant. * * * *And these principles may be applied in fuller measure in futherance of the public interest, which here the petitioner represents, than if only private interests were involved.*" (Emphasis supplied)

In applying the foregoing principles, the Court in *NLRB* v. *Tempest Shirt Mfg. Co.*, 285 F.2d 1, 4 (5th Cir. 1960), stated:

> * * * [T]he crucial question for determining successorship is one of continuity: whether the industry remains essentially the same after the transfer of ownership. * * * It is quite obvious in this case that there has not been any substantial business change: the same products are made; the same machinery and equipment are used; the same supervisors and employees are retained; by purchase, Pascal has the same accounts receivable; and ownership and control of policy remain in the same individuals. * * *
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> *　　*　　*　　*　　*　　*　　*
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> Here, as in [*NLRB* v. *Auto Ventshade, Inc.*, 276 F.2d 303 (5th Cir. 1960)] it is immaterial that the transfer of Tempest's manufacturing business to the Pascal Corporation was a bona fide business transaction carried out at "arm's length." [4]

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[4] See also *P. F. Collier & Son, Corp.* v. *FTC*, 427 F.2d 261, 272 (6th Cir. 1970), *cert. denied*, 400 U.S. 926 (1970); *United States* v. *Van Raalte Co.*, 328 F. Supp. 827 (S.D.N.Y. 1971).

All of the elements enumerated in the cases cited above are present here except that the stock of ITT Continental is owned by ITT and ITT previously had owned no stock in Continental. This, however, is only one of the elements to be considered in holding a successor corporation and is not deemed essential when all of the other elements are met. A continuity of ownership could be relied upon, *inter alia*, to show subterfuge or some other basis for piercing the corporate veil. *Walling* v. *Reuter*, 321 U.S. at 674, and *NLRB* v. *Tempest Shirt Mfg. Co.*, 285 F.2d at 4, are authority for holding a successor corporation even though the transfer of the business was at arms length and for legitimate purposes. *Walling* speaks of enforcing an injunction against "*those* to whom the business may have been transferred" (emphasis supplied), and *Tempest* contemplated the ownership of the successor corporation by other individuals when it was stated that "[t]he crucial question for determining successorship is one of continuity: whether the industry remains the same after the transfer of ownership."

In *Lucy* v. *Adams*, 224 F. Supp. 79 (N.D.Ala. 1963), in holding that an injunction against an individual who was Dean of Admissions at the University of Alabama ran against his successor to that office, the Court stated, at p. 81:

> It is the general rule "that one who succeeds to the interest of a party to whom the injunction is directed and who has notice of the injunction, is bound by the judgment and punishable for contempt for disobedience." 43 C.J.S. Injunctions §263d, page 1013.

The public interest requires that this general rule be equally applicable here where, despite the change in stock ownership, there was substantial identity of the parties, with the entire business of Continental continued using the same assets and personnel, in the same manner and with the same customers.

Further, ITT Continental's contemplation of continuing the business that was conducted by Continental prior to the merger, and assumption by ITT Continental of all of the liabilities of Continental, must be interpreted to include the outstanding order to which Continental was subject. It is of no moment that liability to the provisions of the consent decree may not have been specifically assumed. An obligation imposed by an order issued by a regulatory agency in the public interest should not be deemed less binding a liability under the circumstances than, for example, an obligation to meet a private debt or to comply with a contractual obligation. [5]

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[5] "In case of merger of one corporation into another, where one of the corporations ceases to exist and the other corporation continues in existence, the latter corporation is liable for the debts, contracts, and torts of the former * * * *". 15 *Fletcher Cyc. Corps.* (1961 Ed.) §7121.

Another basis for holding ITT Continental subject to the Commission's consent order is the principle that parties, though not named in an order or injunction, may not violate in rem injunctions. See *United States* v. *Hall*, 472 F.2d 261, 265-66 (5th Cir. 1972), *rehearing denied*, Jan. 30, 1973, and cases cited therein. As explained in *Hall*, at p. 266, "A court entering a decree binding on a particular piece of property is necessarily faced with the danger that its judgment may be disrupted in the future by members of an undefinable class--those who may come into contact with the property. The *in rem* injunction protects the court's judgment."

Hall applied the *in rem* principle to an injunction of disruptive action against a school desegregation plan, even though the party held in contempt was not a party to the original litigation and was acting independently of the parties thereto.

The Commission's consent order against Continental is in the nature of an *in rem* ruling. Application of the *in rem* principle is even more appropriate here than in *United States* v. *Hall.* An order prohibiting a particular business entity from acquiring other businesses or portions of businesses in a particular industry is a judgment which goes directly to the business enjoined and the industry involved. It is a judgment that the business enjoined and the industry involved are such that it would be contrary to the public interest for the business entity enjoined to grow in that industry by acquisition. It is an *in rem* judgment that does not depend upon the particular ownership of the business entity but rather upon an analysis of the business entity in relationship to the relevant market.

The order is no less *in rem* in character because it was entered by consent. It would be an incongruous act of futility if the Commission's order proscribing the growth of a particular business entity by merger should become a nullity simply by virtue of the fact that the business entity has been acquired by an even larger entity, one which has a policy of growth, including growth by acquisition. [6] But that is essentially ITT Continental's position here, and so must be rejected.

This is unlike the situation where a party is ordered to stop a particular type of false advertising or unlawful practice and, subsequent to the order, is acquired by another party or corporation and there is no reason to believe that the new company would engage in the acts or practices proscribed by the order. [7] Here, there was an *in rem* judgment acting in futuro to the effect that the merger of a particular business entity with any other in the industry would be contrary to the public interest. ITT

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[6] ITT has a policy to engage in growth (see, *infra*, pp. 37, 49 [pp. 1377, 1385 herein]).

[7] See, *e.g.*, *A&M Karagheusian, Inc.*, 68 F.T.C. 452 (1965).

Continental may not deal with the *rem* covered by the order in a manner violative of the order. ITT Continental must be deemed to have acquired the business, the *rem*, subject to the Commission's order. [8]

Upon consideration of the foregoing, it is recommended that ITT Continental be held to be a successor corporation to Continental and subject to the provisions of the Commission's consent order dated May 11, 1962.

III. The Consent Order

The initial decision of the hearing examiner, which included the consent order and which was adopted by the Commission on May 11, 1962, recited and adopted various provisions of the parties' Agreement Containing Consent Order to Divest and to Cease and Desist, including those to the following effect: (1) the agreement disposes of the entire proceeding and the consent order is in the public interest for the reasons set forth in Appendix A of the agreement which is a part thereof; (2) the record on which the initial decision and the Commission's decision shall be based consists solely of the complaint and the agreement; (3) the agreement is for settlement purposes only and does not constitute an admission by Continental that it has violated the law as alleged in the complaint; and (4) the complaint may be used in construing the terms of the order (Initial Decision, pars. 4, 6, 8 and 10 (60 F.T.C. 1191-92).

Consideration of the terms of the complaint and the agreement of the parties (including Appendix A thereto), therefore, is essential to understand the theories of alleged violation under which the consent order was issued and the agreed-to positions of the parties in order to appraise whether the facts developed in the hearings held under the Show Cause Order have demonstrated that the public interest or changed conditions of fact require a reopening of the proceeding and an extension of the moratorium provision on acquisition. In other words, any modification of the moratorium provision consented to should be based upon a consideration of public interest or a showing of facts consistent with the theory under which the consent order was agreed to and issued. And that theory is to be found in the complaint and the agreement of the parties, including Appendix A thereto.

The following facts are derived from the agreement:

* * * * * * *

[8] If ITT Continental had acquired Continental during pendency of the action, the acquisition would have been subject to whatever final order the Commission might have issued. See, *e.g.*, *United States* v. *Bates Valve Bag Corp.*, 39 F.2d 162 (3rd Cir. 1930); *G&C Merriam Co.* v. *Saalfield*, 190 Fed. 927, 932 (6th Cir. 1911); *United States* v. *American Optical Co.*, 97 F. Supp. 71 (N.D.Ill. 1951). Under the circumstances here, there is no less reason to hold ITT Continental liable to the provisions of the order, which were operative against Continental at the time of its acquisition, than under a *lis pendens* situation.

7. Continental was a corporation doing business under and by virtue of the laws of the State of Delaware, with its principal business located in Rye, N. Y.

8. As described at the outset of Appendix A to the agreement, the Commission's complaint against Continental charged a violation of Section 7 of the amended Clayton Act in connection with its 1958 acquisition of several named baking companies, including one Omar, Inc., and with violating Section 5 of the Federal Trade Commission Act by reason of its continuous practice of acquiring various baking concerns throughout the United States.

9. At the time of the challenged acquisitions, Continental produced, sold and distributed bakery products at wholesale primarily under the trade name "Wonder" for bread and "Hostess" for cake. Continental's products were baked in some 85 plants located in some 64 cities in 29 states and the District of Columbia, and were distributed throughout 44 states. Continental's sales for 1958 were $328 million and had increased to over $410 million in 1960.

10. For purposes of the agreement, the definition of bread and bread-type rolls used by the Bureau of the Census, as set forth in Census of Manufacturers category SIC 20511, applied. This is a separate and distinct category from all other bakery products in recognition of the fact that bread and bread-type rolls are a separate and distinct line of commerce since they contain different ingredients and require different type machinery and personnel for makeup and bakery than do cake and sweet goods.

11. Because of the nature of the goods produced, the operations of a baking plant are regional in nature. Distribution of bread and related products is limited by the distance they can be economically shipped from the plant and still retain their most important characteristic, freshness. The geographical markets in which bakery products may be examined include a metropolitan area and larger geographical markets such as the total area of distribution in which an acquired company sold bakery products.

12. Appendix A to the agreement recited that the second count of the complaint charged Continental with violating Section 5 of the Federal Trade Commission Act by its alleged "continuous practice of acquiring various bakeries throughout the United States;" that the theory of the count was that, through these acquisitions, respondent gained power to engage in certain unfair competitive acts and practices, *i.e.*, the making of payments for shelf space and entry into retail outlets, and the granting of discriminatory rebates, discounts, and allowances. It was stated that the legality of these pricing practices in themselves was not

intended to be challenged but that the practices were asserted as manifestations of the economic power obtained through the continuous practice of acquisition.

13. Appendix A then summarized the provisions of the consent order, its purpose, and why it was in the public interest, in the following language:

The proposed Order, which is part of the Agreement to which this Appendix is attached, calls for complete divestiture of all the assets of the former Omar, Inc., which was probably the eighth largest baker in the country at the time of acquisition. *One of the principal problems in the baking industry is the tendency towards concentration and the continuous growth of major baking companies through acquisition. Such acquisitional growth and tendency towards concentration places in the hands of a few large companies the means to set the pattern of competition, not only among themselves, but also for all local baking companies serving any given area.* The Omar, Inc. acquisition constituted the principal allegation of the complaint. *Coupled with the divestiture is the order that the respondent shall cease and desist from acquiring for ten years any concern engaged in the production and sale of bread and bread-type rolls.* If this order is adopted by the Commission, the respondent's alleged continuous practice of acquiring companies baking and selling bread and bread-type rolls will be brought to a halt and the major acquisition forming the gravamen of the complaint will be undone. Competition may be restored essentially as it existed before the acquisition of Omar, Inc., and the public interest will be well served. (Emphasis supplied)

IV. Public Interest and Changed Conditions of Fact Bearing Upon Reopening of Proceeding and Modification of Moratorium Provision of Consent Order

The Commission's Show Cause Order, *inter alia,* recited that industry wide concentration in the production and sale of bread and bread-type rolls has increased since issuance of the cease and desist order against Continental on May 11, 1962; that respondent has contributed to this increased concentration by reason of various asset acquisitions including some that were made without Commission permission, some of which were found in *United States* v. *ITT Continental Baking Company,* CA No. C-1220, D.C.Col. Aug. 2, 1971, to be in violation of the consent order; that respondent is and has been the leading and dominant supplier of bread and bread-type rolls in the United States; that respondent was the first baking company placed under a moratorium provision; that moratorium provisions against American Bakeries Company and Campbell-Taggart Baking Company, leading companies in the production and sale of bread and bread-type rolls, terminate on Sept. 19, 1976, and Apr. 13, 1977, respectively.

The Commission stated its opinion that the public interest and changed conditions of fact required it to reopen its consent order in part so as to extend the terms of Section III until Apr. 13, 1977, in order to

balance the competitive situation in the bread and bread-type rolls industry and to provide continuing efficacy to the final order. The Commission, therefore, ordered ITT Continental Baking Company to show cause why the public interest or changed conditions of fact or both do not require the reopening of the proceeding and modification of Section III of the consent decree by extending its operation until Apr. 13, 1977.

There was considerable disagreement between the parties as to the issues to be resolved in the proceeding. Commission counsel withdrew from previously stated positions and agreed that they would not introduce evidence relating to the concentration in particularly selected metropolitan markets and also agreed not to pursue the issue of whether respondent had engaged in particular anti-competitive acts and practices (Tr. 376-77).

After considerable colloquy, Administrative Law Judge Allard summarized Commission counsel's position as follows: that the product market is bread and bread-type rolls as defined by the Census Bureau SIC 2051; that the relevant market encompasses all 50 states; that inquiry must be made into the structural characteristics of the market including the number of competitors and how they are broken down into wholesale bakers, cakemakers, and retail bakers; that concentration should be measured in terms of sales or products, but basically sales; and that concentration should be analyzed in terms of performance characteristics, *i.e.*, (1) financial assets which would demonstrate the potential to enter new markets and the potential for growth and the ability to absorb losses, (2) national advertising and the consumer acceptance that goes along with such advertising, (3) the delivery of multi-products in some areas, (4) the scope of operations, which encompasses the size and locations of markets and the ability to enter into large geographical-type contracts, and (5) the acquisition of Continental by ITT in 1968. Finally, Judge Allard listed as an issue whether respondent has contributed to increased industry wide concentration by the two acquisitions which the District Court in Denver had held to be asset acquisitions. Commission counsel agreed to the correctness of this summarization of issues. Respondent objected to the five issues noted as performance issues (Tr. 395-98).

Subsequently, in denying respondent's Request for Permission to File an Interlocutory Appeal to the Commission from his Statement of Issues (Order of Denial dated Apr. 9, 1973), Administrative Law Judge Allard clarified the performance factors that Commission counsel would be permitted to prove in order to appraise the impact of concentration

facts that might be established. He paraphrased the performance fac-
tors as follows:
(1) respondent's growth, potential for growth and ability to absorb
losses in individual markets; (2) the importance of respondent's nation-
ally advertised Wonder Bread label; (3) respondent's bread marketing
advantage because of its distribution of Hostess cakes; (4) respondent's
ability to make multi-plant contracts covering large geographic areas;
and (5) the increase in respondent's financial power because of the 1968
acquisition of Continental Baking Company by the International Tele-
phone and Telegraph Corporation.

A. Acquisitions in Violation of Consent Order

As previously noted, the Commission's Show Cause Order recited
that respondent had contributed to increased concentration by reason of
various asset acquisitions; that some acquisitions were made without
seeking or obtaining permission of the Commission despite the order;
and some were found in *United States* v. *ITT Continental Baking*
Company, CA No. C-1220, D.C.Col., Aug. 2, 1971, to be in violation of the
order. [9] During a prehearing conference conducted by the undersigned,
it was the understanding of the parties that the issue as to whether
there had been acquisitions by respondent of the sort covered by the
consent order, subsequent to issuance of that order, would be limited to
the two situations found by the district court to be in violation (Tr. 422,
429, 430). [10]

It was also agreed that the administrative law judge was to make his
independent determination on this issue on the basis of the stipulated
facts that had been presented to the district court; that determinations
in the Denver litigation would not be binding upon the administrative
law judge as *res judicata* or collateral *estoppel*, absent finality of that
litigation (Tr. 422-23, 429, 441-42). As of now, the time to file petition for
certiorari from the court of appeals' decision has not as yet expired, and
the administrative law judge makes his own findings and recommenda-
tions relative to the two situations involved. All such findings are based
upon the stipulation of fact of the parties presented to the United States
District Court for the District of Colorado and, more particularly, that

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9 The district court had found two of three complained-of violations to constitute acquisitions in violation of the consent order and found that the third situation complained of did not. On appeal, the United States Court of Appeals for the Tenth Circuit affirmed the district court with respect to the two violations it had found. In addition, it reversed the district court with respect to the third situation and found that the arrangement there involved also constituted an acquisition in violation of the Commission's consent order. *United States* v. *ITT Continental Baking Company*, Nos. 72-1072-73, 10th Cir., Sept. 14, 1973.

10 Administrative Law Judge Allard had previously so limited the scope of this issue; and the parties had agreed to the issue as so limited (Tr. 397).

portion of the stipulation which appears in the record of this case as CX 26H-26Z.

1. The Bon Ton, Inc. Arrangement

14. Bon Ton, Inc. ("Bon Ton"), a Montana corporation with its principal office and place of business in Missoula, Mont., had been for many years prior to July 12, 1965, engaged in the production and sale of bakery products including bread and bread-type rolls. It sold its bakery products, including bread and bread-type rolls, to a variety of customers over some 13 routes in western Montana. Bon Ton's 1963 and 1964 annual sales approximated $654,000 and $613,000, respectively. About 76 percent of its sales were of bread and bread-type rolls.

15. Prior to July 12, 1965, Continental had no distribution of bread and bread-type rolls in the area served by Bon Ton. Bon Ton, however, had for many years sold and distributed to its customers on its several routes cake products produced by Continental under the Hostess tradename.

16. One Alexander Stepanzoff was the president of Bon Ton and owned all of its stock. He controlled the company's policies and was in sole charge of its operations. All actions by Stepanzoff referred to herein were for and on behalf of Bon Ton.

17. In 1964, Stepanzoff approached a Continental representative concerning the possible sale of Bon Ton to Continental. The Continental representatives advised Stepanzoff that Continental could not purchase Bon Ton because of the Commission's outstanding consent order.

18. Pursuant to further discussions, a sales agreement was entered into between Continental and Bon Ton in May 1965, whereunder Bon Ton would buy from Continental for resale, Continental's bread and bread-type rolls and Bon Ton would be a distributor of these products. It was the understanding of the parties that Bon Ton would stop production of bread and bread-type rolls before it became Continental's distributor; that, initially, most of the bread and bread-type rolls provided by Continental would carry Bon Ton labels and would be sold and distributed by Bon Ton over the routes and to the customers it had served while it was a producer; and that eventually the Bon Ton label would be phased out and replaced by Continental-labeled bread and bread-type rolls.

19. Bon Ton was given an exclusive dealership in the western Montana area it had already been serving, but it was required to sell in this allotted territory only products carried by Continental and had to purchase all of its requirements of such products from Continental.

20. Stepanzoff agreed that in the event of termination of the agreement, he would not compete with Continental or with another dealer of Continental in the sale of products similar to those covered by the contract and in the territory covered by the agreement for five years.

21. The sales agreement was signed in May 1965, and was implemented on the weekend of July 10, 1965. Bon Ton terminated its production of bread and bread-type rolls on July 10 and on July 12 began to function as a distributor of bread and bread-type rolls produced by Continental.

22. Continental was given the option to purchase the dealership for $37,500 in the event of Stepanzoff's death or termination of the agreement pursuant to the provisions for renewal. While the agreement was never terminated pursuant to the provisions for renewal, Stepanzoff, on July 12, 1965, deposited in the Bon Ton bakery account a Continental check dated June 5, 1965, for $37,500 drawn in his favor. Stepanzoff and Continental would describe the $37,500 as a non-interest bearing loan which Stepanzoff needed to meet Continental's credit requirements. Stepanzoff stated that Continental wanted security for the $37,500 advance and so he gave Continental an option to purchase the distributorship for $37,500, which he considered to be its fair market value.

23. At first, Continental provided Bon Ton with bread and bread-type rolls wrapped in the Bon Ton-labelled packaging material carrying the labels and trademarks that had been used by Bon Ton and which were owned and controlled by it. After a time, Bon Ton-labelled products were phased out and almost all bakery products carried the Continental labels. To a limited extent, Continental supplied Bon Ton with products produced by others.

24. After July 12, 1965, Bon Ton sold and distributed the products furnished by Continental over the same routes to the same customers and in substantially the same quantities as it had sold and distributed the products produced at its own plant prior to that date.

25. Early in 1966, Bon Ton was confronted with some competitive problems and on March 1, 1966, Stepanzoff was hospitalized with a possible second heart attack. Early in Mar. 1966, Stepanzoff contacted Continental and requested that it take over Bon Ton's trucks and place Bon Ton's drivers on its payroll. Pursuant to an agreement dated Mar. 16, 1966, Continental acquired Bon Ton's accounts receivable, route books, customer lists, trademarks, trucks and all but approximately $1800 of its bank account. Stepanzoff and Bon Ton's drivers became Continental employees. In consideration of the transfer, Continental cancelled Stepanzoff's debt of $37,500, which was incurred when he

received Continental's $37,500 check of June 5, 1965, and also cancelled all outstanding invoices for products sold to Bon Ton.

Recommended Conclusion as to Bon Ton

Despite the contractual arrangements whereby Bon Ton was first changed from a producer and seller of bread and bread-type rolls to simply a distributor of such products for Continental, when the series of arrangements and events are viewed as an entity, it must be concluded that this was, in effect, an acquisition by Continental of the assets of a producer and seller of bread and bread-type rolls. What ultimately constituted the purchase price was given to the seller at the time the seller became a distributor rather than a producer, by a check which predated the actual sale and was executed at a time the seller was actually a producer and seller of bread and bread-type rolls. The arrangement, no matter how staggered in evolution, and regardless of Stepanzoff's interests in temporarily becoming a distributor and then ultimately getting out of the business altogether, can only be viewed as one for the sale of the assets of a producer and seller of bread and bread-type rolls. The sale was contemplated and provided for in its essential details at the very outset of the arrangement and constitutes an acquisition in violation of the Commission's order.

Further, as held in *United States* v. *ITT Continental Baking Co.*, Nos. 72-1072-73, 10th Cir., Sept. 24, 1973 (Slip Op. 9-10), the acquisition of the market and the volume of Bon Ton, which was a principal asset of the bakery, was acquired by the initial arrangement and this violated the order.

2. The Wyoming Baking Company Arrangement

26. The Wyoming Baking Company ("Wyoming Baking"), for some years prior to Apr. 19, 1966, produced and sold bakery products including bread and bread-type rolls. It was a Wyoming corporation with its principal office and place of business in Caspar, Wyo., which operated some 17 routes in Wyoming. Prior to 1966, it had included in its sales Continental's Hostess cake products and at least one variety of Continental's Wonder bread.

27. Wyoming Baking's 1964 and 1965 sales approximated $1 million and $968,000, respectively, of which bread and bread-type rolls accounted for about 70 percent. The corporation was owned by its president Eugene Sneesby, who controlled the company's policies and was in sole charge of operations.

28. At a meeting in Nov. 1965, Herbert Van Wyk, manager of Continental's Denver plant, suggested to Sneesby that Wyoming Baking

terminate its production of bakery products and become a Continental distributor. Discussions continued during Dec. 1965 and Jan. 1966. Van Wyk told Sneesby that Continental could not buy a bakery producing bread and bread-type rolls but that it could buy the routes of such a bakery absent production. Sneesby wanted compensation for discontinuing production. He wanted almost $100,000 to pay off an $80,000 debt incurred for modernizing his plant.

29. In Feb. 1966, Van Wyk forwarded to Mr. Gordon Thomas, a Continental attorney, a copy of a detailed plan prepared by Van Wyk for taking over Sneesby's operations. This called for the purchase at cost of Sneesby's inventory, two loans to Sneesby of $50,000 each, and the outright purchase of Sneesby's business after about 60 days of operation as a distributorship, with Sneesby covenanting not to compete for five years thereafter. On Thomas' copy of Van Wyk's plan, there is marked "No" or "Absolutely out" opposite the above-noted provisions. Thomas would testify that these marginal notes were made by him at the time he received Van Wyk's plan.

30. In Mar. 1966, Thomas, Continental's regional vice president Ralph Ward and Van Wyk met with Sneesby to discuss a possible arrangement. The parties discussed the terms of a proposed agreement whereby Wyoming Baking would buy from Continental for resale Continental's bread and bread-type rolls. Thomas and Sneesby agree that Thomas told Sneesby Continental could not buy any part of the stock or assets of Wyoming Baking. Neither Ward, Thomas nor Sneesby can recollect any discussion of a loan to Sneesby. All parties agree that Thomas was to draft a sales agreement for presentation to Sneesby.

31. Using notes made at the meeting and, to some extent, following the form used in the Bon Ton sales agreement, Thomas drafted a sales agreement which, on Apr. 4, 1966, was sent to Van Wyk. After some slight modifications by Van Wyk, which were approved by Thomas, the sales agreement was executed on or about Apr. 19, 1966.

32. Under the agreement, Wyoming Baking would discontinue production of bakery products, including bread and bread-type rolls, and become a full-line distributor of Continental's products. Wyoming Baking was given an exclusive distributorship in those parts of Wyoming Baking's territory where Continental had not been distributing bread and bread-type rolls, and a non-exclusive distributorship in another area where a different Continental distributor was operating. Wyoming Baking was required to sell in the allotted territory only Continental products and to obtain all requirements of such products from Continental unless prior written approval was obtained from Continental.

33. Continental had the option to purchase the dealership under certain circumstances for $170,000 in the event of Snessby's death or termination of the agreement pursuant to the provisions of renewal. In such event, Wyoming Baking could not compete with Continental in the sale of products similar to those covered in the agreement in the pertinent territory for five years.

34. Sneesby would testify that, contemporaneous with the written agreement, Van Wyk told Sneesby that Continental would exercise its option to purchase the distributorship within a year or two and that Continental would make two interest free loans to Sneesby of $50,000, each of which would be set off against the $170,000 option purchase price; that this discussion was strictly between himself and Van Wyk, although in the presence of Sneesby's attorney and the secretary of Wyoming Baking, but that Van Wyk later denied ever having made such an agreement.

35. Wyoming Baking ceased production of bakery products on the weekend of June 10, 1966, and on Monday, June 13, 1966, commenced distributing bread and bread-type rolls and other bakery products produced by Continental over the same routes to the same customers and in substantially the same quantities as when Wyoming Baking was a producer.

36. From June 13, 1966 to Sept. 1966, Continental supplied Wyoming Baking with certain bakery products, including bread and bread-type rolls wrapped in "Bunny"-labelled packaging material (Wyoming Baking's label). After Sept. 19, 1966, "Bunny" was gradually phased out in favor of Continental labels or, to a small extent, labels of other producers that were sold and distributed by Continental. Continental compensated Wyoming Baking for the inventory of Bunny packaging so used by discounts amounting to $11,634. It also paid $401 for bulk bun cartons and $475 for bread pans that were transferred to Continental. Sneesby and a Commission attorney have described the amount paid for the bread pans as negligible. Van Wyk told Ward that Thomas had advised him there was no legal problem with regard to payment for such supplies so long as payment was not made until after June 13, 1966, when Wyoming Baking would be out of production.

37. In July 1966, Sneesby asked Van Wyk for the first $50,000 interest-free loan that Sneesby claimed Van Wyk had promised him at the time the sales agreement was executed. Van Wyk checked with Thomas, was told there could be no loan and so advised Sneesby. Sneesby obtained the use of $50,000 by withholding payment on that amount of purchases (about three weeks' worth). Continental's responsible officers, Ward, Thomas and Mr. Stevens (Continental's credit manager) had

no knowledge of a commitment to grant Sneesby a loan or credit for $50,000. On numerous occasions, they told Van Wyk to bring Sneesby's credit in line with the ten days' credit provided in the agreement. Sneesby and Van Wyk attempted to get the sales agreement amended to give Sneesby five weeks' credit. This was refused by Continental's officers. Van Wyk acquiesced in the three weeks' credit but stated he had no approval for this.

38. On Nov. 11, 1966, Sneesby wrote Van Wyk requesting an additional $50,000 loan. Sneesby was willing to take this by additional credit if he could get written assurance Continental would allow him to maintain a $100,000 debit balance. On Oct. 18, 1966, Van Wyk told Sneesby there could be no further credit allowance. On Nov. 25, 1966, Sneesby's attorney Brown wrote Van Wyk protesting Van Wyk's denial of making several promises to Sneesby and threatening to sue to reform the contract and for damages.

39. Thomas met with Sneesby and Brown in Jan. 1967. On Jan. 27, 1967, Thomas wrote to Brown covering the various points of the meeting. Thomas stated that if any promise had been made by Van Wyk that Continental would purchase Sneesby's distributorship, this was outside the scope of Van Wyk's authority and that Continental was not legally in a position to purchase Sneesby's business. Thomas' letter recorded his suggestion Continental might be able to find someone interested in purchasing Sneesby's distributorship. Thomas said that if Continental couldn't find such a purchaser, it would apply to the Commission for permission to acquire Sneesby's distributorship.

40. In Feb. 1967, Wheelright Brothers, a distributor of Continental's products in the Boise, Idaho area, was told by Continental of Sneesby's willingness to sell the distributorship and that Continental had no objections to the acquisition.

41. In order to purchase Wyoming Baking, Wheelright secured two bank loans, one for $15,000 and the second for $110,000. Wheelright knew it could not get a $110,000 loan without additional security. Continental agreed to guarantee the $110,000 note and did so.

42. On Apr. 1, 1967, Wheelright acquired Wyoming Baking's distributorship for $125,000 paid by Wheelright to Wyoming Baking. At the same time, Wyoming Baking paid Continental some $58,000 which it owed for merchandise received.

43. Wheelright Brothers operated the former Wyoming Baking distributorship for about a year, after which Wheelright wanted to get out of that business because of diminishing sales and other financial problems whereby it was indebted to Continental. An agreement was entered between Continental and Wheelright whereby Continental ac-

quired the former Wyoming Baking distributorship in consideration of the cancellation of Wheelright's debts and the payment to Wheelright of the $15,000 in cash invested by it at the time of purchase from Sneesby.

Recommended Conclusion as to Wyoming Baking

While not as direct as the situation with respect to Bon Ton, this also constitutes, when viewed as a whole, the purchase by Continental of the assets of a producer and distributor of bread and bread-type rolls in violation of Section III of the consent order.

At the very outset of the negotiations, it is clear that Van Wyk, representing Continental, was presented with a situation where Sneesby was not interested in being a distributor, but wanted to sell out. The series of ensuing events demonstrates how this was in fact accomplished. Indeed, Van Wyk's first written proposal to Continental's attorney specifically, and perhaps naively, spelled out the steps whereby loans were to be made which were, in effect, the purchase price and how the actual purchase was to take place after Sneesby stopped the production of bread and bread-type rolls. While the written proposal was rejected by Continental's attorneys, this, for all practical purposes, is what happened. Indeed, the distributorship sales agreement drafted by Continental's attorneys followed to some extent the form that was used in the Bon Ton sales agreement, which has already been found by the undersigned to be part of a transaction in violation of the order. Both sales agreements contained options whereby Continental could purchase the distributorship once production ceased.

The intervention for a time of a third party (which, significantly, was financially backed by Continental) as owner of the Wyoming Baking distributorship does not make this situation any different than that of Bon Ton. Again, as held in *United States* v. *ITT Continental Baking Co.*, the acquisition of Wyoming Baking's market and volume by virtue of the initial arrangement violated the order.

3. Effect of Bon Ton and Wyoming Baking Acquisitions on Concentration

44. Neither the Bon Ton nor Wyoming Baking acquisitions had any direct or immediate effect on concentration in the bread industry in the metropolitan or regional geographic markets involved in the acquisitions; nor was there any significant increase in industry wide concentration occurring on a national basis as a direct or immediate result of said acquisitions. (Admissions of Commission counsel, Tr. 466-70, 488-89.) The two acquisitions accounted for an increase in Continental's annual sales of almost 0.5 percent (Tr. 488).

B. Recommended Findings as to the Description and Operation of the Industry

45. Bread is a basic food item. It, and related bakery products, account for approximately 10 percent of consumer food purchases. "The bread and related products industry (SIC 2051) is the 10th largest U.S. manufacturing industry. Its shipments of $4.7 billion in 1965 exceeded those of such giants as the drug, rubber, nonferrous metals, machinery, appliance and television manufacturing industries. It was outranked only by industries such as automobile, petroleum and steel." Federal Trade Commission *Economic Report on the Baking Industry* (1967), p. 37.

46. As in the consent decree (see Finding No. 10, *supra*), and the Commission's Show Cause Order, the line of commerce here to be considered is bread and bread-type rolls ("bread") as set forth in the Bureau of Census manufacturing category SIC 2051. This includes white and specialty breads, hamburger, hot dog and brown and serve rolls and related products. Items such as cakes, doughnuts, pies or sweet yeast goods are not included. This is also the definition understood and used by the industry (CX 1; Tr. 525, 651, 684, 778, 841, 922-23, 996-97, 1074).

47. There are four categories of bakers: (1) *wholesale bakers* - bakers which sell at wholesale to other establishments buying for resale including grocers, restaurants, hotels and institutions; (2) *grocery chain* or *captive bakers* - bakeries owned and operated by grocery chains which distribute the bakeries' products through the chains' own retail grocery stores; (3) *home service bakers* - bakers selling through home service routes; and (4) *retail multi-outlet bakers* - retail bakers selling through their own nonbaking outlets. Census and industry definitions coincide on these defined categories (CX 1B, C; Tr. 553, 615, 687-88, 705-06, 784-85, 841-42, 922-23, 996-97, 1074-75).

48. The two most important categories of bakers are wholesale bakers which accounted for 87.5 percent of bread production in 1967, and grocery chain bakeries which accounted for 9 percent. Home service bakeries had only 1.4 percent of the market and retail multi-outlet bakeries accounted for only 1.3 percent (CX 9). Thus, for all practical purposes, an analysis of the market may be limited to wholesale and grocery chain bakers.

49. There is no national geographic market in the bread industry. The markets are local (*i.e.*, metropolitan or regional) because of the perishability of the product and cost of shipping long distances which limits the distance it can be shipped. To maintain freshness, bakeries are limited in their deliveries to varying areas up to 150 miles from point of

manufacture. If depots (redistribution points) are utilized, the bakery can deliver and compete at points up to 300 miles from place of manufacture. Labor costs, pricing structure, labels and consumer acceptance vary from market to market (Tr. 464-66, 610-11, 623, 648-49, 685-87, 800-02, 805, 926, 1077-78; and see Federal Trade Commission's *Economic Report on the Baking Industry* (1967), p. 42).

50. Cake can be shipped over larger areas than bread because it is not as perishable. It has a shelf life of five to six days compared to bread which has a two day shelf life. Also, since cake has a greater value than bread, a baker can afford to ship it further (Tr. 572, 708, 782, 806-07, 1100).

51. Wholesale bakers sell to retail grocery stores, including bread bearing the grocers' own private label, and also to a wide range of other customers including hotels, restaurants, schools and other institutions (CX 1B; Tr. 612-14, 720, 785, 852, 862-63, 930, 932, 997, 1084, 1091). Chain or captive bakers, with rare exceptions, distribute only their own private label bread to their own company's retail stores (CX 1B; Tr. 615, 633, 700, 785, 849, 853, 862-63, 927, 930, 939, 997, 1002-03, 1079, 1082-83). This limitation on captive bakers' distribution reflects labor problems that would be caused if other deliveries were engaged in. Wholesale bakers' deliverymen and chain bakers' drivers belong to different union locals and have different wage scales. There is also a lack of economy in servicing small accounts by chain bakers' semi-trailers (Tr. 699, 833-34, 900, 937-38, 1002-03).

52. A full line baker offers his customers all baked goods they desire for their bakery departments, including bread, sweet yeast goods, cakes and pies. Most bakers, however, do not produce other than bread products. To the extent they supply such other items, they must purchase them from other sources (Tr. 929, 1081).

53. In 1967, 73 percent of the plants in the baking industry specialized in bread and bread-type rolls and 65 percent of bakery sales were in this category (CX 1C, 3). White bread accounts for most of the bread products sold at the wholesale and retail levels (Tr. 846, 924).

54. Captive bakers seldom bake cake (Tr. 570, 889). In addition, they restrict their production to a limited number of high volume items such as white bread (Tr. 499-501, 733, 785, 933, 1086).

55. Wholesale bread bakers sell advertised, primary labels which they own. This is their most expensive bread line (Tr. 688-89, 778-79, 1079). They also sell secondary labels, which generally are not advertised, at lower prices. Secondary labels normally cost more than private labels, which are the lowest priced bread items (Tr. 688-89, 778, 1004,

1079).[11] Secondary labels usually have leaner formulas than primary label bread (Tr. 779).

56. Private label bread includes both that produced by wholesale bakers for retail grocers (chains and cooperative members) and that produced by the chain or captive bakeries. It accounts for about one half of all white bread sales. Private label first appeared in the 1940's but did not begin to grow until the late 1950's and early 1960's (Tr. 564, 615-16, 689, 993-94, 1011, 1083). It has been estimated that from 1962 to 1972, private label sales increased from 20 percent to 36 percent of the total bread market (Tr. 564) and may now be as high as 38 percent (Tr. 659).

57. Tests conducted by the research and testing laboratories of the W. E. Long Company, an independent bakers cooperative, and Quality Bakers of America cooperative disclose that wholesale bakers' bread is generally of a higher quality than that of captive bakeries. While the Federal Government has established minimum standards for bread, bakers have considerable latitude on improving such standards. Variations occur in such elements as flavor, freshness, number of holes, fermentation and oven time and grades of flour, yeast, sugar and shortening (Tr. 1007, 1011, 1107-15, 1144).

58. Chain bakers, unlike wholesale bakers, tend to concentrate in the larger, nonsouthern, metropolitan markets (Tr. 499-501, 705, 785).

59. Deliverymen for wholesale bakers handle at most $1,600 worth of bread products per week in small vans, 14 to 16 feet in length, with a weekly maximum capacity of 2,000 pounds. Drivers for chain bakers employ large semi-trailers, 40 to 45 feet in length, to haul as much as 10,000 pounds or at least $5,000 worth of bread products per week. On an average, the captive bakers' semi-trailers haul about five times as much as the wholesale bakers' vans (Tr. 695-98, 787-88, 790-91, 860-62, 937-39, 1002, 1090).

60. Drivers employed by chain bakers receive a straight hourly wage. Wholesale deliverymen are paid a guaranteed base salary plus a commission. Wholesale deliverymen usually make more money than chain bakers' drivers. Even where both happen to receive the same salary, the chain driver has delivered a substantially greater volume of bread products than the deliverman for the wholesale baker (Tr. 695-98, 785-87, 859-60, 936-37, 1089, 789).

61. In addition to delivering bread products, deliverymen for wholesale bakers replenish stocks, remove "stale" items (usually after 48

[11] Some wholesale bakers also produce a highly advertised "premium" or high quality bread product. Its share of any market is relatively small (Tr. 583-84).

hours), arrange displays and maintain necessary records. Chain baker drivers leave products at the rear of the supermarkets. In-store services are performed by other chain store employees, likely stockboys, who are paid close to the minimum wage (Tr. 699-700, 782, 785-87, 861-62, 1000-01, 1042; CX 47).

62. Since selling and delivery expenses are just under 40 percent of the wholesale cost of bread, the savings reflected by the different methods of delivery described above are significant (Tr. 791, 1002). The delivery disparities have been reliably estimated to afford savings to chain bakers of from 5 cents to 11 cents per loaf (Tr. 685-98, 859-60, 936-37).

63. Before the large expansion of private label breads in the 1950's, private label sold at one to three cents a loaf below the price of wholesale bakers' advertised or primary label bread (Tr. 853-54, 1083-84). Since then, wholesale bakers have allowed the differential to increase, until now, varying with the individual market, the price of wholesale bakers' primary bread is from 10 to 21 cents a loaf higher than private label (Tr. 499-501, 693-96, 791-93, 853-54, 931-32, 1003-04, 1083-84).

64. On advertised bread, wholesale bakers cannot hope, and do not try, to meet the price of captive bakers' bread. Advertised label bread prices, for the most part, fluctuate independently of the price of chain bakers' bread. Wholesale bakers respond to price changes of other wholesale bakers, not chain bakers. And chain bakers do not react to price increases of wholesale bakers (Tr. 694-96, 792-93, 854, 932, 1003-04, 1083-84). This lack of relationship between pricing of the two kinds of bread is conclusively evidenced by the large price spread that has developed over the years. As the price spread grew, primary label bread began to lose sales to private label (Tr. 603-04, 1012). Studies conducted by Continental show a direct correlation between the size of the price spread and the sales of its primary label "Wonder" bread (Tr. 727-29).

65. Grocery stores sell private label bread products at little or no profit or use them as loss leaders. With 8,000 to 12,000 items sold in grocery stores, 6 percent to 10 percent of sales are of bakery products. Because of their overall volume of products, grocers are able to sell some bread products at below cost prices and still maintain overall profitability. Grocery stores often slash private label bread prices in order to build customer traffic. Advertised label bread is not so used (Tr. 695-96, 793-94, 855, 932-33, 1004, 1084-85).

66. Wholesale bakers introduced non-advertised secondary labels to afford price competition with the private labels. Secondary labels are

priced lower than are primary labels, sometimes close to or as low as private labels (Tr. 854, 898-99, 967).[12]

67. Private label bread is normally advertised in local newspapers and in grocery store windows. The advertisements feature price, usually as weekend specials. Wholesale bakers use various advertising media, including television, and feature the quality of their bread (Tr. 614, 793-94, 822-23, 1004).

68. Bread is displayed for sale in grocery stores on metal fixtures called bread racks. These vary in size depending upon the store, but normally range from 35 to 40 feet in length and are about 6 feet high. They have four to six shelves (Tr. 840, 848-49, 906, 928, 1078). There is a preferred position on the bread rack depending upon the traffic or customer flow. The section of the bread rack first attracting the customer's attention is preferred (Tr. 689-91, 780-82, 850-51, 928-29, 1080-81).

69. It is extremely important to have the preferred position on the bread rack. It can mean increased sales of up to 25 percent (Tr. 780, 850-51, 928-29, 995, 1081). In addition to position, it is important to have adequate space on the rack (Tr. 850-51, 928-29, 995), as buyers tend to select what is displayed in quantity (Tr. 995-96).

70. Stores normally give their own private labels, whether supplied by wholesale bakeries or the grocers' captive bakeries, both preferred position and a preferred amount of space on the bread rack. Private labels are given from 50 percent to 90 percent of available space (Tr. 701-02, 730-31, 782, 795, 858, 934-35, 1019-20, 1080, 1087). The remainder of the rack is allotted to advertised brands. The advertised brand of the wholesaler who furnishes the private brand is given the next best preferred position. The remaining positions are given to several advertised brands in accordance with their popularity (Tr. 795-96, 934-35, 1019-20, 1087).

71. While wholesale bakers have made efforts to secure space allotted to grocers' private brands, once space on a bread rack has been given to a private brand, that space, for all practical purposes, is denied to wholesale bakers. They may compete only for the space occupied by other wholesale bakers' brands (Tr. 702-03, 730-31, 734-35, 797-98, 858-59, 899, 934-36, 967-69, 1006, 1154-55).

72. Grocers with captive bakeries often limit the amount and variety of products a wholesale baker can place in their stores. There may be limits on the times service may be performed as well as the inventory

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[12] The president of W. E. Long Co. testified that the price of a secondary label would fall between that of an advertised and captive label, *e.g.*, if a premium label sold for 39 cents and a private label sold for 29 cents, the secondary label would sell for 33 or 34 cents (Tr. 1004). On the other hand, the president of Quality Bakers of America testified that, in most cases, secondary and captive label prices were identical (Tr. 1127).

that may be left in the back room. Indeed, the quantity may be limited to what can go on the allotted bakery display area (Tr. 701-02, 1006).

C. Recommended Findings as to Organization and Operations of ITT Continental

73. Respondent ITT Continental is a corporation organized, existing and doing business under the laws of the State of Delaware. Its principal office and place of business is located at Rye, N. Y. All of its common stock, its only authorized voting stock, is owned by ITT (CX 13B).

73. Respondent is "the world's biggest baker" (CX 18J). Its total net sales of bread products in the United States for 1962 through 1970 are as follows (CX 12C):

Year	*Net Sales*
1962	$262,938,869.09
1963	$251,625,673.64
1964	$257,023,823.59
1965	$265,600,547.87
1966	$300,081,313.28
1967	$312,721,525.43
1968	$331,678,743.68
1969	$351,013,524.91
1970	$375,581,348.00

75. Respondent's Rye, N. Y., headquarters performs many functions for its bakeries. Its laboratory conducts new product research and ingredient and quality standard checks. It supplies engineering, legal, production, sanitation, sales, marketing, advertising, vehicular, industrial engineering and accounting services (Tr. 527-28; CX 22R, S).

76. ITT Continental's president reports to ITT's president, including submittal of a weekly "highlights" memorandum covering matters of special interest and a lengthy monthly operational report covering major events such as sales, profits and trends. ITT Continental's president attends a monthly two-day meeting at ITT headquarters (Tr. 519, 559).

77. ITT Continental is made up of several major divisions, the largest of which is the bakery division. This division has its own president and staff and six regional vice presidents located throughout the United States who report to the president of the division. Within the bakery division are the bread, cake and snack food operations, each run by a separate staff. Prior to Apr. 1972, bread and cake were separate organizations, each reporting to the president of ITT Continental (Tr. 522-23, 682-83).

78. Begun in the 1920's, by 1966, respondent's Hostess cake division had sales of over $160 million and was the nation's largest producer of snack cakes (CX 18J, 20D, H, 47). In Apr. 1972, ITT Continental's bread and cake divisions were combined to form the bakery division (Tr. 682-83).

79. The Morton frozen food division is respondent's fastest growing division, one of the largest producers of frozen prepared foods in the world and a major source of profits (CX 18J). Morton distributes its products in all fifty states and in many foreign countries (CX 13F, 18J-K, 20H). Each year, Morton "produces 400,000,000 complete dinners, entrees and casseroles, and millions of dessert pies, breakfast specialities and other frozen items." (CX 25N).

80. ITT Continental's snack foods division includes the manufacture of potato chips and snack products with plants in Columbus, Ohio and Memphis, Tenn. It also cleans, grades and shells peanuts for sale to processors and packers. It was a separate organization until early 1973, when it became part of the bakery division (Tr. 522-23; CX 13F, 18K, 22R).

81. The Paniplus Company is a subsidiary of respondent. It is an important supplier of ingredients to the baking industry and other food processors. Its products include dough conditioners, enzyme supplements, yeast foods, icing bases, colors, flavors and emulsifiers. Paniplus' sales and service organization is directed from its Kansas City headquarters where its own research staff and laboratories are maintained (CX 20I, 22R; Tr. 522).

82. The Pearson Candy Company is another ITT Continental subsidiary with its plant at St. Paul, Minn. It produces a line of bar candies which is sold principally through brokers. A Pearson subsidiary, T. A. White Candy Co. of South San Francisco, Calif., produces a line of candy items for bulk distribution (CX 13F; Tr. 548).

83. Gwaltney, Inc., of Virginia reports to ITT Continental although it is a subsidiary of ITT, not ITT Continental. Acquired by ITT in 1970, it is the "producer of the nationally famous Gwaltney's genuine Smithfield ham." (CX 24S; Tr. 522, 548).

84. In addition to its holdings in the United States, respondent has operations in Western Europe, Mexico and the Carribean (CX 21G, 25N; Tr. 522). Approximately 31,000 persons were employed by ITT Continental in 1970 (CX 13H).

85. ITT Continental's bread and cake products are primarily marketed under the Wonder and Hostess labels, respectively. Some of its other bread labels are: Profile, Daffodil Farm, Cabet's, Braun's, DiCarlo,

Love's, County Fair, Country Style and Roman Meal (CX 12A, 13E, 22R; Tr. 688).

86. ITT Continental operates three types of bakery facilities: plants producing (1) only bread, (2) only cake and (3) both bread and cake. As of 1970, respondent operated 69 bakeries located in 62 cities in 31 states of the United States and the District of Columbia. Eight of these bakeries produced only cake products (CX 7, 13E). ITT Continental now has 63 bakeries of which 57 bake bread[13] (Tr. 525, 591, 619).

87. ITT Continental engages in national bread operations that cover the geographic area occupied by 70 percent of the population (Tr. 525-27, 624; CX 21B, 47). "Its bakeries located near the areas they serve produce a total of more than 6,000,000 loaves of bread daily" (CX 25N). In 1963, it sold bread in every State of the United States except Alabama, Georgia, South Carolina, North Dakota, Alaska and Delaware. In 1967 and 1970, the only states in which it did not sell bread were Alabama, Georgia, South Carolina and North Dakota. This is still the present situation, although respondent is running more miles today than in 1967 with perhaps a few more trucks (CX 15; Tr. 531-32).

88. ITT Continental sells bread to the retail trade, both chains and independent stores; to the institutional trade, including restaurants, military bases, schools and hospitals; and to vending and catering operations (Tr. 528). About 68 percent or 70 percent of its bread volume carries the Wonder label, 12 percent is in private label of its customers and the remainder is in speciality items (Tr. 692-93). Continental sells more bread than all of the bread produced by all chain bakers combined (CX 5, *in camera*, 9).

89. Respondent operates a fleet of approximately 9,075 delivery trucks, 685 passenger vehicles and 650 tractor-trailers, all of which, except for approximately 630 delivery trucks, are leased. It has an extensive delivery route system with 7,000 regularly established selling routes. Of these, 3,000 sell bread exclusively. Both bread and cake are sold on 1,700 "combination" routes. The remainder sell cake exclusively (CX 13H; Tr. 528-31).

90. Respondent has 300 distribution depots to assist in the delivery of its bread and cake products (CX 13E; Tr. 530). A distribution depot is a warehouse or garage to which semi-trailers deliver bread for redistribution on delivery trucks. As previously found (Finding 49, *supra*), the utilization of depots materially expands the area within which a wholesale baking facility can operate. Respondent also has 350 thrift stores

[13] Six of respondent's bakeries are exclusively cake bakeries. About 25 to 30 produce both bread and cake. The rest bake only bread.

through which it can dispose of products that have been pulled off retailers' shelves because the allotted shelf life has expired (Tr. 530, 782, 784, 1082).

91. Respondent's net sales and net income from 1961 through 1969 were as follows (CX 16D, 18D, 13D):

Year	*Net Sales*	*Net Income*
1961	$429,746,861	$7,564,146
1962	$454,287,373	$8,007,020
1963	$476,043,182	$8,804,534
1964	$493,365,631	$9,179,008
1965	$524,936,000	$9,979,000
1966	$589,543,000	$11,322,000
1967	$621,038,000	$14,666,000
1968	$669,297,000	$16,237,000
1969	$749,478,000	$16,279,000

92. Respondent's gross expenditures for fixed assets from 1962 through 1967 were as follows (CX 16F, 17F, 18F, 19F, 20F, 21F):

Year	*Gross Expenditures for Fixed Assets*
1962	$11,041,689
1963	$ 6,407,142
1964	$18,389,079
1965	$15,565,481
1966	$15,082,863
1967	$19,481,232

93. Respondent's net sales and pretax income by principal product groups during 1967 through 1969 were as follows (CX 13E):

	1969	*1968*	*1967*
	Net Sales (in thousands of dollars)		
Bakery Products	$579,557	$531,170	$494,021
Frozen Food Products	$134,427	$116,728	$106,538
Other Products	$ 35,494	$ 21,399	$ 20,479
	$749,478	$669,297	$621,038
	Pretax Income (in thousands of dollars)		
Bakery Products	$24,678	$22,567	$20,925
Frozen Food Products	$ 4,560	$ 5,693	$ 3,777
Other Products	$ 1,519	$ 1,777	$ 1,014
	$30,757	$29,437	$25,716

94. For reporting purposes, ITT divides its subsidiaries into various financial groups. ITT Continental is in the "Food Processing and Services" group. The sales and income reported for this group are almost

entirely those of ITT Continental. In 1971, food processing and services had sales of $961 million and an income of $18 million. In 1972, sales increased to $1.013 billion and income declined to $6 million (CX 25D; Tr. 548-49).

95. In 1956, bread accounted for 67 percent of Continental's sales, cake for 22 percent and other products for 11 percent. In 1966, bread accounted for 51 percent of sales, cake for 28 percent and other products for 21 percent. As of June 1973, bread sales were between 40 percent and 50 percent of total sales (CX 20H; Tr. 546). As stated in Continental's 1965 annual report, "Under normal conditions the Company's broadened product mix makes it easier to withstand price fluctuations in any single commodity" (CX 19E).

96. ITT Continental is the price leader and sets the pattern of competition in whatever bread market it is in (Tr. 863, 868, 880, 900-01, 909, 912-13, 939, 948, 1091, 1142, 1147-48).

97. ITT Continental is subject to a tremendous challenge to match ITT's almost unprecedented record in earnings, momentum and growth. ITT has made ITT Continental more aggressive in its outlook toward opportunities. ITT expects ITT Continental to grow 15 percent a year in profits, although this percentage of growth is not projected for bread because of present conditions in that industry (Tr. 538-41).

D. Recommended Findings as to Market Concentration

98. Bread sales of the largest bakers have increased disproportionately since 1962 (CX 3, 4):

(Sales in Millions of Dollars)

	4 largest companies	*8 largest companies*	*20 largest companies*	*50 largest companies*
1971	$938.9	$1,251.8		
1970	$908.0	$1,210.7		
1967	$782.2	$1,061.5	$1,368.8	$1,676.1
1963	$599.2	$ 898.8	$1,173.4	$1,473.0

99. Between 1963 and 1971, the four largest bread bakers enjoyed a higher rate of growth than did the eight largest bakers and the industry as a whole. The four largest bakers increased their shipments of bread from $599.2 million in 1963 to $782.2 million in 1967, a 30.6 percent increase. During the same period, the growth rate of bread shipments for the eight largest companies was 18.1 percent and only 11.9 percent for all producers. Between 1967 and 1971, the value of shipments of bread by the four largest bakers grew from $782.2 million to $938.9 million, a 20 percent increase; the growth rate of the eight largest firms was 17.9 percent; the remainder of companies, exclusive of the top eight,

grew at a rate of 8.4 percent. Total bread shipments by all producers increased 12 percent (CX 3).

100. The market shares of the largest bakers in the bread industry have increased since 1962. From 1963 through 1971, top four concentration increased from 24 percent to 30 percent and top eight concentration increased from 36 percent to 40 percent (CX 3):[14]

Share of Market	*4 largest companies*	*8 largest companies*	*20 largest companies*	*50 largest companies*
1971	30%	40%		
1970	30%	40%		
1967	28%	38%	49%	60%
1963	24%	36%	47%	59%

101. Respondent is the largest baker in the bread industry. Its market share increased from 10.7 percent in 1962 to 12.4 percent in 1970, with sales almost one-third larger than Campbell-Taggart, its closest competitor and over a third more than American, the third largest in the industry (CX 5, *in camera*, CX 6, *in camera*). This market share increase of 1.7 percent from 1962 to 1970 was greater than two of its three nearest competitors, Campbell-Taggart and Interstate. Their increases in shares were 1.1 percent and 1.2 percent, respectively. The third, American, enjoyed 2.6 percent (CX 5, *in camera*). American's and Interstate's expansions, in part, reflect substantial acquisitions between 1962 and the end of 1970.[15]

102. Respondent's sales of bread products increased from $262,938,-896 in 1962 to $375,581,348 in 1970, a 42.8 percent increase (CX 12C). In 1963, it sold bread in all but six states. The number has now been reduced to four (CX 15). In 1970, respondent had 61 plants producing bread products in 31 states plus the District of Columbia. Campbell-Taggart had 63 confined, however, to only 22 states. Remaining bread bakers have substantially fewer plants then either ITT Continental or Campbell-Taggart (CX 7).

103. While ITT Continental had 11.2 percent of the national market in 1967 (CX 5), its share of production in seven states and the District of Columbia exceeded 20 percent: Missouri - 22 percent, Colorado - 22.1 percent, Iowa - 22.2 percent, Washington - 23.3 percent, Nebraska - 26.2 percent, Oklahoma - 29.8 percent, District of Columbia - 44.7 percent,

[14] Seller concentration is greater at the metropolitan or regional level than at the national level. *Organization and Competition in the Milling and Baking Industries* (Technical Study No. 5 of National Commission on Food Marketing (1966), p. 51).

[15] American acquired Langedorf United Bakeries, Inc., thereby expanding into four West Coast states (Tr. 1203-04, 1243-44). Interstate acquired several bakeries from Nabisco, Inc. (CX 5 n. 5, *in camera*).

Utah - 48.3 percent (CX 8). In 1970, 18,975,810 people, or 9.3 percent of America's total population, lived in these areas (RX 1). Wonder is the leading advertised label seller in most of the individual markets in which it competes. On an average, the leader in bread sales in a local market is a private label. The private label may be bread furnished by respondent (Tr. 564-65, 659). About 12 percent of respondent's bread production is in private label (Tr. 692).

104. In 1967, the value of shipments of bread by wholesale bakers was $2.443 billion, an increase of more than 20 percent over their $2.026 billion shipments in 1963. In 1963, wholesale bakers had 81.2 percent of the nation's total shipments of bread products. By 1967, this percentage had increased to 87.5 percent (CX 9).

105. In 1967, the value of shipments by chain bakers was $251.2 million, an increase of 1 percent over their $248.7 million worth of shipments in 1963. Despite this increase in sales, chain bakers' share of the nation's total bread production decreased from 10 percent in 1963 to 9 percent in 1967 (CX 9).[16]

106. ITT Continental is both the largest baker and the largest wholesaler baker (CX 6, *in camera*). Its increase in sales of bread products from $262,938,896 in 1962 to $375,581,348 in 1970 (CX 12C) reflects that its share of wholesale bakers' sales increased from 12.4 percent in 1963 to 12.9 percent in 1967 and 14.2 percent in 1970 (CX 6, *in camera*).[17] ITT Continental's sales and share of sales made by wholesale bakers were almost a third larger than its nearest wholesale baker competitor, Campbell-Taggart, during 1963-1970 (CX 6, *in camera*).

107. From 1963 through 1970, the four largest wholesale bakers were ITT Continental, Campbell-Taggart, American and Interstate, in that order. Bread sales by these four bakers increased from $636.8 million in 1963 to $828.8 million in 1967 to $988.8 million in 1970. Thus, sales of the four largest wholesale bakers rose from 31.4 percent of bread sales of all wholesale bakers in 1963 to 34 percent in 1967 and 37.4 percent in 1970 (CX 6, *in camera*).[18]

108. If, instead of assuming that wholesale bakers had the same share of the market in 1970 as they did in 1967 (87.5 percent), it is assumed that their rate of change from 1963 to 1967 continued (*i.e.*, from 81.2 percent in 1963 to 87.5 percent in 1967, or about 1.6 percent per year),[19]

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[16] As admitted by Commission counsel, the competitive significance of chain bakers is greater, where they compete, than their 10 percent and 9 percent shares in 1963 and 1967, because chain bakers: (1) are located in the larger non-southern metropolitan areas, (2) sell at reduced prices, and (3) concentrate production in high volume items (Tr. 499-502).

[17] Percentage figures for 1970, as derived from CX 6, *in camera*, are estimated from data for 1967.

[18] Again, the 1970 percentage figure, as derived from CX 6, *in camera*, is estimated from data for 1967.

[19] ITT Continental presses for this assumption (ITT Continental's Proposed Finding of Fact No. 80).

the wholesale bakers' share of the market in 1970 would have been 92.3 percent. Total wholesale bakers' shipments would have been $2.8 billion (92.3 percent of the $3.03 billion shipments by all bread producers) and the four largest wholesale bakers would have accounted for about 35.3 percent of all wholesale bakers' bread shipments in 1970, still compared to 31.4 percent in 1963 and 34 percent in 1967.

109. Since 1964, the nation's four largest producers in the bread industry have all been wholesale bakers. From 1962 to 1970, only two chain bakers have been among the nation's eight largest. In 1970, the nation's largest chain baker was A&P. It ranked sixth among the nation's bread bakers (RX 5, *in camera*, 20, *in camera*).

110. The number of plants in the bread, cake and related products industry (SIC 2051) declined from 5,010 in 1963 to 4,042 in 1967—a decline of 19.3 percent. Broken down into types of bakeries, wholesale bakery plants declined from 4,287 to 3,751 (12.5 percent), grocery chain bakeries declined from 153 to 128 (16.3 percent), home service bakeries declined from 281 to 35 (87.5 percent) and retail multi-outlet bakeries declined from 289 to 128 (55.7 percent) (CX 10). In 1967, 73 percent of the baking plants in SIC 2051 specialized in bread products (CX 1C).

111. In 1963, there were 4,230 baking companies producing bread, cake and related products (SIC 2051). They employed 232,153 persons and had sales of $3,855,500,000. By 1967, the total number of baking companies had declined by 21.1 percent to 3,336. Employees had declined 6.3 percent to 217,455. Sales, however, had increased by 16.5 percent to $4,489,900,000 (CX 11).

112. In 1963, there were 4,183 baking companies with under 500 employees. They employed 111,719 persons and had sales of $1,775,900,000. By 1967, such companies had declined by 21.4 percent to 3,287. Employees had declined 16.3 percent to 93,551. Sales had increased by 4.4 percent to $1,855,500,000 (CX 11).

113. In 1963, there were 47 baking companies with 500 or more employees. They employed 120,434 persons and had sales of $2,079,600,000. By 1967, the number of this size company had increased to 49. Employees had increased by 2.9 percent to 123,904. Sales had increased by 26.7 percent to $2,634,500,000 (CX 11). In 1967, bread products amounted to 65 percent of total sales by producers in the bread, cake and related products industry (SIC 2051) (CX 1C, 3).

114. In 1963, sales and receipts of $2.1 billion by the industry's large (500 or more employees) baking companies were 17.3 percent greater than the $1.8 billion of small (less than 500 employees) baking companies. By 1967, sales and receipts of large baking companies had in-

creased to $2.6 billion or 41.9 percent more than the $1.9 billion sales and receipts by small companies in the industry (CX 11).

115. From 1968 to the present, the number of bakers has continued to decline. Indeed, the trend has accelerated (Tr. 824, 870, 959-60, 970, 1041). There have been no new wholesale bakery entrants since 1967 (Tr. 578, 824, 872, 1041, 1101).

116. At least since the beginning of 1973, 90 percent of all wholesale bakeries have been operating at a loss (Tr. 554, 717, 819, 933). The president of Qaulity Bakers of America estimated that about 50 percent of his cooperative members are running in the red and that the industry is in a state of disaster (Tr. 1073, 1102). Wards went through a radical reorganization. Interstate was almost acquired by Beatrice Foods (Tr. 554). Most wholesalers are closing plants (Tr. 554). Many smaller bakers are going out of business (Tr. 1236-37).

117. The wholesale bakers' problems have been caused, in large part, by the activities and growth of chain bakeries, costly labor contracts, technological improvements that have created overcapacity, improved highways permitting larger areas to be served by a single plant, high ingredient, selling and distribution costs, problems arising from Federal price controls in effect since Aug. 1971, and the decline in per capita consumption of bread. Of particular current impact is the tremendous increase in the cost of flour following the shipment of flour to Russia in 1972 and the corresponding short supply here coupled with the inability to recoup costs because of price controls (Tr. 478-83, 549-53, 582, 587-90, 717, 817-18, 973-74, 1046-47, 1103). These factors are generally found, to varying extents, in all markets, whether or not ITT Continental is present (Tr. 481-83, 633, 1045, 1062).

118. As established by the opinion testimony of experienced and knowledgeable officials in the field, the industry faces a continuing period in which there will be less and less competitors.[20]

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[20] William F. Donovan, who was president of Ward Baking Company until Feb. 1973, and who is still active in the industry, foresaw that "[T]he baking business is going to continue to suffer the plant closings, the weaker are going to fall by the wayside," unless the various problems facing it are overcome (Tr. 827-28). Merle F. Averik, an official in the industry for many years with several different companies and currently general manager and chief executive of Interstate Brands' Denver bakery, stated that if no relief was forthcoming, by the end of this decade "[T]here will be very few bakeries, survival of the fittest, I guess" (Tr. 873); that even if Congress were to repeal the current tax on processing wheat, this would give only a band-aid effect and would not provide enough help to turn the situation around (Tr. 910-12). George I. Stonbraker, former official of American Bakeries Company, presently vice president in charge of sales of Laub Baking Company, could not envision much relief coming to the industry in the near future (Tr. 960, 970) so that by the end of the decade "There will probably be one or two major suppliers in the United States" (Tr. 960). Thomas H. Bell, vice president of sales and marketing for the W. E. Long Company, while expressing confidence in the ultimate future of the baking industry, felt that "those who can withstand this era, and I am sure it is a cycle, will wind up with less competition and a larger share of the market" (Tr. 1042).

E. Recommended Findings as to ITT Continental's Competitive Advantages

1. Ability to Absorb Losses and Ability and Potential for Growth

119. From 1970 through 1972, respondent spent $25 million each year on capital expenditures.[21] For 1973 and 1974, this amount will increase to $30 million per year. From 25 percent to 50 percent of these expenditures will be directly related to bread production. While the percentage of capital expenditures going to bread has been declining (Tr. 544), it is still substantial.

120. Competitors uniformly have cut back on capital expenditures severely (Tr. 863-65, 941, 942). For example, Ward, the fifth largest bread baker (RX 20), budgeted only $1,700,000 for capital expenditures in 1973 (Tr. 821). Quality Bakers of America does not provide capital improvements for its members (Tr. 1070).

121. Advertising is the only real means to influence the buyer of bread (Tr. 866, 943) and the most effective advertising media for the wholesale baker is television (Tr. 822-23). Respondent has been increasing its overall advertising budget since at least 1966 (CX 20E; Tr. 623). Today, it spends $17 million on advertising just its bread products and Hostess cake line. This includes $5 million of television advertising of the Wonder label, and $8.5 million to advertise the Hostess line (Tr. 849-50). About 50 percent to 55 percent of advertising money goes to promote bread with 70 percent of that directed to the Wonder label using television exclusively (Tr. 660).

122. ITT Continental hired a Mr. Hackett as its new general advertising manager for bread and cake products in Oct. 1968 (Tr. 640). Under his supervision, advertising techniques were studied and improved and the number of employees in marketing and advertising were increased (Tr. 643-44). Since Oct. 1968, ITT Continental has increased its number of advertising managers from 2 to 8 or 10, the number of employees in its advertising department from 5 to 17, and the number of outside advertising agencies utilized from 2 to 3 (Tr. 647-48).

123. Most other bakers have cut back or eliminated advertising (Tr. 864-65, 898, 941-42, 953-54). Ward, the fifth ranking baker had budgeted $1,800,000 for 1973, but is hanging on to it as it is reluctant to spend the money under today's conditions (Tr. 822). While the 72 members of the Quality Bakers of America cooperative who operated 96 plants (Tr. 1070-71) spent $12,000,000 on advertising in 1972 (Tr. 1105), about 50

[21] For example, in 1971, ITT Continental opened a new bakery in East Brunswick, New Jersey, which cost several millions of dollars. It helps serve the metropolitan markets extending from New York City to Philadelphia (Tr. 542-44).

percent of its members cannot now afford to do any advertising (Tr. 1160-62).

124. When ITT Continental closes a plant, the sales for the market frequently are picked up by one or more of its other plants. The interstate highway system has allowed it to close obsolete plants and place production in others. Thus, the fact that it closed 10 percent of its plants in 1971-1972, does not mean it lost 10 percent of its business (Tr. 579, 584). This situation, of course, could not apply to single plant competitors or even to smaller multi-plant competitors unless their other plants happened to be located at just the right places. Belonging to a cooperative, such as Quality Bakers of America, does not furnish such an advantage (Tr. 1093-95).

125. Since 1962, ITT Continental has withdrawn from only one major market, Shreveport, La. (Tr. 577, 714). At the same time, it has expanded the territory covered by existing markets (Tr. 713, 808).

126. ITT Continental operates at a profit even though its bread operation has been operating at a loss since Oct. 1972 (Tr. 551-52, 581-82). Of its 57 bakeries producing at least some bread products, 20 are operating at a loss (Tr. 717). It operates at an overall profit, despite its losses in bread, because of its profits on its other diversified products (Tr. 582-83; CX 19E).

127. Except for Beatrice Foods Company, no other wholesale baker has the diversification of ITT Continental and can so show a profit while its bread operation is sustaining a loss (Tr. 583, 828, 863, 940, 1091, 1145). Beatrice is in only four bread markets (Tr. 718) and, at least during 1970, was not among the nine largest bread bakers (RX 20, *in camera*). Individual wholesale bakers that belong to cooperatives do not secure financial assistance by reason of such membership (Tr. 620-21, 915, 989-90).

128. As exemplified by an instance in Tampa, Fla., ITT Continental is capable of acquiring a bakery and operating it for a period at a loss until such time as it becomes profitable (Tr. 567-69).

2. The Competitive Advantage of Wonder Bread's Nationally Advertised Label

129. "Wonder Bread first appeared as a trade name in 1926, just two years after the formation of * * * [Continental]. In the years since, the bread with the colorful balloon wrapper has become one of America's best known products." (CX 18J). Wonder is the largest-selling advertised bread label (CX 18J; Tr. 562-64, 692, 1009).

130. Advertising is the best means of selling bread and the most effective advertising media is television (Tr. 671, 822-23, 866, 943).

Respondent spends $5 million annually on national television to advertise Wonder bread. An area in the southeastern portion of the United States, where Wonder bread is not sold, is not covered. About 70 percent of the population of the United States is reached (Tr. 648-49, 656, 660, 849-50). No other bread receives such national exposure (Tr. 656-57, 866, 943, 1121-22). Respondent's plants expend an additional $3 million a year on local advertising (Tr. 654).

131. Wonder bread, which is sold in 46 states (Tr. 532), is a nationally known bread label with at least some degree of familiarity in every major market in America (CX 47; Tr. 657, 706, 798, 1008-09).

132. ITT Continental's widely known Wonder label assists it in competing with other brands, including private label brands (Tr. 867, 945, 1012-13, 1092). This is some advantage in selling to those persons who visit or move to a new area and who are already familiar with the highly advertised Wonder bread (Tr. 800, 894, 944-45, 1011-13). It would be of very limited value or advantage in expanding to a new market (Tr. 800, 866-67, 943-45, 975-77, 1009-10).

3. The Competitive Advantage Accruing to Wonder Bread by Reason of Hostess Cake Distribution

133. Hostess is a nationally known cake label, the largest cake line in the nation (CX 18J, 20D; Tr. 659, 1029, 1099). Since cake is not as perishable as bread, has a longer shelf life, and is of greater value in comparable bulk, cake can be distributed over larger areas than bread (Tr. 571-72, 708, 806-07, 1100). Respondent sells Hostess cake through some 3,000 wholesale routes and, in addition, supplies other wholesale bakers with the line (Tr. 528-30, 572, 708-09). There are a number of major markets where ITT Continental sells cake which it does not reach with its bread (Tr. 593, 708).

134. Hostess cake is nationally advertised to the extent of $8.5 million annually (Tr. 650). It differs as a "snack cake line" from cupcakes and other types of cake (Tr. 1124). Grocers consider it important to carry Hostess cake (Tr. 869, 954).

135. Most wholesale bread bakers do not bake cake (Tr. 851, 929). Those who purchase cake from cake bakers for resale lose the manufacturing level profit and realize a smaller profit than the wholesale bread baker that produces his own cake (Tr. 872).

136. Cake is not as competitive a product as bread. There is very little private label cake. Few chains produce their own cake. Thus, it is easier to get cake into a store than bread (Tr. 570, 608, 889, 955).

137. The sale of Hostess cake gives ITT Continental an advantage in selling Wonder bread. The way is eased because of the good reputation

and relationship the Hostess representatives already have with the potential Wonder bread customers, as well as the reputation they have built up for ITT Continental. It is all one company in the buyer's mind (Tr. 806, 869, 896, 954-55, 1031, 1099, 1100, 1142-43). The evidence indicates this would be equally true whether ITT were attempting to sell Wonder bread in a market it is already in or whether it would attempt to enter a new market where Hostess cake was already being sold.

138. At least four times in 1973, in advertisements directed to national accounts in the wholesale grocery market, ITT Continental coupled its presentation of Wonder bread and Hostess cake and represented it as "the only nationally advertised bread and snack-cake line in the country" (CX 47; Stipulation Relating to CX 47, dated October 25, 1973). These advertisements confirm the evidence of third party competitors that there is an advantage to ITT Continental, of which it is aware, in promoting Wonder bread together with Hostess cake. It also evidences that ITT Continental exploits this advantage.

4. ITT Continental's Competitive Advantage In Being Able to Make Multi-plant Contracts Covering Larger Geographic Areas

139. There are instances where contracts to service grocery chains are broader than on a market-by-market basis, and the wholesale baker needs a number of plants in order to fulfill the contracts (Tr. 810-11, 1032, 1097, 1132). ITT Continental has a director of national accounts at its Rye, N. Y., headquarters (CX 47). When the chain buyer wants such an arrangement, a local baking company is unable to compete (Tr. 879-80).

140. In April 1971, ITT Continental contracted with the Arden-Mayfair chain of grocery stores to supply all of its stores on the West Coast. In order to meet Arden-Mayfair's requirements, ITT Continental shipped from its bakeries in Seattle, Portland, San Francisco and Southern California. This was a single agreement negotiated in San Francisco covering the entire chain (Tr. 576, 845-46, 1033, 1098).

141. In 1969, ITT Continental arranged to supply several thousand United Grocers stores with private label bread from several ITT Continental plants (Tr. 1098).

5. Advantages Resulting from 1968 Acquisition of Continental by ITT

142. Companies that join ITT grow at a faster rate after acquisition and move into new trading markets utilizing ITT's management, knowledge and experience (CX 22G). High performance standards are set.

ITT assists "acquired companies in developing and evaluating forward plans and in setting goals higher than would have otherwise been set." (CX 22H). ITT has assisted ITT Continental to attempt "to match ITT's almost unprecedented record in earnings, momentum and growth" (Tr. 538-39).

143. ITT's consolidated sales have increased from $4 billion in 1968 (the year it acquired Continental) to $7.3 billion in 1971, with net income jumping over the same period from $192 million to $406 million (CX 22E, 25D).

F. *Recommended Findings as to the Competitive Advantage of ITT Continental over American Bakeries Company and Campbell-Taggart Baking Company in the Event Section III of the Consent Decree is not Modified*

144. It is uncontested that moratorium-on-aquisition provisions in orders applicable to American and Campbell-Taggart, comparable to that of Section III of the order applicable to respondent, terminate on Sept. 19, 1976 and Apr. 13, 1977, respectively.

145. There is, of course, the obvious advantage to ITT Continental of being able to purchase entities in the wholesale bread industry while its two largest competitors are under orders not to make such acquisitions. ITT Continental, while professing to have no plans of doing so, would like the opportunity to compete in such situations as they may arise (Tr. 598).

146. As stated in a Dec. 15, 1965 letter to the Federal Trade Commission from Roy M. Anderson, Continental's vice president and general counsel, "In the years since the Consent Order in this proceeding was issued many baking companies have offered themselves for sale to Continental. All have been refused, even where they would have been good investments, because there appeared to be no reasonable likelihood that the Commission would approve those acquisitions." (CX 26Z-104). Findings 97, 142 and 143 are incorporated by reference here as bearing upon the likelihood that ITT Continental would expand by acquisition if left free to do so.

147. In addition, there would be a competitive advantage of ITT Continental being able to acquire individual baking plants and equipment from companies going out of business at low or depressed prices while its two largest competitors are under orders not to do so (Tr. 597-98, 1194-97, 1218, 1231-34).

Recommended Conclusions and Disposition

ITT Continental is a successor corporation to Continental under circumstances that subject it to the provisions of the Commission's consent order dated May 11, 1962.

The consent order was agreed to and must be construed in light of the complaint which, in part, charged Continental with violating Section 5 of the Federal Trade Commission Act by reason of its alleged continuous practice of acquiring various baking concerns throughout the United States. The agreement of the parties proposing the consent order provided that it was in the public interest for reasons set forth in Appendix A thereto. In Appendix A, it was recited that "[o]ne of the principal problems in the baking industry is the tendency towards concentration and the continuous growth of major baking companies through acquisition. Such acquisitional growth and tendency towards concentration places in the hands of a few large companies the means to set the pattern of competition, not only among themselves, but also for all local baking companies serving any given area."

Following the above-quoted agreed to statement of fact, the parties represented that if the moratorium-on-acquisitions provisions of Section III of the proposed order would be adopted by the Commission, "the respondent's alleged continuous practice of acquiring companies baking and selling bread and bread-type rolls will be brought to a halt * * *."

The facts established on hearings conducted pursuant to the Show Cause Order demonstrate that the agreed-to-rationale for issuing Section III of the consent order against Continental is even more factually pertinent today than when the consent order was issued.

The record of the hearings conducted pursuant to the Show Cause Order establishes that, as averred in that order, industry-wide concentration in the production and sale of bread and bread-type rolls has increased since issuance of the consent order against Continental on May 11, 1962. This is so both with respect to (1) the amount and share of overall sales enjoyed by the largest companies in the industry (Findings 98-109), with respondent, by far the largest competitor in the industry, having increased its amount and share of overall sales (Findings 74, 101-03, 106), and (2) the number of competitors in the industry, which has declined drastically since 1963, with every indication that the decline will continue for some time. And those going out of business are primarily the smaller competitors (Findings 110-18).

Respondent (Brief 12-16) argues that a showing of increased concentration on a nationwide basis is meaningless since competition for the sale of bread is in a series of local or regional markets. However, it is the combination of local markets that go to make up the nationwide figures. And the nationwide figures, which show increases in concentration,

necessarily reflect generally the situation in the local markets. [22] This is particularly true with respect to respondent whose overall success reflects the results of competitive efforts in areas covering 70 percent of the population of the United States and whose Wonder bread is normally the best selling primary label bread in each market in which respondent competes. While private label breads are most often the top sellers in local markets, 12 percent of respondent's production goes to supply private labels, so that Wonder bread may be competing against private label bread manufactured and sold by respondent. To the extent that the private label may be manufactured by the grocer's own bakery, and such captive label bread constitutes about 9 percent of national bread production figures, this is not bread that has been sold to the grocer; it is bread which the grocer supplies to himself. Hence, there is no competition with respect to *selling* the grocer this share of the market. See more detailed discussion, *infra*, pp. 53-54 [pp. 1388-1389 herein], in connection with consideration of the competitive significance of captive label bread vis-a-vis that of wholesale bakers.

Even if there were some question as to the applicability of nationwide sales figures to metropolitan or regional markets, there could be none with respect to the showing of a dramatic decline in the number of competitors. It is uncontested that the causes for such decline are generally found in all markets.

Commission counsel press for findings that there is a wholesale bread bakers' submarket within which concentration and increases in concentration should be measured. Accordingly, they have introduced such statistical evidence relating both (1) to the overall market including wholesale bakers and captive bakers and (2) to the contended for "wholesale bakers" submarket which excludes the production of captive bakers. Respondent (Brief 6-12) argues that Commission counsel have failed to establish the existence of a wholesale bakers' submarket and that, in any event, the Commission is precluded from considering such an alleged submarket because the Show Cause Order refers only to industry-wide concentration and not to concentration in any submarket.

The Show Cause Order does recite the increase in industry-wide concentration and Commission counsel have admitted that captive bakeries are included within the term "concerns engaged in the production and sale of bread and bread type rolls" as used in the consent order (Tr. 463). The inclusion of all bakers of bread within the industry-wide definition, however, does not preclude consideration of competitive

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[22] It would be unrealistic to require Commission counsel to establish the metes and bounds of each local market in the United States and present statistical data for each market. See, *United States* v. *Pabst Brewing Co.*, 384 U.S. 546, 548-50 (1966); *FTC* v. *Procter & Gamble Co.*, 386 U.S. 568, 570-71 (1967).

factors within that industry. Therefore, an analysis of the different manners in which wholesale and captive bakers operate and the circumstances and extent to which they compete or are precluded from competing with each other are pertinent.

From the facts found in this connection (Findings 51-72), it is concluded that, for all practical purposes, the share of the market accounted for by chain or captive bakeries is not open to the competition of wholesale bakers. The two types of bakers distribute in common to only one type of account--grocers that own captive bakeries. As to other accounts, *i.e.*, grocers that do not own their own bakeries, hotels, restaurants, schools and other institutions, the wholesale bakers compete only among themselves. Wholesale bakers also compete, only among themselves, for the rack space and the share of purchases of the chain store with its own bakery that is not already irrevocably assigned to that chain's captive bakery.

Another consideration in analyzing the overall market is the fact that a captive bakery makes no sales. It is simply a grocer making his own bread. Thus, sales in the wholesale bread market are, in fact, limited to sales made by wholesale bakers, exclusive of the production of captive bakeries. This would also be true in applying industry-wide figures to local markets.

It would serve no practical purpose to determine whether a wholesale bakers submarket exists. Apart from any such finding, the competitive realities within the broad classification of SIC 20511 do show the more pertinent significance of the higher concentration figures of wholesale bakers alone (including respondent) than those of all bakers included in that classification (compare Findings 104-09 with Findings 98-103).

In any event, even considering production statistics for the entire industry, including that of captive bakeries, both concentration and respondent's share have increased.

As already concluded, Continental's arrangements with Bon Ton and Wyoming Baking constituted acquisitions in violation of the Commission's consent order (*supra*, pp. 19-20, 24-25 [pp. 1362, 1366 herein]). However, as admitted by Commission counsel (see Finding 44), these acquisitions had no direct or immediate effect on concentration in the bread industry in the local markets involved, nor did they cause any direct or immediate significant increase in industry-wide concentration on a national basis. Relying upon this admission, respondent argues (Brief 4-6) that there is no ground to modify the consent order, contending that, in order to prevail under the Show Cause Order, Commission counsel must show not merely an increase in concentration, but also that the concentration was a result of respondent's acquisitions.

The undersigned does not so read the Show Cause Order. The consent order, as agreed to by the parties, provided that it could be "altered, modified or set aside in the manner provided for other orders." Respondents to orders are expected to obey their requirements. The provision for modification, therefore, did not contemplate, and was not contingent upon, the fact that respondent might violate Section III of the consent order. The recitation in the Show Cause Order, that respondent had contributed to the already separately stated averment of industry-wide concentration by its own acquisitions in violation of the order, was not intended to limit or qualify that prior averment. Increases in concentration and increases in concentration caused by respondent are separate considerations.[23] This ruling was conveyed to respondent when the undersigned first acted in this matter before hearings commenced (Tr. 438-39).

Continental's arrangements with Bon Ton and Wyoming Baking, which constituted acquisitions in violation of Section III of the consent order (See Findings 14-43 and Conclusions relative thereto, *supra*, pp. 17-25 [pp. 1361-1367 herein]), while not having any direct or immediate effect on concentration in the metropolitan or geographic markets involved or any significant increase in industry-wide concentration, nevertheless constituted instances where local businesses were replaced by the industry's largest national competitor. These arrangements, therefore, created situations which run directly contrary to the agreed-to statement of the purpose of Section III of the consent order. (See *supra*, p. 13 [p. 1358 herein]). As stated by Mr. Justice Douglas in his opinion concurring in part in *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526, 543 (1973):

> The adverse influence on local affairs of out-of-state acquisitions has not gone unnoticed in our opinions. Thus "the desirability of retaining 'local control' over industry and the protection of small business" was our comment in Brown Shoe Co. v. United States, 370 U.S. 294, 315-316, on one of the purposes of strengthening Section 7 of the Clayton Act through passage of the Cellar-Kefauver Act.

While only two such instances of respondent replacing local competitors have been shown, they are particularly significant as they occurred while respondent was subject to an order of the Commission not to engage in such activity. Absent such an order, it must be anticipated

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[23] Indeed, a trend toward concentration in an industry is a material consideration in a merger case even though the trend is not caused by mergers. *United States* v. *Pabst Brewing Co.*, 384 U.S. 546, 552 (1962). Similarly, it is a material consideration in deciding whether to extend the terms of a provision in an order already entered in a merger case that has been completed, though terminated by consent order. There is, therefore, no merit to respondent's position, which permeates its brief and reply brief, that the Commission must now show an unlawful acquisition by respondent as a prerequisite to modifying the consent order. The consent order has already been entered pursuant to agreement, following a complaint which did allege unlawful acquisitions. The Commission need not now prove a violation of law.

that respondent would avail itself of the ever so many opportunities to acquire local bakeries that now exist and promise to continue to exist.

The record establishes various competitive advantages that respondent enjoys in marketing its bread products. The record thus brings up to date, with respect to respondent, the existence of advantages and abilities of a national competitor to set the pattern of competition in any given local market, the factor that was agreed to by the parties as a basis for entering the consent order. The record demonstrates that respondent has such advantages not only over local competitors but over other bakers that compete on a broad geographic scale, though not as broad as does respondent. The record also shows that respondent's advantages have increased in material respects since issuance of the consent decree in 1962.

One advantage of respondent is its ability to absorb losses and still maintain an ability and potential for growth. Respondent is not only the world's biggest baker, with net sales in bread increasing from $263 million in 1962 to $375.5 million in 1970 (Finding 74), but it engages in other and diversified activities which have grown and account for increasingly larger shares of its sales and income (Findings 77-83, 91, 93-95). Thus, respondent can weather the current adversities in the industry, while its competitors, lacking such diversification are operating at an overall loss and are hard pressed (Findings 126-27). Respondent has disbursed large sums on capital expenditures and advertising while its competitors have uniformly cut back on or eliminated such endeavors. While respondent may have cut back to some extent, the gap between it and its competitors in these areas has been increasing (Findings 119-23). In addition, Continental, because of its far flung bread operations, is able to close a particular plant and maintain the business through other plants that are strategically situated, whereas smaller competitors who are faced with plant closings simply must lose the business (Finding 124). Further, respondent's individual bakeries have the advantage over local competitors of substantial home office assistance in the nature of laboratory, engineering, legal, sales, marketing, advertising and accounting services (Finding 75).

A second advantage is that of Wonder being a nationally known bread label sold in every state but four[24] (a label that is extensively advertised on national television with only 30 percent of the population not directly reached) to the point that there is some degree of familiarity with Wonder bread in every major market in America. This has been found to be of some advantage in selling to persons who visit or move to a new

[24] In 1963, there were six states in which Wonder bread was not sold (Finding 87).

area and who are already familiar with Wonder bread and of limited value or advantage in introducing Wonder into a new market (Findings 129-32).

Respondent also has an advantage by virtue of the fact that it produces and sells the number one cake line in America, Hostess, even in areas where it is not presently selling Wonder bread, and that the uniform acceptance by grocers of respondent's Hostess line is an advantage in introducing and promoting Wonder bread (Findings 133-38). Another competitive advantage over smaller bakers is that of being able to make multi-plant contracts covering areas broader than on a market-to-market basis by virtue of having plants in different markets (Findings 139-41).

Finally, ITT Continental has the advantage of ITT's assistance in matching ITT's tremendous growth and in meeting goals that are set higher than if respondent were not owned by ITT (Findings 142-43).

From all of the foregoing advantages, particularly during a period when 90 percent of respondent's competitors are operating at a loss and are hard pressed to survive, it may be presumed that respondent has the capacity to set the pattern of competition in any given market, even to a greater degree than that contemplated by the parties in Appendix A to the agreement for entry of the consent order. And the record establishes that respondent is indeed the price leader who sets the pattern of competition in whatever bread market it is in (Finding 96).

Since the consent order, at least through 1965, many baking companies have offered themselves for sale to Continental, which sales were refused by Continental because of the consent order (Finding 146). Notwithstanding the order and in violation thereof, Continental acquired the assets of Bon Ton and Wyoming Baking in 1965 and 1966. There is an even greater opportunity to acquire bakeries at very low prices now because of the numbers that are going out of business, closing plants, or losing money. And this situation is not limited to local bakeries. Note that Interstate almost sold out to Beatrice (Finding 116).

Given this situation, there is every reason to believe that, if allowed to do so, respondent would acquire available bakeries. It has the capacity of choosing desirable baking companies and plants and, if necessary, riding out the storm until the factors that are currently plaguing the industry abate.

There is direct reporting and liaison between ITT and respondent (Finding 76). ITT has made respondent even more aggressive in its outlook toward opportunities and respondent is subject to a tremendous challenge to match ITT's almost unprecedented record in growth (Finding 97). This can only portend a proclivity on the part of respondent to

take advantage of expansion or acquisition opportunities and to continue its aggressive leadership activities in all markets.

Further, respondent has a competitive advantage over its next two largest competitors, American and Campbell-Taggart, which are subject to moratorium-on-acquisition restrictions until Sept. 19, 1976 and Apr. 13, 1977, respectively (Findings 144-47).

Finally, there is compelling public interest to act in the matter since bread is a basic food item accounting, together with related bakery products, for 10 percent of consumer food purchases. The bread and related products industry is the tenth largest in the United States.

In consideration of all of the foregoing, the record in this matter is hereby certified to the Commission with the recommendation that the proceeding be reopened and that Section III of the consent order issued by the Commission on May 11, 1962, be altered and modified to read as follows:

III

It is further ordered, That for a period of time until Apr. 13, 1977, ITT Continental Baking Company shall cease and desist from acquiring, directly or indirectly, through subsidiaries or otherwise, the whole or any part of the stock, share capital, or assets of any concern, corporate or noncorporate, engaged in any state of the United States in the production and sale of bread and bread-type rolls unless the Commission, on petition for modification of this Section III of this order permits such an acquisition by respondent, said modification to be within the sole and final discretion of the Federal Trade Commission.

Opinion Of The Commission

By Thompson, *Commissioner:*

The Federal Trade Commission issued an order on May 11, 1962, requiring Continental Baking Company to cease and desist from acquiring, for a period of 10 years, any interest in any company producing bread and rolls without the Commission's prior approval.[1] On Sept. 13, 1968, the firm named in that order, Continental Baking Company, ceased to exist by reason of a merger between it and the International Telephone and Telegraph Corporation (ITT) and the assignment of its

[1] *In re Continental Baking Company*, Dkt. 7880, 60 F.T.C. 1183 (1962). That order reads in part as follows: "IT IS FURTHER ORDERED, That for a period of ten (10) years from the date of issuance of this order by the Federal Trade Commission respondent shall cease and desist from acquiring, directly or indirectly, through subsidiaries or otherwise, the whole or any part of the stock, share capital, or assets of any concern, corporate or non-corporate, engaged in any state of the United States in the production and sale of bread and bread-type rolls unless the Commission, on petition for modification of this Section III of this order, permits such an acquisition by respondent, said modification to be within the sole and final discretion of the Federal Trade Commission."

assets to a new ITT subsidiary known as ITT Continental Baking Company (ITT Continental). On Apr. 27, 1972, just prior to the date on which the Commission's 10-year prohibition against further acquisitions by Continental Baking was scheduled to expire, the Commission, issued a show cause order to that successor corporation, ITT Continental, directing it to show cause why the 1962 order against its predecessor, Continental Baking, should not be reopened and its merger ban extended for another five (5) years, to 1977. ITT Continental's argument that the Commission lacked the authority to so modify the initial order was rejected and, in an order of Aug. 1, 1972, the Commission directed the assignment of the matter to a hearing examiner for the receipt of evidence on the question of whether the public interest required such an extension of the 10-year merger ban against the successor corporation, ITT Continental. Hearings were held between June 12, 1973 and Oct. 25, 1973. The hearing examiner (now administrative law judge) concluded that such a reopening and extension of the merger ban was required by the public interest and recommended that the effective date of the order be extended to Apr. 13, 1977.[2]

Respondent ITT Continental challenges the law judge's findings and conclusions on a number of grounds, its major arguments being (1) that, again, the Commission lacks the authority to reopen and modify the 1962 cease and desist order in question because of its character as a "consent" order rather than one entered after litigation; (2) that ITT Continental is not a "successor" to Continental Baking Company, the original respondent in this matter; and (3) that the evidentiary record developed at the hearings on the show cause order fails to establish the necessary public interest in such an extension of the ban in question for another 5 years. We agree with this latter contention and, having concluded that the show cause order must be set aside for failure of proof on that substantive issue, we do not reach the other questions presented by the parties.

In order to determine whether the public interest requires that this respondent be barred from acquiring other producers of bread products, the Commission would have to know, at a minimum, (1) whether competition in the various local and regional bread markets in the country was increasing, decreasing, or holding steady; (2) whether any such changes in the effectiveness of competition in those markets were due to the merger activity of the established firms in the industry or to some other cause or causes; and (3) whether this respondent, if not currently an important factor in that merger activity, is likely to become one if not restrained by an extension of the merger ban at issue in this proceeding.

[2] Certification of Record and Recommendations on Order to Show Cause (Dec. 12, 1973), p. 59 [p. 1393 herein].

The record before us is inadequate on the first two of these key issues.

The findings of the administrative law judge here can be briefly summarized. In substance, he found that the number of baking firms has been falling steadily and that aggregate (industrywide) concentration in the bread industry has been rising since 1962. He did not attribute the major part of that increased concentration to merger activity, however. The 4 largest firms in the bread industry--ITT Continental, Campbell-Taggart, American, and Interstate--increased their aggregate share of all bread products sold in the country from 24 percent in 1963 to 30 percent in 1971.[3] ITT Continental, the nation's largest baker, increased its share of the bread industry from 10.7 percent in 1962 to 12.4 percent in 1970, a gain of 1.7 percentage points. The merger component of this gain was nil.[4] Campbell-Taggart, American, and Interstate added 1.1, 2.6, and 1.2 percentage points, respectively, to their individual market shares during that period.[5] The two smallest of these other members of the "big four" group, American and Interstate, made one or more "substantial" acquisitions since 1962 but those mergers accounted for only a "part" of the 2.6 and 1.2 percentage points added to their respective market shares during those post-1962 years.[6]

The number of bread producers has been declining sharply for many years. There were 10,325 baking plants in the United States in 1939. By 1963, this number had dropped to 5,010.[7] And by 1967 it had dropped still lower, to 4,042.[8] In terms of the number of *companies* doing business in the industry, there was a 30 percent drop between 1947 and 1963--from 6,000 to 4,300--and a further decline of more than 20 percent between 1963 and 1967, with the total then standing at 3,336.[9] While a substantial number of these departing firms were acquired by the larger members of the industry in the pre-1964 period,[10] a major factor here has clearly been a series of technological changes in the industry that have significantly increased the minimum efficient plant size.[11] As more and more

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[3] Id., pp. 38-39 [p. 1377 herein].

[4] The administrative law judge analyzed the effects of two post-1962 acquisitions by respondent, one with 1964 sales of $613,000 and the other with 1964 sales of $1 million. Since ITT Continental's sales of bread products increased from approximately $263 million in 1962 to just over $375 million in 1970, these two acquisitions represent less than 1 percent of respondent's sales growth in the post-order period. As the law judge concluded: "Neither the Bon Ton nor Wyoming Baking acquisitions had any direct or immediate effect on concentration in the bread industry in the metropolitan or regional geographic markets involved in the acquisitions; nor was there any significant increase in industry wide concentration occurring on a national basis as a direct or immediate result of said acquisitions." Id., p. 25 [p. 1367 herein].

[5] Id., p. 39 [p. 1378 herein].

[6] Ibid.

[7] *Economic Report on the Baking Industry*, Staff Report to the Federal Trade Commission (Nov. 1967), p. 39.

[8] Certification of Record and Recommendations on Order to Show Cause, p. 43 [p. 1381 herein].

[9] Id., p. 42 [p. 1380 herein].

[10] *Economic Report*, supra, p. 40.

[11] Two such factors, the advent of continuous-mix equipment and changes in bread formulas and oven design that cut the average baking time in half, greatly enlarged the potential output of the average plant. Id., p. 45 [p. 1382 herein].

firms have sought to get their per-unit costs down to the minimum level by incorporating the newer and lower-cost technology in their plants, the productive capacity of the industry has sharply outstripped the growth in consumer demand. The result is that the industry has been suffering from chronic excess capacity for many years,[12] a situation that of course further intensifies the competitive struggle for volume. The smaller firms, especially those with older plants and equipment, have thus found themselves operating not only high-cost facilities but operating them at less than full capacity. Not being able to match the lower costs and prices of their more technologically advanced rivals, many of these smaller firms have been forced to either close their doors or sell out to other firms in the industry.[13]

While it is not within the power of the Federal Trade Commission to reverse or stop the march of technology, it is our responsibility to be especially vigilant in our enforcement of the antitrust laws in industries that, like this one, are being propelled by the internal thrust of technological forces away from the competitive economic model and toward the kind of oligopolistic structure those laws are designed to prevent. Put another way, an industry that is already being made more concentrated by natural changes in technology is especially vulnerable to the various contrivances by which economic markets are traditionally monopolized. It may well be, for example, that a substantial degree of concentration must be tolerated in the baking industry in order to permit its member firms to operate plants of maximum efficiency and thus to sell bread to the consuming public at the lowest price consistent with its continued production. If so, however, we should make very sure indeed that the larger members of the industry are not using any of the techniques prohibited by the antitrust laws to achieve a still *higher* level of concentration.

We cannot tell from the record before us where the baking industry really stands on the spectrum between a competitive and a non-competitive market and, equally importantly, we cannot tell from this record whether that industry has moved measureably closer to the monopoly end of that spectrum in the post-1962 years. We have been provided, as noted, with data on changes in concentration here at the *national* level, *i.e.*, on the industry's movement from a nationwide 4-firm share of 24

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[12] The industry was reportedly operating at 40 percent to 60 percent of practical capacity in 1958. Id., p. 45 [p. 1382 herein].

[13] The administrative law judge found, for example, that the "wholesale bakers' problems have been caused, *in large part*, by the activities and growth of chain bakeries, costly labor contracts, *technological improvements that have created overcapacity*, improved highways permitting larger areas to be served by a single plant," among other things. Certification of Record and Recommendations on Order to Show Cause, p. 43 [p. 1381 herein] (emphasis added).

percent in 1963 to a 4-firm share of 30 percent in 1971. The difficulty with those numbers, however, is that they cast no light on whether the degree of competition in the sale of baking products in the United States has actually changed. The administrative law judge expressly found that "[t]here is *no* national geographic market in the bread industry. The markets are local (*i.e.*, metropolitan or regional) because of the perishability of the product and cost of shipping long distances which limits the distance it can be shipped."[14] [Emphasis added.] While bread can be shipped as far as 150 to 300 miles from the producing plant, most of it is in fact sold within 50 miles of the place of production.[15] In short, "bread markets consist, typically, of a metropolitan area and a rural-urban fringe."[16] If there was any doubt that the various cities are separate and distinct markets in the bread industry, it would be dispelled by the fact that there is no particular relationship between the *price* of bread in one city and its price in another, even one that is exceptionally close to it.[17] If there is no national market in the bread industry, national concentration figures cannot help us. Rising concentration at the national level may tell us that concentration is rising *somewhere* in the country but it does not tell us *where* that phenomenon is occurring. These increases could be taking place, for all we know, in metropolitan areas that are still characterized by such low concentration as to merit no antitrust concern. And of course they could be due—and indeed the record here suggests that they probably are—primarily to technological changes in the industry rather than anticompetitive mergers.

We do have some fragmentary pieces of evidence on the structure, conduct, and performance of the baking industry in a relatively small number of relevant metropolitan markets. In the 1963-65 period, for example, the share of the 4 largest firms operating in 17 cities reportedly ranged from 39 percent (Minneapolis) to 92 percent (Beaumont, Texas), the *average* 4-firm share in this group of cities being 63 percent.[18] (At a slightly higher level of aggregation—the *state* level—there is some evidence of both high and increasing levels of concentration. The

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[14] Id., p. 26 [p. 1368 herein].

[15] *Economic Report*, supra, p. 42.

[16] Walsh and Evans, *The Baking Industry*, 1947-1958 (University of Nebraska, 1963), p. 16. (Quoted in *Economic Report*, supra, p. 42.)

[17] "For example, in January 1966 the average price for white bread was 15.4 cents in Milwaukee and 20.6 cents in Chicago. Despite the fact that the two cities are only 90 miles apart, they are to a large extent separate bread markets. The difference is even more apparent between Baltimore and Washington, D.C., which are only 40 miles apart. In January 1966, the differential was 3.8 cents and, because of subsequent bread price increases--principally in Baltimore—in September 1966, it widened to 4.7 cents. In addition to being higher, the movements in the Baltimore price bore almost no relationship to the average Washington, D.C., price." Id., p. 42.

[18] Id., p. 44.

median 4-firm concentration ratio in the bread industry for all of the states rose, for example, from 38 percent in 1954 to 49 percent in 1958.)[19] There is also reason to believe that, in at least a number of important bread markets, prices have not been set by the natural forces of competition. Indeed, a 1967 study by our own Bureau of Economics reported to us that the baking industry ranked 2nd in the nation (behind only the dairy industry) in terms of the number of price-fixing cases brought against it.[20] There is again, however, no evidence in this record that this kind of activity has been rendered more likely in our various metropolitan markets as a result of any post-1962 merger activity. One might *suspect* that it has on the basis of the substantial increase in national concentration during that period. But suspicion, no matter how prescient it might be, is no substitute for proof.

The able administrative law judge was of the view that, notwithstanding the absence of a national market in the sale of bread products, there was no need to examine the state of competition in the various metropolitan areas. First, he thought that what was true of the whole must necessarily be true of the important parts.[21] Secondly, he was of the view that, since the withdrawal of a particular baking firm from the industry must necessarily increase concentration in the *specific* metropolitan area it had formerly done business in, the sharp decline in the number of such firms in the United States as a whole in the post-1962 period could only mean that concentration had risen in a substantial number of such local metropolitan areas.[22] Finally, the law judge thought it would simply "be unrealistic to require Commission counsel to establish the metes and bounds of each local market in the United States and present statistical data for each market."[23]

It may well be that the reference in the Commission's show cause order to the post-1962 increase in "industry-wide concentration" led the

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[19] Id., pp. 43-44.

[20] Id., p. 52. Nine (9) such price-fixing cases in the bread industry are discussed in this *Report*. Id., pp. 52-55.

[21] "However, it is the combination of local markets that go to make up the nationwide figures. And the nationwide figures, which show increases in concentration, necessarily reflect generally the situation in the local markets." Certification of Record and Recommendations on Order to Show Cause, p. 52 [p. 1387 herein]. The law judge apparently believed that a smooth and uniform link between the whole and the parts was assured here by the universality of the causes at work, *i.e.*, by the fact that the same forces that had raised concentration in the "national" market were present--and to substantially the same degree--in all or substantially all of the various local bread markets. In his words: "It is uncontested that the causes for such decline [in the number of baking firms] are generally found in all markets." Id., p. 52 [p. 1387 herein]. If so, however, this merely underscores the learned law judge's own finding that these major "causes" of increased industrywide concentration are not now large-firm mergers--it could hardly be supposed that mergers would be occurring in anything approaching a uniform geographic pattern--but the underlying hydraulics of technological change, forces that do indeed blanket an entire industry on such a uniform basis.

[22] "Even if there were some question as to the applicability of nationwide sales figures to metropolitan or regional markets, there could be none with respect to the showing of a dramatic decline in the number of competitors." Ibid.

[23] Ibid.

law judge to believe that the issue of the relevant geographical market had thereby been resolved by the Commission itself.[24] The fact remains, however, that neither this Commission, its counsel, nor the learned law judge can logically find that (a) there is no national market in a given product but that (b) if concentration has increased in such a non-existent market, competition in some relevant real market must have been injured. The critical issue of competitive injury must be resolved on the basis of changes in the structure of actual rather than hypothetical markets. And while we agree that it can be difficult to establish the facts as to what has been happening in even a sample of three or four relevant local bread markets, we know of no principle of law that permits difficulties of proof to justify the inferring of a fact to be proved from another fact that has no *necessary* causal relation to it. Economic facts do not have to be proven with engineering precision. But the issue of whether the effectiveness of competition is being eroded in an industry that accounts for 10 percent of the nation's food bill is too important to be left to the fragile divining rod of intuitive judgment, no matter how informed and acute it might be, as the sole basis for choosing between one of several equally plausible inferences.

We will dismiss the show cause order. We will not dismiss the industry itself, however--or this respondent--from further antitrust scrutiny. Given the enormous size of the baking industry (annual sales of roughly $5 billion in 1965) and its apparently high and rising levels of concentration, we are issuing today an order directing this respondent to inform the Commission in advance of all future acquisitions, the latter reports to be submitted no less than 60 days prior to consummation. Any significant mergers in this industry, and particularly any that promise to raise concentration still higher in a metropolitan area that already appears to be dangerously close to the borderline between effective competition and effective monopoly, will receive the most searching attention from this agency. The American consumer is entitled to every assurance that, on a product as important as bread, the price he is required to pay is one that has been set in an effectively competitive marketplace.

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[24] The show cause order reads in part: "WHEREAS, industry-wide concentration in the production and sale of bread and bread-type rolls has increased since the issuance of the cease and desist order against Continental Baking Company on May 11, 1962 * * *." Show Cause Order, Dkt. 7880 (Apr. 27, 1972), p. 3. Describing the various disagreements between the parties on the issues to be resolved in the proceeding, the law judge observed: "Commission counsel withdrew from previously stated positions and agreed that they would not introduce evidence relating to concentration in particularly selected metropolitan markets. * * *" Certification of Record and Recommendations on Order to Show Cause, p. 14 [p. 1358 herein].

ORDER REQUIRING FILING OF SPECIAL REPORT

Pursuant to the Opinion of the Commission in the Matter of ITT Continental Baking Company, Docket 7880, attached herewith and made a part hereof, and Sections 6, 9, and 10 of the Federal Trade Commission Act, 15 U.S.C. 46, 49, and 50, you, ITT Continental Baking Company, are required to file with the Commission a Special Report informing the Commission of any acquisitions of any interest in any concern engaged in the production and sale of bread and bread-type rolls, such report to be filed not less than sixty (60) days prior to each such acquisition.

Said reports must be subscribed and sworn to by an official of the reporting company.

You are advised that penalties may be imposed under applicable provisions of Federal law for failure to file special reports or for the filing of false reports.

Commissioner Nye not participating.

FINAL ORDER

This matter having been heard by the Commission upon briefs and oral argument in support of and in opposition to the appeal of counsel for respondent ITT Continental Baking Company from the Recommendations of the Administrative Law Judge on the Commission's Order to Show Cause why the proceeding should not be reopened and the cease and desist order of May 11, 1962 against Continental Baking Company be extended to prohibit respondent ITT Continental Baking Company from acquiring any firm engaged in the production and sale of bread and bread-type rolls without prior permission of the Commission for a period of time until Apr. 13, 1977, and

The Commission having determined that, for the reasons stated in the accompanying opinion, the appeal should be granted and the Order to Show Cause dismissed,

It is ordered, That respondent's appeal from the administrative law judge's Recommendations on Order to Show Cause be, and it hereby is, granted, and

It is further ordered, That the Order to Show Cause be, and it hereby is, dismissed.

Commissioner Nye not participating.