IN THE MATTER OF

# THE KROGER COMPANY

*Docket 9102. Interlocutory Order, Feb. 26, 1979*

## ORDER DENYING MOTION FOR RECONSIDERATION AND DENYING MOTION TO DISQUALIFY ADMINISTRATIVE LAW JUDGE

Respondent has moved for reconsideration of our recent order affirming the administrative law judge's ("ALJ") denial of respondent's motion for discovery of certain documents in the files of the Commission. Respondent has also moved to disqualify the ALJ, Montgomery K. Hyun, on the ground that because he had access to many of these same documents during his prior employment as attorney-advisor to former Chairman Engman, his continued participation creates an actual or apparent impropriety. Respondent perceives an impropriety because "it appears that [Judge Hyun] may decide the case or have his reaction to evidence preconditioned by ex-record material and discussion on pertinent issues arising from his activities engaged in before becoming an administrative law judge." Affidavit of Stuart J. Land at 6. Judge Hyun declined to disqualify himself and certified respondent's motion to the Commission, pursuant to Section 3.42(g) of our Rules of Practice.

### The Issue of Disqualification

This case concerns, *inter alia,* allegations that respondent, which owns a chain of supermarkets, made comparative price claims about the relative costs to consumers of its products, which claims were based upon methodologically unsound price surveys. Judge Hyun accepted an assignment to this matter only on the basis, which he has expressly reaffirmed, that he had no recollection of advising former Chairman Engman on, or otherwise dealing with, any matter pertaining to respondent or to retail food advertising generally during his tenure as an attorney-advisor. Respondent has not suggested that the contrary is true. Thus, the only question with which we are presented here is whether disqualification of an administrative law judge is mandated where in his prior employment he had access to, but does not recall reviewing, materials which, respondent contends, might influence his reaction to record evidence and thus lead him to render a biased decision.

### The Nature of the Claim

Judge Hyun resigned from the Commission in September 1973; the

preliminary investigation underlying the instant complaint was not opened until December 1975, and the complaint itself was not issued until July 1977. Accordingly, respondent cannot and does not allege that the documents to which Judge Hyun had access bear specifically on the allegations against it. Instead, respondent avers that the Commission documents concern and would reflect upon the ease or difficulty of designing and implementing a methodologically valid retail food price survey generally. Collectively, respondent claims, such documents would tend to be exculpatory in nature.[1] But, it is apparent, respondent could only benefit from any preconditioning of the mind of Judge Hyun resulting from his exposure to allegedly exculpatory information. To assert this disqualification claim, therefore, respondent avers that at the time of Judge Hyun's resignation from the Commission, the exculpatory nature of the document may not yet have become evident, because the Commission's staff had not yet comprehended or reported the difficulties of devising a sound methodology. Thus, it is alleged, during his seven-month service as an attorney-advisor, Judge Hyun would have had access only to documents which might not prove to be exculpatory after all, and that he therefore may be "preconditioned," if one presumes he actually read or discussed the documents, to react other than positively to respondent's defense asserting the unreasonable difficulty of conducting a methodologically valid survey.

## Disposition of the Motion for Disqualification

Because we do not perceive an appearance of impropriety, we decline either to reverse our earlier determination concerning document production[2] or to order the disqualification of the ALJ. Even if all the allegations contained in the moving affidavit are taken as true, respondent would still fall short. As we have previously stated, an ALJ should be disqualified only upon an adequate showing of bias or prejudgment. Mere access to internal Commission documents tangentially relevant to a proceeding cannot be grounds for his dismissal, notwithstanding that such access has served, under our Rules of Practice, as grounds for denial of clearance to a former Commission employee who wished to appear as counsel for respondent in this litigation. *See* letter of November 16,

[1] On this basis, respondent has sought, unsuccessfully, to have all such documents, including those which the ALJ has ruled are exempt from disclosure by reason of privilege, produced and admitted into evidence in this litigation. Judge Hyun has, of course, ordered production to respondent of all relevant non-privileged factual materials, including exculpatory information, in the possession of the Commission.

[2] As noted at the outset, we recently affirmed Judge Hyun's denial of respondent's motion for production of otherwise privileged Commission documents. Respondent has asked us, in connection with the motion for disqualification of Judge Hyun, to reconsider this determination, so that it might "lay bare facts which would either confirm or dispel the appearance of impropriety that now exists." Motion for Reconsideration at 2.

1978 to S. Mark Tuller, Esq. As we have noted previously, our clearance rules address issues wholly distinct from those pertinent to disqualification of a law judge.[3]

The two instances cited by respondent in which disqualification was ordered by a Court of Appeals because an individual acting in an adjudicative capacity had gained knowledge of relevant facts while serving in a prior, non-judicial capacity, differ materially from this case and do not support respondent's contention that Judge Hyun must be disqualified.

In *American Cyanamid Co.* v. *FTC,* 363 F.2d 757 (6th Cir. 1966), it was proved that a member of the Commission, in his role as Chief Counsel to the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee, had personally investigated the same facts and issues concerning the same parties named as respondents in an administrative proceeding, prior to adjudicating that proceeding in his subsequent role as Chairman of the Commission. The decision plainly is not based on the Commissioner's access to pertinent information in his role as Chief Counsel but rather upon his extensive personal conduct, which the court held to be sufficient to unseat the presumption of impartiality. Indeed, the Court of Appeals specifically stated that the Commissioner's service, standing alone, as counsel to the subcommittee that was undertaking the investigation, would not necessarily require his disqualification. 363 F.2d at 768.

In *United States* v. *Amerine,* 411 F.2d 1130 (6th Cir. 1969), a criminal case, the court ordered the disqualification of a district court judge who had tried and sentenced a defendant against whom the original complaint had been issued during the period of the judge's prior service as United States Attorney. There are critical distinctions between *Amerine* and the instant case, even beyond the undeniable asymmetry of the criminal and civil laws. First, the complaint in this case was not issued until four years after Judge Hyun's resignation from the Commission, a salient distinction which eliminates any need for disqualification. *See United States* v. *Wilson,* 426 F.2d 268 (6th Cir. 1970); *Barry* v. *United States,* 528 F.2d 1094 (7th Cir.), *cert. den.,* 429 U.S. 826 (1976); *United States* v. *Kelly,* 556

[3] In the clearance context, the Commission's primary concern is with the perception that a former employee may have an advantage in representing a client by reason of having had access to nonpublic information, and as a matter of policy the Commission has decided to base its determinations on an essentially objective standard—likelihood of access and opportunity to be exposed to such information—rather than to rely solely upon the subjective standard of actual exposure. In the present context, however, respondent's claim of disqualification rests largely upon the supposed effects of actual exposure to certain information, and the Commission has concluded in any event that, under its precedents, even actual exposure would not be disqualifying, *see infra,* Alternative Ground for Disposition of Motion to Disqualify, there being no comparable problem of a former Commission employee using for private purposes information acquired while a Commission employee.

F.2d 257 (5th Cir. 1977), *cert. den.,* 434 U.S. 1017 (1978). Second, Mr. Hyun's role as attorney-advisor to a Commissioner is hardly akin to that of a United States Attorney, who exercises supervisory responsibility and at least nominally initiates charges and issues complaints. Finally, *Amerine* is of limited utility in any event, since the opinion rested solely upon a statutory construction of the former version of 28 U.S.C. 455, under which the judge was deemed to have been "of counsel" to the government by dint of his former role as United States Attorney.

Finally, respondent urges upon us the current version of 28 U.S.C. 455(b) (1976), as amended in 1974, which mandates the disqualification of a federal judge who has "personal knowledge of disputed evidentiary facts concerning the proceeding" or who "participated as . . . adviser . . . concerning the proceeding" while "in governmental employment." The proposed application of the statute to the facts at hand cannot be sustained. First, the statute on its face does not apply to administrative law judges,[4] and respondent's argument that the courts have so extended the statute, Application for Review of ALJ's Order of January 15, 1979 at 12, lacks support. There is considerable authority, apart from the application of maxims of construction, which suggests that Section 455 does not apply to agency adjudicators, whose potential disqualification is to be tested instead against the standard set out in the Administrative Procedure Act ("APA"). *See* 5 U.S.C. 556(b) (1976); *Securities and Exchange Comm'n* v. *R. A. Holman & Co.,* 323 F.2d 284, 287 (D.C. Cir.), *cert. den.,* 375 U.S. 943 (1963); *Converse* v. *Udall,* 262 F.Supp. 583 (D. Ore. 1966), *aff'd,* 399 F.2d 616 (9th Cir. 1968), *cert. den.,* 393 U.S. 1025 (1969). The APA gives appropriate recognition to the varied functions performed by agencies which federal judges would not be expected to perform. Where Congress has not explicitly subjected agencies to the same strictures applicable to federal courts, it would be inappropriate to subject an agency's actions to the same standards. *See generally Vermont Yankee Nuclear Power Corp* v. *NRDC,* 435 U.S. 519 (1978); *FTC* v. *Flotill Prods., Inc.,* 389 U.S. 179, 183–85 (1967); *United States* v. *Morton Salt Co.,* 338 U.S. 632, 641–42 (1950).

Second, assuming *arguendo* that the statute does apply, it does not require Judge Hyun's disqualification. The judge has specifically denied having any "personal knowledge" whatever concerning this proceeding, and he has specifically denied that he "participated as an advisor" concerning this proceeding. The authorities are also clear that under Section 455, a necessary precondition to disqualifi-

[4] Only justices, judges, magistrates and referees in bankruptcy are expressly covered.

cation is that the proceeding in question have been initiated during the judge's prior tenure in a non-judicial capacity, a hurdle which respondent plainly fails to surmount here. *See United States* v. *Kelly, supra; Barry* v. *United States, supra.*

In the absence of some evidence extrinsic to the discovery in this case, which suggests that Judge Hyun's stated recollections are mistaken, we see no basis for disqualification or even for further inquiry. There is nothing to suggest that the judge will decide the case on the basis of anything other than the record evidence. Respondent has failed utterly to demonstrate that Judge Hyun has "a bent of mind that may prevent or impede impartiality of judgment." *Berger* v. *United States,* 255 U.S. 22, 33–34 (1921).

## Alternative Ground for Disposition of Motion to Disqualify

As an alternative and independent ground for affirmance, the Commission is of the view that Commission rule and precedent, as well as the Administrative Procedure Act, dispose of respondent's arguments.

For example, *Grolier, Inc.,* 87 F.T.C. 179, 180 (1976), *aff'd* 91 F.T.C. 486 (1978), contradicts respondent's position. There, the Commission held that even an ALJ's prior participation as an attorney-advisor in "provid[ing] advice during the precomplaint stage of an investigation" would not alone be sufficient to order his disqualification on the grounds of alleged improper commingling of functions, possible bias, or possible exposure to information not later admitted into evidence. In the instant case, of course, Judge Hyun has stated that he has no present recollection of participating in this matter, and we have no reason to question his statements. *Cf. National Nutritional Foods Ass'n* v. *FDA,* 491 F.2d 1141, 1144–46 (2d Cir.), *cert. den.,* 419 U.S. 874 (1974); *Hercules* v. *EPA,* No. 77–1248, slip op. at 59–62 (D.C. Cir. Nov. 3, 1978). Judge Hyun's conduct thus falls well within the ambit of activity protected by *Grolier.*

Neither is the relief sought by respondent required by the APA. Section 7, 5 U.S.C. 556, of course, mandates impartiality, but does not aid respondent, because respondent has failed completely to overcome the strong presumption of honesty and fairmindedness attributed to agency adjudicators. *See Withrow* v. *Larkin,* 421 U.S. 35, 47, 55 (1975). Indeed, under respondent's argument a Commissioner who had access to the same information as Judge Hyun could not then preside at the reception of evidence, a result clearly inconsistent with the APA.

Disposition of the Motion for Reconsideration

Respondent's motion for reconsideration must be denied. Absent some extrinsic evidence of bias or prejudgment by the ALJ, respondent is not entitled to discovery of otherwise privileged documents to which it has sought and been denied access already in this proceeding. *Cf. United States* v. *Litton Industries, Inc.*, 462 F.2d 14 (9th Cir. 1972); *R. A. Holman & Co.* v. *S.E.C.*, 366 F.2d 446 (2d Cir. 1966), *cert. den.*, 389 U.S. 991 (1967). The naked conclusory allegation of bias, resting upon a hypothetical preconditioning of the mind of the ALJ resulting from his possible exposure to documents which he does not recall, does not state a need sufficient to overcome a proper assertion of privilege. Accordingly,

*It is ordered,* That respondent's motion for reconsideration of the Order Affirming Order Ruling on Respondent's Motion for Production of Documents be, and it hereby is, denied. And,

*It is further ordered,* That respondent's motion for disqualification of the administrative law judge be, and it hereby is, denied.

Commissioner Pitofsky did not participate.

IN THE MATTER OF

# LOUISIANA-PACIFIC CORPORATION

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

*Docket C-2956. Complaint, Feb. 27, 1979 — Decision, Feb. 27, 1979*

This consent order, among other things, requires a Portland, Ore. firm engaged in harvesting and converting timber into various wood products, including medium density fiberboard (MDF) and particleboard, to divest, within two years to a Commission-approved buyer, the Rocklin MDF plant, which firm acquired through its merger with the Fiberboard Corporation; and offer the new buyer the opportunity to purchase from the firm, for five years, a limited amount of the raw materials necessary to manufacture MDF. Additionally, the order prohibits the firm, for ten years, from acquiring, without prior agency approval, any entity engaged in the manufacture of particleboard or MDF.

## *Appearances*

For the Commission: *James Egan.*

For the respondent: *William E. Willis, Sullivan & Cromwell,* New York City.

## COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondent, subject to the jurisdiction of the Commission, has entered into a merger agreement which, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, that said agreement constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21, and Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 4(b), stating its charges in the following Count I.

The Federal Trade Commission, having further reason to believe that the above-named respondent also has violated and is violating Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, through the acquisition of the stock and/or assets of various corporations, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21, and Section 5(b), of the Federal

Trade Commission Act, 15 U.S.C. 45(b), stating its charges in the following Count II.

COUNT I

I. Louisiana Pacific Corporation

PARAGRAPH 1. Louisiana Pacific Corporation (L-P) is a corporation organized under the laws of the State of Delaware with its principal place of business located at 1300 S.W. Fifth Ave., Portland, Oregon.

PAR. 2. L-P is a diversified, integrated forest products company. It grows and harvests timber which it then converts to various wood products, including lumber, plywood, particleboard, veneer, pulp and wood chips. In 1977 L-P had total shipments of particleboard in excess of $56 million and total sales of lumber in excess of $330 million.

PAR. 3. In 1977 L-P had net sales in excess of $794 million and net income in excess of $60 million.

II. Fibreboard Corporation

PAR. 4. Fibreboard Corporation (F-B) is a corporation organized under the laws of the State of Delaware with its principal place of business located at 55 Francisco St., San Francisco, California.

PAR. 5. F-B is a diversified, integrated forest products company. It grows and harvests timber, which it then converts to various wood products, including lumber, plywood, medium density fiberboard (MDF), pulp and wood chips. It is also involved in the manufacture and sale of container products and insulation. F–B's total shipments of MDF in 1977 exceeded $10 million and its total sales of forest products exceeded $51 million.

PAR. 6. In 1977 F-B had net sales in excess of $227 million and net income in excess of $1.2 million.

III. Jurisdiction

PAR. 7. At all times relevant herein L-P and F-B have been engaged in the manufacture and sale of various products, including those products relevant to this complaint, in interstate commerce and are engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and each is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

IV. The Merger Agreement

PAR. 8. On March 22, 1978 L-P and F-B entered into a merger agreement which provides, inter alia, for the merger of F-B into L-P. The merger agreement further provides that, upon consummation of the merger, F-B will become a wholly-owned subsidiary of L-P. The value of the transaction is in excess of $56 million.

V. Trade and Commerce

PAR. 9. The relevant markets are:

a. The manufacture in the United States of particleboard and MDF, and the sale thereof.

b. The manufacture in the Western Region of the United States of particleboard and MDF, and the sale thereof.

c. The manufacture in the Pacific Coast Region of the United States of particleboard and MDF, and the sale thereof.

PAR. 10. The Western Region of the United States as used herein includes the States of Arizona, California, Colorado, Idaho, Montana, New Mexico, Oregon, Nevada, Utah, Washington and Wyoming. Of these states particleboard and/or MDF is actually produced only in the States of California, Idaho, Montana, New Mexico, Oregon and Washington. The Pacific Coast Region of the United States as used herein includes the States of California, Oregon and Washington.

PAR. 11. Concentration in each of the relevant markets enumerated in Paragraph 9 of this complaint is already high and increasing.

PAR. 12. Barriers to entry into each of the relevant markets enumerated in Paragraph 9 of this complaint are already high and increasing.

VI. Actual Competition

PAR. 13. L-P and F-B are now and have been since at least 1975 actual competitors of each other in each of the relevant markets enumerated in Paragraph 9 of this complaint, and actual competitors of others engaged in each of the relevant markets enumerated in Paragraph 9 of this complaint.

PAR. 14. L-P is the largest manufacturer, by capacity, of particleboard/MDF in the United States, accounting, in 1978, for approximately 12.4 percent of all capacity in that market. In 1978 F-B had approximately 1.3 percent of the total capacity in that market. In terms of actual production, L-P was the second largest producer in 1977 accounting for approximately 11.1 percent of all particleboard/MDF produced in the United States. In that same year F-B

accounted for approximately 1.3 percent of total production in that market.

PAR. 15. L-P is the largest manufacturer, by capacity, of particleboard/MDF in the Western Region of the United States, accounting, in 1978, for approximately 14.5 percent of all capacity in that market. In 1978 F-B was ranked twelfth in that market in terms of capacity with approximately 2.9 percent of the total. In terms of actual production, L-P was the third largest producer in 1977 accounting for approximately 14.1 percent of all particleboard/MDF produced in the Western Region of the United States. In the same year F-B ranked thirteenth in terms of production accounting for 2.9 percent of the market.

PAR. 16. L-P is the third largest manufacturer, by capacity, of particleboard in the Pacific Coast Region of the United States accounting in 1978, for approximately 11.4 percent of all capacity in that market. In 1978 F-B was ranked eleventh in that market in terms of capacity with approximately 3.3 percent of the total. In terms of actual production, L-P was the fourth largest producer in 1977 accounting for approximately 10.0 percent of all particleboard/MDF produced in the Pacific Coast Region of the United States. In the same year F-B ranked twelfth in terms of production accounting for approximately 3.5 percent of the market.

VII. Effects; Violations Charged

PAR. 17. The effects of the proposed acquisition may be to substantially lessen competition or tend to create a monopoly in the relevant markets enumerated in Paragraph 9 of this complaint in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

(a) actual competition between L-P, F-B and others in the manufacture and sale of particleboard/MDF will be eliminated; and

(b) concentration in the manufacture and sale of particleboard/MDF will be increased and the possibilities for eventual deconcentration may be diminished.

## COUNT II

VIII. Louisiana-Pacific Corporation

PAR. 18. The allegations as set forth in Paragraphs 1 through 3,

inclusive of Count I are hereby incorporated by reference and made a part of Count II as if rewritten herein.

IX. Evans Products Company

PAR. 19. Evans Products Company is a corporation organized under the State of Delaware with its principal place of business located at 1121 S.W. Salmon St., Portland, Oregon.

PAR. 20. Evans Products Company is engaged in the manufacturing, marketing and retailing of building materials including lumber, plywood, plywood specialities, and precut homes, and the manufacturing, marketing and leasing of transportation and industrial equipment. In 1975, its last full year of particleboard production, Evans Products Company had particleboard shipments in excess of $9 million.

X. Georgia-Pacific Corporation

PAR. 21. Georgia-Pacific Corporation ("G-P") is a corporation organized under the laws of the State of Delaware with its principal place of business located at 900 S.W. Fifth Ave., Portland, Oregon.

PAR. 22. G-P is a diversified integrated forest products company. It grows and harvests timber which it then converts to various wood products, including lumber, plywood, particleboard and wood chips. In 1975 G-P had particleboard shipments in excess of $31 million.

XI. Jurisdiction

PAR. 23. The allegations as set forth in Paragraph 7 of Count I which relate to L-P are hereby incorporated by reference and made part of Count II as if fully rewritten herein.

PAR. 24. At all times relevant herein Evans Products and G-P have been engaged in the manufacture and sale of various products, including those products relevant to this complaint, in interstate commerce and are engaged in commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

XII. The Acquisitions

PAR. 25. On April 2, 1976, L-P purchased from Evans Products Company a particleboard plant in Missoula, Montana for $11,798,000 (including plant and related assets).

PAR. 26. On August 30, 1976, L-P leased a particleboard plant from G-P at Ukiah, California ("Ukiah") for a period of five years at an

average annual payment of $480,000. L-P has the option to purchase the plant at the end of 3 years.

XIII. Trade and Commerce

PAR. 27. The relevant markets are:

a. The manufacture in the United States of particleboard and MDF, and the sale thereof.

b. The manufacture in the Western United States of particleboard and MDF, and the sale thereof.

c. The manufacture in the Pacific Coast Region of the United States of particleboard and MDF, and the sale thereof.

PAR. 28. The allegations as set forth in Paragraph 10 of Count I are hereby incorporated by reference and made a part of Count II as if rewritten herein.

PAR. 29. At the time of the acquisitions by L-P of the Missoula particleboard plant and the Ukiah particleboard plant, the manufacture of particleboard/MDF and the sale thereof in the relevant markets as enumerated in Paragraph 27 of this complaint was highly concentrated and increasing.

PAR. 30. Barriers to entry into the manufacture and sale of particleboard/MDF are substantial and are increasing.

XIV. Actual Competition

PAR. 31. At the time of the acquisitions, L-P and Evans Products Company were and had been since at least 1975, actual competitors of each other in the relevant markets as enumerated in Paragraph 27, subparts a. and b. of this complaint and actual competitors of others engaged in the relevant markets as enumerated in Paragraph 27, subparts a and b, of this complaint.

PAR. 32. At the time of the acquisitions, L-P and G-P were and had been since 1975, actual competitors of each other in the relevant markets as enumerated in Paragraph 27 of this complaint, and actual competitors of others engaged in the relevant markets as enumerated in Paragraph 27 of this complaint.

PAR. 33. In 1975, the year preceeding the acquisitions L-P accounted for approximately 5.3 percent of all particleboard/MDF production in the United States; 3.9 percent of all particleboard/MDF production in the Western Region of the United States and 4.6 percent of all particleboard/MDF production in the Pacific Coast Region of the United States. In that same year, G-P's Ukiah plant accounted for 1.6 percent of all particleboard production in the

United States; 3.3 percent of all particleboard/MDF production in the Western Region of the United States and 3.9 percent of all particleboard/MDF production in the Pacific Coast Region of the United States. In that same year, Evans Products Company accounted for 2.9 percent of all particleboard/MDF production in the United States and 6.1 percent of all particleboard/MDF production in the Western Region of the United States.

XV. Effects, Violations Charged

PAR. 34. The effects of the acquisitions may be to substantially lessen competition or tend to create a monopoly in the relevant markets enumerated in Paragraph 27 of this complaint in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

(a) actual competition between L-P, G-P, Evans Products Company and others in the manufacture and sale of particleboard/MDF has been eliminated; and

(b) concentration in the manufacture and sale of particleboard/MDF has been increased and the possibilities for eventual deconcentration have been diminished.

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with a violation of the Federal Trade Commission Act and the Clayton 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 jursidictional 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 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 agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following findings and enters the following order:

1. Respondent Louisiana-Pacific Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business at 1300 S.W. Fifth Ave., Portland, Oregon.

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

For the purpose of this order, the following definitions shall apply:

(a) "Particleboard" is a flat panel product consisting of particles of wood bonded together with a synthetic resin or other suitable bonding system by a process in which the interparticle bond is created by the bonding systems, as further described in Commercial Standard CS236-66, published by the United States Department of Commerce, National Bureau of Standards, and as reported under the Standard Industrial Classification Manual No. 24921.

(b) "Medium density fiberboard" is a dry-formed panel product manufactured from lignocellulosic fibers, combined with a synthetic resin or other suitable binder, by the application of heat and pressure in which the interfiber bond is substantially created by the added binder, as further described in the standard published by the National Particleboard Association, N.P.A. 4-73, and as reported under the Standard Industrial Classification Manual No. 24997.

(c) The "Rocklin MDF plant" consists of land, plant, property, equipment and machinery presently owned and operated by Fibreboard Corporation for the manufacture of medium density fiberboard at Rocklin, California, to be acquired by respondent as a result of its merger with Fibreboard Corporation, including all additions, replacements and improvements thereto hereafter made by respondent.

### I

*It is ordered,* That respondent, its officers, directors, agents, representatives and employees shall, absolutely and in good faith

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divest, within two (2) years from the date this order becomes final, subject to the prior approval of the Federal Trade Commission, all rights, title and interest in and to the Rocklin MDF plant acquired by respondent as a result of its merger with Fibreboard Corporation.

II

*It is further ordered,* That in connection with any divestiture of the said Rocklin MDF plant, respondent will offer to any prospective acquirer the right to enter into a contract to buy from respondent (or its subsidiary Fibreboard Corporation) for use in said plant at Rocklin, California wood residue raw materials of the type currently being supplied by Fibreboard Corporation's internal operations to said plant, which contract will include provisions substantially as follows:

(a) the contract will continue for a minimum of five (5) years;
(b) prices will be market prices existing in the the area during the contract term for similar wood residue raw materials; and
(c) quantities to be sold in each year will equal at least the total quantity of said wood residue raw materials heretofore supplied to said plant from Fibreboard Corporation's own internal operations in the year 1977, or which will be supplied in the year 1978, or double the total quantity of said materials so supplied in the first six months of 1978, whichever is greatest.

III

*It is further ordered,* That none of the assets and properties required to be divested by respondent pursuant to Paragraph I above, shall be divested directly or indirectly to anyone who is, at the time of divestiture, an officer, director, employee, or agent of, or under the control, direction or influence of respondent, or who owns or controls more than one percent of the capital stock of respondent.

IV

*It is further ordered,* That respondent shall cease and desist for a period of ten (10) years from the date this order becomes final from acquiring, directly or indirectly, through subsidiaries or otherwise, without the prior approval of the Commission, (1) the whole or any part of the stock or share capital or any concern, corporate or noncorporate, engaged at the time of acquisition in any State of the United States in the manufacture of (a) particleboard, or (b) medium density fiberboard, or (2) a manufacturing plant or facility engaged

at the time of acquisition in any State of the United States in the manufacture of (a) particleboard, or (b) medium density fiberboard. Any exercise hereafter by respondent of its option to purchase the Ukiah, California particleboard plant presently operated by respondent pursuant to a lease shall not be prohibited by this paragraph.

V

*It is further ordered,* That respondent shall within one (1) year from the date this order becomes final, and every sixty (60) days after one (1) year until respondent has fully complied with the provisions of Paragraphs I and II of this order, submit in writing to the Federal Trade Commission a verified report setting forth in detail the manner and form in which respondent intends to comply or has complied with this order. All compliance reports shall include a summary of contacts or negotiations with anyone for the specified assets, the identity of all such persons, and copies of all written communications to and from such persons.

VI

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

IN THE MATTER OF

# LANCASTER COLONY CORPORATION, ET AL.

DISMISSAL ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND CLAYTON ACTS

*Docket 9119. Complaint, Oct. 25, 1978 — Dismissal Order, March 6, 1979*

This order dismisses the complaint against two manufacturers of machine-made glassware alleging violations of Section 7 of the Clayton Act, and Section 5 of the Federal Trade Commission Act. The Commission, in dismissing the complaint, held that under the unique circumstances presented in this case, further proceedings in the matter are not in the public interest.

*Appearances*

For the Commission: *Edward T. Colbert* and *William D. Mitchell.*

For the respondents: *Richard Murphy* and *Fred A. Summer, Dunbar, Kiezel & Murphy,* Columbus, Ohio, *Edward Wolf, J.B. Rather* and *R.W. Davis, White & Case,* New York City and *John W. Barnum, White & Case,* Washington, D.C.

## COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondents, each subject to the jurisdiction of the Commission, have entered into an acquisition agreement which, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, that said agreement already constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21, and Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

## I

## Definition

PARAGRAPH 1. For the purpose of this complaint, the following definition shall apply: "Machine-made glassware" means all moderately-priced soda-lime glass beverageware, tableware, food preparation glassware, and novelty and ornamental glassware items produced by machine.

## II

### Federal Paper Board Company, Inc.

PAR. 2. Federal Paper Board Company, Inc. (Federal Paper) is a corporation organized and existing under the laws of the State of New York, with a principal place of business at 75 Chestnut Ridge Road, Montvale, New Jersey.

PAR. 3. Federal Paper through its unincorporated Federal Glass Company division (Federal Glass) produces machine-made glassware and sells said machine-made glassware throughout the United States.

PAR. 4. In its fiscal year ended December 31, 1977, Federal Paper had net sales of approximately $397,000,000, and net income of approximately $13,800,000; Federal Glass had net sales of approximately $48,000,000 and income before allocation for taxes and corporate overhead of approximately $910,000.

PAR. 5. Federal Glass is the third largest manufacturer of machine-made glassware in the United States.

PAR. 6. Federal Glass, until 1978, was for many years a member of the American Glassware Association, which is a trade association made up of the major domestic manufacturers of machine-made glassware.

## III

### Lancaster Colony Corporation

PAR. 7. Lancaster Colony Corporation (Lancaster Colony) is a corporation organized and existing under the laws of the State of Delaware, with a principal place of business at 37 West Broad St., Columbus, Ohio.

PAR. 8. Lancaster Colony, through its subsidiary Indiana Glass Company, an Indiana corporation, produces machine-made glassware, and sells said machine-made glassware throughout the United States. Lancaster Colony also produces machine-made glassware through its subsidiary Lancaster Glass Corporation, an Ohio corporation, and sells said machine-made glassware throughout the United States.

PAR. 9. In its fiscal year ended June 30, 1978, Lancaster Colony had sales of approximately $237,000,000, and net income of approximately $23,300,000. Lancaster Colony had sales of machine-made glassware of approximately $35,500,000.

PAR. 10. Indiana Glass Company is the fourth largest manufacturer of machine-made glassware in the United States.

PAR. 11. Indiana Glass Company, until 1978, was for many years a member of the American Glassware Association, which is a trade association made up of the major domestic manufacturers of machine-made glassware.

## IV

## Jurisdiction

PAR. 12. At all times relevant herein Federal Paper and Lancaster Colony have been engaged in the manufacture and sale of machine-made glassware in interstate commerce and are engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and each is a corporation whose business is in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

## V

## The Acquisition Agreement

PAR. 13. On or about April 1978 Federal Paper and Lancaster Colony agreed in principle to the acquisition by Lancaster Colony of all Federal Glass assets of Federal Paper. The proposed purchase agreement provides, *inter alia,* for the sale of the Federal Glass assets of Federal Paper in exchange for approximately $42,000,000. A letter of intent was executed by Lancaster Colony on August 29, 1978.

## VI

## Trade and Commerce

PAR. 14. Relevant lines of commerce are the manufacture and sale of machine-made glassware and submarkets thereof.

PAR. 15. A relevant section of the country or geographic market is the entire United States.

PAR. 16. The United States machine-made glassware market is highly concentrated with the combined market share of the four largest manufacturers estimated to be approximately 74 percent.

PAR. 17. Barriers to entry into the manufacture of machine-made glassware and submarket thereof are substantial.

## VII

### Actual Competition

PAR. 18. Federal Paper and Lancaster Colony are and have been for many years actual competitors in the manufacture and sale of machine-made glassware and submarkets thereof, and actual competitors of others engaged in the manufacture and sale of machine-made glassware and submarkets thereof throughout the United States.

## VIII

### Effects

PAR. 19. The effect of the proposed acquisition may be to substantially lessen competition or to tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, or Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

(a) actual competition between Federal Paper and Lancaster Colony in the manufacture and sale of machine-made glassware and submarkets thereof will be eliminated;

(b) actual competition between competitors generally in the manufacture and sale of machine-made glassware and submarkets thereof may be lessened;

(c) Federal Paper will be eliminated as an actual substantial independent competitor in the manufacture and sale of machine-made glassware and submarkets thereof;

(d) concentration in the manufacture and sale of machine-made glassware and submarkets thereof will be increased and possibilities for eventual deconcentration may be diminished;

(e) mergers or acquisitions between other machine-made glassware manufacturers may be encouraged, thus causing a further substantial lessening of competition and tendency toward monopoly in the relevant markets.

## IX

### Violations Charged

PAR. 20. The proposed acquisition by Lancaster Colony of the Federal Glass assets of Federal Paper (if consummated), the proposed Purchase Agreement between Lancaster Colony and Federal Paper (if executed), and the agreement in principle between

Lancaster Colony and Federal Paper, constitute violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and are or would be unfair acts, practices or methods of competition in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

## Order Granting Complaint Counsel's Motion To Withdraw from Adjudication and To Dismiss the Complaint

The administrative law judge (ALJ) has certified to the Commission the motion of respondent Federal Paper Board Company, Inc. (Federal) to terminate this proceeding by an order prohibiting the sale of any of the assets of its Federal Glass Division (Division) to respondent Lancaster Colony Corporation (Lancaster). Also certified to the Commission is complaint counsel's motion to withdraw the case from adjudication and to dismiss the complaint. The ALJ recommends that the Commission accept Federal's motion and deny that of complaint counsel.

The Division has been closed since January 31, 1979, when Federal announced the shutdown of its plant, alleging continuing operating losses. However, Federal has refused to provide complaint counsel with financial and other relevant information in support of its "failing company" defense. In their papers, complaint counsel note that the withdrawal of the Wheaton Glass Co. and the Eastcliff Corporation from negotiations to purchase the Division have exhausted all feasible alternatives to liquidation of the Division or sale to Lancaster. Complaint counsel recognize the possibility that some other purchaser might exist but suggest that the slight chance of identifying another party which will expeditiously return the plant to normal operation is not worth the gamble of approximately 1500 jobs at stake. Counsel further point out that liquidation of the Division could result in the loss of its customers to the two largest firms in this industry, Anchor Hocking Corporation and the Libbey Division of Owens-Illinois.

Under these rather unique circumstances, and in the exercise of our discretion, we conclude that further proceedings in this matter are not in the public interest. Accordingly,

*It is ordered,* That the complaint in this matter is hereby dismissed.

IN THE MATTER OF

# CHILDREN'S ADVERTISING

*TRR No. 215-60. Interlocutory Order, March 7, 1979*

## ORDER MODIFYING SCHEDULE

Effective March 9, 1979, the Commission will be temporarily reduced to four members, of whom two are not presently participating in the instant proceeding. Whether or not two Commissioners might properly exercise certain decisionmaking authority under these circumstances, the Commission believes that, if at all reasonably possible, it is in the public interest that Commission decisions of significance with respect to this proceeding be taken with the participation of no fewer than three Commissioners. At the same time, certain phases of most Magnuson-Moss rulemaking proceedings, including this one, typically involve little or no intervention by the Commission because of the wide latitude to conduct hearings vested in the presiding officer. It would be productive of considerable delay, and manifestly not in the public interest, were such phases of a matter to be suspended merely because of the desire of the Commission that decisions to be made at some unspecified time in the future be made with the participation of no fewer than three members.

In light of the foregoing, the Commission can perceive no reason why the presently ongoing "legislative" hearings in this matter, which are subject to the direction of the presiding officer, ought not proceed as scheduled. Nor does any reason appear why interested parties may not thereafter propose issues for designation, or why the presiding officer may not subsequently recommend designation of such issues.[1] However, it is the present intention of the Commission that it will not designate such issues as contemplated by the Initial Notice of Rulemaking, 43 F.R. 17967, 17971 (April 27, 1978) until it may do so pursuant to a vote in which at least three members of the Commission participate. To achieve these results the following order is issued:

*It is ordered,* That following completion of the Washington, D.C. "legislative" hearing in this matter, persons wishing to do so must submit to the presiding officer on or before April 30, 1979, or by such other time as the presiding officer may in his sole discretion establish (1) proposed disputed issues of fact that are material and

[1] The Initial Notice of Proposed Rulemaking, 43 F.R. 17967, *et seq.* (April 27, 1978), makes no express reference to the role of the presiding officer in the designation process. It was the Commission's intention that the presiding officer should make a recommendation to the Commission as to what issues, if any, should be designated.

necessary to resolve at a disputed issues hearing, (2) requests to cross-examine at a disputed issues hearing witnesses who appeared at the "legislative" hearings, and (3) requests to present oral rebuttal at a disputed issues hearing.

*It is further ordered,* That following receipt of the submissions ordered above, the presiding officer shall make a recommendation to the Commission identifying disputed issues of fact, if any, that are material and necessary to resolve at a disputed issues hearing.

*It is further ordered,* That subsequent proceedings in this matter shall be had at such time as the Commission shall hereafter order.

Chairman Pertschuk and Commissioner Pitofsky did not participate.

IN THE MATTER OF

# TRW, INC., ET AL.

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND CLAYTON ACTS

*Docket 9084. Complaint, June 17, 1976 — Final Order, March 8, 1979*

This order, among other things, requires a Cleveland, Ohio manufacturer and seller of electronic point-of-sale credit authorization equipment to cease having on its board of directors any individual who is simultaneously serving as a director of Addressograph-Multigraph Corp., or any other competitive business entity. The order also prohibits Horace A. Shepard from simultaneously serving as a director of TRW, Inc. and any other competing company.

## *Appearances*

For the Commission: *John M. Mendenhall* and *Paul P. Eyre.*

For the respondents: *Richard W. Pogue, Robert H. Rawson* and *Brent L. Henry, Jones, Day, Reavis & Pogue,* Cleveland, Ohio and *Joseph D. McGarth,* Baker Heights, Ohio.

## COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondents have been and are in violation of the provisions of Section 8 of the Clayton Act, as amended, and Section 5(a)(1) of the Federal Trade Commission Act, as amended, and that a proceeding in respect thereof would be in the public interest, issues this complaint, stating its charges as follows:

PARAGRAPH 1. Respondent TRW, Inc., (hereinafter TRW), is an Ohio corporation and maintains its principal office at 23555 Euclid Ave., Cleveland, Ohio. TRW has capital, surplus, and undivided profits aggregating more than One Million Dollars ($1,000,000). TRW is engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, and is engaged in or its business affects commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

PAR. 2. Respondent Addressograph-Multigraph Corporation (hereinafter Addressograph) is a Delaware corporation and maintains its principal office at 20600 Chagrin Boulevard, Shaker Heights, Ohio. Addressograph has capital, surplus, and undivided profits aggregating more than One Million Dollars ($1,000,000). Addressograph is engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, and is engaged in or its business affects commerce, as

"commerce" is defined in Section 4 of the Federal Trade Commission Act.

PAR. 3. Respondent Horace A. Shepard is an individual. His business address is the same as that of TRW.

PAR. 4. On or about April 29, 1969, respondent Horace A. Shepard was elected director and chief executive officer of TRW and has served in such capacities with TRW from on or about April 29, 1969, until the present. On or about November 4, 1971, respondent Horace A. Shepard was elected director of Addressograph and has served in such capacity with Addressograph from on or about November 4, 1971, until on or about November 6, 1975.

PAR. 5. During all or part of the period January 1, 1973 through and including November 6, 1975, the business of TRW and Addressograph included, but was not limited to, the manufacture, sale and distribution in commerce of point-of-sale credit authorization equipment and teller-operated bank transaction equipment, and other such equipment used for credit validation, check cashing validation, recording of deposits and withdrawals from financial institutions, and inventory record keeping.

PAR. 6. By the nature of their business as hereinabove described and location of operations with respect thereto, Addressograph and TRW were competitors, concurrent with respondent Horace A. Shepard's membership on the Boards of Directors of TRW and Addressograph, during part or all of the period January 1, 1973 through and including November 6, 1975, so that the elimination of competition by agreement between them would constitute a violation of the antitrust laws.

PAR. 7. The simultaneous membership of respondent Horace A. Shepard on the Boards of Directors of respondents TRW and Addressograph constitutes a violation of Section 8 of the Clayton Act, 15 U.S.C. 19, and Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45.

## INITIAL DECISION BY JOSEPH P. DUFRESNE, ADMINISTRATIVE LAW JUDGE

### DECEMBER 22, 1977

### PRELIMINARY STATEMENT

In a complaint dated June 17, 1976, the Commission charged that respondents TRW, Inc., Addressograph-Multigraph Corporation (A-M) and Horace A. Shepard, had violated Section 8 of the Clayton Act,

as amended, (15 U.S.C. 19) and Section 5(a)(1) of the Federal Trade Commission Act, as amended, (15 U.S.C. 45(a)(1)). [2]
Section 8, in pertinent part, reads as follows:

> . . . no person at the same time shall be a director in any two or more corporations, any one of which has capital surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, . . . if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws. . . .

Section 5(a)(1) provides:

> Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

The gravamen of the charges was that the simultaneous membership of Mr. Shepard on the boards of directors of TRW and A-M from January 1, 1973, through November 6, 1975 (hereinafter referred to as the "critical period"), constituted a violation of the Clayton and FTC Acts (Complaint, ¶¶ 4 and 7). This, because during the critical period the business of TRW and A-M ". . . included, but was not limited to, the manufacture, sale and distribution in commerce of point-of-sale credit authorization equipment and teller-operated bank transaction equipment, and other such equipment used for credit validation, check cashing validation, recording of deposits and withdrawals from financial institutions and inventory record keeping" (Complaint, ¶ 5).

The result alleged was that, since TRW and A-M were competitors due to the nature of their business and location of operations, coupled with Mr. Shepard's simultaneous membership on the boards of each, elimination by agreement between them of competition between TRW and A-M would constitute a violation of the antitrust laws (Complaint, ¶ 6). [3]

In their answers, in pertinent part, TRW and Mr. Shepard:

1. Denied having violated Section 8 of the Clayton Act, Section 5 of the FTC Act and denied a proceeding, as alleged in the introductory paragraph of the complaint, was in the public interest. They also denied, for want of knowledge sufficient to form a belief, the allegations regarding A-M. (Answers, ¶¶ 1 and 3);

2. Admitted (1) TRW's capital, surplus and individual profits aggregate more than $1,000,000, (2) that it is engaged in commerce or that its business affects commerce as "commerce" is defined in the FTC Act, and (3) that Mr. Shepard is an individual whose address is the same as that of TRW. (Answers, ¶¶ 2 and 3);

3. Averred that Mr. Shepard became a director of TRW on March

26, 1957, chief executive officer of TRW on December 22, 1969, continued in these positions and that on or about March 20, 1971, became and continued to serve as a director of A-M until November 6, 1975. (Answers, ¶ 4);

4. Admitted that between January 1, 1973, and December 6, 1975, TRW's business included the manufacture, and distribution in commerce, of products falling in the generic categories of equipment described above. They denied knowledge as to A-M's products and denied that TRW and A-M were competitors, so that the elimination of competition by agreement between them would constitute a violation of the antitrust laws, during the critical period. They also denied that Section 8 and Section 5 had been violated. [4]

The following affirmative defenses were asserted:

1. The complaint did not state a claim upon which relief could be granted (Answers, ¶ 7);

2. Mr. Shepard had decided prior to August 8, 1975 (when he first learned of the Commission's investigation - RX 54A; Solganik, Tr. 1961-62), to leave the Board of Directors of A-M, did so on November 6, 1975, and the issues raised by the complaint were moot (Answers, ¶ 8);

3. The relevant period was between October 1973, when A-M first sold an AMCAT and November 7, 1974, the date of Mr. Shepard's last election to the Board of A-M (Answers, ¶ 9) during which period A-M and TRW were not competitors (Answers, ¶ 10) and that any alleged competition between them was *de minimis* (Answers, ¶ 11);

4. TRW and Mr. Shepard were denied their rights of due process, denied equal protection of the laws and subjected to abuse of process (Answers, ¶¶ 12 and 13);

5. Section 5 of the FTC Act should not be applied to an interlocking directorate which is not violative of Section 8 of the Clayton Act (Answers, ¶ 14);

6. Section 8 of the Clayton Act does not apply to corporations (Answer of TRW. ¶ 15);

7. The proceedings were not in the public interest (Answers, ¶¶ 16 and 15, respectively); and

8. There is neither a reasonable expectation the alleged wrong would be repeated nor a need for issuance of an order (Answers, ¶¶ 7 and 16, respectively). [5]

Prehearing conferences were held on November 4, 1976 by ALJ aniel Hanscom, to whom the case was assigned initially, and by me ı May 9 and 25, 1977, and on June 27, 1977. Motions for summary cision were made both by complaint counsel and TRW. These her have been denied or are denied by this decision.

In a negotiated order described in a "Decision and Order" dated August 11, 1977, [90 F.T.C. 144] the charges as to A-M were resolved. In the order, A-M admitted all the jurisdictional facts alleged in the complaint and stipulated that consent to the order did not constitute an admission that the law had been violated.

The Consent Order: (1) prohibits A-M from having interlocking directorates with competitors if the elimination of competition by agreement between them would constitute a violation of the antitrust laws; (2) requires preparation of a list by each A-M director of the products, names and addresses of other corporations on whose board the director sits or to which he/she has been nominated; (3) requires A-M to review prior to each election of directors and to retain for each member of its board of directors and nominees, a descriptive list of all products and services of other corporations on whose board the director serves or to which he or she is a nominee; (4) requires A-M to notify the Commission of any proposed assignment, sale, or the like which may affect compliance with the order; and (5) requires filing of a report within 90 days as to the manner and form in which A-M has complied with the order.

The adjudicative hearings in the case-in-chief involving the remaining respondents, TRW and Mr. Shepard, were held in Cleveland, Ohio, and Los Angeles, California, from July 18 - 27 and July 29 - August 1, 1977, respectively. Hearings in the case-in-defense were held in Cleveland from August 22 - 29, 1977. Complaint counsel presented the case-in-rebuttal in Cleveland on September 2, 1977. The official record consists of 2477 pages of transcript. There are 111 numbered exhibits. Of these, 35 were rejected; however, in accord with Commission Rule 3.43(g), they remain a part of the official record. [6]

## Bases for the Findings of Fact; Abbreviations Used

The findings of fact following are based on a review of the allegations made in the complaint, respondents' answers, the documentary evidence, and consideration of the demeanor of the witnesses. In addition, the proposed findings of fact, conclusions and proposed orders, together with reasons and briefs in support thereof filed by each side have been given careful consideration. To the extent not adopted by this decision in the form proposed or in substance, they are rejected.

For convenience, the findings of fact include references to supporting evidentiary items in the record. Such references are intended to serve as guides to the testimony, evidence and exhibits supporting the findings of fact. They do not necessarily represent complete

summaries of the evidence considered in arriving at such findings. The following abbreviations have been used:

Tr. - Transcript, preceded by the names of the witness and followed by the page number.

CX - Commission's Exhibit, followed by its number.

RX - Respondents' Exhibit, followed by its number.

CCPF and CCB - Complaint Counsel's Proposed Findings and Brief

RPF and RB - Respondents' Proposed Findings and Brief.

[7] Note: The transcript in this proceeding was not paginated consistently. In order to locate citations to the transcript it may be helpful to use this table. The left hand column alphabetically lists the witnesses and the right hand column gives the date(s) on which he testified. Transcript volumes correspond to the dates of testimony.

| Witness Name | Date Testified |
|---|---|
| Barney | July 29, 1977 |
| Bender | July 22, 1977 |
| Benton | August 26, 1977 |
| Bryan | July 25, 1977 |
| Bauchwitz | August 29, 1977 |
| Close | August 25, 1977 |
| Creekmore | July 19, 1977 |
| Davis | August 23, 1977 |
| Dougherty | July 29, 1977 |
| Dugan | September 2, 1977 |
| Fleming | July 26, 1977 |
| Gorman | August 23, 1977 |
| Guthrie | July 20, 1977 |
| Kaplan | July 21, 1977 |
| Kovar | August 24, 1977 |
| Mattes | July 27, 1977 |
| Mettler | August 22, 1977 |
| Munyon | August 24-25, 1977 |
| Murphy | August 23, 1977 |
| Noel | July 18, 1977 |
| Oie | August 1, 1977 |
| Overmire | August 1, 1977 |
| Peterson | September 2, 1977 |
| Schmidt | July 19, 1977 |

| | |
|---|---|
| Schwartz | September 2, 1977 |
| Shepard | August 22, 1977 |
| Solganik | September 2, 1977 |
| Turley | September 2, 1977 |
| T. Walsh | July 27, 1977 |
| W. Walsh | July 27, 1977 |
| Weber | July 29, 1977 |
| Weedon | July 26, 1977 |
| Wolfson | July 20, 1977 |

## [8] FINDINGS OF FACT

### I. The Parties

#### A. Respondent TRW, Inc.

1. TRW, Inc. (hereinafter TRW) is a publicly held corporation organized and existing under the laws of the State of Ohio. TRW is headquartered at 23555 Euclid Ave., Cleveland, Ohio. (Answer of TRW, ¶ 2).

2. TRW and its subsidiaries are principally engaged in the design, manufacture and sale of products for industry and government, and for the performance of advanced systems engineering, research and technical services in electronics and computer based services, domestic car and truck products, international car and truck products, car and truck replacement parts, spacecraft and propulsion products, fasteners, tools and bearings and energy products and services. TRW, during this proceeding, owned and operated plants in the United States, Europe, South America, Australia, Canada, Mexico, Africa, Taiwan and the United Kingdom (Moody's Industrial Manual, 3024–30, 1977 ed.).

3. In fiscal 1974, TRW had total current assets of $960,233,000, net sales and revenues totaling $2,486,022,000 and net income of $254,352,000. In fiscal 1975, TRW had total current assets of $897,592,000, net sales and revenues totaling $2,585,683,000 and net income of $263,903,000 (Moody's Industrial Manual, 3024–30, 1977 ed.).

4. On April 23, 1974, TRW acquired Financial Data Services, Inc. (hereinafter FDSI) (CX 180; CX 182).

5. TRW, at all times pertinent to this proceeding, engaged in commerce as defined in Section 1 of the Clayton Act [15 U.S.C. 12 and Section 4 of the Federal Trade Commission Act [15 U.S.C. 4 (Answer of TRW, ¶ 2; Finding 2).

6. TRW, at all times pertinent to this proceeding, had capit

surplus and undivided profits aggregating more than one million dollars (Answer of TRW, ¶ 2; Finding 3). [9]

B. Addressograph-Multigraph Corporation

7. Addressograph-Multigraph Corporation (hereinafter A-M) is a publicly held corporation organized and existing under the laws of the State of Delaware. A-M is headquartered at 20600 Chagrin Boulevard, Shaker Heights, Ohio. (Answer of A-M, ¶ 3).

8. A-M and its subsidiaries manufacture and sell an extensive line of name-and-data writing, office duplicating and offset duplicating machines and apparatus. A-M, during this proceeding, operated some 38 plants in the United States, Canada, Mexico, Europe, Africa, Japan, Australia and New Zealand (Moody's Industrial Manual, 1108–09, 1977 ed.).

9. In fiscal 1974, A-M had net current assets of $147,799,000, net sales and revenues totaling $540,833,000 and net income of $308,000. In fiscal 1975, A-M had net current assets of $150,930,000, net sales and revenues totaling $584,246,000 and net income of $4,908,000 (Moody's Industrial Manual, 1108–09, 1977 ed.).

10. A-M, at all times pertinent to this proceeding, engaged in commerce as defined in Section 1 of the Clayton Act [15 U.S.C. 12], and Section 4 of the Federal Trade Commission Act [15 U.S.C. 44] (Answer of A-M, ¶ 3; Finding 8).

11. A-M, at all times pertinent to this proceeding, had capital, surplus and undivided profits aggregating more than one million dollars (Answer of A-M, ¶ 3; Finding 9).

12. A-M, by a consent decision and order dated August 11, 1977 [*supra*], withdrew from adjudication prior to this hearing.

C. Respondent Horace A. Shepard

13. Following a distinguished military career, Horace A. Shepard, in 1951, joined TRW as Vice President and Assistant to the General Manager. Shepard became President of TRW in 1962 and Chairman and Chief Executive Officer in 1969 (Shepard, Tr. 849, 850–52). [10] First elected to TRW's Board of Directors in 1957, Mr. Shepard has served continuous three-year terms from that date to the present. Mr. Shepard, due to TRW's mandatory retirement at age 65 policy, retired as Chief Executive Officer on November 30, 1977. Mr. Shepard, however, is permitted to remain on the TRW Board until his seventy-second birthday (Shepard, Tr. 852; CX 181).

14. Horace A. Shepard was initially elected to the A-M Board of Directors on March 20, 1971 (Shepard, Tr. 874; Davis, Tr. 1158). Mr.

Shepard served on the A-M Board through November 6, 1975 (Shepard, Tr. 884; Answer of A-M, ¶ 4).

15. Horace A. Shepard served on both the A-M and TRW Boards of Directors from March 20, 1971, through November 6, 1975 (Findings 13–14).

## II. The Alleged Interlock

### A. How Horace A. Shepard Came To Sit on the A-M Board

16. In 1970, Charles L. Davis was offered and, in 1971, assumed the Presidency of A-M (Davis, Tr. 1154). Charles L. Davis and Horace A. Shepard had enjoyed a friendship dating back to and beyond the period when Shepard was Davis' commanding officer at Wright-Patterson Air Force Base in Dayton, Ohio (Davis, Tr. 1153; Shepard, Tr. 853–54). After having been offered the Presidency of A-M, Davis, in the course of deciding to accept the position, sought out Shepard's advice (Shepard, Tr. 856–58; Davis, Tr. 1154–55). Even while weighing A-M's offer, Davis entertained hopes that Shepard could be persuaded to join the A-M Board (Davis, Tr. 1155–56; Shepard, Tr. 858–59). Because of his desire to have directors of the A-M Board whom he could trust as well as his general lack of familiarity with the Cleveland business community, Davis, after assuming the A-M Presidency, continued to press the A-M directorship upon Shepard (Davis, Tr. 1156–57; Shepard, Tr. 860). Shepard finally agreed to join the A-M Board with the understanding that he would serve as a director only for a five-year period, during which time Davis hoped to reverse A-M's fortunes (Davis, Tr. 1157; Shepard, Tr. 858, 860). [11]

17. Horace A. Shepard, for his own part, was initially reluctant, due to his other responsibilities, about accepting the position on the A-M Board (Davis, Tr. 1155–56; Shepard, Tr. 859). Before agreeing to become an A-M director, Shepard conferred with Eugene Ford, then TRW's General Counsel, and Dr. Rueben Mettler, then President but now Chief Executive Officer of TRW. TRW's General Counsel "examined all of the relevant facts" and concluded that Shepard could join the A-M Board (Gorman, Tr. 1023; Shepard, Tr. 862–64, 927). Mettler, because of Shepard's busy schedule and a belief that an A-M directorship was of no benefit to TRW, advised Shepard against joining the A-M Board (Mettler, Tr. 933–34, 956, 963). It should be noted that, although TRW now employs an extensive screening process to avoid Clayton 8 problems (Gorman, Tr. 1029–42; RX 4; *see also* RX 58, RX 59), the procedure in 1971 was rather less well developed (Gorman, Tr. 1024), so much so that the TRW Board

was never notified—either by Shepard or anyone else—that Shepard had joined the A-M Board (Mettler, Tr. 934; Shepard, Tr. 861-62).

18. There is no indication that TRW in any way promoted or took corporate action sanctioning Shepard's assumption of the A-M directorship (Findings 16-17).

B. Other Alleged Interlocks Involving Horace A. Shepard and TRW

19. In 1967, while serving on the Boards of TRW and Midland-Ross Corporation, Horace A. Shepard was the object of a Section 8 investigation conducted by the Department of Justice. Shepard himself had the question of overlapping TRW and Midland-Ross products researched with the conclusion of no overlap. Nevertheless, the Department of Justice requested that Shepard resign from either the TRW or Midland-Ross Board. Shepard, in order to save the two corporations legal expenses and adverse publicity, resigned from the Midland-Ross Board. The Department of Justice then closed the investigation without filing a complaint (Shepard, Tr. 864-68; CX 208, CX 208-A, CX 208-E to K, CX 208-O, CX 208-V). [12]

20. In 1968, Shepard was asked to join the Board of White Motor Company. Shepard requested and was denied a "railroad" clearance (*i.e.*, the submission of a question to the Justice Department with a request for an advisory opinion as to the legality under the antitrust laws of a course of action, Weedon, Tr. 363). As a result of the denial, Shepard refused the White Motor directorship (Shepard, Tr. 869-73; Gorman, Tr. 1015-16; Weedon, Tr. 365, 367, 370; CX 210).

21. In 1971, Shepard, while serving on the Boards of TRW, A-M and Harris-Intertype Corporation, was again the subject of a Department of Justice Section 8 investigation. On the basis of studies conducted by the three corporations, Shepard concluded that no product overlap existed (Shepard, Tr. 874-78). In a meeting which occurred in Cleveland in the summer of 1971 between Justice Department officials and TRW counsel, it was made clear that the area of concern was the possibility of product overlap between A-M and Harris. Further, the Department of Justice had concluded that TRW and A-M were not competitors (Gorman, Tr. 1017-21; Weedon, Tr. 353, 356, 361; CX 211-A - B; *see also* RX 56; RX 57; and Gorman, Tr. 1021-23 on the question of any possible ambiguity about the understanding of that meeting and its commitment to writing). Shepard subsequently resigned from the Harris Board (Gorman, Tr. 1021). Shepard regarded the investigation and its resolution as "in fact a clearance to continue as director of both TRW and Addressograph-Multigraph" (Shepard, Tr. 878).

22. On July 26, 1974, Shepard resigned from the Board of Diamond Shamrock Corporation. Shepard had previously been notified that the Federal Trade Commission intended to file a complaint against Diamond Shamrock and the Standard Oil Company for alleged violations of Section 8 (Shepard, Tr. 923-24; Weedon, Tr. 381, 384; CX 212; CX 213 to CX 213-O; CX 214 to CX 214-O). [13]

## III. The Products

### A. The TRW System 4000/5000

23. *Generally:* Throughout the complaint period, TRW's key product, for purposes of this proceeding, was its System 4000/5000 (Bauchwitz, Tr. 1838). Although the System 4000 was marketed apart from the System 5000, the two systems were essentially one and the same. The System 4000 was designed as a credit authorization system (on "credit authorization" *see* T. Walsh, Tr. 543-44; Bryan, Tr. 246) for department store house accounts (Bauchwitz, Tr. 1810-11, 1843; Kovar, Tr. 1230, 1244; Close, Tr. 1547-48; CX 167). The design of the System 5000 concentrated upon the credit authorization needs of banks and other financial institutions (Bauchwitz, Tr. 1886; Kovar, Tr. 1230; CX 158; CX 172). Both systems were optimally suited to environments characterized by the need for clusters of terminals and a high volume of transactional traffic (Kovar, Tr. 1226, 1228, 1283; Bauchwitz, Tr. 1811; Bryan, Tr. 280; Close, Tr. 1546-58; Findings 24-25, *infra*).

24. *System Features:* The TRW System 4000/5000 used, during the complaint period, the 4103 terminal (Kovar, Tr. 1231-33; *see generally* CX 201). Designed to occupy as little retail counter space as possible, the functions of the 4103 were limited to the clerk's use of the keyboard to transmit information and the receipt and display of the computer's answer (Kovar, Tr. 1234-35). The 4103 terminal lacked both a printer, a device applying text or numbers to a page in response to an electrical impulse, and imprinter, a device transferring raised characters to an inked piece of paper, as well as the ability to communicate directly with a computer (Kovar, Tr. 1231-32, 1271). In order to communicate over a telephone line with a central computer, the 4103 terminal had to be used in conjunction with a controller (Kovar, Tr. 1235-36). The controller was itself composed of a scanner control, which monitored the various terminals attached to the controller, and the modem, which converted the keypad signal to telephone use (Kovar, Tr. 1238, 1240-41; Close, Tr. 1549). Through the use of the special capabilities of the store located controller, as many as 128 4103 terminals could be simultaneously controlled. The

effect of this arrangement was to distribute the costs of the controller and host computer among many terminals in a single store location (Kovar, Tr. 1240; Bauchwitz, [14] Tr. 1811-12). The 4103 terminal could be upgraded to include an imprinter, card reader and customer identification pads. However, these items would be included alongside and not in the terminal housing (Kovar, Tr. 1334-36).

25. *System Uses:* The envisioned use of the System 4000/5000 in a multi-clustered terminal environment was borne out in fact. During the complaint period, 70-75 System 4000's—and some 60,000 credit authorization terminals—were sold or leased to American department stores (Bauchwitz, Tr. 1813, 1893). Ninety percent of all System 4000 revenues came from department store sales and leases (Bauchwitz, Tr. 1813).

B. The TRW Validata System

26. *Generally:* TRW's Validata System involved the sale of a service rather than mechanical system (Kovar, Tr. 1253). Validata provided the service of verifying transactions involving credit cards, checks and lost or stolen airline tickets (Bryan, Tr. 245, 276). In contrast to credit authorization (*see* Finding 23, *supra*), credit verification calls for a search of a "negative" file containing those accounts not to be honored. Validata's "negative" file was drawn from data supplied by, among others, Master Charge, American Express, Diner's Club, Carte Blanche and BankAmericard (Bryan, Tr. 247-48). Validata was designed for use in the clustered or multi-terminal environment. Airport terminals were considered to be particularly appropriate sites (Kovar, Tr. 1254), but Validata also was advertised for use in shopping malls (Kovar, Tr. 1326-27).

27. *System Uses:* Airlines and national car rental agencies were the major subscribers to the Validata service (Bauchwitz, Tr. 1820, 1827; Bryan, Tr. 245, 279). Indeed, 95 percent of all Validata revenues came from airlines and car rental agencies (Bryan, Tr. 279). Validata proved unworkable for shopping malls because of that type of facility's inability to impose upon its tenants the degree of control exercised by airline terminals (Kovar, Tr. 1256). Validata was used in other than multi-clustered environments as an accommodation to some customers but not frequently (Kovar, Tr. 1320-23). [15]

C. FDSI Terminals

28. On April 23, 1974, TRW acquired FDSI (Finding 4, *supra*). FDSI devices were predominantly large machines designed for use in

banks and savings and loans (Kovar, Tr. 1262–63; Bauchwitz, Tr. 1875). The principal FDSI terminals offered for sale during the complaint period are described in Findings 29–31, *infra.*

29. The FDSI TT-115, which lacked an imprinter, was designed for consumer use in the very specialized environment of a supermarket check stand (Kovar, Tr. 1265; CX 159). The TT-115 System operated along lines very similar to those of the TRW System 4000 (Close, Tr. 1592). The TT-115 was the only TRW or FDSI device which contained a magnetic stripe card reader (Kovar, Tr. 1267). In addition, the TT-115 featured, in order to provide security to the consumer user, a Personal Identification Number (PIN) used in conjunction with the terminal keyboard (PIN pad) (Kovar, Tr. 1264–65; Bauchwitz, Tr. 1831; CX 163). The TT-115 was designed for and sold only to Glendale Federal Savings and Loan for use in the Smith Food King Chain (Kovar, Tr. 1269; *see also,* Findings 39–42, *infra*). During the complaint period, the TT-115 cost $1,675 (Bauchwitz, Tr. 1907). William J. Bauchwitz, a planning staff member of TRW's Communications Systems and Services Division, indicated that the per terminal economics of the TT-115 and AMCAT I were, in some circumstances, comparable (Bauchwitz, Tr. 1909). This parity of economies could be upset, however, by the specific needs of an individual buyer (Bauchwitz, Tr. 1910–14).

30. FDSI, under the auspices of TRW, also produced some 10 prototype models of the TT-116 (Bauchwitz, Tr. 1864). The ability of the customer to insert a check for validation into the terminal was the distinctive feature of the TT-116 (Kovar, Tr. 1299–1301; Bauchwitz, Tr. 1861; CX 104-Z-17). The TT-116 prototype models were shown to Wells Fargo (Kovar, Tr. 1310). [**16**]

31. During the complaint period, FDSI produced foam board mock up models only of the TT-117. The TT-117 was meant to perform credit authorization, check validation and other electronic funds transfer functions at supermarket cash register counters (Bauchwitz, Tr. 1864–65; CX 104-Z-18; CX 104-Z-19; CX 244-Z-29; CX 244-Z-31).

D. The AMCAT I

32. *Generally:* A-M had long been in the business of supplying gasoline companies with Zip-Zap machines (invoice and receipt imprinting devices) for use in credit card sales. Because of the increasing losses suffered by the oil companies due to credit card fraud, A-M developed a device, the AMCAT I, for transmitting requests and receiving credit authorization information (Cady, Tr. 1713–15). Although A-M's hopes for marketing the AMCAT I were

not realized (Cady, Tr. 1711–12), the AMCAT I was utilized by some gasoline service stations and small retail stores (*see* Finding 34, *infra*).

33. *System Features:* In contrast to the TRW System 4000, the AMCAT I integrated many of the credit authorization system components into the terminal itself. The inclusion of a modem in the AMCAT I created a "stand alone" terminal. That is to say, the AMCAT I was capable of communicating with a host computer through a specially leased telephone line without the use of a controller or any other externally located piece of equipment (Cady, Tr. 1703–04; Kovar, Tr. 1274; CX 245-Z-97). The AMCAT I, as a result of its integrated nature, was substantially larger than the TRW 4103 Kovar, Tr. 1257; CX 245-Z-93). The AMCAT I was capable of reading either magnetic stripe or raised character plastic cards. The AMCAT I also had a display and imprinter/printer device which allowed it to print a receipt from a plastic card (Cady, Tr. 1703, 1756). [17]

34. *System Uses:* Between January of 1973 and November 6, 1973, AMCAT I's were used predominantly in a "stand alone" environment, *i.e.,* one or two isolated terminals in a relatively small retail establishment (Cady, Tr. 1756–57; Close, Tr. 1568, 1612). Where large retail stores could establish their own system of credit authorization and in-house credit cards, it was not feasible for small retail shops to develop their own credit systems. Small stores tended to look to third party extenders of credit, such as American Express Company, to supply a fully developed electronic credit authorization plan (Close, Tr. 1564, 1584). Small stores, as a result, needed a credit authorization terminal possessing magnetic stripe card reading capabilities since the magnetic stripe card was commonly used by third party credit extenders (Close, Tr. 1570). Moreover, the small retail store favored the integrated terminal for this device reduced modem and phone line costs (Close, Tr. 1565). The AMCAT I, which answered all of the above demands, was accordingly utilized by third party extenders of credit, most notably American Express (Close, Tr. 1583; Cady, Tr. 1721). During the complaint period, AMCAT I's were not used by department stores, airlines, car rental agencies or in financial institutions as teller machines (Cady, Tr. 1752–58; Murphy, Tr. 1178, 1205–06).

E. Other A-M Products

35. During the critical period, any other relevant A-M products were largely variations on the AMCAT I. The AMCAT IC, which was utilized primarily in the First National Bank of Atlanta's "Honest Face" electronic transfer of funds program (*see* Findings 42–46,

*infra*), was an adaption of the AMCAT I which accepted checks and featured a consumer operated terminal (Cady, Tr. 1726–31; CX 195-V; CX 245-Z-96). The AMCAT 2 (CX 245-Z-93) differed from the AMCAT I in its ability to be used in a dial-up telephone system rather than having to be tied to a dedicated telephone line. This modification in the AMCAT I was prompted by the special needs of the oil companies and [18] their service stations. However, apparently very few, if any, AMCAT 2's were actually sold (Cady, Tr. 1724–26). The MODCAT and HALFCAT terminals were pared down versions of the AMCAT I. Although shown to potential buyers, these variations on the AMCAT I were apparently never produced in other than cardboard model form (Cady, Tr. 1741–44).

## IV. Credit Authorization System Transactions Occurring During the Critical Period

### A. The Electronic Funds Transfer Market Generally

36. The outstanding feature of the so-called electronic transfer of funds systems marketplace during the complaint period was its highly experimental and developing state (Benton, Tr. 1689; W. Walsh, Tr. 427; Creekmore, Tr. 33; Noel, Tr. 137; CX 171). The general description of electronic transfer of funds can be broken into three rather more specific categories: the authorization of credit card transactions, the verification or guaranteeing of checks, and the true transfer of funds, *i.e.,* deposits and withdrawals from savings or checking accounts. Indicative of the industry's highly fluid state was the proliferation of systems of different functional capabilities and engineering design. Various systems produced by numerous manufacturers could accomplish one, two or all of the above-named functions (Noel, Tr. 120). Systems, even when similar in the end function performed, were frequently dissimilar in their method of accomplishing that final result (Noel, Tr. 118–20).

37. The following factors were generally agreed to have been taken into account by potential electronic funds transfer systems purchasers: (1) the geographic dispersion of points of sale, *i.e.,* a department store with many points of sale within that store as opposed to a system of gasoline stations, (2) the physical location of terminals including the amount of space allotted per terminal, *e.g.,* the difficulties posed by fitting a terminal into a supermarket check stand, (3) the anticipated transactional volume, (4) the type of credit card and credit system used, *i.e.,* in-house as opposed to a third party credit system, (5) the specific jobs which the terminal was expected

to do, *e.g.,* imprinting and printing capability and (6) the cost of the system (Bauchwitz, Tr. 1577; Bryan, Tr. 273–74). [19]

B. Specific EFT Purchase Transactions

38. *Glendale Federal Savings & Loan Association:* On November 19, 1974, the Board of Directors of the Glendale Federal Savings & Loan Association, pursuant to a proposal made to the Federal Home Loan Bank Board approved a proposal for placing a number of electronic funds transfer terminals in Southern California supermarkets (Barney, Tr. 650–51). The goal of the Glendale Federal proposal was to set up facilities permitting the acceptance of deposits to and the authorization of withdrawals from savings and checking accounts at retail food store checkout stands (Barney, Tr. 648). In implementing this plan, Glendale Federal desired a terminal small enough to fit into the restricted space of a supermarket check stand, keyboard and digital display, a magnetic stripe card reader and a personal identification number pad (PIN pad) (Barney, Tr. 653–55, 658–60).

39. Donald J. Barney, Manager of the Information Systems Division of Glendale Federal, personally contacted TRW, NCR, Burroughs and IBM in late June or early July of 1974 to inquire whether those firms had equipment capable of meeting Glendale Federal's requirements. In addition to those firms solicited, Glendale Federal stood willing to submit its system specifications to any other interested manufacturer. Glendale Federal was approached by representatives of A-M in either late July or early August of 1974. On August 26, 1974, Mr. Barney visited A-M's Los Angeles branch and witnessed a demonstration of the AMCAT terminal (Barney, Tr. 651–52). No manufacturer, whether or not solicited, had equipment that would do what Glendale Federal wanted it to do in the fashion desired (Barney, Tr. 653). The AMCAT, for instance, did not operate at a sufficient baud rate (the rate of communicating from the terminal to the computer) so that the rate of communication was too slow for an adequate service response, the A-M Communication Network required the use of an expensive control unit to gain compatability with the central processing unit, the AMCAT terminal was too large to fit on the check-out stand, and A-M did not offer a PIN pad to insure proper user security (Barney, Tr. 652–55). [20] The TRW 4103 was found to have "the same limitations" such as the lack of a magnetic card reader. However, the 4103 fit the check stand (Barney, Tr. 658). Despite the common deficiencies, Mr. Barney testified "it was clear to me that no manufacturer except TRW was going to be able to design and build a piece of gear and deliver it in

our time frame, for the installation of the original 200 machines" (Barney, Tr. 655; *see also* CX 227-Z-65, CX 227-Z-67). A-M persisted in attempting to sell to Glendale Federal, but never submitted a formal proposal (Barney, Tr. 656, 686; RX 23).

40. TRW began development work on a terminal specially designed for Glendale Federal, the TT-115, in the fall of 1974, negotiated an agreement with Glendale Federal at the end of November 1974 and executed a formal contract of purchase in March of 1975. TRW began delivering completed TT-115's in May of 1975. The first installation of a TT-115 terminal in a Glendale Federal system supermarket occurred on August 23, 1975 (Barney, Tr. 650–52).

41. Some time between February 28 and March of 1975, A-M showed Glendale Federal the MODCAT (Barney, Tr. 656–57). The MODCAT appeared to fit Glendale Federal's specifications of the year before; however, in March of 1975, Glendale was not in the market for a terminal (Barney, Tr. 658).

42. *First National Bank of Atlanta:* The First National Bank of Atlanta, Georgia, had developed an electronic check verification and factoring (*i.e.,* the buying of accounts receivable created by written checks from retail establishments) system. The so-called "Honest Face" system allowed consumer check verification or factoring to take place, by means of a point of sale terminal, at the retail establishment itself (Creekmore, Tr. 11–12). The consumer issued an "Honest Face" card operated the point of sale terminal, which verified or factored the consumer's check. Because the terminal was to be consumer operated, First National of Atlanta insisted that the terminal be equipped with an operator lead through, or prompter device, which would lead the consumer through his use of the terminal (Creekmore, Tr. 67–68). Because the "Honest Face" system was to be activated by a specially issued card, the terminal had to have the capability of reading a magnetic stripe card. Finally, in order to actually verify the check, the terminal had to have [21] an imprinter (Creekmore, Tr. 68–69). Although it was envisioned that "Honest Face" terminals would be installed in all types of retail stores, at the close of 1975 some 375 terminals had been placed only in grocery stores, liquor stores and other stand-alone locations. "Honest Face" terminals were not placed in a major retail store because those stores had too many point of sale locations and because large stores had their own electronic cash registers (Creekmore, Tr. 37–38, 73).

43. In its search to find a manufacturer willing to devise a system featuring a shopper operated terminal, First National Bank contact-

ed 37 electronic terminal vendors, including A-M and TRW (Creekmore, Tr. 59–60). Robert P. Creekmore, the First National Bank of Atlanta, Georgia officer who headed up the Honest Face Program, testified that all terminal vendors balked at developing a shopper operated terminal (Creekmore, Tr. 59).

44. Although TRW never submitted a formal bid, (Creekmore, Tr. 77), Mr. Creekmore testified that "over our period of discussions they [TRW] offered to make certain modifications in new products, that in effect would give partial answers to some of the needs that we had in the terminal we desired" (Creekmore, Tr. 65). However, First National of Atlanta's talks with TRW finally broke down because of TRW's inability to develop a satisfactory shopper operated terminal (Creekmore, Tr. 76–78; Bauchwitz, Tr. 1848).

45. A-M, initially, had neither the hardware to satisfy First National of Atlanta's needs nor the willingness to modify their existing equipment. A-M so opposed First National's idea that a customer operated terminal was desirable and feasible that First National, for a time, angrily refused to have any further discussions with A-M representatives (Creekmore, Tr. 81; Cady, Tr. 1729). A-M subsequently warmed to the idea of the prompter device, developed the AMCAT IC (*see* Finding 35, *supra*) and negotiations between A-M and First National were resumed (Cady, Tr. 1730; CX 193-V). [22]

46. A-M's willingness to meet First National's requirements combined with the unwillingness of the other terminal vendors, allowed A-M to secure, by February of 1975, the "Honest Face" contract (Creekmore, Tr. 77, 81).

47. *Metroteller/Erie County Savings & Loan, Erie, Pa.:* Metroteller (or Consumer Save System Corporation and Consumer Service Corporation as it was known during the critical period) was a wholly-owned subsidiary of the Erie County Savings Bank (Wolfson, Tr. 21). Metroteller existed to develop remote banking facilities, *i.e.,* a facility which would allow a customer of a financial institution to make savings and checking account deposits and withdrawals while in a retail establishment (Wolfson, Tr. 20–21, 33–35). Metroteller provided this service not only to its parent, but to other local financial institutions (Wolfson, Tr. 25).

48. In October of 1974, Erie County Savings Bank began a search for a point of sale terminal. Joseph Wolfson, President of Metroteller, described the search as a process of contacting many terminal vendors and then narrowing the field as it became apparent which suppliers were offering products well suited to Erie National's requirements (Wolfson, Tr. 26–27). Among the half dozen vendors

contacted by Metroteller were A-M and TRW's FDSI division (Wolfson, Tr. 25; Bauchwitz, Tr. 1874–75).

49. Beginning in July of 1974 and through the end of 1975, Metroteller met with TRW and FDSI representatives to discuss the suitability of TRW and FDSI products as remote banking terminals. Metroteller was shown the TT-108. Metroteller officials were taken to California to observe the TT-115's used by Glendale Federal (Wolfson, Tr. 45–47, 49–50, 53). The TT-140, which Metroteller eventually purchased, was not shown during the critical period (Bauchwitz, Tr. 1880).

50. At the same time that Metroteller was being shown TRW's products, A-M was also attempting to sell their AMCAT I and 2 to Metroteller (Wolfson, Tr. 60–61, 63–64). Because of programming costs as well as expense in adapting Erie National's existing system to the AMCAT terminals, Metroteller did not purchase any of the A-M terminals (Wolfson, Tr. 64–67). [23]

51. *Buckeye Federal Savings & Loan, Columbus, Ohio:* During the critical period, Buckeye Federal implemented a remote service unit terminal program. It was anticipated that terminals, located in retail stores, would be able to make deposits, withdrawals, confidential inquiries and guarantee checks (Guthrie, Tr. 86, 87, 91–92). Buckeye decided that it was interested in securing a terminal possessing the capability to print a receipt, a ten key pad—so that a customer could utilize a personal security code—a magnetic stripe card reader and an imprinter (Guthrie, Tr. 119–20).

52. Buckeye initially attempted to contact "anybody we could think of who had a credit authorization device or was in the terminal business" (Guthrie, Tr. 103). A-M and TRW were among the manufacturers contacted by Buckeye Federal (Guthrie, Tr. 103, 110). A-M was the only vendor with a terminal integrating all of the above-described functions. Nevertheless, TRW made some efforts or representations of efforts, of attempting to modify their product to meet Buckeye's goals. Stephen Guthrie, Buckeye's Senior Vice President for Marketing and Data Processing, testified that FDSI and TRW products were never seriously considered (Guthrie, Tr. 120).

53. Buckeye eventually installed AMCAT terminals on April 21, 1975 (Guthrie, Tr. 91). Terminals have subsequently been installed at supermarket offices and courtesy windows, and discount stores (Guthrie, Tr. 93, 96).

54. *Credit Systems, Incorporated (CSI):* Credit Systems, Incorporated, of St. Louis, Missouri, was a processing center for 785 banks handling Master Charge and Visa cards (Bender, Tr. 194). In April of

1974, CSI began to formulate the design for a system which would handle check guarantees for retail stores at the point of sale and act as an automatic teller for financial institutions (Bender, Tr. 197, 201). The terminals developed were intended to be used in both banks and retail outlets (Bender, Tr. 200). [24]

55. In order to realize their system design, CSI conducted a study of electronic transfer of funds manufacturers. The study's purpose was to ascertain the universe of manufacturers and the particular computer hardware produced by each (Bender, Tr. 202–03). As a result of their survey, CSI classified potential point of sale terminal vendors into one of three categories: (1) mechanical reader with automatic printer/imprinter, (2) mechanical reader, non-printing, and (3) manual input. A-M was placed in the first classification, TRW in the last. Neither A-M nor TRW was listed under the mechanical reader, non-printing category (Bender, Tr. 220–22).

56. CSI, during the critical period, sent out requests for quotation to all manufacturers (CX 102), whatever their category, for a point of sale terminal (CX 101). Both A-M and TRW responded to CSI's request for quotation (CX 103; CX 104). Although TRW admitted in its response that its terminal lacked a printing capability, TRW stated that it expected to have such capability by the fall of 1976 (Bender, Tr. 222–23; CX 104-Z-4-5). TRW's response, nevertheless, talked of the "excellent match" between CSI's needs and TRW's equipment (CX 104-F). Because of legislative and regulatory action, CSI did not actually purchase any terminal (Bender, Tr. 213–14). However, Jay Bender, President of Systems Service for CSI, testified that TRW's present inability to supply a terminal with printing and imprinting capacity made TRW's response unsatisfactory (Bender, Tr. 228, 233; Bauchwitz, Tr. 1848).

57. *American Express:* During the complaint period, American Express Company was the major purchaser of AMCAT terminals (Cady, Tr. 1721). This situation was the result of both a good relationship between American Express and A-M (Cady, Tr. 1718–19) and the suitability of the AMCAT terminal to American Express needs (Cady, Tr. 1719–20; Bryan, Tr. 281–82; Finding 33, *supra*). Peter Bryan, an Executive Vice President of Payment Systems, Inc., a subsidiary of American Express, and a former TRW employee, testified that American Express never seriously considered TRW's terminal. American Express, however, did go to the trouble of assessing whether TRW's product would answer American Express' needs (Bryan, Tr. 282). [25]

58. *Virginia Federal Savings & Loan, Richmond, VA.:* From 1974, Virginia Federal Savings & Loan began considering the purchase of

terminals for a remote unit system similar to that created by Buckeye Federal (Fleming, Tr. 394, 397, 404; *see* Finding 51, *supra*). Virginia Federal, though it ultimately purchased the AMCAT terminal, had no contact with A-M representatives prior to November 6, 1975 (Fleming, Tr. 407). Virginia Federal was aware, however, of the existence of the AMCAT and its use by California Federal Savings and Loan (Fleming, Tr. 395; see Findings 60–61, *infra*). During the November 1974 - March 1975 period, Virginia Federal discussed the suitability of TRW's terminals for the Virginia Federal System (Fleming, Tr. 400–03). The TRW product performed many, but not all, of the functions desired by Virginia Federal (Fleming, Tr. 402–04). Even the AMCAT, which met most of Virginia Federal's demands, was unable to produce receipts (Fleming, Tr. 404–05). The major objections of Virginia Federal to TRW were the difficulties in servicing and the expense of the TRW system due to the fact that a mini-computer would have been required for each location housing a terminal (Fleming, Tr. 402).

59. *Continental National Bank:* The Continental National Bank of Chicago, Illinois used the AMCAT in supermarkets to authorize charge account purchases, guarantee checks and for Master Charge transactions (T. Walsh, Tr. 543, 546). Continental did not consider any terminal other than the AMCAT (T. Walsh, Tr. 551).

60. *California Federal Savings & Loan, Los Angeles, CA.:* During the critical period, California Federal Savings & Loan placed electronic transfer of funds terminals, which were activated by plastic cards, at supermarket and liquor store locations. Customers holding California Federal cards could make deposits and withdrawals from their accounts and cash checks (Weber, Tr. 601). This initial system used the AMCAT I. This record contains no evidence about the competitive circumstances surrounding this purchase decision (Weber, Tr. 613). [26]

61. California Federal subsequently began to contemplate expansion of its original system. It wished to expand the terminal network into the Vons Grocery Store chain and hoped to place terminals at the check-out stand counter in addition to special courtesy booths (Weber, Tr. 614, 626–27). While this expansion was being planned, California Federal had discussions with TRW and A-M representatives about terminals suitable for check-out counter use. California Federal was told that the TRW 4103 terminal would function at either a courtesy booth or check-out counter. A-M represented that its MODCAT was suitable for check-out counter use (Weber, Tr. 627–28, 640–41; CX 302; CX 303). Due to the lack of a terminal with printing and imprinting capability, negotiations between TRW and

California Federal eventually broke down. TRW never submitted a formal bid (Bauchwitz, Tr. 1883–85).

62. *Bank of America, San Francisco, CA.:* As early as 1973, Bank of America had designed an experimental electronic transfer of funds system (Dougherty, Tr. 693–97). By 1975, Bank of America wanted to enlarge upon the original system. In July of 1975, Bank of America issued a request for information (CX 243-C to 243–Y) for terminals, controllers and subsystems necessary to support merchant point of sale operations. These requests for information were issued to some 29 vendors. Bank of America received responses from 10 of those 29 vendors, including A-M and TRW (Dougherty, Tr. 702, 710–11; CX 244; CX 245-A). It should be noted that Bank of America recognized a distinction between a request for information and a request for proposal. That distinction was that a request for information was used to determine available suppliers of equipment, characteristics of equipment and the ability of suppliers to meet generally basic requirements. By contrast, a request for proposal was viewed as a firm indication of the bank's intent to purchase some amount of equipment as a direct result of receiving responses (Dougherty, Tr. 728–29; CX 243-A). TRW replied to Bank of America's request for information. TRW officials testified that TRW was unable to meet Bank of America's specifications (Bauchwitz, Tr. 1889–93). Nevertheless, TRW's response, in its Executive Summary section, refers to "the excellent match between our equipment and the capabilities and system requirements defined in your RFI" (CX 244-K). Later in TRW's response, the following statement appears: "The requirement-by-requirement comparison which follows indicates an excellent match between Bank of America's requirements and the capabilities of TRW" (CX 244-Q). [27]

63. *Security Pacific Bank, Los Angeles, CA.:* During the critical period, Security Pacific Bank devised an electronic transfer of funds system utilizing magnetic stripe cards. These cards were "read" by terminals located in supermarkets. The terminals were to be connected via leased telephone lines with a central data base in Security Pacific's computer operations center (Oie, Tr. 737–38). Without a formal invitation, TRW representatives paid several visits to Security Pacific during the course of 1975. During these visits, TRW representatives loaned a TRW terminal to Security Pacific for a Security Pacific branch manager's show (Oie, Tr. 742–44). During 1975, A-M also visited Security Pacific. A-M's calls typically involved conversations with Security Pacific officials and leaving printed material describing the AMCAT terminal (Oie, Tr. 744–45). Security

Pacific ultimately purchased terminals from the Concord Computing Company (Oie, Tr. 740).

64. *Wells Fargo Bank, San Francisco, CA.:* During the critical period, Wells Fargo Bank developed Wells Service. Wells Service provided credit card authorization, check authorization and check guarantee to retailers (Overmire, Tr. 758). The decision of Wells Service to use TRW terminals was apparently made by default. Wells Fargo Bank did not consider any other vendors, including A-M, for Wells Service (Overmire, Tr. 761, 776).

65. However, Wells Fargo Bank, also during the critical period, considered developing an electronic transfer of funds system for supermarkets (Overmire, Tr. 761). Wells Fargo talked to TRW personnel over the last half of 1975 about the development of suitable terminals (Overmire, Tr. 761–64). TRW, as a result, developed prototypes for Wells Fargo. This involved modification of existing TRW terminals enabling the terminal housing to contain an imprinter with a slot into which a shopper could insert a check as well as electronic modification allowing the imprinter to print on the check (Overmire, Tr. 765–66). [28]

66. During 1975, Wells Fargo Bank also had contact with A-M regarding Wells Fargo's proposed expansion of electronic funds transfer services into the supermarket environment. Specifically, Wells Fargo looked at the AMCAT I. Mr. Peter Overmire, Vice President, Finance and Analysis Division of Wells Fargo Bank, testified that, in his opinion, the AMCAT I would have satisfied Wells Fargo's supermarket application needs. However, it was also Overmire's opinion that the AMCAT I was unduly cumbersome for check approval (Overmire, Tr. 766–67). It was eventually decided that the TRW terminal was to be used. However, Wells Fargo's supermarket application project never went beyond an internal experimental phase (Overmire, Tr. 768–69).

## V. Respondents' Charges That Due Process Was Denied Them and That the Administrative Process Was Abused

67. By letter of August 8, 1975, the Federal Trade Commission first advised respondents of the investigation leading to the complaint in this matter. A proposed complaint accompanied the August 8 letter (Solganik, Tr. 1961–62; RX 54-A).

68. On September 8, 1975, counsel for respondents met with members of the Cleveland Regional Office of the Federal Trade Commission to discuss the August 8 letter and proposed complaint. Respondents, at the September 8 meeting, informed the Federal Trade Commission that Horace Shepard previously had decided not

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to stand for re-election to the Board of Directors of A-M (Gorman, Tr. 1053; Solganik, Tr. 1965; RX 54-C), but Mr. Shepard told A-M that the Federal Trade Commission's letter was the reason for his decision not to stand for re-election (Shepard, Tr. 884–87). The next day, Mr. Thomas B. Clark, Secretary and Corporate Counsel of A-M, met with the Cleveland Regional Office staff to discuss a letter similar to that received by TRW on August 8, 1975, and an attached proposed complaint (CX 306-A and B; RX 54-D). Although Mr. Clark offered to provide the Commission staff with information about A-M's business and products, neither then nor at any other time prior to the service of the complaint did the Federal Trade Commission request information from A-M (Solganik, Tr. 2012; CX 306–A and B; RX 54–E). [29]

69. On October 31, 1975, the Federal Trade Commission requested from TRW information about dollar sales volume for certain TRW products, the date of TRW's acquisition of FDSI and a description of FDSI products. The October 31 letter, which was received by TRW on November 3, 1975, requested TRW to provide this data by November 7, 1975 (Gorman, Tr. 1086–87; CX 305-E). TRW informed the Federal Trade Commission that it would be unable to meet the requested date for submitting the three categories of data (Gorman, Tr. 1087). On November 14, 1975, the Cleveland Regional Office of the Federal Trade Commission forwarded to Washington, D.C., its recommendation that the complaint issue. At that time, respondents had not replied to the October 31, 1975 request for information (Solganik, Tr. 2020; RX 54-H to RX 54-H-1).

70. After learning about the forwarding of the recommendation, respondents requested and had a meeting with staff of the Federal Trade Commission in Washington, D.C., for the purpose of making a presentation as to why no complaint should issue (Gorman, Tr. 1056–57; Solganik, Tr. 1972–74). On December 10, 1975, a meeting was held in the Office of the Executive Director of the Federal Trade Commission. In attendance were Clinton Batterton, Assistant to the Director, Bureau of Competition, Federal Trade Commission; Robert Davidson, Counsel for TRW; John F. Dugan, Deputy Executive Director for Regional Operations, Federal Trade Commission; Joseph Gorman, Counsel for TRW; Lawrence Fox, Office of Regional Operations, Federal Trade Commission; Charles McCormick, Economist, Bureau of Economics, Federal Trade Commission; John M. Mendenhall, Law Clerk, Cleveland Regional Office, Federal Trade Commission; Richard Pogue, Counsel, Jones, Day, Reavis and Pogue, representing Shepard and TRW; Vivian L. Solganik, Assistant Regional Director, Cleveland Regional Office, Federal Trade Com-

mission; and Daniel Schwartz, Assistant Director for Evaluation, Bureau of Competition, Federal Trade Commission (Dugan, Tr. 2048–49; Solganik, Tr. 1974–75). At the close of the December 10 meeting, Mr. Gorman orally requested and received from Mr. Daniel C. Schwartz, the senior staff person present for the Federal Trade Commission, an assurance that TRW would be informed as soon as proposed complaint was forwarded (Solganik, Tr. 2026–28; Schwartz, Tr. 2032–33). [30]

71. Following the December 10, 1975, meeting, respondents next heard from the Federal Trade Commission some six months later, on June 25, 1976 (RX 54-M). By telephone call, Commission staff informed counsel for respondents that on June 17, 1976, the Federal Trade Commission had voted to direct the issuance of a complaint (Gorman, Tr. 1070; Peterson, Tr. 2067, 2071; RX 54-M; RX 55).

72. On July 9, 1976, respondents filed a motion for reconsideration of the issuance of the complaint and, in the alternative, urged the Federal Trade Commission, pursuant to Section 2.21 of the Commission's Rules of Practice, to accept an assurance of voluntary compliance from respondents (RX 53). On July 13, 1976, the Federal Trade Commission referred the motion to an administrative law judge for determination. The Commission itself refused to consider respondents' motion for reconsideration and related relief (RX 3-G; RX 54-U to RX 54-U-3; RX 55-A).

73. On July 22, 1976, respondents were served with the complaint and the presiding administrative law judge was identified (RX 40-D; RX 54-V).

74. The motion for reconsideration referred by the Federal Trade Commission to the administrative law judge was certified to the Federal Trade Commission by the administrative law judge in September of 1976 (88. F.T.C. 544 (1976)).

75. On October 13, 1976, the Federal Trade Commission denied TRW's motion for reconsideration (88 F.T.C. 544 (1976)). [31]

## Discussion

### The Case Is Not Moot Even Though the Interlock Was Dissolved

Respondents argue that Mr. Shepard's decision not to stand for re-election to the A-M Board of Directors moots this proceeding. Administrative tribunals are not under the "case or controversy" constitutional constraint federal courts are (U.S. CONST. art. III, § 2; *Powell* v. *McCormick,* 395 U.S. 496 n.7 (1969)), but the doctrine of mootness is substantially the same for either. *Compare Tung-Sol*

*Electric, Inc.*, 63 F.T.C. 632 (1963) with *Walling* v. *Helmerick & Payne, Inc.*, 323 U.S. 37 (1944).

The Supreme Court has ruled upon the concept of mootness in the context of a Section 8 case:

> Both sides agree to the abstract proposition that voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot. A controversy may remain to be settled in such circumstances, *e.g.*, a dispute over the legality of the challenged practices. The defendant is free to return to his old ways. This, together with a public interest in having the legality of the practice settled, militates against a mootness conclusion. For to say that the case has become moot means that the defendant is entitled to a dismissal as a matter of right. The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement.
>
> The case may nevertheless be moot if the defendant can demonstrate that "there is no reasonable expectation that the wrong will be repeated." The burden is a heavy one. Here the defendants told the court that the interlocks no longer existed and disclaimed any intention to revive them. Such a profession does not suffice to make a case moot although it is one of the factors to be considered in determining the appropriateness of granting an injunction against the now-discontinued acts. *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 632–33 (1952) (footnotes and citations omitted).

[32] A-M has entered into a consent agreement with the Commission which should eliminate, for that firm, further Section 8 difficulties. Mr. Shepard, by contrast, can continue to sit on TRW's Board of Directors for seven more years. Mr. Shepard's reputation for business acumen makes it likely that his services will be solicited by other firms and that other improper-interlock questions could arise. *See United States* v. *Trans-Missouri Freight Ass'n,* 166 U.S. 290 (1897). In my view, respondents have not convincingly met the heavy burden demanded of them by *W.T. Grant.* Respondents' reliance upon *United States* v. *Cleveland Trust Co.,* 392 F. Supp. 699 (N.D. Ohio 1974) is misplaced as they more closely resemble the position of defendant Cleveland Trust, as to whom the proceedings were not moot. Pneumo-Dynamics Corporation, another defendant there had effectively eliminated the means as well as the motive for violating Section 8. Similarly, *Paramount Pictures Corp.* v. *Baldwin-Montrose Chemical Co., Inc.,* 1966 Trade Cases ¶ 71,678 (S.D.N.Y. 1966), is of no help to respondents because the defendant there also had rid itself of the means for violating Section 8.

The Provisions of Section 8 of the Clayton Act

A reading of those parts of Clayton 8 applicable to the interlock

between TRW and A-M through Mr. Shepard shows that four criteria must be met before its provisions apply. These are:

(1) One of the interlocked corporations must have capital surplus and undivided profits aggregating more than one million dollars;

(2) Each of the interlocked corporations must be engaged in interstate commerce;

(3) Neither of the corporations may be a bank, banking association, savings bank, trust company or common carrier; and

(4) The corporations, by virtue of their business and location of operation, must be competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the federal antitrust laws. *See generally* Wilson, *Unlocking Interlocks: The On-Again Off-Again Saga of Section 8 of the Clayton Act,* 45 ANTITRUST L.J. 324–25 (1976).

[33] Here each corporate respondent admitted that it met the million dollar requirement and that it was engaged in commerce as defined by Section 1 of the Clayton Act. Neither corporate respondent asserted that it is a bank, banking association, savings bank, trust company or common carrier. (Note: The Federal Trade Commission has challenged, under Section 5 of the Federal Trade Commission Act, an interlock between a savings and loan association and a bank. *Perpetual Federal Savings and Loan Association,* Dkt. 9083 [90 F.T.C. 608] (FTC Initial Decision, March 28, 1977). The initial decision by FTC Administrative Law Judge Timony holds that the interlocks challenged violated Section 5 of the FTCA. *Slip op.* at 41. That decision is on appeal to the Commission.)

Both respondent TRW and respondent Horace Shepard, as well as former respondent A-M, deny that TRW and A-M were competitors during the critical period (Answer of TRW, ¶ 10; Answer of Horace Shepard, ¶ 10; Answer of A-M, ¶ 6). Thus, the crux of the matter to be resolved, insofar as the charges brought under Clayton 8 are concerned, is whether TRW and A-M were competitors during the critical period. Clayton 8 itself does not indicate who are competitors beyond reciting that the corporations' business and location of operation are factors to be considered. Since both TRW and A-M are large, nationally and internationally engaged firms doing business in many of the same geographic areas (Findings 2–3, 8–9), their activities are such that the location of operation language in Section 8 is clearly met. It is not so clear whether their business activities were such during the critical period as to make them competitors.

## For Purposes of Section 8, TRW And A-M Were Competitors During the Critical Period

Neither the Clayton Act nor its legislative history defines "competitors." Judicial opinions and writings regarding Clayton 8 do not go into great detail about the meaning of this word. This, no doubt, is because Clayton 8 decisions are infrequent and the statutory requisite of "competitors" has usually been stipulated. [34]

Complaint counsel argue that a showing that two corporations are in a position to form any agreement to violate the antitrust laws makes them, for purposes of Section 8, competitors (CCB at 16). I do not agree. In *United States* v. *Crocker National Corp.,* 422 F. Supp. 686 (N.D. Cal. 1976), an argument similar to complaint counsel's was made. Judge Peckham, in rejecting the argument, stated that the anomalous result of so holding would be that vertically related companies—suppliers and buyers—are competitors. 422 F. Supp. at 703. If followed to its logical end, the argument suggests, contrary to fact, that all corporations compete. This, because any two corporations could agree to do something violative of any antitrust law, *e.g.,* agree as to prices or to limit production, each of which is a *per se* violation of the antitrust laws. *See* REPORT OF THE ATTORNEY GENERAL'S COMMITTEE TO STUDY THE ANTITRUST LAWS (1955) at 12.

Section 8 requires a finding of both a competitor relationship and the ability of those competitors to eliminate competition by agreement. The first and significant factual determination is whether the interlocked firms are or were competitors. Since *Sears, Roebuck* v. *United States,* 111 F. Supp. 614 (S.D.N.Y. 1953), Section 8 has been said to have a "per se character." Halverson, *Interlocking Directorates—Present Antitrust Enforcement Interest Placed in Proper Analytical Perspective,* 21 VILL. L. REV. 393, 398-99 (1976). Such statements are only partially correct. Section 8 operates in *per se* fashion only after the factual determination of a competitor relationship. Judge Weinfeld, in *Sears, Roebuck,* explained the reason for the controlling effect of a finding of a competitor relationship over the "so that," *i.e.,* hypothetical anticompetitive agreement, portion of Section 8:

> This conclusion [that a per se reading was to be given to the "so that" branch of the Clayton 8 competitors test] is compelled because of the futility of trying to decide whether a given hypothetical merger would violate the pertinent sections of the antitrust laws. . . . The government's position presents no such difficulty. To accept its workable per se test . . . permits the prohibitory features of § 8 to be administered with the full scope which the legislators must have contemplated. 111 F. Supp. at 617.

[35] Section 8 becomes concerned about potential anticompetitive

agreements only when competing firms with a common director are involved. Once facts are found sufficient to conclude that two firms in interstate commerce compete (the three other statutory requisites of Section 8 having been met), analysis shifts to Section 11, the Clayton Act's enforcement provision.

In *Crocker,* Judge Peckham also said that, for Section 8 cases, "[w]hether two corporations were, in fact, competitors was apparently to be determined according to the traditional tests of competition—common sales in the same product and geographic market. This is the import of the phrase 'by virtue of their business and location of operation.' " 422 F. Supp. at 703–04. Previous Clayton 8 decisions have found, in seeming conformity with *Crocker,* a substantial quantity of common sales. In *Sears, Roebuck,* Judge Weinfeld noted that Sears, Roebuck and Goodrich Tire and Rubber Company conceded that they were competitors "in the sale . . . at retail" in 97 communities and 31 states to a volume of $80,000,000 annually of such things as refrigerators, hardware, sporting goods, auto supplies, tires, radios, television sets and toys. 111 F. Supp. at 617, 620. The Federal Trade Commission's recent decision in *Kraftco Corporation,* 89 F.T.C. 46, reflects that Kraftco and SCM stipulated that they were competitors in various parts of the United States in the sale of margarine, edible oils and barbecue sauce to a total of some $83,000,000. 89 F.T.C. at 48. It is important, however, to note that in *Kraftco* and *Sears, Roebuck* the statutory requisite of "competitors" was either admitted or stipulated. No precedent has been found in which the presence of sales or a certain dollar amount of sales has been conclusive in arriving at a decision about whether two firms were Section 8 competitors.

In my view, *Crocker's* test for competitors is too restrictive, for it may be read to suggest that the existence of competition hinges upon "sales" having been made. There can, however, be intense competitive efforts by firms interested in making a sale without any or all of them succeeding in persuading the buyer to purchase. Nonetheless, this effort, even when no sale results, indicates a competitor relationship. **[36]** More in keeping with my own notion of the type of activity which ought to be seen as evidencing the existence of a competitive relationship is the opinion of Mr. Justice Stevens, then sitting on the United States Court of Appeals for the Seventh Circuit, in *Protectoseal Company* v. *Barancik,* 484 F.2d 585 (7th Cir. 1973). The *Protectoseal* opinion indicates that two corporations competed for the same business in selling safety containers, faucets, fittings and accessories for flammable liquids. In fact, the defendant so testified. 484 F.2d at 587. Justice Stevens concluded that the language of Section 8 "contemp-

lates a horizontal market relationship between the companies, [which] implies that a market-wide analysis of competition is unnecessary." 484 F.2d at 589. In *Brown Shoe* v. *United States,* 370 U.S. 294 (1962), a Clayton 7 merger case, the United States Supreme Court said that: "[A]n economic arrangement between companies performing similar functions in the production or sale of comparable goods or services is characterized as 'horizontal'." 370 U.S. at 334. *Perpetual Federal Savings & Loan Association,* in focusing upon "rivalry" rather than "sale" to support a finding of competitors, further advances understanding of the horizontal competitors relationship. The ALJ, in *Perpetual,* found on the basis of a stipulation as well as evidence that the interlocked bank and savings and loan association competed "in attracting savings and making residential loans." *Slip op.* at 20.

This discussion has not finally clarified the question as to who are "competitors" beyond the elementary notion of a horizontal relationship marked by rivalry. I believe that the way to come to grips with the concept of competitors is to recollect what Section 8 sought to protect. *Sears, Roebuck,* in its summary of the legislative history of Clayton 8, found that Section 8 was enacted to preserve competitive relationships and, as such, was to be broadly construed. Judge Weinfeld wrote:

> . . . Interlocking directorships on rival corporations had been the instrumentality of defeating the purpose of the antitrust laws. They had tended to suppress competition or foster joint action against third party competitors. The continued potential threat to the competitive system resulting from these conflicting directorships was the evil aimed at. Viewed against this background, a fair reading of the legislative [37] debates leaves little room for doubt that, in its efforts to strengthen the antitrust laws, what Congress intended by § 8 was to nip in the bud incipient violations of the antitrust laws by removing the opportunity or temptation to such violations through interlocking directorates. 111 F.Supp. at 616.

In this light, the best view as to who competitors are, in a Section 8 context, can be seen in the classic definition of competition set forth in *United States* v. *Standard Oil of New Jersey,* 47 F.2d 288 (E.D. Mo. 1931), a Sherman Act merger decision in which Circuit Judge Stone wrote "competition is, in its very essence, a contest for trade." 47 F.2d at 297. To the same effect is language in *United States* v. *The Philadelphia National Bank,* 201 F. Supp. 384 (E.D. Pa. 1952), *rev.* 374 U.S. 321 (1963):

> . . . the Congress by use of the word "competition," intended to preserve free and open markets wherein the rivalry of the commercial firms, in the same line of endeavor, for the patronage of the common customer, would be demonstrated by a business atmosphere where free purchasers and free sellers, under no obligation to

sell, would enter into contracts of purchase and sales (or service contracts) because of the actual inducements offered, such as quality of product, terms, delivery and the many other factors which make for good business relations, having in mind the peculiar situations, facts and circumstances which govern the particular transactions between individuals in organizations. 201 F. Supp. at 352.

The foregoing decisions support the view that in looking for standards by which to judge two firms "competitors," the critical element is the "contest" or "rivalry" for trade but an attempt to restrict the concept of "rivals" or "competitors" to a fixed set of circumstances would be unwise. As the quotation from *Philadelphia National Bank* suggests, the facts which may warrant the conclusion of rivalry for trade are too numerous to catalogue. The manner in which corporations and businessmen compete will change over time, but the relationship of "competitors"—when firms or individuals find themselves in a contest for trade—is constant. It is the relationship, rather than the ever shifting chain of causal factors, which Section 8 seeks to preserve and foster. All of this notwithstanding, [38] it still is necessary to do more than replace the legal conclusion of "competitors" with the equally unhelpful tag of "rivals."

"Competitors" in Section 8 does not have to be defined by a narrow set of announced facts because there is a simple method of inquiry for arriving at this legal conclusion. A finding that firms are competitors, for the purposes of Section 8, is reachable by using a conjunctive approach. That is: (1) Does a buyer, at least initially in the purchasing process, perceive, with good cause (*e.g.,* he observes their advertising, salesman calls, displays at conventions, etc.) that the products or services of two firms are more or less equally suitable to his end use? and (2) Have the charged sellers oriented their marketing efforts toward that buyer? This method of inquiry does not focus exclusively upon consummated sales, but considers all activity in the contest for trade. By considering the question of "Who are competitors?" from both a buyer's and seller's perspective, allegedly illegally interlocked sellers are safeguarded from eccentric buyer perceptions. Further, Section 8 is not rigidified by application of inappropriate antitrust tests. This last point is well illustrated by attempts to apply the cross-elasticity of demand and product interchangeability tests to a Section 8 case (*see* Munyon, Tr. 1365–73). *See generally, United States* v. *duPont deNemours & Co.,* 351 U.S. 377 (1956); *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 325–28 (1962); *see also,* R. Posner, *Economic Analysis of Law,* 121–24 (1972). These tests were developed in order to define product markets for Sherman Act and Clayton Act monopoly, trade restraint or merger

cases. In such cases, the antitrust laws are concerned with arriving at an objective economic measure of competitive harm. Section 8 on the other hand is oriented toward preserving the competitive situation as well as instances of objective competition. We are guided by Mr. Justice White's warning that "[I]nterchangeability of use and cross-elasticity of demand are not to be used to obscure competition but to 'recognize competition where, in fact, competition exists.' " *United States* v. *Continental Can Co.,* 378 U.S. 441, 453 (1963). Cross-elasticity of demand and product interchangeability are of use in a Section 8 proceeding, but they must not become the beginning and end of factual inquiry. [39]

The conjunctive approach leaves open the meaning of terms such as "purchasing process," "end use" and "marketing efforts" for application to the facts of a particular case. This is desirable because sophisticated pieces of computer hardware designed for use by large, institutional buyers are sold in a very different manner from the loaf of bread found on the local grocery shelf or the golf balls in a pro shop. Section 8 must be flexible enough to preserve the competitor relationship whether sophisticated devices, specialized products or consumer goods are being marketed by the interlocked corporations.

The attempts by TRW and A-M to persuade common prospective users, purchasers and lessees to buy or rent equipment capable of performing substantially identical functions evidences the fact that they were competitors during the critical period (*e.g.,* Findings 43-47). The electronic funds transfer and credit validation equipment industry was in its infancy when the interlock existed. There is no extended history with which one can measure competition between A-M and TRW in this industry before the Shepard interlock. In fact, the AMCAT, one of the devices A-M offered to prospects during the period for use in electronic fund/credit transactions, which competed with TRW's 4103 terminal, was not ready for the marketplace until Mr. Shepard became a board member of A-M (Finding 35). This is ironic because a relative scarcity of fully developed off-the-shelf "hardware," available from these companies during the critical period but with products adaptable to similar end uses, could be the genesis of greater anti-competitive effects from a common director than would vigorous attempts to sell fully developed "hardware." This, because design and production were still flexible and much of the effort by producers of devices for use in the electronic funds transfer industry such as TRW and A-M was toward persuading potential users to modify their plans and objectives so that the devices the supplier offered would meet the purchaser's needs (*e.g.* Findings 40, 45). [40]

In order to support the charge that a Section 8 violation occurred, complaint counsel does not here allege and need not prove that anticompetitive effects ensued from the interlock. Section 8 is designed to protect the market from future problems as well as present ones, and a developing industry is a most appropriate focus for enforcement. No one can second guess as to the direction in which two interlocked companies would have invested in research and market development had there been no common director. As the court said in *Sears,* 111 F. Supp. at 620:

> . . . a director serving in a dual capacity might, if he felt the interests of an interlocking corporation so required, either initiate or support a course of action resulting in price fixing or division of territories or a combination of his competing corporations against a third competitive corporation. The fact that this has not happened up to the present does not mean that it may not happen hereafter.

## The *De Minimis* Defense Does Not Apply To Section 8

There are some provisions in Commission orders and in other judicial precedents suggesting that the dollar volume of sales in competition, in terms of the overlap in sales or as a percentage of either of the interlocked corporations' total sales, is significant in determining whether Section 8 has been violated. For example, in *United Brands Company,* FTC Dkt. 9034 (reported as *Kane-Miller. Corp., et al.,* 88 F.T.C. 279), par. II, consent order dated September 1, 1976—only sales in excess of $1,000,000 trigger the prohibitory provisions. The same is true of 12 consent settlements in which the order focuses only on overlaps of $1,000,000. These 12 orders bind a group of firms in the energy industry, *i.e.,* FTC Dkts. C–2684 - 2695, TRR ¶ 20,876 (73–6 Transfer Binder), *e.g.,* C–2684, par. 11, 86 F.T.C. 196, 198. [41]

In *Paramount Pictures Corp.* v. *Baldwin-Montrose Chemical Co.,* 1966 Trade Cases ¶ 71,678 at 82,065 (S.D.N.Y. 1966), the court held that "*de minimis* competition is not encompassed by the proscription of § 8." And in *Sears, Roebuck,* 111 F. Supp. at 621, the following appears: "Surely the sales of $80,000,000 do not come within the *de minimis* principle."

Also in *Sears, Roebuck* the court did say: "[T]he vital distinction between § 7 and § 8, however is that the latter omits the § 7 test and promulgates its own substantiality standard in the form of the one million dollar size requirement." 111 F. Supp. at 619. To the same result is language in *Crocker National Corp.,* 422 F. Supp. at 703:

> The real purpose of the "so that" clause seems to have been the establishment of a *per se* rule that interlocking directorates among competing corporations (that otherwise meet the requirements of the fourth paragraph of Section 8) are illegal. . . . Thus, in

furtherance of this purpose [nipping incipient antitrust violations in the bud], Congress sought to avoid questions as to whether the competition which interlocking directorates could potentially restrain was substantial or *de minimus* [SIC].

To the same effect is a comment by Mr. Wilson: "Accordingly, since no actual restraint is required, Section 8 amounts to a *per se* prohibition of all corporate director interlocks meeting the four statutory requirements." 45 ANTITRUST L.J. at 325.

Recent expressions in Commission adjudicative decisions as to the present state of the law on this point reflect that a *de minimis* argument is not a defense to a charge that Section 8 has been violated, *e.g., Kraftco Corporation.* There the Commission accepted without comment the ALJ's observation that: "A strong argument can be made that there is no *de minimis* defense in a Section 8 case because the statute prohibits interlocks where the competitive relationship is such that elimination of competition by agreement would violate *any* of the provisions of *any* of the antitrust laws." 89 F.T.C. at 53, n. 17. [42]

## Applicability of Section 5 of the Federal Trade Commission Act

The complaint charges that both Section 8 of the Clayton Act and Section 5(a)(1) of the Federal Trade Commission Act were violated by the TRW/A-M interlock (Complaint, ¶ 7).

The legislative history and judicial decisions on Section 5 support the view that Congress intended it to enlarge the scope of existing statutory law so that the Commission could *supplement* the statutes as it discerned a need. The Senate committee report on enactment of the Federal Trade Commission Act includes the following:

The Committee was of the opinion that it would be better to put a general provision condemning unfair competition than to attempt to define the numerous unfair practices, such as local price cutting, interlocking directorates, and holding companies intended to restrain substantial competition. S. Rep. No. 597, 63d Cong., 2d Sess. 13 (1914).

Judicial decisions established long ago that the Federal Trade Commission Act was passed in order to go beyond the proscriptions spelled out in the antitrust laws. *F.T.C.* v. *Beech-Nut Packing Co.,* 257 U.S. 441, 453 (1952). More recently, in a landmark case, the Supreme Court said that the FTC was established ". . . to hit [along with the courts] at every trade practice, then existing or thereafter contrived, which restrained competition or might lead to such restraint if not stopped in its incipient stages. . . . The Commission has jurisdiction to declare that conduct tending to restrain trade is

an unfair method of competition even though the selfsame conduct may also violate the Sherman Act." *F.T.C.* v. *Cement Institute,* 333 U.S. 683, 693 (1948). [43]

It also is well established that FTCA 5 applies to acts and practices which violate the antitrust laws, regardless of whether the violation is in letter or in spirit. *F.T.C.* v. *Sperry & Hutchinson Co.,* 405 U.S. 233, 239–44 (1972); *F.T.C.* v. *Brown Shoe, supra,* 384 U.S. at 322; *F.T.C.* v. *Motion Picture Advertising Service Co.,* 344 U.S. 392, 394–95 (1953); *F.T.C.* v. *Keppel & Bro.,* 291 U.S. 304, 314 (1934).

The Commission has announced its intention to use the FTC Act to supplement the antitrust laws. One example of such an announcement is found in the Commission's August 12, 1976, Statement of Policy (3 TRR ¶ 4,587 at 6956) regarding the naming of individuals in corporate interlock complaints:

> While the reach of Section 8 of the Clayton Act to interlocks between banks and other corporations such as savings and loans may not be clear,[6] no similar express statutory provision is contained in Section 5 of the FTC Act. The Commission has cited Section 5 as an independent basis of liability in interlock cases.[7] (Note: Footnote 6 is a quote from that part of Section 8 applicable to banks; footnote 7 is a cite to the *Kraftco* decision.)

Certainly, the legislative history of the FTC Act shows that the Congress said quite clearly an interlocking directorate is an unfair trade practice. (*See* quote above on p. 42; ". . . the numerous unfair practices, such as local price cutting, *interlocking directorates,* and holding companies . . . .")

In the recent initial decision in the FTC Act Section 5 case, *Perpetual Federal Savings & Loan Association, supra,* (pp. 10–11, *slip opn.*) ALJ Timony noted that, with the exception of certain banking organizations and common carriers, Clayton 8 prohibits interlocking directors between large competing corporations and provides that interlocks between savings and loan associations and banks violate the *policy* of Section 8 against interlocks of competing firms and amount to *incipient violation* of the Sherman Act. (15 U.S.C. 1). He [44] concluded that ". . . such *violations of the central policy* of the antitrust laws clearly violate Section 5." This is in harmony with the very well established interpretation in the 1941 *Fashion Originator's Guild* v. *F.T.C.* case, 312 U.S. 457 at 463. There, the Supreme Court declared that if the defendant's "*purpose and practice* . . . runs counter to the public policy declared in the Sherman and Clayton Acts, the Federal Trade Commission has the power to suppress it as an unfair method of competition." (Emphasis added.)

Respondents argue that ". . . Complaint Counsel has neither alleged nor shown that Mr. Shepard's simultaneous service on A-M's

and TRW's Boards had any impact whatsoever upon competition. Thus, the alleged actions of Respondents could not have been an unfair method of competition 'in or affecting commerce,' and Section 5 cannot apply" (RB, p. 11).

However, the *Sears, Roebuck & Co.* decision, *supra,* 111 F. Supp. at 621, makes clear that the government need not show anticompetitive effects to sustain a Clayton 8 violation. And in *Perpetual* the ALJ found that a Section 5 violation based on the practice prohibited by Clayton 8 needs no proof of injury to competition or consumers. The latest Commission dual Clayton 8 and FTCA 5 case, *Kraftco,* does not reach the question whether ". . . the substantive standard for judging an interlock may be different under Section 5 . . ." (footnote 26 to ALJ's Conclusions, 89 F.T.C. at 58, adopted by the Commission, 89 F.T.C. 69) but leaves no doubt that Section 5 applies.

With regard to respondent TRW, the situation here parallels *Kraftco* more than *Perpetual.* In *Perpetual,* questions were raised about the underlying policy and jurisdictional extent of Clayton 8. Here, the allegedly illegal interlock, when examined in the light of the evidence, is clearly covered by the provisions of Section 8 and, here, the jurisdictional requisites of the Section were admitted. In such a situation, in contrast to the Kraftco/SCM situation, there is no need to resort to FTCA 5 in order to effectuate the policy reflected by Clayton 8. Enforcement action predicated on Section 8, the statute enacted specifically to bring an end to prohibited interlocking directorates is adequate to accomplish the Congressional purpose. [45]

As recently as January 1977, in its *Kraftco* opinion, *supra,* 89 F.T.C. at 64, when it was addressing the question whether a corporate respondent should be placed under a cease and desist order when violation of both Clayton 8 and FTCA 5 had been charged, the Commission said: ". . . no better illustration of a practice offensive to the spirit and policy of the antitrust laws if not their letter can be imagined than the employment and retention by a corporation of a director whose presence on the board itself violates the law. Application of Section 5 in such a case does no more than effectuate the clear purpose of the Clayton Act." Even so, it is worthy of particular note that both the Supreme Court in *Fashion Originator's* and the Commission in *Kraftco* suggested that affirmative action was critical in their thinking as to whether a violation of Section 5 had occurred. Further, the Commission's language in *Kraftco* reflects that affirmative corporate action must be found in order to serve as the predicate for issuance of an order under Clayton 8. No such action has been found here. Before interlocked corporations should

be placed under either a Clayton 8, or an FTCA 5 order grounded on Section 8, culpability, a history of illegal interlocks, hostility toward or great reluctance in taking steps to avoid improper interlocks, none of which has been evidenced here, but several of which were in *Kraftco* (89 F.T.C. At 55–58, 65), must be shown.

## Corporate Liability for Violations of Section 8

Prior Commission decisions make it very clear that corporations may be held accountable for interlocking directorates which are found to be illegal. Thus, in *Kraftco, supra,* the Commission said that Section 11 of the Clayton Act provides that only corporations may divest stock and assets and rid themselves of directors "chosen contrary to the provisions of sections 7 and 8 of this [the Clayton] Act," 89 F.T.C. 46, 62 (1977). The Commission's position on this is not unlike its position regarding a parent corporation's responsibility for the illegal acts of its subsidiaries. ". . . [I]f the facts demonstrate even latent control," the parent may be held vicariously liable for its subsidiaries' acts. *Beneficial Corporation and Beneficial Management Corporation,* CCH [1973–76 Transfer Binder, TRR ¶ 20,959 at 20,812 (FTC 1975) [86 F.T.C. 119 at 159]. This view has support from the decision of the sixth circuit court of appeals in *P.F. Collier & Son Corp.* v. *F.T.C.* 427 F.2d 266, 270 (6th Cir. 1970). The court said: [46]

> . . . [W]here a parent possesses latent power, through interlocking directorates, for example, to direct the policy of its subsidiary, where it knows of and tacitly approves the use by its subsidiary of deceptive practices in commerce, and where it fails to exercise its influence to curb illegal trade practices, active participation by it in the affairs of the subsidiary need not be proved to hold the parent vicariously responsible. Under these circumstances, complicity will be presumed.

Counsel for TRW point out that in *United States* v. *W. T. Grant, supra,* 345 U.S. at 634, the Supreme Court expressly reserved judgment on the question as to ". . . whether corporations may violate Section 8 or, for other reasons, be enjoined under the statute," n.9. (Counsel also point out that the question currently is on appeal in *SCM* v. *F.T.C.,* Case No. 77–4978 (2d Cir. 1977).) A different view is found in the comment in "Antitrust Questions and Answers," Edwin S. Rockefeller, BNA Books, 1974, at p. 5, re the order issued in *Sears, Roebuck, supra:*

> The district judge directed the individual defendant to resign his directorship in one or the other of the two companies involved and directed the company chosen to accept his resignation, but the court turned down the Government's request for a broad injunction against future violations of Section 8, stating in an endorsement on the back of the judgment that such decree "should be granted only where there is

evidence showing a persistent purpose to violate or commit recurrences of the condemned act."

A part of the text of the order directed to Sears Roebuck in that case is set forth in *United States* v. *Sears, Roebuck & Co.,* 165 F. Supp. 356 (D.C. S.D.N.Y. 1958) in connection with an interpretation requested of Judge Weinfeld. It shows clearly that Sears, the corporation was enjoined along with Mr. Weinberg, the illegally interlocked director, at 357 and 359. [47]

## Other Defenses Put Forward

In addition to the defenses already addressed, respondents asserted several others (*see,* pp. 3–4, *supra,* RB, pp. 12 and 30). One was that the complaint does not state a claim upon which relief could be granted. A reference to 5 U.S.C. 555, "Adjudications," and to the charges made in the complaint, however, is sufficient to show that respondents clearly were charged in the manner prescribed for administrative proceedings and that the allegations raised questions as to whether respondents had violated Section 8 and Section 5. The following expresses the rule:

> There is no requirement that a complaint in an administrative proceeding enumerate precisely every event to which a hearing examiner may finally attach significance. The purpose of the administrative complaint is to give the responding party notice of the charges against him. *See* 1 Davis—in Administrative Law Treatise §§ 8.04–8.05 and cases cited therein. The complaint is adequate if "the one proceeded against be reasonably apprised of the issues in controversy, and any such notice is adequate in the absence of a showing that a party was misled." *Cella* v. *United States,* 208 F.2d 783, 789 (7th Cir. 1953), *cert. denied* 347 U.S. 1016, 74 S.Ct. 864, 98 L.Ed. 1138 (1954); *Swift & Co.* v. *United States,* 393 F.2d 247, 252 (7th Cir. 1968). As the Commission case against petitioners unfolded, there was a 'reasonable opportunity to know the claims of the opposing party and to meet them.' *Morgan* v. *United States,* 304 U.S. 1, 18, 58 S.Ct. 773, 776, 82 L.Ed. 1129 (1938); *Swift & Co.* v. *United States, supra,* 393 F.2d 247, 252. *L.G. Balfour Co. et al.* v. *F.T.C.,* 442 F.2d 1, 19 (7th Cir. 1971).

What Justice Brandeis said many years ago remains true:

> All that is requisite in a complaint before the commission is that there be a plain statement of the thing claimed to be wrong so that the respondent may be put upon his defense. Dissent in *F.T.C.* v. *Gratz,* 253 U.S. 421, 430 (1920).

[48] The view of Justice Brandeis later came to be the view of the majority. *F.T.C.* v. *Brown Shoe Co.,* 384 U.S. 316, 320–21 (1966).

With regard to the no-public-interest defense, that is a point on which the Commission has said many times that an ALJ possesses no authority. In deciding to issue a complaint, the Commission proper, per Section 5(b) of the FTC Act, makes the determination that it has

"reason to believe" that the proceeding is "to the interest of the public." Complaint counsel validly cites the decision on an interlocutory appeal in *Exxon Corp.*, 83 F.T.C. 1759 (1974), as a precedent holding that the ALJ has no authority in this area of Commission proceedings. A very recent expression to the same effect was handed down by the Commission in *Herbert R. Gibson, Sr., et al.*, Dkt. 9016. on October 12, 1977 [90 F.T.C. 275].

Another defense was that one of the grace period provisos in Section 8 obviates a finding of a violation in this case because complaint counsel failed to prove that TRW and A-M were competitors on November 7, 1974, one year before Mr. Shepard left the board of A-M (RB, pp. 30–35). The provisos in the Section authorize, as I understand them, (1) continuance as an illegally interlocked director for one year from the date of the "disabling" event when elected at a time when the corporation did not meet the $1,000,000 requirement but did later (penultimate paragraph), or (2) a change in the affairs of the corporation "from whatsoever cause" destroyed his/her eligibility (last paragraph). Clearly, here the $1,000,000 criterion exists and the "from whatsoever cause" language does not obviate the basis for the proceeding because TRW and A-M were competitors when they first offered devices to perform functions for members of the electronics-funds-transfer/credit transactions industry (Findings 23, 28, 33–34, CX 171, CX 8).

Section 8 is not clear on the point and neither is the legislative history, but I do not agree with the position of counsel for TRW that the one year grace period runs from the date of the director's election for the year in which the "disabling" event occurs. Such a holding could force an interlocked director to leave a board with only a few days of grace if the disabling event occurred just at the end of his term of service. Rather, I believe that it was the intent of the Congress to have the grace period run for at least one year from the date the "disabling" event occurs. In any event, the statutorily provided grace period does not affect my conclusion that instant interlock violates Section 8. This, as mentioned above, because TRW and A-M were competitors of each other well before November 7, 1974. [49]

## The Staff Assurance that Respondents Would Be Apprised Before a Recommendation for Complaint Was Forwarded to the Commission

Counsel for TRW argues that respondents were denied due process, equal protection under the law and that they were the

victims of an abuse of the administrative process by the Commission. The specific arguments made are:

(1) The August 8, 1975, letter from the FTC staff in Cleveland, Ohio, apprising TRW of the investigation reflected that the staff had concluded from their "findings" to recommend issuance of a complaint; however, TRW had been unaware of the investigation (RB, p. 80).

(2) The Cleveland FTC staff persisted in its attitude even though Mr. Shepard informed them that prior to his having learned of the investigation he had decided to leave the board of A-M at the next election of directors (RB, p. 80) and did so seven (7) months before the complaint issued.

(3) The Cleveland FTC staff requested only three bits of information in a letter dated October 31, 1975, but on November 14, 1975, before TRW could furnish it, the staff forwarded a recommendation to FTC headquarters in Washington, D.C., that complaint should issue (RB, p. 81).

(4) At the conclusion of a meeting in Washington, D.C., on December 10, 1975, attended by staff members from the Commission's Cleveland Regional Office and Bureau of Competition and the Assistant Executive Director for Regional Operations, counsel for TRW learned of the opposition of the staff of the Bureau of Competition to the issuance of a complaint. He was told that he would be informed by the staff before they forwarded such a recommendation to the Commission so that attempts might be made to persuade Commissioners to vote against issuance (RB, p. 80). [50]

(5) TRW, in reliance on this assurance, took no further steps (RB, p. 86) and the next contact counsel for TRW had from Commission staff was a telephone call on June 25, 1976, informing him that issuance of a complaint had been voted by the Commission on June 17, 1976 (RB, p. 80).

(6) On July 15, 1976, counsel for TRW was informed that the Commission had (1) rejected a Motion for Reconsideration filed by him on July 9, 1976, (2) refused to accept an Assurance of Voluntary Compliance simultaneously filed, and (3) forwarded these documents to an unidentified ALJ (RB, p. 84).

(7) On July 7, 1976, its General Counsel (GC) advised the Commission to take the position, and "hoped it was soon" (*see* RX 55-A) that complaints are issued when its members (three in this instance) vote issuance even though the Commission's Rules do not specify what constitutes "issuance." (Note: The significance of this is that the Commission's Rules provide that all motions are to be sent

to and addressed to the ALJ (except those to disqualify him) when a proceeding is before him (§ 3.22); hence, if the complaint were "issued" when voted, all motions thereafter were to be handled by the ALJ rather than the Commission. The Commission apparently took the GC's advice and on July 13, 1977, rejected "Respondents' Motion for Reconsideration and Related Relief . . .," dated July 9, 1976.)

The arguments regarding the paucity of knowledge respondents had regarding the staff investigation, the regional office's inexorable decision to recommend issuance of a complaint and the limited information requested of respondents are a part of the internal workings of the Commission and warrant no additional comment. [51]

The abbreviated recital of other actions, however, clearly shows that a most embarrassing and regrettable series of events occurred which would lead to great frustration, anger and resentment. But from a legal standpoint the actions were not so egregious that respondents were denied due process, denied equal protection under the law or subjected to an abuse of process. In an administrative proceeding respondents' *right* is to have due notice as to (1) when and where a hearing will be held, as well as the nature of the hearing, (2) the legal authority and jurisdictional basis for the hearing, and (3) the matters of fact and law asserted. 5 U.S.C. 554(b). *Golden Grain Macaroni Company* v. *F.T.C.,* 472 F.2d 882, 885–86 (9th Cir. 1972), *cert. denied,* 412 U.S. 918 (1973).

Respondents have been accorded each of these rights, even though the road they have had to travel was a tortuous one. The complaint and the various interlocutory matters, the prehearing conferences and orders and the adjudicative hearings provided the information and afforded those things to which respondents were entitled as a matter of legal, due process, right.

No one can reasonably argue that the staff assurance was not a professional commitment which *should* have been fulfilled. But the fact that it was not kept does not warrant a holding that respondents were prejudiced in the legal sense so that dismissal of the complaint would be appropriate. The fact that persons (in the broadest sense of the word) under investigation by the FTC may seek to persuade an individual Commissioner as to what his attitude should be toward investigative results and the fact that the Commission as a collegial body recognizes that this occurs does not establish a right to make such a presentation. On page two of its "Order" in this matter dated October 13, 1976, 88 F.T.C. 544, the Commission said at 545:

Neither the Commission's rules nor its practice provide for precomplaint presentations to the Commission, except for consent orders. The staff cannot create such a right by agreement with a respondent. Each Commissioner, in the exercise of discretion, determines whether to afford proposed respondents an opportunity to be heard before voting whether to issue a complaint.

[52] Clearly, whether such a presentation will be permitted is *solely* within the discretion of each Commissioner. There is no Commission rule which authorizes such presentations. That no staff person can grant or deny such permission so that the Commission or a Commissioner is bound, in the absence of authorized, specifically delegated authority not present here, has been well established for many years. For example, "The United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit," *Utah Power & Light Co.* v. *United States,* 243 U.S. 389, 409 (1917). If this is true of statutory law, it cannot be less so with regard to administrative procedures which an agency establishes. Of course, an agency must rigidly adhere to those procedural rules which it has established (*Pacific Molasses Co.* v. *F.T.C.,* 256 F.2d 386, 389 (5th Cir. 1966)), but there was no Commission rule providing for what counsel for respondents was seeking.

Although no decision precisely in point has been found, in *Double Eagle Lubricants, Inc., et al.* v. *F.T.C.,* 360 F.2d 268 (10th Cir. 1965), where the Commission did not agree with staff advice as to where a disclosure should appear on a can of rerefined (used) oil, the court said:

The Commission is charged with the protection of the public interest. No principle of equitable estoppel bars it from the performance of that duty because of mistaken action by its subordinates.[5] Citing in n.5 *P. Lorillard* v. *F.T.C.,* 186 F.2d 52, 55 (4th Cir. 1950), cf. *United States* v. *San Francisco,* 310 U.S. 16, 32 (1940), and *F.C.C.* v. *Pottsville Broadcasting Co.,* 309 U.S. 134, 145 (1940).

It is true, as counsel for TRW suggests, that the trend is toward an erosion of sovereign immunity and toward the view that an agency sometimes may be estopped, *i.e.,* bound by the acts of its employees. *See* 2 K. Davis, *Administrative Treatise,* Section 1701 *et seq.,* esp. pp. 541–44. The courts, however, have not gone so far that what the staff did and failed to do here would warrant dismissal of the complaint. Cases cited by counsel for TRW held the government to be estopped when property of the federal government or [53] business dealings with the government were involved rather than, as here, where the subject matter is enforcement of the antitrust laws. For example, the *Brandt* v. *Hickel* case which counsel cites, 427 F.2d 53 (9th Cir. 1970)

(RB, pp. 91–92), deals with an oil lease. In *United States* v. *Wharton,* 514 F.2d 406 (9th Cir. 1975), the Whartons had settled on land on which the government sought to prevent them from getting a patent under the Desert-Land Entry Act of 1877 after the Whartons had acted in accord with government employees' advice (now 43 U.S.C. 321, *et seq.*).

If, for example, the Commission proper had given Mr. Shepard a favorable advisory opinion per Commission Rule 1.3 as to the interlock challenged here and then issued a complaint without first allowing him to resign, the doctrine of estoppel no doubt would apply. But that example is quite different from what happened to respondents.

Thus, I do not agree with the arguments of counsel for TRW that the Commission failed to comply with its own rules in its refusal to meet with him or his clients or to entertain his motion for reconsideration (RB, pp. 95–106). First, as noted above, there is no "rule" that binds the Commission, or any of the Commissioners, to meet with persons investigated by the staff before a vote is taken to consider whether a complaint should issue. Whether such a meeting is held is completely discretionary with the Commission or Commissioner to whom an approach is made. *See* the "Order" cited *supra,* at 88 F.T.C. 544, 545. Contrary to what counsel argues, the net effect of the GC's advice was no more than to suggest that the rules be made clearer as to when a complaint issues. It was merely a clarification which did not affect respondents' substantive rights.

Further, before the adjudicative hearings began, ALJ Hanscom certified the matter to the Commission together with the various documents respondents provided him which had been designed to convince the Commissioners to be approached that the complaint should not issue. *See* "Certification to the Commission for a Limited Purpose of Respondents' Motion for Reconsideration and Related Relief and Various Other Motions and Related Papers," dated September 15, 1976. Thus, the Commission and its members had the benefit of the facts respondents said they wanted to present before the hearings began and could have taken the action counsel for TRW was seeking. [54] That the Commission chose not to does not derogate from the fact that the Commission had TRW's arguments submitted to it. Consequently, respondents were not prejudiced, deprived of due process, denied equal protection of the laws and were not the victims of an abuse of the administrative process. Respondents must make a case sufficiently strong to convince that there was such substantial prejudice that procedural due process was

denied them. *Arthur Murray Studio of Washington, Inc.* v. *F.T.C.* 458 F.2d 622, 624 (5th Cir. 1972). Respondents have not made such a case.

## The Need for an Order

Respondents' counsel argues that a prospective order is unnecessary to protect the public from any future recurrence of an illegal interlocking directorate on the part of Mr. Shepard. He contends that (RB, pp. 74–77): (1) The complaint does not allege the possibility of future violations; (2) Mr. Shepard has given assurances of future compliance with Section 8 with respect to A-M as well as all other corporations; (3) Mr. Shepard is 65 and will retire as Chief Executive Officer of TRW; and (4) Mr. Shepard had been off the A-M board nearly seven months before the complaint was served.

The threshold question that underlies the construction of a remedy is what kind of order, within the broad range of an equity court's remedial powers, would, in the particular circumstances, be most effective to "cure the ill effects of the illegal conduct and assure the public freedom from its continuance." *Ekco Products Co.*, 65 F.T.C. 1163 (1964), *affirmed*, 347 F.2d 745 (7th Cir. 1965).

In both the initial decision of the ALJ and the opinion of the Commission in *Kraftco, supra,* there is language that affirmative corporate action suggesting culpability as contrasted with indifference or passivity, was persuasive in reaching the determination that SCM, the corporation, should be held accountable. Thus, the initial decision there supported issuance of an order against SCM on the basis that the corporation either did or could have (1) *seated* interlocking directorates, (2) *reaped* the anticompetitive benefits, and (3) possibly *appointed* new interlocking [55] directors after each was discovered. 89 F.T.C. at 51. To the same effect, the Commission said that the corporation might *maintain* an interlocking directorate and, if detected, simply *replace* the ousted director with another interlocking board member *without fear* that detection would result in anything more than the director's resignation, 89 F.T.C. at 63.

In contrast, there is nothing in the record of this case to suggest that TRW played an active role in Mr. Shepard's becoming a director of A-M, that TRW was indifferent or even hostile to the Commission staff's concern over the interlock, that TRW has an extensive history of being involved in interlocked director questions, that TRW was even interested in or resisted the ending of Mr. Shepard's interlock, or that TRW was disinclined to take action to prevent the occurrence of illegal interlocks in the future. This lack of action by TRW in doing those things, which might lead to the adverse competitive consequences with which the Congress was concerned when Section

8 was enacted, persuades me that in this case the corporate respondent should not be placed under an order to cease and desist.

This case is very different from the situation obtaining in *SCM/Kraftco, supra,* (*see* 89 F.T.C. at 65) in that:(1) the end of the interlock had been decided upon by Mr. Shepard before the Commission staff pointed out its concern (Finding 68); (2) it was affected by Mr. Shepard without TRW involvement seven months before the complaint issued (Findings 15, 17, 68); (3) it was a technical infraction rather than a substantive one (Finding 16); and (4) the record contains impressive evidence as to TRW's steps to improve further its procedures for preventing improper interlocks (Finding 17). Consequently, issuance of an order running to TRW is not called for.

As noted above, once the elements of a Section 8 violation are met, as they have been here, attention shifts to Section 11 of the Clayton Act. Section 11's sweeping language makes it clear that it was drafted so that there would be an effective remedy for every Clayton Act violation, but this does not mean that all respondents charged must be the objects of an order if a violation is found. The problem is not the reach of available remedies, but the just exercise of the reach. The question simply stated is: given a violation of Section 8, what are the guidelines governing the application of Section 11's sanctions? [**56**]

Paragraph (b) of Section 11 empowers the Commission to issue an order to a corporation to ". . . rid itself of the directors chosen contrary to the provisions of section[s] 8 . . . ." In pertinent part, the Section also authorizes modification or the setting aside in whole or in part of an order issued when ". . . conditions of fact or of law have so changed as to require such action or if the public interest shall so require. . . ." If that post-order-issuance discretion exists, there is no mandate that an order *must* issue against TRW since neither the facts adduced in the trial nor the public interest warrant such. In the light of the evidence in the record, neither the language of Clayton 8, the circumstances, nor the public interest calls for the issuance of an order against TRW under either Clayton 8 or FTCA 5. As to the discretion of an administrative law judge to issue an order, see *Kraftco, supra,* 89 F.T.C. at 55–56.

The order attached has been issued against respondent Shepard because it is the best protection of the public against the recurrence of an illegal interlock involving Mr. Shepard. It is based on authority set forth in Clayton 8 and FTCA 5 simply because the violation of Section 8 by him also violated FTCA 5.

The order has not been imposed because of a fear that Mr. Shepard

would otherwise seek out directorships which violate the antitrust laws. In the past, Mr. Shepard has been asked to participate in the directorship of many large corporations (Findings 19–22), because of his reputation for business acumen. He will, no doubt, be asked to sit on other boards or otherwise to assist other businesses in the future. Although Mr. Shepard will no longer be the Chief Executive Officer of TRW, he will probably remain on the board for several years. (Finding 13).

TRW is a diversified corporation as are many other large corporations; and there is, thus, the clear possibility that Mr. Shepard's simultaneous membership either on such boards of directors, or otherwise as an officer, employee, agent or representative of a business, would violate Clayton Section 8 or [57] FTCA Section 5. Now that one such illegal interlock has been proven by the government, it would not only be incumbent on Mr. Shepard voluntarily to make absolutely certain that this situation does not again occur, but there also should be a sanction, as this order is, which goes beyond Mr. Shepard's assurances. The foregoing notwithstanding, it would be disingenuous to say that consideration also was not given to omitting an order running to Mr. Shepard. On balance, however, it is my belief that the public interests calls for the imposition of the order appended.

As the Commission stated in *Kraftco,* 89 F.T.C. at 66: "[W]e think the violation is itself the best evidence of the possibility of future occurrences, and that the burden rests with respondent to demonstrate that violations will not recur before consideration may be given to omitting an order . . . ." Discontinuance or abandonment of the violation does not remove the need for an order. *Fedders Co.* v. *F.T.C.,* 529 F.2d 1398 (2d Cir. 1976) *cert. denied,* 429 U.S. 818. The mere voluntary assurance by respondent to comply with the law is not necessarily an adequate safeguard for the future. *Clinton Watch Co.* v. *F.T.C.,* 291 F.2d 838, 841 (7th Cir. 1961), *cert. denied,* 368 U.S. 952 (1962). Nor does the possibility that other proceedings could be started if he was found again to be the conduit effecting an illegal interlock demonstrate the absence of a danger of recurrence. Nowhere has Congress suggested that those found to have violated Clayton Section 8 may be allowed several "bites at the apple." [58]

I do not agree with respondents' contention that the complaint must allege the possibility of future occurrences to sustain a prospective order. Respondents were served with the notice order and the trier of fact can go beyond the order accompanying the complaint, sometimes called "fencing in" to fashion an appropriate order to forestall future occurrences of the same or like nature.

*F.T.C.* v. *National Lead Company,* 352 U.S. 419 (1957); *Jacob Siegel Co.* v. *F.T.C.* 327 U.S. 608 (1946).

Respondents have also averred, in substance, that the prospective order should not issue because of complaint counsel's "unclean hands" in this case. As discussed in the *Other Defenses* section above, complaint counsel's actions are not controlling in determining whether issuance of an order is warranted. It is my view that a need for an order has been shown.

## CONCLUSIONS

The Federal Trade Commission has jurisdiction over the respondents and the subject matter of this proceeding.

These proceedings and the order issued hereby are to the interest of the public.

When these proceedings began, respondents TRW and A-M had, and continue to have, capital, surplus and individual profits aggregating more than $1,000,000.

When these proceedings began, respondents TRW and A-M were, and have continued to be, in commerce or their business affected commerce as those terms are defined in the Clayton and Federal Trade Commission Acts.

Respondents TRW and A-M were competitors of one another during the period January 1, 1973, through November 5, 1975, in the manufacture, sale or distribution of point of sale credit authorization equipment, teller operated bank transaction equipment and other such equipment used for credit validation, recording of deposits and withdrawals from financial institutions, and inventory record keeping. [59]

Respondent Horace A. Shepard was a member of the Boards of Directors of TRW and A-M throughout the critical period January 1, 1973 - November 5, 1975.

The membership of Mr. Shepard on the Boards of TRW and A-M during the critical period violated Section 8 of the Clayton Act and Section 5 of the Federal Trade Commission Act.

The order issued should be addressed only to Mr. Shepard. Such an order follows:

## ORDER

### I

*It is ordered,* That respondent Horace A. Shepard, shall forthwith cease and desist from serving, and in the future shall not serve, as a director, officer, employee, agent, or representative of any corpora-

tion or other form of business entity if he simultaneously serves as a director, officer, employee, agent or representative of any other corporation, or other form of business entity, if such corporations or other forms of business entities are, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws. [60]

II

*It is further ordered,* That within thirty (30) days from the date on which this order is served upon him Mr. Shepard shall file with the Commission a written report setting forth the manner and form in which he has complied with this order.

OPINION OF THE COMMISSION

BY CLANTON, *Commissioner:*

I. Background

On June 17, 1976, the Commission issued a complaint against respondents TRW, Inc., Addressograph-Multigraph Corporation ("A-M"), and Horace A. Shepard, charging them with violations of Section 8 of the Clayton Act, 15 U.S.C. 19 and Section 5 (a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1). The basis for the complaint was the simultaneous membership of Mr. Shepard on the Board of Directors of TRW and A-M from January 1, 1973, through November 6, 1975 (the "complaint period"). The complaint alleged that during this period of time the business of TRW and A-M "included, but was not limited to, the manufacture, sale and distribution in commerce of point-of-sale credit authorization equipment and teller-operated bank transaction equipment, and other such equipment used for credit validation, check cashing validation, recording of deposits and withdrawals from financial institutions, and inventory record keeping" (Complaint, Paragraph 5). [2]

Subsequent to the complaint, A-M negotiated a consent order [90 F.T.C. 144] with the Commission on August 11, 1977.[1] In his initial decision filed with the Commission on December 22, 1977, the administrative law judge ("ALJ") found that Mr. Shepard's member-

[1] The relevant portions of the consent order provide that A-M: (1) is prohibited from having interlocking directorates with competitors if the elimination of competition by agreement between them would constitute a violation of the antitrust laws; (2) is required to review and retain a list of each A-M director, stating the name, address and products of each corporation for which the director is a member of the Board of Directors or a nominee; and (3) is required to review and retain prior to each election of directors, for each member of its Board of Directors and nominees, a descriptive list of all products and services of other corporations on whose board the director or nominee serves or to which he or she is a nominee.

ship on the boards of TRW and A-M violated Section 8 of the Clayton Act and Section 5 of the Federal Trade Commission Act. However, the ALJ entered an order only against Mr. Shepard on the ground that "neither the language of Clayton 8, the circumstances, nor the public interest calls for the issuance of an order against TRW under either Clayton 8 or FTCA 5" (ID p. 56).[2] Both parties [3] have appealed, respondents from the imposition of an order against Horace Shepard and complaint counsel from the ALJ's failure to enter an order against TRW.

## II. The Parties and Relevant Products

### A. Horace A. Shepard

Horace Shepard joined TRW as Vice President and Assistant to the General Manager in 1951. He was first elected to the Board of Directors of TRW in 1957 and has served continuously since that date. While he retired as an officer from TRW on November 30, 1977, at the age of 65, he can continue to sit on TRW's Board until he is 72 (ID 13). He was initially elected to the A-M Board on March 20, 1971, and served on that Board until his resignation on November 6, 1975 (ID 14).

### B. TRW, Inc.

TRW is a publicly held corporation with net sales and revenues of $2,585,683,000 and a net income of $263,903,000 in fiscal 1975 (ID 1,3). During the course of these proceedings TRW was engaged, *inter alia,* in the design, manufacture and sale of a variety of products for industry and government, including those products relevant to this proceeding, as well as performance of advanced systems engineering, research and technical services in electronics and computer based services (ID 2).

TRW offered essentially three relevant product lines during the complaint period: the System 4000/5000, the Validata service, and certain products manufactured by FDS/i, a company which was acquired by TRW in April 1974 (ID 4, 23-31).

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[2] The following abbreviations will be used in this opinion.

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| ID | - Initial Decision finding number |
| ID p. | - Initial Decision page number |
| Tr. | - Transcript page number |
| CX | - Complaint Counsel's exhibit number |
| RX | - Respondents' exhibit number |
| RAB | - Respondents' appeal brief |
| CAB | - Complaint Counsel's appeal brief |
| R.Ans | - Respondents' answering brief |
| C.Ans | - Complaint Counsel's answering brief |
| RFF | - Respondents proposed findings of fact |

The System 4000/5000 was a credit authorization terminal[3] designed for use and sold to department stores (4000) and financial and thrift institutions (5000). Although the System 4000 [4] was marketed apart from the System 5000, the two systems were otherwise identical and used a terminal identified by the numbers 4103. The 4103, which was approximately 9 inches by 7 inches (Tr. 1235), had no ability itself to communicate with a computer. Rather it was connected to a controller, which in turn was connected by a dedicated telephone line to the host computer. The controller was located in the department store and was connected to as many as 128 terminals within the store. The computer, on the other hand, was located at a central location such as the headquarters of the department store (ID 23, 24; Tr. 1235–1244).

The Validata was an information service offered by TRW. What was sold was not the equipment but rather "loss protection" by means of an on-line file of stolen airline tickets, bad credit cards from 15 different credit card issuers, and a bad check file. Validata was utilized by airlines, car rental agencies, hotels and motels (ID 26, 27; Tr. 1819; Tr. 1253–54). Unlike the System 4000/5000, the data base was not maintained by the users but rather by TRW itself (Tr. 1820–21).

The third group of equipment offered by TRW during the complaint period was that which was acquired from FDS/i in 1974, and which formed the basis for TRW's electronic funds transfer system ("EFTS").[4] The TT–115, which was similar to the 4103 terminal requiring the use of a controller and dedicated telephone line (Tr. 1837), was used in a point of sale location by Glendale Federal Savings and Loan (ID 29). As so used, it provided for the deposit and withdrawal of money from a plastic card account, and the transfer of funds from a plastic card account to a supermarket account. In addition, the plastic card could be used as an identification card to authorize a personal check to pay for groceries (Tr. 1834–35).

TRW also offered within this group of products the TT–116 and the TT–117. Distinctive about the TT–116 was the ability of a customer to insert a check into the terminal for validation. The TT–117 differed from the other two products in that it was designed to perform credit authorization, as well as the other functions of check

[3] Credit authorization is a system whereby a clerk or customer enters certain information into an electronic terminal from which it is communicated to a main computer. The main computer then determines, from the information it has stored, whether the transaction should be authorized or denied (Tr. 246).

[4] EFTS is an electronic system whereby the "electronic impulses substitute for paper checks to describe the credits and debits related to a financial transaction" (Tr. 1682); in other words, the deposit and withdrawal of funds is made from a bank account without the traditional processing of checks.

validation and electronic transfer of funds. However, neither the TT-116 nor the TT-117 was sold by TRW during the complaint period. TRW produced only prototype models of the TT-116 and foam board mock up models of the TT-117 (ID 30,31). [5]

C. Addressograph-Multigraph Corporation

A-M is also a publicly held corporation with fiscal 1975 net sales and revenues totalling $584,246,000 and net income for that year of $4,908,000 (ID 7, 9).

Between January 1973, and November 1975, the relevant products offered by A-M were the AMCAT I, the AMCAT IC and the AMCAT II (Tr. 1723-24). The AMCAT I, which was introduced in the spring of 1973 (Tr. 1710-11), was a credit authorization terminal originally designed to meet the needs of the oil companies for use in gas stations. It contained all the communication functions within itself, and therefore could be used in a stand alone environment hooked up directly to a dedicated telephone line (ID 32, 33). It was approximately 16 inches long and wide and 8-9 inches high (Tr. 1275). Because the AMCAT I was able to operate in a stand alone environment free from the need for a communicator, it was utilized in small retail establishments which extended credit through third parties such as American Express (ID 34).

The AMCAT IC was a variation of the AMCAT I allowing direct operation by a consumer and containing a check tray for purposes of check verification (Tr. 1727-28). The modifications were made in part at the request of Robert Creekmore of the First National Bank of Atlanta for use in its Honest Face Program (ID 35; Tr. 17-2;[5] Tr. 1728-30).

The AMCAT II was designed for out of the way service stations in which use of the dedicated telephone line would have been too expensive. As such the AMCAT II was meant to be used in conjunction with the regular telephone lines (ID 35; Tr. 1725-26).

There were two other variations of the AMCAT-the HALFCAT and MODCAT. Both products were smaller versions of the AMCAT, but neither ever got beyond foam board mock ups (ID 35).

While the AMCAT family of products was initially designed for credit authorization purposes, it was ultimately adapted for EFTS use. As such, it was sold during the complaint period to Buckeye Federal Savings and Loan (ID 51-53) and to California Federal Savings and Loan (ID 60). [6]

[5] The trial transcript has been paginated in three sets: pages 1 to 180; pages 1 to 115; and pages 1 to 2179. To avoid confusion, we have referred to the first set with a "1" after the page number and to the second set with a "2" after the page number. The third set of numbers is referred to only by the relevant page number.

## III. Mootness

At the threshold we are confronted with respondents' argument that this case should be dismissed because the issues raised are now moot. Respondents rely on several factors in making this argument. They contend that Mr. Shepard had determined in late 1974 or early 1975 to resign from A-M's Board and that his resignation was effective November 6, 1975, seven months before the Complaint issued. They also assert that TRW has instituted relatively stringent procedures to insure that simultaneous directorships will not take place in the future with A-M or any other corporation. Finally, they rely on the fact that in January 1977, A-M determined to discontinue its AMCAT product line, and indeed sold that line in June 1977.

It is well settled that "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot." *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 632 (1953). *See, e.g., United States* v. *Concentrated Phosphate Export Ass'n, Inc.*, 393 U.S. 199, 203 (1968); *Rubbermaid, Inc.* v. *FTC*, 575 F.2d 1169, 1172 (6th Cir. 1978); *Carter Products, Inc.* v. *FTC*, 323 F.2d 523, 531 (5th Cir. 1963). There exist considerations of public policy in determining the legalities of the issues involved, as well as the fact that the respondent is always free to return to his old ways absent any form of legal restraint. *United States* v. *W.T. Grant*, 345 U.S. at 632.

Nevertheless, if the respondent can demonstrate that there is no "reasonable expectation" that the wrong will be repeated, the case may be moot. *Id.* at 633. Such a demonstration, however, demands more than simply cessation of the wrong and a disclaimer that it will not be repeated.[6] There must be some showing that the cessation or abandonment of the practice was undertaken in good faith. Additionally, and more importantly, the respondent must show that the "challenged practices have been surely stopped under circumstances which assure that there is no reasonable likelihood of resumption of said practices . . . thus rendering the issuance of an order unnecessary." *Tung-Sol Electric Inc.*, 63 F.T.C. 632, 645 (1963). [7]

The time of the cessation, although not dispositive, nevertheless bears on the issue of good faith. While Mr. Shepard resigned prior to issuance of the complaint, his resignation occurred only after he was notified that an investigation was underway. Furthermore, there is evidence to indicate that the FTC's investigation was precisely why he chose to resign from A-M's Board (ID 68). On the other hand,

[6] We note that frequently cessation or abandonment is used as a synonym for mootness. As *Grant* and other decisions make clear, however, such usage is inaccurate.

there is testimony, which the ALJ credited, that Dr. Reuben F. Mettler, then President of TRW, learned well in advance of the Commission's investigation that Mr. Shepard intended to resign from A-M's Board (Tr. 939).

But even if we were inclined to accept Mr. Shepard's explanation for leaving A-M's Board, that action is not dispositive. In the final analysis, the issue of mootness turns on whether there is a likelihood of resumption of the questioned practice, for "the main goal of the Commission is to protect the public against continued or future violations of the statutes it administers". *Tung-Sol,* 63 F.T.C. at 646.[7]

Here, Mr. Shepard was sworn, as have several officials of TRW, that he will not again sit on A-M's Board, and that TRW will not violate Section 8. But such assurances are simply not sufficient and do not meet the stringent and heavy burden imposed on respondents by *Grant.* While Mr. Shepard may not sit on A-M's Board, there is no assurance that he will not be in a position where he could violate Section 8 in the future by sitting on other Boards that are in competition with TRW. Indeed, respondents do not argue that Mr. Shepard will refrain from membership on any other Board, but rather that it is unlikely at his age that he will be asked (RAB 10).[8]
[8]

Likewise, the TRW affidavits relating to the installation of company procedures to prevent Section 8 violations, as well as the sale of the AMCAT product line, are not dispositive. *Tung-Sol* clearly demonstrates that the likelihood of resumption must be measured against changed circumstances which make it essentially impossible for the illegal activity to be resumed. Thus, for example, in *Tung-Sol,* there had been a change in industrywide practices such that "there exist[ed] no overall competitive condition which might prompt or even make feasible a return by respondents to the former practices." 63 F.T.C. at 650.

Other cases have similarly emphasized that the circumstances surrounding the challenged practices must be changed in a way which makes it highly unlikely that they will be repeated. In *Carter Products, supra,* the reviewing court agreed that the case was not moot, and cited the Commission's determination that, "[T]here has been no showing of *unusual circumstances* which would indicate that entry of an order is unnecessary nor does it appear that there has been any *change in the competitive conditions* which may have

[7] While this issue is closely intertwined with that of ultimate relief, "the two concepts are analytically distinguishable and a court could find that a case is not moot and yet deny injunctive relief." *SCM Corp.* v. *FTC,* 565 F.2d 807, 812 (2d Cir. 1977).

[8] It is also worth noting that even at the time he was considering whether to resign from A-M's Board, Mr. Shepard had already been invited to become a member of Procter and Gamble's Board (Tr. 939).

influenced respondents to use advertising of the type under consideration." 323 F.2d at 531 (emphasis added). Discontinuance of the unlawful practices also proved insufficient to serve as a defense in *P.F. Collier & Son Corp.* v. *FTC*, 427 F.2d 261, 275 (6th Cir. 1970), where the practices were "capable of being perpetuated or resumed . . . ." And, as the Commission noted in *Coro, Inc.*, 63 F.T.C. 1164, 1200 (1963), the respondent had failed to show that its abandonment of the illegal practices was not "forced upon it by business and economic conditions . . . ." In so concluding, the Commission distinguished other cases where, due to "the *total and permanent* character of the abandonment, it was concluded that resumption, because it would be economically unprofitable, was highly improbable." *Id.* at 1199–1200 (emphasis added).

We are not presented with such a situation here. While TRW no doubt intends to continue its screening procedures, there is in fact nothing which would independently cause it to do so. A-M's sale of its AMCAT product line in 1977 may, at this time, eliminate the competitive overlap between the two firms as to credit authorization and EFTS products, but it by no means prevents TRW and Mr. Shepard from interlocking with other [9] firms in the same product area or other lines of business.[9] Moreover, the very ease with which interlocks may be undertaken and withdrawn only underscores the importance of requiring a stronger showing of changed circumstances than has been presented here.[10] In short, the proof offered by respondents fails to demonstrate with some degree of certainty that "violations cannot recur," *Rubbermaid, Inc., supra*, 575 F.2d at 1172. Thus, we reject respondents' mootness contention. [10]

## IV. Competition

[9] In further support of their mootness argument, respondents cite *United States* v. *The Cleveland Trust Co.*, 392 F.Supp. 699 (N.D. Ohio 1974), where the court dismissed a Section 8 count on the ground that one of the interlocking firms, a non-defendant in the case, had gotten out of the relevant product line. The court's decision rested primarily on *Paramount Pictures Corp.* v. *Baldwin-Montrose Chemical Co., Inc.*, 1966 Trade Cases ¶71,678 (S.D.N.Y. 1966). There the court, in an alternative holding, concluded that for Section 8 relief to be granted "there must still exist a *present ability* to resume any competition which may have ceased." *Id.* at 82,065–66 (emphasis added). In *Paramount*, the defendant sold its stock interest in one of the competing companies, leading the court to hold that this sale, negotiations for which had begun in good faith before issuance of the complaint, would be sufficient to warrant dismissal of the Section 8 charge. Here, TRW has not withdrawn from the credit authorization or EFTS business. A-M's exit only reduces one of undoubtedly many other possibilities for interlocks in this industry. TRW, as well as Mr. Shepard, clearly has a "present ability" to engage in similar interlocks in the future, even though A-M may not. To the extent *Cleveland Trust* suggests a different conclusion, we respectfully decline to follow it.

Moreover, even complete withdrawal by an interlocking firm from the competitive product lines might not justify declaring the case moot or refusing to issue an order. Additional evidence suggesting the possibility of future law violations, albeit in other product markets, could very well call for some form of prospective relief.

[10] Complaint counsel also contend that two prior Section 8 matters involving TRW and Mr. Shepard further undercut respondents' argument that violations are not likely to recur. (C. Ans 9; *see also* ID 19, 21). While these incidents are of limited evidential value, inasmuch as there was no adjudication of liability, they do illustrate the shortcomings of relying too heavily on discontinuance, which can be effected with relative dispatch, as a means of ensuring future compliance with Section 8.

Respondents next argue that A-M and TRW were not competitors during the complaint period, and thus, that Mr. Shepard's positions on both Boards did not violate Section 8. It is, of course, true that Section 8 requires that the allegedly interlocked corporations "are or shall have been theretofore by virtue of their business and location of operation, competitors so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws."

Though the issue of competition is central to a Section 8 case, in previous litigation under this section the parties have generally stipulated to the existence of competition.[11] That issue, however, is squarely before us here. Respondents contend that the appropriate tests for determining competition are whether there is (1) cross-elasticity of demand between the products or (2) reasonable interchangeability of use (RAB 27). By these measures, it is asserted, TRW's and A-M's products are not price sensitive nor are they sold to the same customers.

Complaint counsel, on the other hand, urge a more expansive interpretation of the term "competitors" by focusing on the proviso in Section 8 which reads as follows:

> so that the elimination of competition by agreement between [the competitors] would constitute a violation of any of the provisions of any of the antitrust laws.

This language, it is argued, defines what is meant by "competitors" and encompasses any test of competition under the antitrust statutes. Put differently, the relevant issue, as framed by complaint counsel, is whether the interlocking firms can "form an agreement that would violate the antitrust laws under the rule of reason analysis as it was known to Congress in 1914 under the *Standard Oil* decision" (CAB 33). [11]

The difficulty with complaint counsel's formulation is that it proves too much. As the ALJ noted, virtually any two corporations can fashion some kind of agreement which could violate the antitrust laws (ID p.34). It is not entirely clear what complaint counsel have in mind. If they mean that any competitive relationship may be reached by the statute—whether horizontal, vertical or potential—it seems fairly well settled that Section 8 applies only to firms which are horizontal competitors.[12] If, on the other hand,

[11] Although there was apparently no such stipulation in *Paramount Pictures*, the court gave only summary treatment to the issue of competition.

[12] *Protectoseal Co.* v. *Barancik*, 484 F.2d 585, 589 (7th Cir. 1973); *United States* v. *Crocker National Corp.*, 422 F.Supp. 686, 703-04 (N.D. Cal. 1976). *See also* Federal Trade Commission Report on Interlocking Directorates (1951). Of course, Section 5 of the FTC Act may reach interlocks involving firms in a buyer/seller relationship or between potential competitors, an issue we do not address here.

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complaint counsel merely intend to suggest the approach for determining whether TRW and A-M are, in fact, competitors on a horizontal level, their interpretation of the Section 8 proviso provides little guidance. Since the case was brought and tried on a horizontal theory, we shift the focus of our inquiry to the criteria for assessing whether such a relationship existed.

In our view, a finding that two firms are competitors must be grounded on economic considerations. It is not enough to place undue focus on such vague, conclusory terms as "contest" or "rivalry" for trade, characterizations which are emphasized by both complaint counsel and the ALJ. While it is not inaccurate to describe competition broadly in this fashion, it does not materially advance the inquiry.

In judging whether competition exists, we believe it is appropriate to draw by analogy on concepts applied under Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 2 of the Sherman Act, 15 U.S.C. 2, in defining a relevant product market. This approach is consistent with the language in Section 8 that corporations are competitors "by virtue of their business and location of operation." At the same time, it is clear that we need not get bogged down in a marketwide analysis, *Protectoseal Co.* v. *Barancik,* 484 F.2d 585, 589 (7th Cir. 1973), which requires the kind of product market definition that would be called for in a merger or monopolization case. [12]

As respondents point out, evidence of cross-elasticity of demand or product interchangeability is highly relevant in defining competition and drawing the outer parameters of appropriate product markets in other antitrust contexts. *Brown Shoe Co.* v. *United States,* 370 U.S. 294 (1962); *United States* v. *E. I. duPont de Nemours & Co.,* 351 U.S. 377 (1956). Nevertheless, the Supreme Court has cautioned that these criteria should not be used "to obscure competition but to recognize competition where, in fact, competition exists." *United States* v. *Continental Can Co.,* 378 U.S. 441, 453 (1964) (citation omitted) (Section 7 Clayton Act case). That guidance is even more relevant in a Section 8 proceeding where the market interaction of all competitive products, including those produced by the interlocking companies, will not be fully explored. Within this framework we turn to the facts of this case.

As was noted at the outset, both TRW and A-M manufactured, distributed and sold equipment used for credit authorization purposes.[13] Likewise, both manufactured and sold equipment used for the

[13] TRW's products were the System 4000/5000 and the Validata service, while A-M's products were the AMCAT line of goods.

electronic transfer of funds.[14] Nevertheless, TRW argues that because the equipment was purchased by different types of users and functioned in different ways they were not competitive products.[15]

There is no dispute that the products of both TRW and A-M accomplished essentially the same thing. The dispute is only as to the significance of "for whom" and "how." Thus, TRW argues that its System 4000/5000 was designed to work in a clustered environment (*i.e.*, large retail stores or other businesses with multiple check out stands) and in fact was at its economical peak when so placed (RAB 34–35). Nevertheless, the Heritage Bank Corporation in Chicago, Ill., placed its TRW credit authorization terminals in retail establishments in which there were no [13] more than 5–7 terminals (Tr. 94–2). Additionally, there was testimony that TRW's Validata Service, which utilized the same terminal as the System 4000/5000, was used by car rental agencies in off-airport premises in which only one or two terminals were used (Tr. 250; ID 18, 21–22).

TRW also argues that the various characteristics of the two products are so substantially different as to make them clearly distinct. However, the fact that TRW's 4103 did not have a card reading device could be overcome by ordering a separate piece of equipment from a different manufacturer. Indeed, Donald Kovar testified that the TT–115 sold to Glendale Federal contained a separately manufactured card reader (Tr. 1265–66).

Both TRW and A-M vied for the business of the same purchasers. There is more than ample testimony to reflect the fact that requests for information went out to, and initial contacts were made with, both companies by the same potential purchasers. Mr. Creekmore of the First National Bank in Atlanta ("FNBA") testified that he initially contacted 37 electronic terminal vendors, including TRW and A-M (ID 43). Mr. Wolfson testified that Metroteller, a subsidiary of Erie County Savings and Loan, also contacted both TRW and A-M (ID 48).[16] Furthermore, at a more serious level of bidding, both TRW and A-M would respond. Credit Systems, Inc. ("CSI"), for example, received responses to bids for quotations from both A-M and TRW (ID 56).

Beyond these discussions, both TRW and A-M would attempt to

[14] TRW sold its TT–115 to Glendale Federal Savings and Loan. A-M sold its AMCAT to California Federal Savings and Loan.

[15] While complaint counsel alleged four categories of competitive equipment, the record is silent as to inventory recordkeeping and reveals that A-M never manufactured or sold teller operated bank transaction equipment (Tr. 1880). We are therefore concerned only with point of sale credit authorization equipment, including credit validation and check cashing validation, and equipment used for the electronic withdrawal and deposit of funds from a financial institution, *i.e.*, EFTS.

[16] There was similar testimony from Buckeye Federal Savings and Loan (ID 52), California Federal Savings and Loan (ID 61), Bank of America (ID 62), and Wells Fargo Bank (ID 66).

convince purchasers that what was really needed was the kind of equipment manufactured by each company, respectively. In its response to Bank of America's request for information, TRW urged reconsideration by the Bank of some of its requirements (CX 244). Likewise, Mr. Creekmore testified that TRW continued to attempt to sell FNBA a terminal which was not customer operated despite FNBA's express desire for one which was customer operated (Tr. 66–2).

If attempts to convince were not effective, the next course of action would be to develop new products or modify existing ones. Mr. Sheldon Kaplan, who was employed by A-M during the relevant time period, testified that he would first try to persuade a potential purchaser to use what A-M had already developed. Only after that first step would he change his tactic to determine what A-M could develop or modify (Tr. 176). Development and modification were in fact used by A-M for FNBA's "Honest Face" program (the AMCAT 1-C) (ID 45), and by TRW to meet Glendale Federal's need (ID 39–40). [14]

Attempts by TRW and A-M to persuade, develop and modify are especially significant when it is remembered that both credit authorization and EFTS were infant industries during the complaint period (ID 36). In fact, in many states the use of EFTS was not even statutorily permitted (Tr. 213–14). Thus, the industry was characterized by many products which performed the same function but in different ways. This was matched by customers who, because of the newness of the industry, did not have a particular set of requirements in mind. There was, as Mr. Thomas C. Noel, President of ELCOM Industries put it, "no specific, one universal set of requirements" (Tr. 137–1).

In view of this situation, it is not surprising that evidence of cross-elasticity of demand or product interchangeability would be less conclusive than where the products are fungible, or the technology standardized. At this stage of market development, it is understandable that customer needs would be more individualized, with particular attention devoted to product features and less to price.

As a consequence, it could be expected that the products of the two companies would not be readily interchangeable for all purposes. Yet, the adaptive responses of the firms to new demands suggest the kind of competitive response that is likely where a common market exists, even though the contours of that market may not be drawn with great precision. Moreover, despite the fact that for some uses the products may nct have been close substitutes (*e.g.,* large department stores vs. gasoline service stations), the evidence indi-

cates that the systems were in much more direct competitive confrontation in other situations.

Perhaps the best illustration of the firms' ability to meet similar customer needs is found in the use of EFTS terminals in California supermarkets. Both Glendale Federal Savings and Loan and California Federal Savings and Loan decided to place EFTS terminals in Los Angeles supermarkets to allow the deposit and withdrawal of funds from customer accounts (ID 38, 60). While Glendale used the TRW TT–115 (ID 40), California Federal used the AMCAT I (ID 60). Glendale's TT–115 was small enough to fit into the check-out stand and utilized a personal identification number (PIN) pad. The AMCAT I had neither of these features (ID 39). Nevertheless, both terminals performed the same functions in the same type of retail environment. [15]

Furthermore, in response to Glendale's specifications, which included a magnetic card reader as well as a keyboard and digital display, A-M showed Glendale its MODCAT. While this terminal appeared to fit all of Glendale's needs, it was offered only after Glendale had already contracted with TRW for purchase of the TT–115 (ID 41).

That the market here does not reflect the tidiness that respondents or their expert witness, Dr. Paul Munyon, would like, does not negate the existence of effective competition between TRW and A-M. Though application of traditional tests for defining competition may lead to imperfect results in instances such as this one, where the market has not yet fully matured, we believe the record demonstrates that meaningful competition does exist and that it satisfies the standard set forth in Section 8. To the extent that the character of the competition, as opposed to its existence, has further significance, it should be considered in the context of fashioning appropriate relief.

## V. One-Year Grace Period

Related to the issue of whether TRW and A-M were competitors is respondents' argument that paragraph 5 of Section 8[17] absolves Mr. Shepard of any liability under Section 8. Paragraph 5 provides for a

[17] This paragraph provides in pertinent part:

> When any person elected or chosen as a director . . . of any . . . corporation subject to the provisions of this Act is eligible at the time of his election or selection to act for such . . . corporation in such capacity his eligibility to act in such capacity shall not be affected and he shall not become or be deemed amenable to any of the provisions hereof by reason of any change in the affairs of such . . . corporation from whatsoever cause, whether specifically excepted by any of the provisions hereof or not, until the expiration of one year from the date of his election or employment.

one-year grace period from the date of a lawful election before liability attaches to an illegally interlocked director.

Respondents maintain that complaint counsel bears the burden of showing that Mr. Shepard was not eligible to be a director of A-M on November 7, 1974, the date of his last election and one year prior to his resignation (RAB 46). Complaint counsel have countered that there should be no exemption beyond the first election. Additionally, complaint counsel argue that the definition of "change in the affairs" should not include competition (C.Ans 38). [16]

In attempting to resolve the issue, the ALJ has interpreted paragraph 5 as being triggered by a "disabling" event rather than the date of election (ID p. 48). Without taking issue with the ALJ's interpretation, respondents alternatively argue that the ALJ erred by not finding such a disabling event (RAB 46).

We do not agree with the interpretation of either complaint counsel or the ALJ. Complaint counsel's position is based, in part, on the possible inconsistency that would result in subjecting directors (as well as officers and employees) who serve for terms in excess of one year to greater risk than directors who are elected (and reelected) for one-year terms. This stems from the fact that after one year a "change in the affairs" of a company would subject a director to immediate liability, whereas directors sitting for reelection each year presumably would have more time. Accordingly, complaint counsel urge that the most reasonable interpretation, which would apply fairly to everyone, would allow only one grace period, running from a director's or employee's initial election by the corporation or bank. While there may be some imperfections in the operation of this provision, the language of paragraph 5 is not limited to first-time elections. Moreover, the legislative history indicates that the author of the provision apparently felt that the one-year period generally conformed with the normal tenure of directors, at least bank directors. 51 Cong. Rec. 9603 (1914). In addition, there would appear to be no reason to assume new directors will be any less knowledgeable about a "change in the affairs" occurring after their election than other directors. That is particularly true where the change may be precipitated by action of the other company or companies involved in the interlock. Thus, we conclude that paragraph 5 applies to all elections of a director by the same corporation.

As for complaint counsel's second argument that a "change in the affairs" does not include the development of competition, neither the language of paragraph 5 nor its legislative history convinces us of the correctness of this interpretation. Paragraph 5 applies to a "change in the affairs . . . *from whatsoever cause* . . ." (emphasis

added). And, the House debates indicate that the provision was added to address changes other than those relating to the size of the interlocking firms[18] which might affect the legality of an interlock (*Id.*). Certainly a change resulting in two firms becoming competitors for the first time is as significant as changes in the size of the asset or revenue base of a firm. Consequently, we believe paragraph 5 encompasses changes in the competitive status of interlocking firms that would trigger Section 8 liability. [17]

Finally, we find no basis for reading into the statute a requirement that the one-year period runs from the date of the "disabling" event, as suggested by the ALJ. Paragraph 5 explicitly provides that the grace period runs "until the expiration of one year from the date of [the director's] election . . ." The meaning of that language seems quite clear.

Nevertheless, notwithstanding our interpretation of paragraph 5, we do not find the one year exemption applicable in this instance. Implicit in our holding that TRW and A-M were competitors in the relevant product lines is that they were competitors on November 7, 1974. Indeed, TRW and A-M were competitors at least as early as May 1973, when A-M offered its AMCAT product line (RFF 47). Thus, as of the date of his last election to the A-M Board, Mr. Shepard was ineligible to sit as a director.

## VI. *De Minimis* Defense

In conjunction with its argument on competition, respondents also contend that sales of the allegedly competing products were so small as to be *de minimis* and thus without the scope of Section 8.[19]

There is authority to suggest that such a defense is not appropriate to a Section 8 case, *United States* v. *Crocker National Corp.*, 422 F.Supp. 686, 703 (N.D. Cal. 1976); *United States* v. *Sears, Roebuck & Co.*, 111 F.Supp. 614, 619–21 (S.D.N.Y. 1953), since the statute is *per se* in nature and incorporates its own standard of substantiality. TRW and A-M have never disputed that they have "capital, surplus, and undivided profits aggregating more than $1,000,000" (ID 6, 11).

We need not resolve this issue, though, since we are not persuaded that respondents meet a *de minimis* standard however formulated. TRW's sales in the relevant product lines averaged $7 million annually during the period covered by the complaint (RX 62, RX

[18] Compare paragraph 4 of Section 8.

[19] Respondents in making their *de minimis* argument calculate TRW's sales data by excluding sales to department stores, airlines and car rental agencies. They justify this approach by claiming that A-M did not compete for this business (RAB 5–6). In view of our disposition of the competition issue, this approach is wholly inadequate.

62A, C.Ans 3), while A-M sales were about $1 million annually (RAB 5).[20] Although the sales of the products involved are relatively small in comparison to TRW's and A-M's overall revenues, such figures should not be viewed solely from the perspective of the two firm's operations. Consideration must also be given to the developing state of the technology and the fact that TRW's sale of its TT-115 EFTS system to Glendale Federal Savings and Loan was the largest EFTS project in the country at the time (Tr. 1688). Under these circumstances, we do not view the amount of commerce involved to be insignificant.

## VII. Relief[21]

The ALJ, having found that Section 8 was violated,[22] entered an order against Mr. Shepard but not against TRW. Complaint counsel appeal the failure to enter an order against TRW, while respondents appeal the order against Mr. Shepard. We have determined that an order should issue against Mr. Shepard, but in a more limited fashion than proposed by the ALJ. We have also determined that under the circumstances, an order should issue against TRW. While we have wide latitude in fashioning a remedy, it must be reasonably related to the unlawful practices found to exist.[23]

### A. Mr. Shepard

In deciding to issue an order against Mr. Shepard, we believe that Mr. Shepard's current status as a TRW director, together with his past membership on other boards, demonstrates a "cognizable danger" that a violation could occur again. [19]

The record contains evidence that Mr. Shepard has been a frequent member of various other boards. Indeed, as noted above, Mr. Shepard was approached by Procter and Gamble at the very time he was considering whether to resign from A-M. Under such circumstances, the likelihood of Section 8 violations is much greater than for an individual less sought after. Moreover, because TRW is a

[20] While the issue was not specifically referred to in *Protectoseal, supra,* we note that one of the corporations had competitive sales of only a million and a half dollars. 484 F.2d at 587.

[21] Although respondents have argued on appeal that broken commitments by the staff are of such a nature as to deny them due process and the right to a dismissal of this proceeding, we see no need to address this issue again. Our position was made clear in our order of October 13, 1976, 88 F.T.C. 544, and elaborated upon by the ALJ at p. 49 of the Initial Decision. Those decisions adequately deal with respondents' contentions.

[22] The ALJ also found violations of Section 5 of the FTC Act, as to both respondents, a decision with which we concur (ID p.59). Respondents have argued that in the absence of a Section 8 violation there is no independent basis for finding a Section 5 violation (RAB 46). In view of our disposition of respondents' liability under Section 8, we need not address this aspect of their appeal.

[23] *National Society of Professional Engineers* v. *United States,* 435 U.S. 679, 698 (1978); *FTC* v. *Colgate-Palmolive Co.,* 380 U.S. 374, 394-95 (1965); *FTC* v. *National Lead Co.,* 352 U.S. 419, 429 (1957); *FTC* v. *Ruberoid Co.,* 343 U.S. 470, 473 (1952).

large corporation with many products, the number of corporations which could be deemed competitive is also large. The combination of these factors persuades us that the public interest would be best served by issuance of an order against Mr. Shepard.

We are not inclined, however, to issue an order as broad as the one issued by the ALJ. The coverage of that order extends to Mr. Shepard's position as an "officer, employee, agent or representative of any corporation." Because the facts are not so egregious as to warrant such broad coverage, we require only that Mr. Shepard cease and desist from sitting on the Board of Directors of any corporation which competes with TRW.

This result is warranted by a combination of factors. In the first place, Mr. Shepard's age indicates that he may not be sought after by as many corporations as would otherwise approach a younger individual. The record does not indicate what the limiting age is for various corporations, but we suspect that TRW's age limit of 72 is not on the low side. At the time the appeal briefs were filed in 1978, Mr. Shepard was 65 years old and was eligible to remain on TRW's Board for seven more years.

We are further influenced by the fact that Mr. Shepard sought counsel before joining A-M's Board (ID 17). While such action does not absolve him of liability, it evidences some awareness of the concerns at stake.[24] Moreover, on at least one occasion, after having sought advice of counsel, Mr. Shepard declined an invitation to become a Director (ID 20). Both instances demonstrate at least some attempt by Mr. Shepard to comply with the mandate of Section 8. [20]

Lastly, we note that the nature of the violation is not as egregious as we have found in other instances. While such a distinction does not negate the need for an order, we regard it as mitigating the need for a broad fencing-in provision. Under the circumstances, we feel an order limited to his tenure on the Board of TRW should sufficiently sensitize Mr. Shepard to interlock problems that may arise if he chooses to sit on other boards in situations not covered by the order.

It should be made clear that our decision to limit the order against Mr. Shepard does not depend on any one factor, but rather on the combination of all three. In that context, this case presents a unique set of circumstances which we believe justifies a more limited form of relief.

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[24] However, the fact that Mr. Shepard could rely, and apparently did rely, on Department of Justice statements during a 1971 investigation about competitive overlap between TRW and A-M, does not detract from the need for an order in this instance. Indeed, such reliance merely highlights the need to be constantly aware of changing products since the issue in the earlier investigation did not involve credit authorization or EFTS equipment.

B. TRW

Our determination to enter an order against TRW is based on different concerns.[25] The ALJ found, *inter alia,* that "there is nothing in the record of this case to suggest that TRW played an active role in Mr. Shepard's becoming a director of A-M" (ID p.55). Consequently, he determined that an order was inappropriate. We do not disagree with the ALJ's finding but rather with this conclusion. We think it is precisely TRW's failure to take action which is important. *Kraftco Corp.,* 89 F.T.C. 46, 65, *remanded on other grounds sub nom. SCM Corp.* v. *FTC,* 565 F.2d 807 (2d Cir. 1977). That TRW may have had no anticompetitive purpose in mind is beside the point. It is precisely to avoid such issues that Section 8 was enacted as a *per se* statute.

Mr. Shepard testified that he sought counsel from TRW (ID 17). It is therefore without question that TRW was aware of his membership on A-M's Board. While there may have been no competition between the two firms at the time Mr. Shepard was first elected to A-M's Board, competition arose over the course of time as new products were developed. It was therefore incumbent on TRW to monitor the legality of Mr. Shepard's membership. At a minimum, TRW should have evaluated Mr. Shepard's eligibilty each time he stood for election to TRW's Board. [21]

While TRW now has a screening process to avoid Section 8 problems, which followed on the heels of previous investigations, (Tr. 1026), we nevertheless believe that there is a "cognizable danger" that a Section 8 violation could occur again, and that TRW's screening process does not thoroughly insure against such future violations. Mr. Gorman testified that the screening process has been in effect since 1972 (*Id.*). Yet, Mr. Shepard's interlock with A-M went unnoticed until August, 1975, and then only after the Commission commenced its investigation.

In an attempt to avoid repetition of this very problem, we have structured the order to require each member or prospective member of TRW's Board to file with the corporation a written statement listing the products and/or services that are produced or sold by such other corporations on which the individual sits. In this way, TRW will have the benefit of an independently prepared list of products, which by its nature should be more thorough than a list prepared by TRW.[26] Furthermore, TRW will be prohibited from having on its Board any individual who fails to submit the required information.

[25] We do not understand TRW to argue that a corporation is not covered by Section 8. Indeed, such an argument has been recently rejected. *SCM Corp.* v. *FTC,* 565 F.2d 807, 811 (2d Cir. 1977).

[26] TRW currently prepares its own list from whatever sources it can find (Tr. 1031–35).

This requirement will remain in effect for a period of five years, at which time TRW will be free to utilize whatever other procedures it believes might be as effective.

Finally, we have limited the ban on interlocks with competing corporations to ten years. Normally a perpetual proscription is appropriate in view of the relatively clearcut statutory provisions and ease of compliance. Nevertheless, in view of mitigating factors, such as the nature of the violation and previous efforts to institute a screening procedure, even though inadequate, we find it unnecessary to bind respondent forever.

An appropriate order is attached.

## FINAL ORDER

This matter having been heard by the Commission upon the cross-appeals of respondents and counsel supporting the complaint from the initial decision, and upon briefs and oral argument in support thereof and opposition thereto, and the Commission, for reasons stated in the accompanying opinion, having determined to deny the appeal as to respondents and grant the appeal as to counsel supporting the complaint:

*It is ordered,* That the findings of fact and initial decision of the administrative law judge be adopted insofar as not inconsistent with the findings of fact and conclusions of law contained in the accompanying opinion.

*It is further ordered,* That the following order to cease and desist be, and the same hereby is, entered:

## ORDER

### I. TRW, Inc.

The following definitions shall apply in this order:

"Subsidiary" of TRW means any corporation, 50 percent or more of the voting stock of which is owned or controlled, directly or indirectly, by TRW. [2]

"Parent" of TRW means any corporation which owns or controls, directly or indirectly, 50 percent or more of the voting stock of TRW.

"Sister" of TRW means any subsidiary of a parent of TRW.

1. *It is ordered,* That TRW, Inc., its successors and assigns, shall forthwith cease and desist from having, and in the future shall not have, on its board of directors any individual who either:

(a) serves as a director of Addressograph-Multigraph Corp., or any other corporation if TRW, Inc. and Addressograph-Multigraph

Corp., or such other corporation are, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws; or

(b) fails to submit to TRW, Inc., any statement required by Paragraph Two of this order to be obtained by TRW, Inc.

The requirements of this paragraph shall be effective for a period of ten (10) years from the date of this order.

2. *It is further ordered,* That within thirty (30) days of the effective date of this order, and prior to each election of directors or prior to the solicitation of proxies for such election, whichever is earlier, TRW, Inc., shall obtain a written statement from each member of its board of directors (except directors whose terms expire at the next election and who are not standing for re-election) and from each nominee for a directorship (who is not then a director) showing:

(a) the name and home mailing address of each director or nominee; and

(b) the name and principal office mailing address of, and a listing of each product or service produced or sold by, each corporation which the director or nominee then serves as a director, or has been nominated to serve as a director at the time of the statement. [3]

The requirements of this paragraph shall not apply to elections of directors occurring after five years from the effective date of this order, nor shall directors or nominees be required to list products or services of subsidiaries, sisters, or parents of TRW, Inc.

Nothing in the paragraph shall be construed to relieve respondent of its obligation under Paragraph 1(a) hereto due to any error or omission contained in any written statement received pursuant to this paragraph.

3. *It is further ordered,* That within forty-five (45) days of the effective date of this order and annually for a period of ten (10) years hereafter, TRW, Inc., shall file with the Commission a written report setting forth in detail the manner and form in which it has complied with this order. Copies of the statements obtained pursuant to Paragraph Two of this order shall be submitted to the Commission as part of the reports of compliance required by this paragraph during the first five (5) years. Nothing in this paragraph shall relieve TRW of its obligation to comply with Paragraphs One and Four of this order once it is no longer required to submit reports of compliance to the Commission.

4. *It is further ordered,* That TRW, Inc., shall notify the Commission at least thirty (30) days prior to any change in the corporation such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order. The requirement of this paragraph shall be effective for a period of ten (10) years from the date of this order.

## II. Horace A. Shepard

*It is ordered,* That Horace A. Shepard shall forthwith cease and desist from serving, and in the future shall not serve, as a director of any corporation or other form of business entity, if he simultaneously is serving as a director of TRW, Inc., if such corporation or other form of business entity and TRW, Inc., are, by virtue of their business and location of operation competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws.

IN THE MATTER OF

# INDIANA DENTAL ASSOCIATION, ET AL.

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

*Docket C-2957. Complaint, March 14, 1979 — Decision, March 14, 1979*

This consent order, among other things, requires an Indianapolis, Ind. dental association and fourteen component societies to cease establishing or engaging in any policy, act or practice that may induce their members to refuse to submit data requested by third-party payers for benefit determinations; compel third-party payers to alter provisions of health care benefits programs; influence members to render other than independent judgments; or restrict consumers and third-party payers in their choice of dentists and/or dental consultants. Respondents are further required to mail a copy of the complaint and order to each of their members, together with a letter advising them that they are free to choose their own course of action in dealing with dental health care insurance plans.

*Appearances*

For the Commission: *Larry E. Gray.*

For the respondents: *Baker & Daniels, J.P. Barney* and *J.R. Genkins,* Indianapolis, Ind. and *P.C. Ward,* Washington, D.C., of counsel.

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, (15 U.S.C. 41, *et seq.*), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the respondents named in the caption hereof have violated the provisions of Section 5 of the Federal Trade Commission Act and that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows:

PARAGRAPH 1. The following definition shall apply in this complaint: "Third-party payer" or "payer" means any entity that provides a program of reimbursement for dental health care services to employees or members of any business organization, and any person, such as an independent claims adjuster, who provides evaluative services in connection with any such reimbursement program.

PAR. 2. Respondent Indiana Dental Association ("IDA") is an Indiana corporation with its principal office at 402 Jefferson Building, One Virginia Ave., Indianapolis, Indiana. IDA has approxi-

mately 2000 members, all of whom are licensed to practice dentistry in Indiana. IDA charters, and is divided into, geographic component societies. Membership in a component society is a condition of membership in IDA. The respondents alleged in Paragraphs Three through Sixteen comprise all the component societies of IDA. The component societies designate representatives who constitute IDA's House of Delegates, which is the governing body of IDA.

PAR. 3. Respondent First District Dental Society, an Indiana corporation, is a component society of IDA with its mailing address in care of Dr. Steven E. Dixon, 3700 Bellemeade Ave., Evansville, Indiana.

PAR. 4. Respondent Indianapolis District Dental Society, an Indiana corporation, is a component society of IDA with its principal office at the Illinois Building, 17 West Market St., Indianapolis, Indiana.

PAR. 5. Respondent Isaac Knapp Dental Society, an Indiana corporation, is a component society of IDA with its mailing address in care of Dr. Emory W. Bryan, Jr., 700 Indiana Bank Bldg., Ft. Wayne, Indiana.

PAR. 6. Respondent Western Indiana District Dental Society, an Indiana corporation, is a component society of IDA with its mailing address in care of Dr. Robert H. Michaels, 3120 Wabash Ave., West Terre Haute, Indiana.

PAR. 7. Respondent Ben Hur Dental Society, an unincorporated association, is a component society of IDA with its mailing address in care of Dr. Michael A. McDonald, 1606 North Lebanon, Lebanon, Indiana.

PAR. 8. Respondent East Central Dental Society, an unincorporated association, is a component society of IDA with its mailing address in care of Dr. Paul B. Risk, 610 S. Tillotson Ave., Muncie, Indiana.

PAR. 9. Respondent Eastern Indiana Dental Society, an unincorporated association, is a component society of IDA with its mailing address in care of Dr. John P. Backmeyer, 2519 East Main St., Richmond, Indiana.

PAR. 10. Respondent Greene District Dental Society, an unincorporated association, is a component society of IDA with its mailing address in care of Dr. Keith M. Broshears, 290 A St., Linton, Indiana.

PAR. 11. Respondent North Central Dental Society, an unincorporated association, is a component society of IDA with its mailing address in care of Dr. Dennis M. Miller, 3608 Pleasant St., South Bend, Indiana.

PAR. 12. Respondent Northwest Dental Society, a corporation, is a

component society of IDA with its mailing address in care of Dr. Edward Young, 808 Madison St., LaPorte, Indiana.

PAR. 13. Respondent South Central Dental Society, an unincorporated association, is a component society of IDA with its mailing address in care of Dr. Peter H. Leonard, 2739 Central Ave., Columbus, Indiana.

PAR. 14. Respondent South Eastern Dental Society, an unincorporated association, is a component society of IDA with its mailing address in care of Dr. Elbert P. Combs, 411 Clifty Drive, Madison, Indiana.

PAR. 15. Respondent Wabash Valley Dental Society, an unincorporated association, is a component society of IDA with its mailing address in care of Dr. F. Wesley Peik, 3429 S. La Fontaine St., Kokomo, Indiana.

PAR. 16. Respondent West Central Dental Society, an unincorporated association, is a component society of IDA with its mailing address in care of Dr. Lewis J. Urschel, 2204 Scott St., Lafayette, Indiana.

PAR. 17. Members of respondents are engaged in the business of providing dental health care services to patients for a fee and are paid for such services from the patients' personal funds and/or from funds provided under dental health care benefits programs. Except to the extent that competition has been restrained as herein alleged, members of respondents have been and are now in competition among themselves and with other dentists.

PAR. 18. Respondents are engaged in substantial part in representing the pecuniary interests of their members. By virtue of such activities, respondents are corporations organized for the profit of their members within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 19. In 1976, total expenditures for dental health care services in the United States were approximately $8.6 billion. The annual rate of expenditures in Indiana is at least $150 million.

PAR. 20. In the course and conduct of their businesses, members of respondents:

(A) Receive substantial revenue from private third-party payers and from the Federal Government in payment for rendering dental health care services, which money flows across state lines;

(B) Receive and treat patients from states other than Indiana; and

(C) Utilize and prescribe substantial quantities of drugs, medicines, and other products which are shipped in interstate commerce,

as a result of which the acts and practices hereinbelow alleged are in

or affect commerce within the meaning of the Federal Trade Commission Act, and respondents are subject to the jurisdiction of the Federal Trade Commission.

PAR. 21. A substantial portion of the population of Indiana is covered by dental health care benefits programs administered by third-party payers. Many of such programs include provisions for determination of benefits in advance of treatment ("predetermination") and limitation of coverage to the least expensive adequate course of treatment and require that radiographs ("X-rays") be submitted to aid in benefit determinations. The purpose of such provisions is to contain the cost of dental care. Their efficient utilization requires cooperation from treating dentists.

PAR. 22. For many years past, respondents and their members have formed agreements and engaged in acts, practices, and methods of competition having the purpose or effect of eliminating, preventing, or hindering competition among dentists with respect to cooperation by dentists with dental health care benefits programs containing predetermination and least expensive adequate course of treatment provisions.

PAR. 23. In the course of the conduct alleged in Paragraph Twenty-Two, respondents have requested, urged, and organized their members to refuse to submit X-rays to third-party payers or otherwise to cooperate with such payers by, *inter alia:*

(A) Promulgating, adopting, publishing, and distributing to members "Principles for Determining the Acceptability of Plans for the Group Purchase of Dental Care," a "Manual on Group Funded Dental Care Programs," and other guidelines for dealing with third-party payers, along with forms and information to facilitate adherence to such guidelines;

(B) Encouraging and inducing members to discontinue serving and/or to refuse to serve as dental consultants for third-party payers and to refuse to provide payers with other professional services such as, but not limited to, taking X-rays for use in benefit determination;

(C) Conducting meetings, workshops, and pledge campaigns among members to gain the agreement of individual members not to compete with other dentists in dealing with third-party payers;

(D) Urging dental organizations in other states to pursue courses of conduct similar to that hereinabove described; and

(E) Urging payers, purchasers, and beneficiaries of dental health care benefits plans to eliminate provisions of such plans that the respondents find unacceptable.

PAR. 24. As a result of the acts, practices and methods of competition alleged in Paragraphs Twenty-Two and Twenty-Three:

(A) Competition among dentists in Indiana has been hindered, restrained, foreclosed, and frustrated;

(B) The cost of dental health care services in Indiana has been or may be stabilized or otherwise tampered with;

(C) Consumers have been or may be deprived of the benefits of third-party payers' cost-containing measures, including lower or potentially lower costs for dental health care services and dental health care benefits insurance;

(D) Consumers have been or may be denied the benefits of a second dentist's opinion as to the adequacy of proposed dental treatment; and

(E) Consumers have been limited in their opportunity to select dentists who cooperate with dental health care benefits programs.

PAR. 25. The aforesaid acts and practices constitute unfair methods of competition and unfair or deceptive acts or practices by respondents 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 respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of Section 5 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 respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues

its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Indiana Dental Association ("IDA") is an Indiana corporation with its principal office at 402 Jefferson Building, One Virginia Ave., Indianapolis, Indiana. IDA charters, and is divided into, 14 geographic component societies, more particularly described below:

Respondent First District Dental Society, an Indiana corporation, is a component society of IDA with its mailing address in care of Dr. Steven E. Dixon, 3700 Bellemeade Ave., Evansville, Indiana.

Respondent Indianapolis District Dental Society, an Indiana corporation, is a component society of IDA with its principal office at the Illinois Building, 17 West Market St., Indianapolis, Indiana.

Respondent Isaac Knapp Dental Society, an Indiana corporation, is a component society of IDA with its mailing address in care of Dr. Emory W. Bryan, Jr., 700 Indiana Bank Building, Fort Wayne, Indiana.

Respondent Western Indiana District Dental Society, an Indiana corporation, is a component society of IDA with its mailing address in care of Dr. Robert H. Michaels, 3120 Wabash Ave., West Terre Haute, Indiana.

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Respondent West Central Dental Society, an unincorporated association, is a component society of IDA with its mailing address in care of Dr. Lewis J. Urschel, 2204 Scott St., Lafayette, Indiana.

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

## ORDER

### I

*It is ordered,* That the following definition shall apply in this order: "Third-party payer" or "payer" means any entity that provides a program of reimbursement for dental health care services to employees or members of any business organization, and any person, such as an independent claims adjuster, who provides evaluative services in connection with any such reimbursement program.

### II

*It is further ordered,* That respondents, their successors or assigns, and the officers, agents, representatives and employees of each of them, directly or through any subsidiary, division, or other device, shall cease and desist from engaging in any activity, course of conduct, practice, or policy that in whole or in part:

A. Requests, urges, recommends or suggests that dentists, or has the purpose or effect of requiring or organizing dentists to, (1) refuse to submit radiographs or such other pre-treatment and post-treatment reports, analyses and materials (except where post-treatment radiographs are not taken in the course of treatment and would expose the patient to unnecessary radiation) as third-party payers request for use in benefit determination or (2) refuse to deal in any particular way with any one or more third-party payers;

B. Compels or coerces any third-party payer to incorporate, delete or modify any provision in any existing or proposed dental health care benefits program;

C. Has the purpose of causing or inducing consumers to choose

dentists who do not cooperate with third-party payers, or influencing, to any degree, consumers' choice of dentists based on the degree and/or manner of noncooperation between such dentists and any third-party payer or payers;

D. Has the purpose of compelling, coercing, or inducing any third-party payer to select particular dental consultants for reasons other than the expertise of such consultants; or

E. Has the purpose or effect of influencing any dental consultant to render any opinion other than that which reflects his independent expert judgment.

III

*It is further ordered,* That within thirty (30) days after this order becomes final, each respondent shall mail to each of its members a copy of the Commission's complaint and order in this matter, as well as a letter, in the form shown as "Appendix A" to this order, advising that respondents have abandoned all policies, guidelines and principles that request, urge, recommend or suggest that dentists, or have the purpose or effect of requiring or organizing dentists to, (1) refuse to submit radiographs or such other pre-treatment and post-treatment reports, analyses and materials (except where post-treatment radiographs are not taken in the course of treatment and would expose the patient to unnecessary radiation) as third-party payers request for use in benefit determination or (2) refuse to deal in any particular way with any one or more third-party payers. Furthermore, the letter shall further advise that dentists are free to choose to deal with any such programs and payers in such manner as they decide individually. In addition to the foregoing, each respondent shall mail a copy of the aforementioned complaint, order, and letter to every person who joins such respondent within five (5) years of the date of service of this order; *provided, however,* that mailing by the Indiana Dental Association will relieve the appropriate component society of the obligation of such mailing to a member of the Indiana Dental Association.

IV

*It is further ordered,* That, within sixty (60) days after service of this order, and annually on the anniversary date of the original report, for each of the five (5) years thereafter, each respondent shall individually file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with this order.

V

*It is further ordered,* That nothing in this order shall be construed to exempt any respondent from compliance with the antitrust laws or the Federal Trade Commission Act, and the fact that any activity is not prohibited by this order shall not bar a challenge to it under such laws and statute.

VI

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

APPENDIX A

(Respondent's Letterhead)

Dear Doctor:

As you may be aware, the Federal Trade Commission (FTC) has been investigating certain activities of the Indiana Dental Association (IDA) and its component societies. IDA and its component societies have voluntarily entered into an agreement with the FTC which resulted in the issuance by the Commission on [date] of a complaint and the entry of a consent order which requires, in essence, that IDA and its component societies cease and desist from certain activities that are concerned with dental health care benefits programs and cooperation by dentists with the administrators of such programs. The order also requires that you be sent a copy of the complaint and order and this letter.

In accordance with the terms of the FTC's order, you are hereby notified that IDA and its component societies have abandoned all policies, guidelines and principles which request, urge, recommend or suggest that dentists, or have the purpose or effect of requiring or organizing dentists to, (1) refuse to submit radiographs or such other pre-treatment and post-treatment reports, analyses and materials (except where post-treatment radiographs are not taken in the course of treatment and would expose the patient to unnecessary radiation) as third-party payers request for use in benefit determination or (2) refuse to deal in any particular way with any one or more third-party payers. You are further notified that you are free to

choose to deal with any such payers and programs in such manner as you decide individually.

Copies of the FTC's complaint and order are enclosed.

Sincerely,

_____

President

Enclosures