IN THE MATTER OF

BENEFICIAL CORPORATION, ET AL.

Docket 8922. Interlocutory Order, Dec. 20, 1977

Order rejecting proposed form of order submitted by respondents and directing the submission, by both parties, of a new form of order within sixty days. If no joint proposal is submitted, parties are directed to submit, within sixty days, briefs fully addressing the issues raised in the Commission's order of July 15, 1977.

In response to our order of July 15, 1977, calling for briefs directed to issues presented by the order of the United States Court of Appeals for the Third Circuit remanding this matter, respondents have submitted a proposed order and sample advertisement which is not opposed by complaint counsel. We have examined the proposed order and sample advertisement and find them deficient in several respects. First, only a proposed print advertisement has been submitted with the proffered order as an example of what the order would permit, although the record establishes that respondents use radio and television advertising extensively. It is not at all clear how the parties believe the order would apply to such advertising.

Moreover, our review of the proposed advertisement does not convince us that the deception that we earlier found in respondents' use of the "instant tax refund" slogan would be cured. The proposed advertisement still suggests that there is *some* relationship (even if not a dependency) between the loan and the amount of the expected refund. In fact, as we have previously held, and the court of appeals has affirmed, the eligibility for, or amount of, any income tax refund is entirely unrelated to an applicant's eligibility for, or the amounts of, any loan.

Under the circumstances, we believe that the best course is to conduct further proceedings.

It is ordered, That the parties submit, within 60 days, such other order (if any) as they may jointly propose. Any such proposed order shall be accompanied by proposed advertisements for the media customarily used by respondents and by a detailed proposed protocol for objective consumer perception surveys of those and other representative advertisements. The proposed protocol should be designed to test whether the proposed advertisements cure the deception which we previously found in respondents' use of the "instant tax refund" slogan.

It is further ordered, That if the parties do not submit such a joint

proposal, they submit within 60 days briefs as required by our order of July 15, 1977, fully addressing the issues raised in that order.

IN THE MATTER OF

JIM WALTER CORPORATION

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

Docket 8986. Complaint, July 29, 1974 — Final Order, Dec. 20, 1977

This order, among other things, requires a Tampa, Fla. manufacturer of shell housing and construction material to divest itself within one year of all interests in the Philip Carey Company and Carey-Canadian Mines, Ltd., divisions of Panacon Corporation; and prohibits the firm from acquiring for a period of ten years, any interest in a manufacturer, seller, or distributor of asphalt or tar roofing products without prior Commission approval.

Appearances

For the Commission: *Joseph J. O'Malley, Peter W. Kitson, Harold J. Lamboley, Jr.* and *Gilbert E. Geldon.*

For the respondent: *W. Donald McSweeney, William A. Montgomery* and *Susan A. Henderson, Schiff, Hardin & Waite,* Chicago, Illinois.

COMPLAINT

In the exercise of authority vested in it by the Federal Trade Commission Act, the Federal Trade Commission, having reason to believe that respondent, Jim Walter Corporation, a corporation, has violated Section 7 of the Clayton Act (15 U.S.C. 18), and that a proceeding in respect thereof would be in the public interest, issues this complaint charging as follows:

I. DEFINITIONS

For the purpose of construing this complaint the following definitions shall be controlling:

(a) "Asphalt and tar roofing" shall include both built-up roofing and shingles which are made from a dry felt, asbestos, or fiber glass base, saturated or coated with asphalt flux or coal tar pitch.

(b) "Built-up roofing" includes both tar and asphalt multi-layer, flat-topped roofing. This type of roof covering normally consists of from two to four plys of roll roofing sheets "built-up" with alternating coats of asphalt or coal tar pitch. [2]

(c) "Saturated felts" consist of a dry felt base, made from rags, wood, and other cellulose fibers, impregnated with an asphalt or tar saturant.

(d) "Roll roofing" is made from a saturated felt by applying an

additional coating of more viscous, weather-resistant asphalt. Roll roofing serves as the laminations in a built-up roof.

(e) "Asphalt shingles" are mineral-surfaced saturated felts machine-cut into squares of strips.

(f) "Asphalt and tar roofing materials" and "asphalt roofing materials" are used interchangeably herein to refer to saturated felts, roll roofing, and asphalt shingles, but specifically excludes accessory items such as asphalt cements, adhesives, primers, and mineral granules.

II. RESPONDENT

2. Jim Walter Corporation (hereafter "JWC") is a publicly-held corporation chartered and operating under the laws of the State of Florida, with a principal place of business at 1500 North Dale Mabry Highway, Tampa, Florida.

3. In addition to being the leading manufacturer of shell (partially finished) housing, JWC also ranks as a major producer of construction materials. Most of the corporation's activities are conducted through eight operational groups: mineral and fiber products; metal and wood products; stone and concrete products; pipe products; homebuilding supplies; paper; sugar operations; and oil and gas operations. Since its incorporation in 1955, JWC has managed to increase its share of the shell house market by internal expansion, and diversified into homebuilding supplies via acquisitions. In the past ten years alone JWC has [3] acquired no fewer than seventeen separate companies. For its fiscal year ending August 31, 1972, JWC reported revenues of $881,737,000; total assets of $983,217,000; and a net income of $44,568,000. On the basis of these figures, the May 1973 *Fortune 500* issue ranked Jim Walter Corporation as the 161st largest industrial corporation in the United States.

4. On July 12, 1962, JWC revealed the details of its agreement to purchase a 34 percent stock interest in the Celotex Corporation. A principal manufacturer of insulation fiberboard, mineral wool, gypsum, and asphalt roofing materials, Celotex became a fully-owned subsidiary of Jim Walter Corporation by the close of 1964. JWC further expanded its capacity to produce building materials and, in particular, roofing products by acquiring the Barrett Building Materials Division of Allied Chemical Corporation in 1967. The merger of Barrett into JWC's Celotex Division extended "Celotex' capabilities in roofing materials from one plant to eight."

5. At all times relevant to this complaint JWC has sold and shipped, and continues to sell and ship, its products in interstate

commerce throughout the United States. Consequently, JWC was, at the date of the acquisition in question here, and is now, engaged in commerce as "commerce" is defined in the Clayton Act (15 U.S.C. 12).

III. PANACON CORPORATION

6. Prior to April 17, 1972, Panacon Corporation (hereafter "Panacon") was a corporation chartered and operating under the laws of the State of Michigan, with a principal place of business at 320 South Wayne Ave., Cincinnati, Ohio. The Glen Alden Corporation owned 89 percent of the outstanding common stock of Panacon prior to April 1972.

7. At the time of its acquisition, Panacon was a substantial manufacturer of "a wide range of products for residential and commercial construction and industrial applications." Organized in six operating divisions, Panacon produced and marketed such diverse products as vitreous china, porcelain-on-steel plumbing ware, floor tiles, roofing materials, insulations, bathroom cabinets, lighting fixtures, ventilating fans, electric [4] fireplaces, and water heaters. For its fiscal year ending December 31, 1971, Panacon reported revenues of $181,129,000; total assets of $106,008,000; and a net profit of $10,591,000.

8. On April 9, 1970, the Plan and Agreement of Merger executed on December 31, 1969, by the Philip Carey Corporation and Briggs Manufacturing Company was consummated. Under the terms of this agreement Carey was merged into Briggs and Briggs, as the surviving entity, adopted the new name of Panacon Corporation. Each share of the Briggs common stock was exchanged for one share in Panacon; all of the Carey common stock was converted into 4,644,000 shares of common and 7,356,000 shares of Class A common stock in Panacon.

9. At all times relevant to this complaint Panacon sold and shipped products in interstate commerce and was, therefore, engaged in commerce as that term is defined in the Clayton Act (15 U.S.C. 12).

IV. THE ACQUISITION

10. Pursuant to an agreement signed earlier in the month, JWC purchased an 89 percent stock interest in Panacon from Glen Alden Corporation for $62,000,000 on April 17, 1972. On June 29, 1972, the shareholders of Panacon voted to approve the merger of Panacon into the Celotex Division of JWC. Thereafter, JWC completed its

takeover by giving the remaining shareholders cash for their 11 percent interest. The total cost of the acquisition was approximately $73,000,000.

V. TRADE AND COMMERCE

11. Functionally, the production of asphalt and tar roofing materials breaks down into two distinct processes: (1) the preparation of a base (dry felt, asbestos, or fiberglass) mat; and (2) the conversion of this mat into saturated felts, roll roofing, or shingles. The overwhelming proportion of asphalt roofing materials derive from a dry felt base saturated with asphalt flux, coated with mineral granules, and cut into sheets or shingles. [5]

12. Today over 80 percent of all roofing applied in the United States is produced by the asphalt roofing industry. There are approximately 29 manufacturers of asphalt roofing materials operating a total of 120 plants in the United States.

13. Asphalt roofing materials are manufactured, transported, sold, and applied throughout the United States. For the year (1971) preceding the acquisition in question here total sales of asphalt roofing materials, as defined herein, amounted to $654.7 million, of which $457.9 million represented sales of shingles and $196.8 million was sales of built-up roofing (saturated felts and roll roofing). The eight largest manufacturers of these products reported sales of $539.6 million, or 82.4 percent of all sales; the four largest manufacturers realized $336.3 million in sales, or 51.4 percent of all sales of asphalt roofing materials. These same eight manufacturers operated 92, or 76.7 percent, of all plants producing these materials in the United States.

14. For the year 1971, Jim Walter Corporation ranked fifth in sales of all asphalt roofing materials; third in sales of built-up roofing materials; and seventh in the sale of shingles. JWC represented 8.8 percent, 12.3 percent, and 7.3 percent of all sales of asphalt roofing materials, built-up roofing, and shingles. During the same year Panacon ranked sixth, fifth, and sixth in sales of all asphalt roofing materials, built-up roofing, and shingles, respectively. After this acquisition, Jim Walter Corporation ranked second, first, and second in the sales of all asphalt roofing materials, built-up roofing, and shingles, respectively, with total sales of asphalt roofing materials of $123.5 million.

VI. EFFECTS OF THE ACQUISITION

15. The effect of the acquisition of Panacon by JWC may be

substantially to lessen competition or to tend to create a monopoly in the manufacture, sale, and distribution of all asphalt roofing materials and of built-up roofing and shingles in the United States, as a whole, and in certain states in the following ways: [6]

(a) By eliminating actual competition between JWC and Panacon in the manufacture, sale and distribution of all asphalt roofing materials and built-up roofing and shingles.

(b) The ability of JWC's competitors to compete in the manufacture, sale and distribution of all asphalt roofing materials and built-up roofing and shingles has been, and may be, further substantially diminished.

(c) The probability of JWC's competitors pricing their asphalt roofing products on an independent basis has been, and may be, further substantially impaired as a result of the increased potential for price leadership among manufacturers of asphalt roofing materials.

(d) The entry of new asphalt roofing materials manufacturers may have been, and may be, significantly discouraged or retarded.

(e) The ability of purchasers of asphalt roofing materials, as defined herein, to select from alternative manufacturers has been and may be substantially limited.

(f) The dominant position of JWC in the manufacture, sale and distribution of all asphalt roofing materials and of built-up roofing materials and shingles has been, and may be, further enhanced and solidified vis-a-vis its competitors with the result that any reduction in such dominance will be extremely remote.

VII. VIOLATION

16. The acquisition of Panacon Corporation by Jim Walter Corporation constitutes a violation of Section 7 of the Clayton Act (15 U.S.C. 18).

INITIAL DECISION BY JOSEPH P. DUFRESNE, ADMINISTRATIVE LAW JUDGE

MAY 6, 1976

PRELIMINARY STATEMENT

In a complaint dated July 29, 1974, the Commission charged Jim Walter Corporation (JWC) with violation of Section 7 of the Clayton Act (15 U.S.C. 18). The gravamen of the charges was that the effect of the purchase by JWC of the stock of Panacon Corporation (Panacon) for approximately $73,000,000 in April 1972 (Complaint, par. 10) may

have been, or be, substantially to lessen competition or to tend to create a monopoly in the manufacture, sale and distribution of all asphalt roofing materials and of built-up roofing and shingles in the United States as a whole and in certain states (Complaint, par. 15). [2]

The complaint definition of asphalt and tar roofing materials includes saturated felts, roll roofing, and asphalt shingles made from a dry felt, asbestos or fiber glass base, saturated or coated with asphalt flux or coal tar pitch, but excludes accessory items such as asphalt cements, primers, and mineral granules (Complaint, par. 1(a), (f)).

It was alleged that adverse effects on competition would come about in the following ways:

(a) By eliminating actual competition between JWC and Panacon in the manufacture, sale and distribution of all asphalt roofing materials and built-up roofing and shingles.

(b) The ability of JWC's competitors to compete in the manufacture, sale and distribution of all asphalt roofing materials and built-up roofing and shingles has been, and may be, further substantially diminished.

(c) The probability of JWC's competitors pricing their asphalt roofing products on an independent basis has been, and may be, further substantially impaired as a result of the increased potential for price leadership among manufacturers of asphalt roofing materials.

(d) The entry of new asphalt roofing materials manufacturers may have been, and may be, significantly discouraged or retarded.

(e) The ability of purchasers of asphalt roofing materials, as defined herein, to select from alternative manufacturers has been and may be substantially limited.

(f) The dominant position of JWC in the manufacture, sale and distribution of all asphalt roofing materials and of built-up roofing materials and shingles has been, and may be, further enhanced and solidified vis-a-vis its competitors with the result that any reduction in such dominance will be extremely remote. (Complaint, par. 15)

[3] In its answer, JWC denied the allegations and denied making the acquisition, but admitted that its wholly-owned subsidiary, The Celotex Corporation (Celotex), had acquired approximately 89 percent of the two classes of common stock of Panacon. The answer also raised the defenses (1) that the acquisition of Panacon by Celotex enhanced competition, (2) that neither asphalt roofing materials, built-up roofing, nor shingles, as referred to in the complaint, is a proper line of commerce under Section 7 of the Clayton Act, and (3) that the entire United States is not a proper section of the country under Section 7 for purposes of this case.

Prehearing conferences were held on October 24, 1974, and January 7, 1975; however, participation by counsel for JWC in other antitrust proceedings involving Celotex interfered with the completion of discovery and the start of the adjudicative hearings. The start of the hearings also was delayed due to the filing of numerous (23)

motions and applications for review having to do with such things as the date for the hearings to begin, discovery, and the protection of competitively sensitive information.

The hearings began on October 28, 1975. Presentation of the case-in-chief was completed on December 1, 1975. A motion for dismissal was orally argued on December 1, 1975 (Tr. 1152-1197), and denied on January 21, 1976. Presentation of the case-in-defense was completed on January 21, 1976. The record was closed for the receipt of evidence on February 11, 1976, but was reopened for the receipt of additional testimony on February 17, 1976. March 12, 1976, was the date by which proposed findings of fact, conclusions and a proposed order were to be filed and March 29, 1976, was the date by which the parties replied to the proposals and briefs of the other side.

The findings of fact below are based on a review of the complaint, respondent's answer, stipulations, testimony and exhibits, and consideration of the demeanor of the witnesses at the hearings. In addition, the proposed findings of fact, conclusions and order, together with reasons and briefs in support thereof filed by both sides have been given careful consideration. To the extent not adopted in this decision in the form proposed or in substance, they are rejected as not supported by the record or as immaterial. [4]

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

CX - Commission's Exhibit, followed by number of exhibit being referenced.

RX - Respondent's Exhibit, followed by number of exhibit being referenced.

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

Admissions - Respondent's response to Complaint Counsel's Request for Admissions filed May 16, 1975.

FINDINGS OF FACT

I. RESPONDENT JIM WALTER CORPORATION

A. Jim Walter Corporation

1. The Jim Walter Corporation (JWC) is a publicly held corporation organized and existing under the laws of the State of Florida, with its principal place of business at 1500 North Dale Mabry Highway, Tampa, Florida (Complaint and Answer, par. 2). It was incorporated in 1955 (Complaint and Answer, par. 3).

2. JWC is one of the nation's largest building and construction materials companies (CX 28, at 22; CX 29U; CX 31B). Prior to December 31, 1969, JWC was engaged in the sale, construction and financing of shell-type homes. As of January 1, 1970, JWC home building activities were transferred to its wholly-owned subsidiary, Jim Walter Homes, Inc. (Admissions, pars. 6, 9). [5]

3. JWC conducts its business through a large number of subsidiary corporations which are organized into operating groups (Complaint and Answer, par. 3; *see* CX 8B). In 1972, these groups included mineral and fiber products; pipe products; home building; metal and wood products; stone and concrete products; paper; sugar; savings and loan operations; and oil and gas operations (CX 29L-T).

4. JWC and its subsidiaries had approximately 26,400 employees on August 31, 1974 (CX 37E).

5. As of August 31, 1972, JWC owned all of the outstanding voting securities of the following corporations:

Jim Walter Homes, Inc.
Dixie Building Supplies, Inc.
J.W. Walter, Inc.
Best Insurors, Inc.
Mid-State Homes, Inc.
Coast to Coast Advertising, Inc.
Jim Walter Advisers, Inc.
The Celotex Corporation
First Brentwood Corporation
The South Coast Corporation
Knight Paper Company
The Georgia Marble Company
United States Pipe and Foundry Company
The Columbia Moulding Company
Walter Land Company
Gamble Brothers, Inc.

Monarch America, Inc.

At the same time Celotex owned all of the outstanding voting securities of the following subsidiaries:

Jim Walter Export, Inc.
Celotex Canada Limited
Jim Walter Research Corp.
Celotex Limited
Miami Carey Ltd.
Carey Canadian Mines, Ltd.

(CX 35M).

[6] 6. For its fiscal year ending August 31, 1971, consolidated sales and revenues of JWC and its subsidiaries were $710,029,000 and consolidated earnings were $32,449,000 (CX 28, at 12; CX 33X). For its fiscal year ending August 31, 1972, JWC reported consolidated revenues of $885,172,000; total assets of $983,217,000; and a net income of $44,568,000 (Complaint and Answer, par. 3; CX 29X; CX 35G). For its fiscal year ending August 31, 1973, JWC reported consolidated sales and revenues of $1,068,636,000; total assets of $1,081,999,000; and net income of $54,097,000 (CX 30B; CX 36F).

7. The JWC organization has grown through a series of acquisitions. In the ten year period preceding the filing of the complaint in July 1974, JWC or its subsidiaries acquired no fewer than 17 separate companies with cash and/or stock (Complaint and Answer, par. 3). The following were among the more prominent acquisitions by JWC:

a. Celotex stock - 34% in 1962, the balance by 1964 (CX 28, at 20, 21; CX 33B; CX 35B);

b. Edwards Power Door Company, Inc., Mount Vernon, New York, in 1965, which became a part of Celotex in 1971 (CX 8A; CX 17I; CX 28, at 21);

c. Brentwood Financial Corporation, Los Angeles, California, in 1966, an operator of savings and loan companies and an insurance agency (CX 8A; CX 17I);

d. Barrett Building Materials Division of Allied Chemical Corporation in 1967. The Division later became a part of Celotex (CX 8A; CX 28, at 21; CX 45; CX 47);

e. Alger-Sullivan Company, Inc., Century, Florida, in 1967, a producer of laminated railroad flooring. In 1971, it also became a part of Celotex. (CX 8A; CX 17I);

f. Marquette Paper Corp. of Chicago, Illinois, in 1968 (CX 8A; CX 17J);

g. Gilbert C. Van Camp Insurance Agency in 1968 through the Brentwood subsidiary (CX 8A; CX 17J); [7]

h. Majestic Carpet Mills, Inc., Georgia, in 1968, which later became a part of Celotex (CX 8A; CX 28, at 21; CX 17J);

i. Knight Paper Corporation, Jacksonville, Florida, in 1968 (CX 8A; CX 28, at 21);

j. Georgia Marble Company, in 1969, which mines or quarries granite, marble, limestone and other minerals (CX 8A; CX 17K);

k. Mohawk Tablet Company, in 1969, through its Marquette Paper subsidiary (CX 8A; CX 17J);

l. United States Pipe and Foundry Company of New Jersey, in 1969 (CX 8A; CX 17J);

m. Columbia Moulding Company, in 1970 (CX 8A; CX 17L; CX 28, at 22);

n. Aetna Savings and Loan Association of Los Angeles, in 1971, through its Brentwood subsidiary (CX 8A; CX 53);

o. Monarch America, Inc. of St. Louis, Missouri, in 1972, a manufacturer of metal weather stripping (CX 17L; CX 29F; CX 54);

p. North American Door Corporation, Lindenhurst, New York, in 1972, which became a part of Celotex (CX 17M; CX 55);

q. Gamble Brothers, Louisville, Kentucky, in 1972 (CX 9B; CX 29F; CX 56);

r. Marble Products Company, Atlanta, Georgia, in 1972, which became a part of Georgia Marble (CX 9B; CX 30E);

s. D.J. Dinsmore of South Dakota in 1972, a producer of window sash products (CX 9B; CX 30E);

t. Christian Wood Products in 1972, which was combined with Gamble Brothers (CX 9B; CX 30E);

u. Crown Tough Carpets Division from Johns-Manville Corporation in 1973 (CX 9B). [8]

8. William Frack, a JWC Vice-President in charge of corporate expansion programs and with no employment relationship to Celotex, participated in the negotiations for most of JWC's acquisitions from 1968 through 1974 (Frack, Tr. 389, 397–404).

9. The companies acquired by JWC during the period 1968–1973 were headquartered in various states and did business in interstate commerce (Frack, Tr. 411–12).

10. JWC was, at the date of the acquisition, engaged in commerce as "commerce" is defined in the Clayton Act (15 U.S.C. 12) (Findings 11–14).

11. JWC subsidiaries are operated as integral parts of the JWC

organization (*see, e.g.,* CX 28, CX 29; Findings 3, 23), and these subsidiaries engage in interstate commerce (Findings 9, 22).

12. In connection with the negotiations for the acquisition of Panacon, officers of JWC traveled several times between JWC headquarters in Tampa, Florida, and New York City (Frack, Tr. 390–93).

13. JWC has borrowed money from commercial banks located in a number of states. It has long term loan agreements with Continental Illinois National Bank and Trust of Chicago, Chase Manhattan Bank, First National City Bank, First National Bank of Chicago, Bank of New York, National Bank of Detroit, Chemical Bank, and Cleveland Trust Company (CX 49B). The funds used by Celotex to purchase the Panacon stock were borrowed by JWC from a group of commercial banks (CX 39B).

14. The common stock of JWC has been registered and traded on the New York Stock Exchange since 1964 (CX 28, at 21). JWC has listed securities on the New York, Midwest, and Pacific Stock Exchanges (CX 32B; CX 33A; CX 35A; CX 36A; CX 37A; CX 52; CX 53; CX 54; CX 55; CX 56). Its transfer agents have included the First National City Bank in New York, the Central National Bank of Cleveland, Ohio, and the First National Bank of Chicago, Illinois (CX 28, at 27). [**9**]

B. The Celotex Corporation

15. Celotex is a corporation organized and existing under the laws of the State of Delaware. It was in 1972, and is now, a wholly-owned subsidiary of JWC (CX 35M, Admissions No. 1).

16. Celotex and its subsidiaries manufacture and distribute a variety of building material products throughout the United States. Among these products are asphalt roofing products, including residential roofing, roll roofing, and felts, and asphalt coatings and accessories. Celotex also produces gypsum wallboard insulation products, acoustical products, and siding (CX 33B; CX 35B; CX 36B; McMurry, Tr. 1267).

17. In 1971, Celotex operated a total of 22 plants in the U.S. and one in Canada (CX 33J). In 1972, after the merger of Panacon, Celotex operated 29 plants located throughout the U.S. and one in Canada (CX 35K). By 1973 the number of plants had grown to 31 (CX 36L).

18. In 1967, Celotex increased its roofing capacity from one plant to eight when the Barrett Building Materials Division of Allied Chemical Corporation was acquired by JWC and merged into Celotex (CX 28, at 21; CX 45).

19. In 1972, Celotex operated roofing plants at Birmingham, Alabama; Camden, Arkansas; Chester, West Virginia; Chicago, Illinois; Edgewater, New Jersey; Los Angeles, California; Philadelphia, Pennsylvania; and San Antonio, Texas. It had dry felt mills at Camden, Arkansas; Peoria, Illinois; Los Angeles, California; Philadelphia, Pennsylvania; and San Antonio, Texas (CX 2B).

20. As of August 31, 1971, JWC estimated that Celotex was the fourth or fifth largest manufacturer of asphalt roofing products in the United States (CX 33D) and in all of 1971 shipped asphalt roofing products into 47 states and the District of Columbia (CX 70, *in camera*). By August 31, 1972, after the merger of Panacon into Celotex, JWC estimated that Celotex was the second largest manufacturer of asphalt roofing products (CX 35E). [10]

21. At the time of the acquisition, Celotex was in the process of building a new roofing plant in Goldsboro, North Carolina. The Goldsboro plant was an entirely new, high speed, large capacity plant which was planned to include a felt mill and to produce a full line of roofing products. Its capacity was at least twice that of Panacon's proposed plant at Hopewell, Virginia (*see* Findings 42-43). The plant cost $9-12 million (Cordell, Tr. 1232; Di Salvo, Tr. 1829-30), and was scheduled to become operational in 1973 (CX 28, at 4).

22. Celotex was in 1972, and is now, engaged in trade or commerce among several states (Admissions, par. 12), and is engaged in commerce as "commerce" is defined in the Clayton Act (15 U.S.C. 12).

C. *Relationship Between Jim Walter Corporation and Celotex*

23. Although Celotex is maintained as a separate corporate entity, having its own officers and separate books of accounts, corporate minutes and other corporate records (Cordell, Tr. 1208-09; RX 55; RX 56), it is operated as an integral part of the JWC organization. In its annual reports, JWC refers to Celotex as the "Celotex Division" (CX 28F; CX 29L; CX 30L) and publishes consolidated financial statements which include the assets, earnings and liabilities of Celotex and other subsidiaries (CX 27-31). JWC also incorporates the accounts of all companies which are over 50 percent owned by it, including Celotex, in reports filed with the Securities and Exchange Commission (Admissions, par. 5; CX 32-39).

24. JWC sets the general policies regarding salaries and promotions for Celotex, but specific decisions on salaries, hiring and promotions are made by the Celotex management (Di Salvo, Tr. 1767-68).

25. JWC operates a stock option program for employees of Celotex (Di Salvo, Tr. 1769–70). The plan allows full-time employees of all JWC domestic subsidiaries, including Celotex, to purchase JWC common stock (CX 58; CX 60). [11]

26. Celotex does not operate a separate legal department. Legal services are secured from JWC on a request basis either from in-house attorneys or from outside sources (Di Salvo, Tr. 1775–76).

27. Celotex is in charge of its own advertising, which often bears the name of JWC (Di Salvo, Tr. 1776–77). Top management of JWC tries to establish and promote the name and image of the Jim Walter Corporation itself, rather than the brand names of its corporate subsidiaries, such as Celotex (Cordell, Tr. 1212–13).

28. Celotex does not maintain a research department for its exclusive use. The Jim Walter Research Corporation, a wholly-owned subsidiary of Celotex, conducts research for all the divisions of Celotex and for the other companies within the JWC organization. The Jim Walter Research Corporation is maintained as a separate profit center. Celotex is billed for its services on a monthly basis, and maintains an annual budget for research expenditures (Di Salvo, Tr. 1756–57; Hasselbach, Tr. 1476, 1495B; *see* RX 600–603).

29. JWC exercises extensive control over the business activities of Celotex. JWC appoints or elects all of the members of the Board of Directors of Celotex (Admissions, par. 2), and there is substantial overlap between the officers and directors of the two corporations.

30. The following chart identifies the positions that the members of the Board of Directors of Celotex occupied with JWC at the time of the acquisition of Panacon in April 1972:

	Celotex	*JWC*
J. O. Alston	Director	Vice-Chairman Director
William Herbert	President Director	(Herbert became Vice-President in 1972 and Sr. Vice-President and Director in June 1973)
Eugene Katz	Director	Vice-President Director
Richard Thompson	Vice-President Director	Vice-President Secretary
James Walter	Chairman	Chairman

(CX 8B; CX 10; CX 30I; CX 37-0; CX 42; CX 43C).

[12] In addition, one of Celotex's Vice-Presidents, Mr. Cordell, was a director of JWC and JWC's Senior Vice-President and Treasurer (CX 8B; CX 10). Mr. Cordell is now both President of JWC and Vice-President of Celotex (Cordell, Tr. 1205-06). Four of Celotex's six other vice-presidents were also officers of JWC in 1972 (CX 8B; CX 10).

31. Celotex's acquisition of Panacon was for the most part planned and negotiated by officials of JWC (Findings 46-51).

32. Celotex made the acquisition of Panacon with funds borrowed from JWC. Celotex lacks authority to borrow from commercial banks because of restrictions contained in loan agreements between JWC and its long-term lenders (Cordell, Tr. 1213-14, 1228; Di Salvo, Tr. 1776).

33. The management of JWC and the management of Celotex occupy the same headquarters office building in Tampa, Florida (Admissions, par. 3).

II. PANACON CORPORATION, THE ACQUIRED COMPANY

34. Prior to April 17, 1972, Panacon Corporation was a corporation chartered and operating under the laws of the State of Michigan, with its principal place of business at 320 South Wayne Ave., Cincinnati, Ohio (Complaint and Answer, par. 6).

35. The Glen Alden Corporation owned approximately 89 percent of the outstanding two classes of stock of Panacon Corporation prior to April 1972 (Complaint and Answer, par. 6).

36. Panacon is the surviving corporation of a merger effected on April 9, 1970, whereby the Philip Carey Corporation, an Ohio corporation, was merged into Briggs Manufacturing Company, a Michigan corporation, with the survivor's name changed to Panacon Corporation (CX 39G; Tennesson, Tr. 416-17).

37. Panacon manufactured a wide range of products for residential and commercial construction and industrial applications. At the time of the acquisition, Panacon was organized into six divisions: the Philip Carey Company, which manufactured roofing and other building materials (hereinafter Philip Carey/Panacon); Briggs Manufacturing Company, which produced sanitary plumbing ware; Republic Heater Corporation, which manufactured water heaters; Miami Carey and Miami Carey Ltd., which produced residential products including bathroom and [13] kitchen equipment; and Carey Canadian Mines, which was engaged in the mining of asbestos fibers (Tennesson, Tr. 414-15; CX 25, at 8-14; CX 26, at 6-10). For the year ending December 31, 1971, Panacon reported revenues of approximately $181,129,000, total assets of approximately $106,008,000; and

net profits consisting of income before extraordinary items of $6,138,293 plus tax benefits from utilization of federal income tax operating loss carry forward of $4,453,000 (Complaint and Answer, par. 7).

38. In 1972, Panacon had approximately 5500 employees in the United States and Canada (CX 39T).

39. In 1970, Philip Carey/Panacon produced more than 200 different building and industrial products. It was principally engaged in the manufacture of asphalt shingles and prepared roofing materials. It owned plants in Cincinnati (Lockland), Ohio; Linden and Perth Amboy, New Jersey; Houston, Texas; Memphis, Tennessee; and Wilmington, Illinois (CX 25, at 12).

40. Philip Carey/Panacon was a major manufacturer of asphalt and tar roofing products in the United States, and was a direct competitor of Celotex (Mulligan, Tr. 192; Jenkins, Tr. 580-81; Kingery, Tr. 738; Black, Tr. 1395).

41. Sales of Philip Carey/Panacon were approximately $89 million in 1971 (CX 44C).

42. At the time of the acquisition, Philip Carey/Panacon was about to construct a new roofing plant in Hopewell, Virginia to serve the Mid-Atlantic and Southeast areas of the United States. It had acquired an option on land, secured approval for the money to finance the project, ordered equipment, and conducted engineering studies (CX 26, at 9; Tennesson, Tr. 424; Di Salvo, Tr. 1723).

43. The Hopewell plant was to be built for an estimated $2 million, using a simple warehouse-type building and as much used machinery as possible. The proposed plant was a small one, with a limited capacity and no felt mill (Tennesson, Tr. 442, 467-69; Di Salvo, Tr. 1829-30). After the acquisition by Celotex, plans for construction of the Hopewell plant were abandoned (Tennesson, Tr. 425). **[14]**

44. In 1971, Philip Carey/Panacon distributed asphalt roofing products in 42 states and the District of Columbia (CX 70, *in camera*).

45. Panacon was engaged in interstate commerce at the time of the acquisition (Complaint and Answer, par. 9).

III. THE ACQUISITION OF PANACON

46. Negotiations for the acquisition began in the fall of 1971 when Stanley Mirsky, a merger broker representing the Glen Alden Corporation, which owned 89 percent of the common stock of Panacon, contacted William A. Frack, Jr., JWC's Vice-President for Corporate Development and Expansion, to notify him of the

availability of Panacon as an acquisition candidate (Frack, Tr. 389-90; 407-08).

47. Following the initial contact, Frack was actively involved in preparing for and attending meetings with Glen Alden personnel during the entire course of the negotiations which lasted approximately four months (Blaney, Tr. 334; Frack, Tr. 390-93). In addition to Frack, the early negotiations were attended by Frank Pizzitola, the President of JWC; Bernard Blaney, the Vice-President and Assistant Treasurer of Glen Alden; and Isidore Becker, a member of Glen Alden's Board of Directors (Frack, Tr. 390). Neither Frank Pizzitola nor William Frack was an officer or a director of The Celotex Corporation (CX 10; CX 42; Frack, Tr. 388-89, 391; Cordell, Tr. 1232).

48. Mr. Cordell, Senior Vice-President and Treasurer of JWC and Vice-President of Celotex, became involved in the negotiations (Frack, Tr. 409-10; Cordell, Tr. 1206, 1218-19), and Mr. Pizzitola and Mr. Cordell went to Lockland, Ohio, to inspect the Panacon operations (Cordell, Tr. 1218-19).

49. Charles E. Tennesson, Jr., Panacon's President and Chief Operating Officer, participated in several meetings during the negotiations. The first of those meetings was attended only by Messrs. Tennesson and Pizzitola (Tennesson, Tr. 435). During this session, Mr. Pizzitola outlined to Mr. Tennesson the benefits to Panacon of becoming a part of JWC, a large, growing organization. The name of Celotex was not mentioned during these discussions (Tennesson, Tr. 435-37). [15]

50. Mr. Frank Pizzitola and Mr. Jim Walter, the Chairman of the Board of JWC, met with Mr. Tennesson and other representatives of Glen Alden in early March 1972 (Tennesson, Tr. 437). Mr. Tennesson also had several meetings with Mr. Cordell in New York City (Cordell, Tr. 1209).

51. During the negotiations, it was understood by the Panacon representatives that JWC would acquire Panacon (Tennesson, Tr. 439-37; *see* Frack, Tr. 392). The terms of the acquisition were agreed upon by Mr. Jim Walter, Chairman of the Boards of JWC and Celotex, and Mr. Meshulam Riklis, Chairman of the Board of Glen Alden Corporation (Frack, Tr. 392). The ultimate decision to acquire Panacon was made by the Board of Directors of JWC (Frack, Tr. 406).

52. On April 3, 1972, JWC and Glen Alden issued a joint press release announcing an agreement in principle whereby JWC would acquire Glen Alden's 89 percent stock interest in Panacon, subject to a satisfactory definitive agreement (CX 38D).

53. On the same day, Mr. Jim Walter forwarded to each member

of the Board of JWC a memorandum relating to the proposed acquisition of Panacon (CX 44; Frack, Tr. 393). The memorandum discussed the effects on JWC of three alternative methods of purchasing Panacon: cash; JWC convertible debentures; and JWC common stock (CX 44H, I; Frack, Tr. 394).

54. A draft agreement, dated April 11, 1972, which identified JWC and Glen Alden as the principals, was circulated between the parties (CX 62D-P; Blaney, Tr. 330). On April 12, 1972, the Executive Committee of Glen Alden approved the draft agreement. At this same meeting, Glen Alden's Executive Committee unanimously resolved that the corporation would sell its shares of capital stock of Panacon to JWC (CX 62; Blaney, Tr. 330).

55. JWC often included in contracts for the purchase of companies a provision allowing JWC to assign the contract to one of its subsidiaries (Cordell, Tr. 1216). Such a provision was included in the contract for purchase by JWC of the assets of the Barrett Division of Allied Chemical Corporation (CX 45Z-21). A similar provision was contained in the draft agreement between JWC and Glen Alden (CX 62-0). [**16**]

56. Some time after April 12, 1972, it was decided that Celotex rather than JWC would purchase the Panacon stock (Blaney, Tr. 330).

57. On April 14, 1972, the Board of Directors of JWC met to discuss "the proposed transaction whereby the corporation would acquire" approximately 89 percent of the stock of Panacon (CX 43A). The Board approved the acquisition and urged the management to consummate the transaction (CX 43B).

58. On April 14, 1972, the Board of Directors of Celotex met and authorized its officers to execute an agreement with Glen Alden (CX 42).

59. On April 17, 1972, Celotex purchased Glen Alden's Panacon stock (6,528,739 shares of common and 7,356,000 shares of Class A common) using $62 million advanced by JWC, which had borrowed it from a group of commercial banks (CX 39B; CX 39Z-28 - Z42; Blaney, Tr. 328; Admissions, pars. 20-22). This accounted for about 89 percent of the shares outstanding (Complaint and Answer, par. 10). That same day, JWC issued a press release announcing that it had purchased Panacon stock from Glen Alden. No mention was made of Celotex (CX 23B). On April 20, 1972, the Board of Directors of JWC confirmed and ratified the purchase of the stock by Celotex (Admissions, par. 24). Effective June 29, 1972, the remaining 11 percent of Panacon stock was acquired by Celotex (CX 29Z-2). The

total cost of the stock was approximately $73 million (Complaint and Answer, par. 10).

60. Immediately following the purchase of the stock Messrs. Walter, Pizzitola and Cordell were elected to the Board of Directors of Panacon. Mr. Pizzitola was also elected President and Chief Executive Officer of Panacon (CX 23C; CX 40C). All of these men were members of the Board of Directors and officers of JWC; Messrs. Walter and Cordell also held positions with Celotex (Finding 30).

61. A "Notice of Delayed Annual Meeting of Stockholders," dated May 31, 1972, was addressed to stockholders of Panacon and announced a meeting to elect a Board of five directors (CX 40). The following chart lists the five nominees and their principal occupations, as described in the notice. [17]

J. W. Walter	Chairman and Director of JWC
F. J. Pizzitola	President (since 1970) and Director of JWC. For three years prior thereto he was a Vice-President of Celanese Corporation, a chemical manufacturer.
J. B. Cordell	Senior Vice-President and Treasurer and director of JWC.
B. F. Harrison	President (since 1970) of United States Pipe and Foundry Company ("U.S. Pipe"), Birmingham, Alabama, a wholly-owned subsidiary of JWC. For more than three years prior thereto he was a Vice-President of U.S. Pipe; also a director of JWC (since 1970).
J. Warren Frazier	Attorney, partner of Shackelford, Farrior, Stallings & Evans, Tampa, Florida, General Counsel for JWC.

(CX 40C)

62. On May 31, 1972, and June 28, 1972, the Board of Directors of Celotex unanimously approved a resolution authorizing the merger of Panacon into Celotex (RX 64B, G).

63. The shareholders of Panacon voted to merge Panacon into Celotex on June 28, 1972. The merger took place on June 30, 1972, after approval by the Board of Directors of Celotex of the plan of

merger and consent of the sole shareholder of Celotex, JWC (Answer, par. 10(b), (c); RX 64A-H; Tr. 2151-52).

64. Subsequent to the merger, Philip Carey/Panacon and Carey Canadian Mines, Ltd., operated in the Celotex Division. Miami Carey, Miami Carey Ltd., and Briggs Manufacturing Company, all previously part of Panacon, were included in different operating groups of JWC (CX 29L, P).

65. It is clear from the record as a whole that JWC actively participated in direction of the course of events leading up to and following the acquisition by Celotex of the Panacon stock. JWC's role in the acquisition is illustrated by a statement contained in a report filed by JWC with the Securities and Exchange Commission on May 8, 1972: [18]

> . . . Walter [JWC] and Celotex anticipate that the shareholders of Panacon would receive an amount of cash (as yet undetermined) for their shares of Panacon. As of the date hereof, Walter and Celotex have not decided whether such anticipated action should be accomplished by a liquidation, sale of assets, statutory merger, or otherwise.

(CX 39B)

IV. LINE OF COMMERCE

A. Roofing Products

66. "Roofing products" are materials used to shelter the interior of a structure from the effects of weather, and in particular, to prevent entry of water. A wide variety of materials can be, and are, utilized for this purpose in the United States. These include asphalt shingles, wood shakes and shingles, clay, concrete, cement and asbestos-cement tile, plastic shingles, metal shingles of steel and aluminum, fiberglass sheets, flat and corrugated aluminum sheets, terne, an alloy of tin and lead (Woodward, Tr. 1835) sheets, copper sheets, corrugated galvanized iron sheets, slate, asphalt saturated felts, tar saturated felts, asphalt roll roofing, and rubber and plastic (elastomeric) sheets (Whittemore, Tr. 160-161, 166; Jenkins, Tr. 570; Hasselbach, Tr. 1380; Linck, Tr. 1535, 1551-1552; Taylor, Tr. 1603; Hogan, Tr. 2129).

67. Each of these products is, in the broadest sense, competitive with the others (Taylor, Tr. 1603; Woodward, Tr. 1833-38; 1840; Humphreys, Tr. 1996; McMahon, Tr. 2105-08; Hogan, Tr. 2128-29; Peterson, Tr. 2185; Tinnell, Tr. 2222).

B. Asphalt and Tar Roofing Products

68. Asphalt and tar roofing products have been in use in the

United States since 1893 (CX 1, at 1). They are applied to residential, commercial and industrial roofs, and account for at least 80 percent of all roofing applied in the nation (CX 1, at 1; Snow, Tr. 685-87; Kingery, Tr. 756, 800; McMurry, Tr. 1274; Musser, Tr. 1646; Humphreys, Tr. 2044).

69. Asphalt and tar roofing products are sold and used in every part of the United States (Tennesson, Tr. 470; Snow, Tr. 683; Kingery, Tr. 739; McMurry, Tr. 1238). In contrast, slate, concrete and clay tile, wood shingles and shakes, and asbestos-cement shingles [19] tend to be fairly localized in use (Tennesson, Tr. 460-70). Wood shakes and shingles, while found throughout the United States, are most popular in the Pacific Northwest, California and Texas (Snow, Tr. 683; RX 66; RX 67; RX 68; RX 69; RX 70), with almost 60 percent of all red cedar shingles and shakes shipped into three states (Peterson, Tr. 2197). Clay and concrete tile complement the Spanish architecture of Southern California, Arizona, and Florida (Snow, Tr. 683). Use of slate is primarily confined to Pennsylvania and New England (McMurry, Tr. 1239).

70. There are three basic types of asphalt and tar roofing products: asphalt or tar saturated felts; asphalt roll roofing; and asphalt shingles (CX 1, at 12; Whittemore, Tr. 101; Mulligan, Tr. 178-79, 187). In addition, various accessory items, including coatings, cements, fasteners, and adhesives are used in connection with asphalt and tar roofing products to complete a roof system (CX 1, at 16-18). Shingles, or prepared roofing products, are fastened in overlapping fashion to the roof deck and are not completely sealed. As a result, they are used on more steeply pitched roofs. Built-up roofs are constructed over the roof deck with successive plies of asphalt or tar saturated felts and roll roofing, bonded with asphalt or coal tar pitch. Built-up roofs may be used on flat or low slope roofs (Whittemore, Tr. 107-08; Tennesson, Tr. 415-16; CX 1, at 20).

71. Manufacture of asphalt and tar roofing products involves two separate production steps: (1) fabrication of a base fiber; and (2) conversion of this base fiber into a finished roofing product (CX 1, at 3, 4, 7; Jenkins, Tr. 570). The base fiber serves as the asphalt or tar "carrier" and furnishes strength; the asphalt or tar acts as a binder and provides waterproofing capabilities to the product (Jenkins, Tr. 570; Snow, Tr. 679; Morris, Tr. 819).

72. Asphalt and tar roofing products may be made on a variety of bases, most often asbestos felt, organic felt, or fiberglass mat (Kingery, Tr. 740; Snow, Tr. 1125-27).

73. Organic felts are made from wood, wood chips, newspapers, cartons, rags, wood flour, and other cellulose materials; inorganic

felts are made from asbestos or fiberglass fibers (Whittemore, Tr. 101; Di Salvo, Tr. 1730). Despite some differences in raw material inputs, organic-based and inorganic-based asphalt and tar roofing products are similar in production, use, and performance (Snow, Tr. 679, Kingery, Tr. 740–41). [**20**]

74. Saturated felts are organic or inorganic "sheets" which have been saturated or impregnated with asphalt or tar (Whittemore, Tr. 102; Snow, Tr. 1106; Hasselbach, Tr. 1356–57); their principal uses are as plies in built-up roof systems or as underlayments for asphalt shingles or other shingles or tiles (Whittemore, Tr. 108; Mulligan, Tr. 186; Tennesson, Tr. 415; McMurry, Tr. 1272; McMahon, Tr. 2120; CX 1, at 12).

75. Roll roofings are asphalt saturated or impregnated felts or dry fiberglass or asbestos mats which have been coated with viscous asphalt. These products may be used in place of saturated felts, and result in the need for fewer plies when used as part of a built-up roofing system (CX 1, at 12; Whittemore, Tr. 102–03; Jenkins, Tr. 571; Kingery, Tr. 739–40; Hogan, Tr. 2142–43; Conley, Tr. 2265).

76. Smooth-surfaced roll roofing typically has a fine surfacing applied to its top and back to act as a binding agent. Mineral surfaced roll roofing is made by surfacing the weather side of roll roofing with colored mineral granules. Both smooth-surfaced and mineral-surfaced roll roofings serve as temporary and utility roof coverings or as components to built-up roof systems (Whittemore, Tr. 102–03, 133, 139; Mulligan, Tr. 186; Hasselbach, Tr. 1350–52; CX 1, at 12).

77. Asphalt shingles are mineral-surfaced roll roofing cut into strips or designs for use on steeper sloped roof decks (Whittemore, Tr. 102, 107–08; Mulligan, Tr. 186–87; CX 1, at 12).

78. Two other asphalt roofing products, "Ondeline" and "Decromastic," are not as widely used as saturated felts, roll roofing and shingles and do not appear to fit within the definition of asphalt and tar roofing products by which our consideration of this matter has been guided. "Ondeline" is a mineral-surfaced, asphalt product manufactured in France and sold in corrugated sheet form for use as siding as well as roofing (Woodward, Tr. 1835–36). "Decromastic" is made from galvanized corrugated iron sheets, coated with asphalt and covered with roofing granules for use for roofing (McMahon, Tr. 2107–08). The record evidence does not indicate their use is significant. [**21**]

79. The full-line manufacturers of asphalt and tar roofing products produce saturated felts, roll roofing, and asphalt shingles (Mulligan, Tr. 189–90; Jenkins, Tr. 570; Snow, Tr. 678–79; Tinnell, Tr.

2212). One measure of the competitive strength of an asphalt roofing company is its total sales of these three product categories (Mulligan, Tr. 190). The trade association of asphalt roofing manufacturers collects production statistics from its members for these products (CX 4; CX 5; CX 6).

80. Asphalt and tar roofing products have peculiar characteristics and uses which make them an appropriate line of commerce within which to assess the competitive effects of the acquisition challenged in this proceeding.

(1) Industry Recognition

81. The Asphalt Roofing Manufacturers Association (ARMA) is a nonprofit trade association which exists to promote the sale and use of asphalt and tar roofing products (Whittemore, Tr. 106–07). As part of its sponsored activities the association conducts public relations programs; participates in advertising ventures; lends financial support for industry research; maintains contacts with the National Bureau of Standards, the Federal Housing Administration, and other federal agencies; urges the American Society for Testing and Materials (ASTM) and Underwriters' Laboratories (UL) to establish appropriate standards for asphalt and tar roofing products; and acts as a liaison with roofing contractors (Whittemore, Tr. 107, 124–25).

82. Regular membership in ARMA is restricted to domestic manufacturers of asphalt and/or tar roofing products. The association makes no distinctions between manufacturers of organic and inorganic products for membership purposes. Companies which supply raw materials for asphalt and tar roofing products are eligible for associate memberships in ARMA (Whittemore, Tr. 106, 112–13). Prior to the subject acquisition both Philip Carey and Celotex were members of ARMA (Whittemore, Tr. 106). It was estimated by the managing director that ARMA members account for 85 percent of the total production of asphalt and tar roofing products annually (Whittemore, Tr. 148). [22]

83. The managing director of ARMA compiles a list of all known domestic manufacturers of asphalt and tar roofing products together with their roofing plant and dry felt mill sites (CX 2; CX 3; Whittemore, Tr. 116–17). The list is updated periodically in an attempt to identify all plants operating in the United States (Whittemore, Tr. 116, 122).

84. As a service to its regular members, ARMA employs a private accounting firm to collate statistics on member shipments of asphalt and tar roofing products. The report questionnaire requests information of each participating member's shipments of mineral and

do not precipitate immediate cost movements in, or demand shifts to, other roofing products, although they may cause customers to consider other products (Waltz, Tr. 1675-76). [27]

104. Dr. Lanzillotti, the economist called as a witness by JWC, testified that the price movements for asphalt and tar roofing products from 1970 to 1975 were affected by two overriding events: (1) imposition of federal price controls in 1971 and 1972; and (2) escalation of petroleum prices by the OPEC cartel in late 1973 (Lanzillotti, Tr. 2392). Respondent's exhibits disclose the lack of correlation between the prices of wood roofing products and asphalt roofing products during the period 1970-1975 (RX 84; RX 90; RX 91; Lanzillotti, Tr. 2393, 2573-74).

V. SECTION OF THE COUNTRY

105. Transportation costs are an important factor in determining the distance asphalt roofing products can profitably be shipped by a manufacturer (McMurry, Tr. 1239; Musser, Tr. 1651-52; Malarkey, Tr. 1961). Since producers of asphalt roofing products generally sell their products FOB seller's plant equalized to the nearest competitive producing or shipping point, they must usually absorb a portion of the transportation cost of shipments they make (Mulligan, Tr. 195; Finding 100). A producer located considerably farther away from a given area than other producers selling in that area cannot profitably sell in that location at a competitive price (Linck, Tr. 1569).

106. The distance a producer can profitably ship his product depends on a number of factors: the capacity and available supply of his plant, demand for his product, the type of transportation available and the amount of transportation charges which he must absorb. These factors vary according to the product sold, and change over time (Jenkins, Tr. 599; Kingery, Tr. 774-76; McMurry, Tr. 1239; Musser, Tr. 1651).

107. While industry witnesses agreed that they prefer to sell close to the plant, they gave estimates of the maximum distance they generally shipped or preferred to ship the bulk of their products which ranged from 250 miles to 600 miles (Jenkins, Tr. 599; Tennesson, Tr. 423; Mulligan, Tr. 196-97; Humphreys, Tr. 1977, 2006; Tinnell, Tr. 2220; *see* Kingery, Tr. 762-63, 780; RX 1). The President of Tamko Asphalt Products (Tamko) testified that a producer of asphalt roofing products should be able to ship at least 300 miles on a regular basis (Humphreys, Tr. 2005-06). [28]

108. Philip Carey/Panacon sold its roofing products only within the area in which it could make a profit (Musser, Tr. 1651). As a

general rule, it sold as much as possible within a 250 mile radius of its plants (Tennesson, Tr. 423; CX 14A).

109. All industry witnesses testified that they made some shipments on a regular basis to areas beyond their preferred maximum shipping distance. These shipments ranged up to 700 or 750 miles (Mulligan, Tr. 196-97; Tennesson, Tr. 423; Jenkins, Tr. 599; Kingery, Tr. 762-63; Humphreys, Tr. 2006; Tinnell, Tr. 2220). As stated by the President of Tamko:

> [Transportation] is a factor, but it is not the most critical factor. The most critical factor is to make the wheels turn.
>
> * * * * * * *
>
> Keep the plant running.

(Humphreys, Tr. 2006)

110. For example, Johns-Manville Corporation shipped about one third of the products it sold in the southern United States from its Waukegan, Illinois, plant, a distance of up to 750 miles. The products shipped were those which were not produced by Johns-Manville's southern plants (Kingery, Tr. 762-63, 782). Philip Carey/Panacon, likewise, made substantial shipments into Middle Atlantic and Southeastern states from its Lockland, Ohio, plant because it had no manufacturing facilities in those areas (Tennesson, Tr. 423). It had two large customers in that part of the United States, which the new Hopewell plant was intended to serve (Tennesson, Tr. 426; Finding 42).

111. Philip Carey/Panacon sold most of its asphalt roofing products east of the Mississippi River, within a 250 mile radius of its plants (Tennesson, Tr. 426; Musser, Tr. 1652). Within these areas it was in direct and substantial competition with Celotex (Tennesson, Tr. 428). The areas within 250 miles of both Philip Carey/Panacon and Celotex plants, and the overlap between them, extending from Texas to Maine, are shown on CX 14. Both Philip Carey/Panacon and Celotex made the bulk of their sales within the areas of overlap. In the 24 states and the District of Columbia, which are entirely or more than half encompassed within the overlapping circles shown on CX 14, the two companies made the following percentages of their sales of asphalt roofing products: [28]

	1970	*1971*	*1972*
Celotex	74.8	73.6	71.9
Philip Carey/Panacon	79.7	89.5	88.8
Panacon/Celotex			80.2

If two other states in which significant sales were made, South Carolina and Wisconsin, are included in the calculation, the percentages of sales are as follows:

Celotex	78.2	76.9	75.3
Philip Carey/Panacon	93.2	93.0	92.1
Panacon/Celotex			83.5

(Glassman, Tr. 1069A).

112. While there are a large number of asphalt roofing products manufacturers who sell and compete only on a local or regional basis (Mulligan, Tr. 208, 191-92; Humphreys, Tr. 2063; *see* CX 2; CX 3), the largest companies in the asphalt roofing industry sell throughout most or all of the United States (Mulligan, Tr. 191-92, 207; Jenkins, Tr. 581; Kingery, Tr. 739, 788; Conley, Tr. 2259-60; *see* CX 2; CX 3). Philip Carey/Panacon sold its products in a total of 42 states and the District of Columbia in 1971, including a limited amount of sales of some products on the West Coast (Tennesson, Tr. 442; Musser, Tr. 1952; CX 70, *in camera*). Celotex in 1971 sold its asphalt roofing products in 47 states and the District of Columbia (CX 70, *in camera*).

113. Dr. Lanzillotti testified that in his study of the roofing industry, he considered a nation-wide market because the firms making up the industry had plants throughout the United States and were shipping interregionally into broad areas of the country (Lanzillotti, Tr. 2309-10). He also testified that Philip Carey/Panacon and Celotex both competed in the national market, shipping products interregionally from their various plants, and competed with each other generally throughout the United States (Lanzillotti, Tr. 2478). [30]

114. The United States as a whole and that region of the country encompassing the 26 states and the District of Columbia which run northeast from Texas to Maine, in which both Philip Carey/Panacon and Celotex made the bulk of their sales of asphalt roofing materials (Finding 111), are appropriate sections of the country within which to assess the competitive effects of the acquisition challenged in this proceeding.

VI. INDUSTRY STRUCTURE

A. Industry Members and Production

115. According to an industry-wide survey conducted by the Commission, total domestic shipments of organic and inorganic based asphalt and tar roofing products for 1970, 1971, and 1972

amounted to $484.9 million, $680.9 million, and $765.4 million, respectively (CX 15A, B, C, *in camera*).

116. The industry shipment figures (as well as market share and concentration figures) for 1970, 1971, and 1972 were compiled from data submitted by each company listed in Finding 123 in response to a 6(b) Special Report survey authorized by the Commission on June 25, 1973 (*see* CX 69) and/or in response to supplementary requests made by Commission personnel (Glassman, Tr. 490). All information used to compile this survey was submitted in certified documentary form (Glassman, Tr. 1043-44). Initial uncertainties over the treatment to be accorded asbestos and fiberglass based materials and the inclusion of interplant transfers were clarified through follow-up inquiries and a stipulation with respondent (*see* CX 69; Tr. 234; Glassman, Tr. 490, 518-19). Questionnaires were sent to known producers of asphalt and tar roofing products and to any company identified as a competitor by those companies responding to the Special Report (Glassman, Tr. 490).

117. Value of shipments of imported asphalt and tar roofing products were not incorporated in the industry universe totals for 1970, 1971 and 1972 in view of evidence that imports represented at most 1 percent of the domestic market (Glassman, Tr. 956-58, 964, 966-67; *see also* Lanzillotti, Tr. 2525). It is not possible to determine from public sources the precise level of imports of asphalt and tar roofing products (*see* Lanzillotti, Tr. 2509-25; RX 76-79). [31]

118. In order to check the reliability of the data compiled from the 6(b) responses and supplementary responses, complaint counsel attempted to reconcile the 6(b) universe with figures derived from Bureau of Census data on 1972 value of shipments of the asphalt and tar roofing products covered by the 6(b) survey, and with an ARMA report on unit shipments by state in 1972 of certain categories of asphalt roofing products by 24 of its members (Glassman, Tr. 492, 969).

119. The size of the Census universe was $688.1 million in shipments and was constructed from the following SIC codes:

Product Code	*Product*	*Value*
2952311	Smooth-surface roll roofing	$50.5 million
2952313	Mineral-surface roll roofing	$44.0 million
2952314	Self-sealing strip shingles, 240 pounds or less	$388.1 million

2952315	Self-sealing strip shingles 245 pounds or more	$17.4 million
2952316	Regular strip shingles, 235 pounds or less	$57.8 million
2952317	Regular strip shingles, 245 pounds or more	
2952318	Individual shingles	$25.8 million
2952351	Asphalt saturated felts	$78.2 million
2952355	Tar saturated felts	$3.1 million
3292781	Asphalt or tar saturated asbestos felts	$23.2 million

(CX 12S; CX 13U; Glassman, Tr. 481–86, 1008–10, 1014, 1018).

[32] 120. The ARMA report covered the following categories or products: smooth-surface roll roofing, shingles, and asphalt and tar saturated felts. ARMA's Managing Director testified that the categories of products used in the 6(b) survey were generally comparable to the classifications used by ARMA in the survey of its members (CX 4A–B; Whittemore, Tr. 127–29, 131–32, 137–39).

121. There appear to be no sources of statistics on sales or shipments of asphalt and tar roofing products other than the 6(b) survey, the ARMA reports, and the Bureau of the Census data (Glassman, Tr. 1072; Whittemore, Tr. 129–30).

122. The 6(b) universe of shipments of asphalt and tar roofing products was the largest of those constructed from the three sources. The margin of error in the 6(b) universe as compared to the others varied from 2.7 percent to 10 percent (Glassman, Tr. 966, 969). The discrepancy may be attributable to the fact that the ARMA survey of its membership does not cover all industry firms, while it was not possible to isolate shipments of fiberglass based asphalt and tar roofing products from the Census data (Glassman, Tr. 1072–74).

123. According to the Commission's 6(b) survey, there were approximately 32 domestic manufacturers of asphalt and tar roofing products during the period 1970-1972. The following is an alphabetical listing of those companies which manufactured asphalt or tar saturated felts, asphalt roll roofings, and/or asphalt shingles during those years:

1. Allied Materials Corporation;
2. American Tar Company;
3. Arctic Roofing, Inc.;
4. Atlas Roofing Manufacturing Co., Inc. (subsidiary of Masonite Corp.);
5. Bear Brand Roofing, Inc.;
6. Big Chief Roofing Company;
7. Bird & Son, Inc.;
8. The Celotex Corporation;
9. Certain-teed Products Corporation (including B.F. Nelson Manufacturing Company, a one plant roofing operation in Minneapolis, acquired in December of 1970);
10. Congoleum-Nairn, Inc.;
11. Daingerfield Manufacturing Company (owned by the same principals who own Big Chief Roofing Co.);
12. Delta Roofing Mills, Inc.;
13. Elk Roofing Company;
14. Evans Products Corporation;
15. Fensky Felt & Wrapping Mills; [33]
16. The Flintkote Company;
17. Lloyd A. Fry Roofing Company;
18. GAF Corporation;
19. Globe Roofing Products Company, Inc.;
20. Johns-Manville Corporation;
21. The Koppers Company;
22. The Logan-Long Company;
23. Lunday-Thagard Oil Company;
24. Herbert Malarkey Roofing Company;
25. Nicolet Industries;
26. Owens-Corning Fiberglas Corporation;
27. Philip Carey Company (a division of Panacon before it was merged into Celotex in mid-1972);
28. Southern Asphalt Roofing Corporation;
29. Tamko Asphalt Products, Inc. (including its subsidiary Royal Brand Roofing, Inc.);
30. Tilo Company, Inc.;
31. United States Gypsum;
32. Volunteer Asphalt Company.

(RX 82, *in camera; see also* CX 2A–E; RX 99A; RX 99B)

B. Concentration

124. Four-firm and eight-firm concentration in the asphalt and

tar roofing industry was 50.98 percent and 82.21 percent in 1970; 51.76 percent and 82.78 percent in 1971; and 59.21 percent and 84.78 percent in 1972. During these same years Celotex and Philip Carey/Panacon, respectively, accounted for [*See In Camera* Findings] in 1970; [*See In Camera* Findings] in 1971; and [*See In Camera* Findings] combined for 1972 of all domestic shipments of asphalt and tar roofing products. As a result of the merger of Celotex, which ranked [*See In Camera* Findings] in 1971, and Philip Carey, which ranked [*See In Camera* Findings] in 1971, Celotex emerged in 1972 as the [*See In Camera* Findings] largest manufacturer in the industry (CX 15A, B, C, *in camera*). Analysis of these figures indicates that from an industry point of view, the subject acquisition contributed to an increase in 4-firm concentration of 7.45 percent and 8-firm concentration of 2 percent from 1971 to 1972. In addition, the figures disclosed that the industry had reached a level of concentration at which economic performance can be expected to deteriorate (Glassman, Tr. 502). (Note: The Commission may wish to remove the *in camera* protection accorded these market share percentages. Per Commission Rule 3.45, Orders according *in camera* treatment to testimony have set October 30, 1977, as the date by which the "age" of the information will call for such treatment to end.) [34]

125. The Celotex-Panacon merger was one of several recent horizontal acquisitions in the asphalt and tar roofing industry. Since 1969, there have been at least seven mergers between companies in the relevant line of commerce: Tamko's acquisition of Royal Brand; Big Chief's acquisition of Daingerfield; Celotex's acquisition of Panacon; Masonite-Atlas' acquisition of Southern; Certain-teed's acquisition of B.F. Nelson; Bird & Son's acquisition of Logan-Long and Flintkote's acquisition of U.S. Gypsum's plants in Jersey City and St. Paul (Whittemore, Tr. 121, 143–45; Jenkins, Tr. 579; Humphreys, Tr. 1976–77; Hogan, Tr. 2128; Finding 59).

C. Barriers to Entry

126. Full scale entry into the manufacture of asphalt and tar roofing products with roofing and felt capacity comparable to that of plants owned by the largest producers in the industry requires a substantial capital investment.

127. The Chairman of the Board of Directors of Bird & Son, Inc., a major competitor in the industry, estimated that the current cost of a roofing plant of the type that Bird & Son would build, with an annual capacity of 175,000 to 200,000 tons, would be $6 3/4 to $7 million. A felt mill was estimated to cost an additional $7.5 to $8 million (Jenkins, Tr. 575–76).

128. The Vice-President and Merchandise Manager for Asphalt and Fiberglass Roofing Products at Johns-Manville, another principal competitor in the industry, estimated on the basis of corporate studies that a combination roofing machine capable of producing fiberglass shingles, fiberglass roll roofing, organic shingles, organic roll roofing, and saturated felts would cost [*See In Camera* Findings]. He also estimated that a new dry felt mill could cost as much as [*See In Camera* Findings] (CX 71, *in camera;* Snow, Tr. 711–14, *in camera,* 1097–98, 1105–06).

129. The President of JWC testified that respondent spent $9 to $12 million in 1972–73 to construct its Goldsboro, North Carolina, plant (Cordell, Tr. 1232). [35]

130. However, entry into the industry can be made on a more modest scale with a significantly smaller investment (Hogan, Tr. 2127; Lanzillotti, Tr. 2424). In 1974, Tamko constructed a roofing plant using organic dry felt at Tuscaloosa, Alabama, for $2.4 million, of which part was obtained through an industrial revenue bond secured with the help of the Tuscaloosa Chamber of Commerce. In 1973, Tamko completed a second line at its felt mill at Joplin, Missouri, for $1.6 million (Hogan, Tr. 2127–28; Humphreys, Tr. 1987–89; Lanzillotti, Tr. 2424–25). In 1973, Consolidated Fiberglass Roofing Products entered the roofing market as a new competitor after building a fiberglass roofing plant for $1.8 million. It has plans to build its own fiberglass mat plant at an additional cost of $2 million. Herbert Malarkey Roofing Company has a fiberglass mat facility already under construction which will cost an estimated $1.5 million to place on stream (Malarkey, Tr. 1954; Conley, Tr. 2246, 2249, 2261–63, 2281).

131. Ownership of a felt producing facility is not essential to the manufacture of asphalt and tar roofing materials. A number of the smaller companies in the industry do not own felt mills (*see* CX 2; CX 3). Other manufacturers, not engaged in the roofing business, provide sources of supply for dry felt. There have been manufacturers of paper-type products with excess capacity which can fulfill requirements contracts to supply roofing felt. Indeed, had Philip Carey/Panacon built its Hopewell plant, it would have supplied the plant by use of requirements contracts rather than by constructing a felt mill (Tennesson, Tr. 468–69; Malarkey, Tr. 1948).

132. Neither patents nor technology are barriers to entry into the asphalt and tar roofing business. Celotex presently has no patented roofing products. Technical assistance is available from machinery and granule suppliers. Trained technical and sales personnel are available to new entrants offering attractive terms of employment

(Snow, Tr. 1131; Hasselbach, Tr. 1307, 1327-28, 1492, 1515-1518; Hogan, Tr. 2131-32; Conley, Tr. 2266). [36]

133. Advertising is not of great importance in the asphalt and tar roofing industry, and there is little brand name preference. Customers are available to new manufacturers charging competitive prices. A new firm wanting to enter would have distribution systems available to it through the established general line wholesalers, building material suppliers, contractors and mass merchandisers in the building products industry (Mulligan, Tr. 180; Hasselbach, Tr. 1329-30; Wehner, Tr. 1424-25; Waltz, Tr. 1662-63, 1670-74; Wolff, Tr. 1864-67, 1885-88). However, a representative of a major mass merchandiser indicated that his company prefers roofing suppliers with an established reputation for producing quality products, multi-plant operations, well-trained field representatives capable of providing expert assistance, and a solid financial basis (Black, Tr. 1387-88, 1397-98).

134. Small manufacturers of asphalt and tar roofing products have been successful in the marketplace. Tamko, for example, has grown to a three-plant operation through an acquisition and construction of a new plant, both in new marketing areas. Similarly, Bear Brand Roofing Company, a one-plant operation, has just completed plant improvements designed to increase its capacity by 30 percent. Its sales have doubled since 1967 and it has just experienced its best year in sales and profits. Big Chief Roofing Company and Herbert Malarkey Roofing Company, both of which are considered small, have been operating at capacity for the last three years (RX 83, *in camera;* Malarkey, Tr. 1947; Humphreys, Tr. 1976-78, 2014-16, *in camera;* Hogan, Tr. 2130; Tinnell, Tr. 2214-15).

135. In general, the dollar sales of asphalt and tar roofing products by the smaller companies grew during the period 1970 to 1972 at a greater rate than that of most of the larger companies (RX 83, *in camera*).

136. The largest firms in the asphalt and tar roofing materials industry own several roofing plants. In 1970-1972, the eight largest companies in terms of number of plants owned more than 70 percent of all United States asphalt and tar roofing plants (CX 68). Although multi-plant operations have certain competitive advantages, particularly in their ability to serve multiple-location customers (Tennesson, Tr. 429-30; Black, Tr. 1397), one-plant manufacturers of asphalt roofing products also have some competitive advantages over multi-plant companies, including the ability to provide better service. Company decisions can be made more quickly and customers can be given more personalized service. The overhead of one-plant opera-

tions generally is lower than that of multi-plant companies (Malarkey, Tr. 1961-1962; Hogan, Tr. 2134-2135; Conley, Tr. 2261). [37]

137. There have been several de novo entrants into the asphalt and tar roofing market in the past 15 years, including Herbert Malarkey Roofing Company (1960), Protective Papers Company (Nicolet) (1960), Big Chief Roofing Company (1961), Daingerfield Manufacturing Company (1962), Royal Brand Manufacturing Co. (1965), Evans Products Company (1970), Asphalt Products Industries, Inc. (1973), and Consolidated Fiberglass Products Company (1973) (RX 96; Whittemore, Tr. 123-24, 159; Malarkey, Tr. 1948-49; Hogan, Tr. 2127-28, 2131).

138. Asphalt Products Industries and Consolidated Fiberglass Products Company (Conglass) were not in existence in 1972. Asphalt Products operates on a very small scale (Malarkey, Tr. 1951). Conglass' sales in 1974 amounted to about [*See In Camera* Findings] of 1972 total sales of asphalt and tar roofing products, and 60 percent of those sales were made to retail outlets owned by one of the firm's shareholders (Conley, Tr. 2245-46, 2249-50, *in camera,* 2270). Of the remaining new entrants mentioned above, none, with the exception of Royal Brand, made as much as [*See In Camera* Findings] of the total national sales of asphalt and tar roofing products in 1972. The combined 1972 market share of all these companies, including Royal Brand, was [*See In Camera* Findings] (RX 82, *in camera*).

VII. COMPETITIVE EFFECTS

139. The acquisition of Panacon by Celotex intensified concentration in the already highly concentrated asphalt and tar roofing products industry (Finding 124), and contributed significantly to an industry-wide trend toward increased concentration (Finding 125).

140. Both Celotex and Panacon's Philip Carey division manufactured and shipped substantial quantities of asphalt and tar roofing products in 1970, 1971, and 1972, and both had substantial market shares in the national market in those years (CX 15A, B, C, *in camera*). Prior to their merger both companies were regarded as major competitors engaged in direct competition with one another (Imbus, Tr. 255-56; Jenkins, Tr. 580-81; Woodward, Tr. 1838, 1856-57; Hogan, Tr. 2128, 2144-45; Tinnell, Tr. 2215, 2231). According to the former President of Panacon, its Philip Carey division competed heavily and directly with Celotex in its principal marketing areas (Tennesson, Tr. 423-28). Philip Carey/Panacon was recognized as a vigorous competitor offering good service and a broad line of quality merchandise at competitive prices (Mulligan, Tr. 192-93; Imbus, Tr.

257–58; Mitzman, Tr. 340; Jenkins, Tr. 580–81; Morris, Tr. 839; Manson, Tr. 915; Wehner, Tr. 1431; Taylor, Tr. 1617; Musser, 1647–49; Waltz, Tr. 1671–74, 1679–81; Tinnell, Tr. 2231). The acquisition eliminated Philip Carey/Panacon as a substantial, competitive [38] force in the asphalt and tar roofing industry in national and regional markets.

141. Both Celotex and Philip Carey/Panacon shipped the bulk of their asphalt roofing products into the same geographic areas (CX 14A; CX 14B; CX 14C; Tennesson, Tr. 426–28; Glassman, Tr. 511–13, 984–85, 1069–A –71; Finding 111). Both firms actively solicited the accounts of such large mass merchandisers as Moore's Super Stores and Lowe's Companies, Inc. (Hasselbach, Tr. 1509–12). In 1970, Celotex furnished Lowe's with 40 percent of its requirements of asphalt shingles, while Philip Carey/Panacon supplied 30 percent. Celotex increased its share to 42 percent and Philip Carey/Panacon's portion declined slightly to 27 percent during 1971. After the Celotex-Panacon merger, Celotex's share of the Lowe's shingles account was 59 percent in 1972, 58 percent in 1973, 57 percent in 1974 and 47 percent in 1975 (Black, Tr. 1393-94, 1398-99, 1402).

142. Between 1970 and 1972, Philip Carey/Panacon and Celotex competed for individual accounts—distributors and roofing contractors—over a wide area. For example, Philip Carey/Panacon accounted for 35 percent to 55 percent of Bergen-Hudson asphalt and tar roofing supplies for northern New Jersey, while Celotex's share of this distributor's roofing requirements ranged from 3 percent to 9 percent (Mitzman, Tr. 340). Roofing contractors from Kansas City, Missouri, and Dayton, Ohio, described the direct competition between Celotex and Philip Carey/Panacon in their areas. In the two years preceding the Panacon acquisition, contractors from both of these areas were purchasing asphalt or tar roofing products from Philip Carey/Panacon and Celotex. One split 70 percent of his roofing purchases evenly between Philip Carey/Panacon and Celotex. Today Celotex alone supplies more than 75 percent of that contractor's asphalt or tar roofing requirements (Manson, Tr. 915–16; Wehner, Tr. 1427–28).

143. Whether viewed in terms of national market shares and concentration ratios, regional marketing areas, or individual accounts, the acquisition of Panacon by Celotex resulted in a substantial lessening of competition in the asphalt and tar roofing industry by increasing four and eight-firm concentration, increasing Celotex's national market share, and eliminating Philip Carey/Panacon as a substantial, independent competitive force.

DISCUSSION

RESPONDENT'S MOTION TO DISMISS

At the conclusion of the case-in-chief, counsel for JWC orally moved for dismissal of the complaint (Tr. 1152). His grounds were (1) that there had been a failure to prove a violation of Section 7 of the Clayton Act (15 U.S.C. 18) (Tr. 1152), (2) that the Commission lacks jurisdiction because Celotex, which effected the acquisition of Panacon, was not charged with the violation, and (3) that JWC is not engaged "in commerce" as that term is used in Section 7 (Tr. 1153). Counsel for JWC argues these points again in his post-hearings Brief (Respondent's Brief, pp. 22–28, 6–8).

Oral argument by counsel for each side was heard on the motion on December 1, 1975. At the start of the oral argument, counsel for JWC submitted "Respondent's Memorandum in Support of Motion to Dismiss the Complaint." At the end of the oral argument the parties were advised that in accordance with Commission Rule 3.22(e) the ruling on the motion would be deferred until the close of the case for the reception of evidence (Tr. 1197–1198). Subsequently, complaint counsel submitted an answering memorandum in opposition to the "Memorandum in Support . . .," *supra.* At the conclusion of the case-in-defense on January 21, 1976, respondent's motion was denied (Tr. 2662); however, some discussion as to why it was denied is appropriate.

The evidence offered by complaint counsel was weighed in the light of the rule set forth in 6 J. Moore, *Fed. Prac.*, ¶56.15(3) at 2,336 (2d Ed. 1974). The rule, in summary, is that all inferences are drawn against the movant, in favor of the party opposing the motion to dismiss, that the movants must make a strongly persuasive showing that it is quite clear what the truth is and that there is no real doubt as to any material fact. Here, at the conclusion of the case-in-chief, the most obviously material fact yet to be established or *finally* resolved was whether the effect of the acquisition of Panacon might be *substantially* to lessen competition. [40]

The evidence introduced in the course of the case-in-chief established *prima facie,* that a violation of Section 7 of the Clayton Act occurred when Panacon was acquired. There was ample evidence showing (1) that Panacon, a corporation, was engaged in interstate commerce in lines of commerce identified with the asphalt and tar roofing industry in various sections of the United States, (2) that JWC, a corporation, and its subsidiary Celotex, also a corporation, were engaged in interstate commerce in a number of the same

sections of the country, and (3) that Panacon and Celotex were engaged in the same lines of commerce (CX 23, 29F, 35B, 35E, 35I).

Other evidence showed that prior to this "horizontal" acquisition, the asphalt and tar roofing industry was concentrated (CX 15 - *In Camera*) and that Celotex believed that it ranked fourth or fifth (CX 33D) in the manufacture of asphalt roofing products and that after the acquisition Celotex believed that it ranked second (CX 35E); hence, at the end of the case-in-chief the evidence showed that the preacquisition competition between Panacon and Celotex may have been substantial. Complaint counsel's evidence also established that neither Panacon, JWC, nor Celotex was in financial straits (CX 35).

The evidence clearly was enough at the least to raise presumptions of fact upon which a decision on the motion to dismiss could be based and was sufficient to establish facts suggesting that a violation of Section 7 of the Clayton Act occurred when the acquisition took place. *Cf. Otis & Co.* v. *Securities & Exchange Commission,* 176 F.2d 34, 42 (D.C. Cir. 1949), *reversed on other grounds,* 338 U.S. 843 (1949). *Also see U.S.* v. *Philadelphia National Bank,* 374 U.S. 321, 362–367 (1963). Certainly, the evidence adduced at the hearings on the case-in-chief ". . . was sufficiently strong for the opponent [respondent JWC] to be called upon to answer it. A *prima facie* case . . ., is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced on the other side." "Prima Facie Case," definition, *Black's Law Dictionary,* Third Edition, p. 1414.

NAMING JWC AND NOT CELOTEX AS THE RESPONDENT

From the answer to the complaint and the evidence in the record it is established that (1) JWC properly was named as the respondent, (2) Celotex, which acquired Panacon in April 1972, is one of many wholly-owned corporate subsidiaries of JWC, and (3) Panacon was merged into Celotex on June 30, 1972 (Findings 5, 63). [41]

Mr. Jim Walter, Chairman of the Board of JWC, and Mr. Joe B. Cordell, a Senior Vice-President, Treasurer and a Director of JWC, had assumed offices on the board of Panacon at the time of the acquisition in April 1972 (Finding 60). JWC advanced the money Celotex paid to Glen Alden Corporation for the Panacon stock (Finding 59). In addition, Messrs. Walter and Cordell held offices on the boards of both JWC and Celotex (Finding 30). As of December 1975, Mr. Herbert, a Vice-President of JWC, had been President of Celotex since January 1972, Mr. Hegerich had been a Vice-President of both JWC and Celotex for more than five years, and Mr. Matlock had been Vice-President and Treasurer of JWC since 1974 and Vice-President of Celotex since 1969 (CX 37–0).

The evidence shows that officials of JWC oversee JWC's operations in various States and Canada, including those of Celotex and other subsidiary corporations as well (Finding 11). It also is clear that JWC and Panacon consider JWC and Celotex to be coextensively responsible for the acquisition and for subsequent actions taken regarding Panacon (Finding 65).

When the pattern and framework of the whole enterprise are taken into consideration (*see Art National Manufacturers Distributing Co.* v. *Federal Trade Commission,* 298 F.2d 476, 477 (2d Cir. 1962), *cert. denied,* 370 U.S. 939 (1962)), it is clear that naming JWC as the respondent in this matter is proper. The evidence is persuasive that Celotex and JWC were alter egos in many respects and that JWC is the corporation which played the dominant role in the acquisition.

Even without the control and substantial identity indicated, the Commission has held that the parent is liable for its subsidiaries' acts ". . . if the facts demonstrate even latent control." *See In the Matter of Beneficial Corporation and Beneficial Management Corporation,* Dkt. 8922, p. 3 [86 F.T.C. 119 at 159], Commission Opinion, slip copy, dated July 15, 1975:

> [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.

[42] *P. F. Collier & Son Corp., et al.* v. *Federal Trade Commission,* 427 F.2d 261, 270 (6th Cir. 1970), *cert. denied*, 400 U.S. 926 (1970).

The following also is found in the *Collier* opinion:

> . . . where stock ownership is resorted to for the purpose of controlling a subsidiary so that it may be used as "a mere agency or instrumentality" of the parent
>
> > "the courts will not permit themselves to be blinded or deceived by mere forms or [sic] law but, regardless of fictions, will deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require." *Chicago, Milwaukee & St. Paul Railway Company* v. *Minneapolis Civic and Commerce Association,* 247 U.S. 490, 501, 38 S.Ct. 553, 557, 62 L.Ed. 1229 (1918). (427 F.2d 266-267)

On page three in the *Beneficial* opinion, the Commission specifically disavowed the common law rule for which counsel for JWC argued in his motion to dismiss by stating that it rejected any such stringent standard. The no longer apt rule regarding the ignoring of separate corporate identities was restated in *National Lead Co.* v.

Federal Trade Commission, 227 F.2d 825, 829 (7th Cir. 1955), *rev'd on other grounds,* 352 U.S. 419 (1957):

> . . . there must be evidence of such complete control of the subsidiary by the parent as to render the former a mere tool of the latter, and to compel the conclusion that the corporate identity of the subsidiary is a mere fiction.

Press Co., Inc. v. *N.L.R.B.,* 118 F.2d 937, 946–947 (D.C. Cir. 1940), *cert. denied,* 313 U.S. 595 (1941).

As noted previously, the more recent precedent holds that ". . . even latent control" (*Beneficial Corporation et al., supra*) warrants holding the parent liable for its subsidiary's acts.

Where the public interest is involved, as it is in the enforcement of both Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act, a strict adherence to common law principles is not required in the determination of whether a parent should be held for the acts of its subsidiary, where strict adherence would enable the corporate device to be used to circumvent the [43] policy of the statute. *Joseph A. Kaplan & Sons, Inc.* v. *Federal Trade Commission,* 121 U.S. App. D.C. 1, 347 F.2d 785, 787 n.4 (1959).

The fact that the *Beneficial, Kaplan,* and *Collier* decisions cited above were brought under Section 5 of the Federal Trade Commission Act makes them no less persuasive for holding that JWC is properly charged in the complaint for acquiring Panacon, in violation of Section 7 of the Clayton Act because Section 5 is the basic statutory authority under which the Commission functions. Its statutory authority to enforce the Clayton Act is contained in Section 11 thereof (15 U.S.C. 21).

Moreover, the Commission has specifically held that an acquisition through a subsidiary is to be deemed the acquisition of the parent for purposes of Section 7. For example, in *Permanente Cement Co.,* 65 F.T.C. 410 (1964), the Commission said:

> The acquisition was actually made by respondent Glacier, a wholly owned subsidiary of Permanente. . . . Since Permanente and Glacier were (and are) under common ownership and management, we deem Permanente, rather than Glacier, the acquiring firm (*cf. Bowater S.S. Co.* v. *Patterson,* 303 F.2d 369, 372–373 (2d Cir. (1962))—although it makes little practical difference whether Permanente or Glacier be deemed the acquiring firm, Permanente's relationship to RMC [the acquiring company] is the critical factor in assessing the lawfulness of the acquisition. *Id.* at 492 n.7.

In view of the foregoing, it was proper to name only JWC as the respondent. Lastly, had it been necessary to add Celotex as a respondent, or had complaint counsel so requested, the Commission has held that it is within the authority of an administrative law

judge to amend the complaint to add a respondent. *See* "Order Affirming Hearing Examiner's Order Amending Complaint," in *The Goodyear Tire and Rubber Company,* Dkt. 6486, 53 F.T.C. 1263, October 26, 1956, as described in "Interlocutory Order Remanding Motion to Amend Complaint for Determination of the Hearing Examiner," in *Capitol Records Distributing Corporation,* Dkt. 8029, 58 F.T.C 1170, 1173 n.5, March 1, 1961. [44]

IS JWC "IN COMMERCE"?

The evidence establishes that JWC is "in commerce" as that term is defined in Section 7 of the Clayton Act, and that it is subject to the Commission's jurisdiction under Section 11. Section 7 provides that both the acquiring and the acquired corporation, must have been engaged in commerce when the challenged acquisition occurred. Counsel for JWC argues, in effect that since JWC is a holding company (Respondent's Proposed Finding II., A., 2.), the excerpt quoted below from the relatively recent decision of the Supreme Court in *United States* v. *American Building Maintenance Industries,* 422 U.S. 271 (1975), supports his position that JWC was not "in commerce" because, in his view, JWC directly does not produce, distribute or acquire goods or services. The quote follows:

> To be engaged "in commerce" within the meaning of Section 7, a corporation must itself be directly engaged in the production, distribution, or acquisition of goods or services in interstate commerce. *See Gulf Oil Corp.* v. *Copp Paving Co.,* 419 U.S. at 195. (at 283)

If the view of counsel for JWC were adopted, no holding company not "directly engaged in the production, distribution or acquisition of goods or services . . ." etc., in a very literal sense, would be chargeable with a violation of Section 7. Such a result would stand Section 7 on its head because the restraints on trade worked by holding companies in the form of trusts were the genesis of the Sherman Antitrust Act (15 U.S.C. 1-7), *Standard Oil Co. of New Jersey* v. *United States,* 221 U.S. 1, 50 (1911), and the Federal Trade Commission and Clayton Acts were passed to supplement the Sherman Act. *See* the "Report of the Attorney General's National Committee to Study the Antitrust Laws," 1955, p. 1; *cf. Arrow-Hart & Hegeman Electric Co.* v. *Federal Trade Commission,* 291 U.S. 587, 595 (1934); *United States* v. *Celanese Corporation of America,* 91 F. Supp. 14, 17 (D.C.S.D. N.Y. 1950). [45]

In fact, the evidence is persuasive and establishes that JWC, as a holding company, *is* engaged in the "production, distribution or acquisition of goods or services in interstate commerce" within the

purview of the quoted language from the *American Building Maintenance* opinion. This, because although the headquarters of JWC is in Tampa, Florida, Mr. Jim Walter, Chairman of the Board, Mr. J. B. Cordell, Senior Vice-President, Treasurer and Director of JWC, Mr. William H. Frack, Jr., a Vice-President and other JWC executives participated in the negotiations in New York (Finding 12) looking toward the acquisition of Panacon and, at other times, other acquisitions as well (Finding 8); hence, in the acquisition of Panacon, they as officers of JWC and JWC itself were engaged in the acquisition of a "good" (a corporation) peculiar to the operations of a holding company. Also, JWC borrowed the money from various banks (*i.e.*, obtained credit, a form of good or service per *Fortner Enterprises, Inc.* v. *U.S. Steel Corp.,* 394 U.S. 495, 508-509 (6th Cir. 1969)) which was furnished to Celotex to make the purchase (Finding 59); hence, JWC distributed a "good" (the money—a tangible commodity, *Fortner, supra,* 394 U.S. at 508) used to buy Panacon stock.

The evidence also shows that JWC has loan agreements with banks in Chicago, New York, Detroit and Cleveland and that JWC has purchased and sold companies throughout the United States. Further, courts have consistently held that the issuance and sale of securities, as JWC has done (Finding 14), on public exchanges are transactions in interstate commerce, *e.g., Parry* v. *Bache,* 125 F.2d 493, 495 (5th Cir. 1942); *Oklahoma-Texas Trust* v. *Securities and Exchange Commission,* 100 F.2d 888 (10th Cir. 1939).

Officials of JWC oversee the activities of the various corporations which it owns. This oversight inevitably calls for direct engagement across State boundaries in managing the firm's assets because those activities take place in many different states (Findings 7, 9, 11). JWC's interstate activities are, in fact, similar in certain respects to those of insurance companies which have been held to be in interstate commerce in a Sherman Act case as the following quote indicates: **[46]**

> "Interrelationship, interdependence, and integration of activities in all the states in which they operate are practical aspects of the insurance companies' methods of doing business." There is ". . . a continuous and indivisible stream of intercourse among the states . . . which are essential to the negotiation and execution of policy contracts. . . . The decisions which that company makes at its home office—the risks it insures, the premiums it charges, the investments it makes, the losses it pays—concern not just the people of the state where the home office happens to be located. They concern people living far beyond the boundaries of the state."

United States v. *South-Eastern Underwriters Association et al.,* 322 U.S. 533, 541–42 (1944). In similar fashion, JWC does many of these

same things in relation to its subsidiaries. Even though JWC does not concern itself with "policy contracts," the decisions made in Tampa do concern operations and employees far beyond the boundaries of Florida.

As the Court noted in the *American Building Maintenance* decision, *supra,* 422 U.S. at 282, the Commission's view is ". . . that § 7 applies only to an acquisition in which both the acquired and the acquiring companies are engaged directly in interstate commerce. *E.g., Foremost Dairies, Inc.,* 60 F.T.C. 944, 1068–1069 [1962]. *Beatrice Foods Co.,* 67 F.T.C. 473, 730–731 [1965]; *Mississippi River Fuel Corp.,* 75 F.T.C. 813, 918 [1969]." [Note: The literal language in the *Foremost* opinion cited reflects that importation "of commodities" is the "indispensable" element to establish the existence of interstate commerce; however, this language does not sufficiently express the concept that other elements of trade between states also are adequate to show the existence of interstate commerce.]

The evidence here establishes that JWC, Celotex, and Panacon all were engaged directly "in commerce" as that term is used in Section 7 of the Clayton Act (Findings 10, 22, 45). [47]

ELEMENTS OF SECTION 7 OF THE CLAYTON ACT

Section 7 (15 U.S.C. 18) provides that no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where in any line of commerce (the product market), in any section of the country (the geographic market), the effect of the acquisition may be substantially to lessen competition, or to tend to create a monopoly.

Both JWC and Panacon were corporations engaged in commerce (Findings 10, 45). That having been established, "determination of the relevant product and geographic market is 'a necessary predicate' to deciding whether a merger contravenes the Clayton Act." *United States* v. *Marine Bancorporation, Inc.,* 418 U.S. 602 (1974); *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 324 (1962); *United States* v. *E. I. du Pont de Nemours & Co. et al.,* 353 U.S. 586, 593 (1957).

1. The Product Market

Identification of the dimensions of the product market within which the legality of an acquisition is to be tested is the first step in every Section 7 case. *Brown Shoe Co., supra,* 370 U.S. at 324. In *Brown Shoe,* the Supreme Court said that while there may be broad

product markets whose outer boundaries "are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it . . .," there also may be "well defined submarkets" within the broader market which in themselves constitute product markets for antitrust purposes. There, men's, women's and children's shoes were held to be economically significant submarkets within the shoe industry. 370 U.S. at 325.

The Court in *Brown Shoe* described seven factors which led it to distinguish the submarkets:

> industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors . . . .

370 U.S. at 325.

[48] In *United States* v. *Aluminum Co. of America* (Alcoa-Rome), 377 U.S. 271 (1964), separate aluminum and copper submarkets were found to exist in the wire and cable industry, and existence of a separate paper insulated power cable submarket was found in *United States* v. *Kennecott Copper Corp.* (Kennecott), 231 F. Supp. 95, 98-100 (S.D. N.Y. 1964), *aff'd per curiam,* 381 U.S. 414 (1965). Previously, in *United States* v. *Bethlehem Steel Corp.,* 168 F. Supp. 576, 593-95 (S.D. N.Y. 1958), the iron and steel industry was found to be the broad line of commerce but ten specific products (*e.g.,* hot rolled sheets, track spikes, electricweld pipe, oil field equipment and supplies) were held to comprise identifiable submarkets as well.

Decisions such as *Alcoa-Rome, Kennecott,* and others which came after *Brown Shoe,* made it clear that not all or even most of the seven factors need to be present before a valid submarket for Section 7 purposes may be found to exist. *United States* v. *Phillipsburg National Bank & Trust Co.,* 399 U.S. 350, 359-60 (1970); *United States* v. *Continental Can Co.* (Continental Can), 378 U.S. 441, 456-57 (1964); *General Foods Corp.* v. *Federal Trade Commission,* 386 F.2d 936, 941 (3d Cir. 1967); *Columbia Broadcasting System, Inc.* v. *Federal Trade Commission,* 414 F.2d 974, 979 (7th Cir. 1969), *cert. denied,* 397 U.S. 907 (1970).

Counsel for JWC argues that *only* the broad market, "roofing products" is the relevant line of commerce and that it includes such products which are made of wood, clay, cement, metal, asbestos and other materials as well as asphalt and tar (Respondent's Brief, p. 9). Although I do not agree with the position of counsel for JWC, there is no question but that in an appropriate case "roofing products" might be examined as the relevant line of commerce. *See Continental Can,*

supra, 378 U.S. at 457–58. But this case is not appropriate for such an examination as is explained below.

The evidence here shows that asphalt and tar roofing products are recognized by the roofing industry as being separate and distinct, in that there is an association of which both Celotex and Philip Carey/Panacon were members which is limited to the domestic producers of such roofing products (Findings 81–82). The evidence also shows that producers of asphalt and tar roofing products consider other such producers to be their competitors (Finding 86). Asphalt and tar roofing products have [**49**] peculiar characteristics due to their composition and performance qualities, including fire resistance, versatility, relatively low price, and they are sensitive to changes in the price of such products (Findings 87–93, 102). Asphalt and tar roofing products are made on machinery which is different from that used to make other roofing products, and they usually are made by producers who concentrate on such products (Findings 96–97). In addition, the technical expertise and capabilities called for in the production of asphalt and tar roofing products are unique when compared with the production of other roofing industry materials such as clay tiles, wood shingles or shakes, sheet metal and the like (Finding 96).

In view of the foregoing factors, it is clear that the asphalt and tar roofing products market is "sufficiently inclusive to be meaningful in terms of trade realities." *Crown Zellerbach Corporation* v. *Federal Trade Commission,* 296 F.2d 800, 811 (9th Cir. 1961). Hence, it is proper to consider asphalt and tar roofing products as the relevant line of commerce in connection with determining whether the acquisition of Panacon by Celotex violated Section 7.

2. The Geographic Market

The section of the country or geographic market at which one must look in order to determine whether an acquisition has substantially lessened competition may be identified in much the same way as the product market. Thus, in *Brown Shoe, supra,* 370 U.S. at 336–37, the Supreme Court said that the "criteria to be used in determining the appropriate geographic market are essentially similar to those used to determine the relevant product market. . . . The geographic market selected must . . . both correspond to the commercial realities of the industry and be economically significant. . . . [A]lthough the geographic market in some instances may encompass the entire Nation, in some other circumstances, it may be as small as a single metropolitan area."

What is clear from the precedents is that the section of the country

to be examined need not be marked off in metes and bounds. *United States* v. *Pabst Brewing Co.,* 384 U.S. 546, 549 (1966); *E. I. du Pont & Co., supra,* 351 U.S. at 395. In this connection, in *Philadelphia National Bank, supra,* 374 U.S. at 360 n.37, the Supreme Court said:

[50] . . . there is still some artificiality in deeming the four county area the relevant "section of the country" so far as businessmen located near the perimeter are concerned. But such fuzziness would seem inherent in any attempt to delineate the relevant geographical market.

Also see United States v. *Connecticut National Bank,* 418 U.S. 656, 669–70 (1974), where the Court said that it is the Government's role to come forward with evidence "delineating the rough approximation of localized banking markets mandated by *Philadelphia Bank, supra,* and *Phillipsburg National Bank, supra.*"

The effects of an acquisition have been considered by the Supreme and lower Courts with reference to both broad geographic markets and submarkets within the broad area, in basically the same manner as in the case of product markets. *United States* v. *Kimberly-Clark Corp.,* 264 F. Supp. 439, 455–56 (N.D. Cal. 1967); *United States* v. *Bethlehem Steel Corp., supra,* 168 F. Supp. at 601–02.

In *Philadelphia National Bank, supra,* 374 U.S. at 358–61, commercial and economic factors were used in identifying the relevant geographic market. The Court said that "the factor of inconvenience localizes banking competition as effectively as high transportation costs in other industries," that "the vast bulk of appellees' business originates in the four-county area," and that federal banking agencies had recognized a comparable "area of effective competition"; consequently, "the four-county area in which appellees' offices are located . . ." was the appropriate section of the country. This, even though that description did not "delineate with perfect accuracy." At 360–61.

In a more recent case where potential rather than horizontal competition was involved, the Supreme Court held that "without exception the Court has treated 'section of the country' and 'relevant geographic market' as identical, and it has defined the latter concept as the area in which the goods or services at issue are marketed to a significant degree by the acquired firm." *Marine Bancorporation, supra,* 418 U.S. at 602. In commenting on the "section of the country" holding of the Court in *Pabst Brewing, supra,* 384 U.S. at 550–51, the Court said in *Marine Bancorporation* in footnote 20:

[51] Some of the Court's language in *Pabst* suggests that the Government may challenge a merger under § 7 without establishing any relevant geographic market. . . . But Pabst in reality held that the Government had established three

relevant markets in which the acquired firm actually marketed its products—a single State, a multistate area, and the Nation as a whole. . . . And in that case the acquiring firm was an actual competitor of the acquired firm in all three relevant geographic markets. . . . Thus while *Pabst* stands for the proposition that there may be more than one relevant geographic market, it did not abandon the traditional view that for purposes of § 7 "section of the country" means "relevant geographic market" and the latter concept means the area in which the relevant product is in fact marketed by the acquired firm.

On the basis of the economic and commercial facts in the record, both the United States as a whole and those regional areas of the United States in which Philip Carey/Panacon and Celotex competed, properly may be examined as the relevant sections of the country for Section 7 purposes.

In 1971, both Celotex and Philip Carey/Panacon sold asphalt and tar roofing products in 47 and 42 states, respectively (Finding 112). Asphalt and tar roofing products are distributed nationally and the major firms compete with others throughout the United States (Findings 112-113). These facts warrant considering the nation as a whole as a relevant geographic market. *See* Commission Opinion in *Beatrice Foods Co.,* Dkt. 8864, p. 8 [86 F.T.C. 1 at 59], slip copy (July 1, 1975).

Even though Philip Carey/Panacon and Celotex did not actually sell their asphalt and tar roofing products in every state, there are numerous precedents to the effect that a national market may be considered along with regional markets. *See Federal Trade Commission* v. *Procter and Gamble Co.,* 386 U.S. 568, 571-72 (1971); *Pabst, supra,* 384 U.S. at 549-551; *A. G. Spalding & Bros., Inc.* v. *Federal Trade Commission,* 301 F.2d 585, 607 (3rd Cir. 1962); *Kimberly-Clark, supra,* 264 F. Supp. at 454-458; Commission decision in *British Oxygen Company Limited, et al.,* Dkt. 8955, pp. 8-9 [86 F.T.C. 1241 at 1346-7], slip copy (December 8, 1975). [52]

In *Kennecott Copper Corp.,* Dkt. 8765, 78 F.T.C. 744 at 917-18 (May 5, 1971), the Commission said that a national market existed for coal even though the acquired firm (Peabody Coal Company) sold principally in the North and South Central States and there was no evidence of sales in the Northeast, Mid-Atlantic or Northwestern States, *affirmed,* 467 F.2d 67 (10th Cir. 1972), *cert. denied,* 416 U.S. 909 (1974), *rehearing denied,* 416 U.S. 963 (1974). *Also see United States* v. *Jos. Schlitz Brewing Company,* 253 F. Supp. 129 at 134-35 N.D. Cal. 1966).

Complaint counsel state that only the United States as a whole is the relevant geographic market (Complaint Counsel Brief, p. 33), and the economist who testified at the instance of JWC used the entire United States as the geographic market in evaluating the data on

which he based his testimony. But this is not a case in which neither party has suggested that anything less than the nation should be considered the proper geographic market. *See* Opinion of the Commission, *The Budd Company,* Dkt. 8848, p. 5 [86 F.T.C. 518 at 572], slip copy, August 29, 1975. In fact, counsel for JWC has suggested that the industry is one of regional markets only (Respondent's Brief, p. 20).

One of complaint counsel's exhibits (CX 14) shows that Philip Carey/Panacon and Celotex had plants in a number of regions stretching northeasterly from Texas to Maine which were so located that competition existed between them to a significant degree in the production and sale of asphalt and tar roofing products. Merely by examining the map showing a 250 mile radius from various of these plant sites (CX 14), it is obvious that there was substantial overlap of the areas where Philip Carey/Panacon and Celotex did much of their business. The area of overlap is that in which Carey marketed most of the asphalt and tar roofing products which it produced. It also is a section of the country in which Celotex, prior to the acquisition, marketed much of the asphalt and tar roofing products which *it* produced (Finding 111).

Since freight rates were a significant factor in determining where Philip Carey/Panacon would make a competitive effort (Findings 105, 108), it is reasonable to use the 250 mile radius in identifying those areas in which it and Celotex sold the bulk of their asphalt and tar roofing products. There is conflicting testimony as to whether a 250 mile or greater distance for shipments [53] of asphalt and tar roofing products is a generally acceptable "rule of thumb" in the industry (Finding 107). Nonetheless, the 250-mile figure has enough acceptance that there is no real problem in using it in reaching the determination that a "belt" running from Texas to Maine also is a relevant geographic market. The Supreme Court has accepted the similarly imprecise "southeastern part of the United States" as the relevant section of the country, *United States* v. *Penn-Olin Chemical Co.,* 378 U.S. 158, 161 (1964), and a lower court found that the "freight rates for shipping beer across the Continental Divide strongly support the conclusion that the Eight Western States area is a relevant section of the country," as was the State of California, in *Schlitz Brewing, supra,* 253 F. Supp. at 146.

Lastly, the competitive realities are that this Texas to Maine "belt" *is* significant economically because it is the area where "the effect of the merger on competition will be direct and immediate . . ." which the Supreme Court has held is an appropriate "section of the country" insofar as Section 7 of the Clayton Act is concerned.

Philadelphia National Bank, supra, 374 U.S. at 357. Certainly, it is the area in which customers of Panacon were obliged to look for an alternative source of supply after the acquisition. *See Permanente Cement, supra,* 65 F.T.C. at 489.

Consequently, and as is alleged in the complaint (par. 15), it is proper to consider both the United States as a whole and the "belt" running from Texas to Maine as relevant sections of the country. Even though the record does not contain precise data as to the market shares of Philip Carey/Panacon and Celotex in the "belt" states, the conclusion is inescapable that those shares were significant because (1) that is the area in which each of them operated the bulk of their plants and made substantial sales (Finding 111), and (2) they were among the industry leaders in national market shares just prior to the acquisition (Finding 124). [54]

3. Market Concentration

The Congress made it clear that its primary concern when the Clayton Act was amended was to forestall, insofar as possible, reductions in competition in all lines of commerce by keeping a large number of small competitors in business. *United States* v. *Von's Grocery Co.,* 384 U.S. 270, 275 (1966). More recently, the Supreme Court in *Philadelphia National Bank, supra,* 374 U.S. at 363, as quoted in *United States* v. *General Dynamics Corp.,* 415 U.S. 486 at 497 (1973), said:

> This intense congressional concern with the trend toward concentration warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects. Specifically, we think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.

According to the Commission survey of the members of the asphalt and tar roofing industry pursuant to Section 6(b) of the Federal Trade Commision Act (15 U.S.C. 46) (CX 15A, B, C, *in camera*), 4-firm and 8-firm concentration was significant (Finding 124). Both Panacon and Celotex enjoyed market shares which resulted in their being included in the 4-firm category after the acquisition (Finding 124).

Counsel for Jim Walter questioned the results of the survey; however, it does provide a reliable indication of the asphalt and tar roofing products industry because of its extensive coverage of such producers. Even though it may be possible to point to technical flaws

in the compilation of industry statistics, the Supreme Court has held that "precision in detail is less important than the accuracy of the broad picture presented." *Brown Shoe, supra,* 370 U.S. at 342 n.69. The Commission also has said that there is no requirement that the exact size of a market need be shown in a Section 7 case. **[55]** *Papercraft Corp.,* Dkt. 8779, 78 F.T.C. 1352, 1405–06 (1971), *modified and affirmed,* 472 F.2d 927 (7th Cir. 1973). The Section 6(b) survey conducted in connection with this case accurately presented the "picture" of the asphalt and tar roofing products industry.

Other evidence of a trend toward concentration is found in the fact that since 1969 there have been six mergers between competitors in the industry other than that between Panacon and Celotex (Finding 125). The trend was furthered when Celotex acquired Panacon, and in the opinion of the economist called at the instance of complaint counsel, the industry had reached a level of concentration at which economic performance frequently deteriorates (Finding 124).

In *Stanley Works* v. *Federal Trade Commission,* 469 F.2d 498, 504 (2d Cir. 1972), *cert. denied,* 412 U.S. 928 (1973), the court said that the cabinet hardware industry was concentrated because the 4-firm percentage of market was 49 percent to 51 percent. To the same effect, in *Industrial Organization,* Professor Joe Bain says that a market in which the 4-firm percentage is 50 percent, as here, reflects high-moderate concentration (p. 131, 2d ed. 1968) (Finding 124).

It is also worthy of note that the merger in this proceeding falls within the class of horizontal mergers subject to challenge under the Department of Justice Merger Guidelines. *Trade Reg. Rep.,* par. 4510.

This case falls squarely within the principle that where there has been a "history of tendency toward concentration in the industry," tendencies toward further concentration "are to be curbed in their incipiency." *Continental Can, supra,* 378 U.S. at 461, citing *Brown Shoe, supra,* 370 U.S. at 345–46. Where "concentration is already great the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great." *Philadelphia National Bank, supra,* 374 U.S. at 365 n.42.

Lastly, it is worthy of mention that the Supreme Court has made clear that Section 7 can be violated in ways that do not necessarily increase concentration in the relevant market. Both potential entry and vertical acquisition cases have so held. *See* Commission decision in *British Oxygen, supra,* p. 30 [86 F.T.C. 1241 at 1265], slip copy. **[56]**

4. Ease of Entry

Counsel for JWC introduced evidence to show that there are no significant barriers to entry into the asphalt and tar roofing industry because (1) a roofing plant without a felt mill can be constructed for as little as $2.4 million, (2) municipal governments sometimes provide funds to encourage construction, (3) technological improvements have reduced entry costs, (4) a felt or mat producing facility, even though unnecessary, can be constructed for as little as $1.6 million, (5) used machinery is available, (6) advertising is not important in the industry, (7) small firms do well, and (8) there are ready means of distribution open to new entrants (Respondent's Proposed Findings IV., B., 1-16, pp. 30-36; *see* Findings 126-133). Although I agree with the position of counsel for JWC to the effect that such evidence is germane to questions as to the various aspects of an acquisition, including the probability of adverse competitive effects (Respondent's Reply Brief, p. 18), that does not negate the fact that in this acquisition substantial competition between Philip Carey/Panacon and Celotex was eliminated.

Ease of entry is not an effective defense to a charge that competition has been eliminated. In *Ekco Products Co.,* Dkt. 8122, 65 F.T.C. 1163, at 1208 (1964), *affirmed,* 347 F.2d 745 (7th Cir. 1965), the Commission said:

> . . . where the merger's effects on competition are those proscribed by Section 7, its illegality cannot be overcome by a showing of ease of entry. . . . Ease of entry may, to be sure, cause the market power of established firms to be eroded by the advent of significant new competitors; but this is likely to be at best a long-term affair. . . . In short, the absence of high entry barriers cannot be depended upon to ensure effectively competitive conditions. . . . [and] a merger that has been proved to be so anticompetitive as to violate Section 7, even apart from difficulty of entry into the market, cannot be defended on a mere showing of absence of high entry barriers.

[57] In a "horizontal" Section 7 case, the focus is on the existing competition rather than on the potential for additional competition, to which ease of entry primarily relates.

> [T]he existence of potential competition does not justify or excuse elimination of actual competition. In such a case, where the merger's effects on competition are those proscribed by Section 7, its illegality cannot be overcome by a showing of ease of entry. . . . Ease of entry may, to be sure, cause the market power of established firms to be eroded by the advent of new competitors; but this is likely to be at best a long-term affair. *See* Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics,* 74 Harvard L. Rev. 226-260 (1960). . . . *Cf.* Bain, Barriers to New Competition 189 (1956); Bain, Industrial Organization 425 (1959).

Also see American Brake Shoe Co., Dkt. 8622, 73 F.T.C. 610, 684 (1968).

5. Competitive Effects

The basic premise of Section 7 is that competition will be most vital when there are many sellers, none of which has any significant market share. *Philadelphia National Bank, supra,* 274 U.S. at 363; *Alcoa-Rome, supra,* 377 U.S. at 289.

Philip Carey/Panacon and Celotex were major competitors in the asphalt and tar roofing products industry and they held significant market shares. The competition between them was keen and substantial (Findings 140–142). The acquisition of Panacon by Celotex eliminated a significant, independent and vigorous competitor with the result that the buying options available to purchasers of asphalt and tar roofing products were reduced since Philip Carey/Panacon was eliminated as an independent source of supply (Finding 140).

Counsel for JWC cite *United States* v. *M.P.M.,* 397 F. Supp. 78, at 92 (D.C. Colo. 1975) (Respondent's Reply Brief, p. 19–20), for the proposition, in essence, that a horizontal merger is not illegal simply because (1) the combination increased the market share of one of the parties, (2) the new firm has more assets, and (3) there [58] are fewer competitors. In *M.P.M.,* the court did hold there was no violation of Section 7 when three ready-mix concrete producers combined. But the court also held that the market area (Denver) was unique; concentration was high and likely to remain so; and one of the firms was failing which made internal expansion a nonfeasible alternative (at 93). As indicated previously, not all of these important factors are present in this case and the *M.P.M.* decision does not otherwise persuade me that the result there should obtain here.

Section 7 was particularly directed against elimination of horizontal competition of the sort which existed between Philip Carey/Panacon and Celotex. The policy underlying the Section "is that corporate growth by internal expansion is socially preferable to growth by acquisition." *Philadelphia National Bank, supra,* 374 U.S. at 370; *accord, Ekco Products, supra,* 347 F.2d 745, at 752.

The Supreme Court repeatedly has ruled that acquisitions of competitors with even lower industry rankings than Philip Carey/Panacon and Celotex enjoyed are illegal. For example, in *Brown Shoe, supra,* the combined markets share was 5 percent. 307 U.S. 341–343. In *Alcoa-Rome, supra,* 377 U.S. at 271, acquisition of the ninth ranked firm, with 1.3 percent of the aluminum conductor market, by the market leader with a 27.8 percent market share was

found to be unlawful. Similarly, a merger between the sixth and seventh ranked firms, Blatz with 5.84 percent and Pabst with 5.48 percent, respectively, of the three-state beer market in *Pabst, supra,* 384 U.S. at 551–552, violated Section 7. Also, with a combined market share of 8.9 percent, a merger between the third-ranking firm with 4.7 percent and the sixth-ranking firm with 4.2 percent of the retail grocery market in the Los Angeles area was held in *Von's Grocery, supra,* 384 U.S. at 281, to violate Section 7. In *Fruehauf Trailer Co.,* 67 F.T.C. 878, 932 (1965), the Commission found that "major competitive factors in the relevant market" had been eliminated even though the combined market share was only 4.6 percent.

Instead of expanding with the possibility of market deconcentration, Celotex combined with Panacon and substantially increased its market share along with improving its standing amongst competitors in the asphalt and tar roofing products industry. Thus, the merger of Celotex and Panacon increased concentration and more firmly established Celotex in the relevant product market. Such results *by means of an acquisition* are exactly what Section 7 was enacted to prevent. [**59**]

Conclusions

1. The Commission has jurisdiction of and over the subject of this proceeding and Jim Walter Corporation (JWC), and the proceedings were and are in the interest of the public.

2. JWC was and is a corporation engaged in commerce as "commerce" is defined in the Clayton Act, as is its subsidiary, The Celotex Corporation (Celotex).

3. Panacon was a corporation engaged in commerce, as "commerce" is defined in the Clayton Act, when its stock was acquired by JWC through its wholly-owned subsidiary Celotex.

4. The appropriate line of commerce which should be considered in judging the legality of the acquisition is asphalt and tar roofing products.

5. The appropriate sections of the country in which the competitive effects of the acquisition should be examined are (1) the United States as a whole, and (2) a belt of 26 states running northeasterly from Texas to Maine.

6. The effect of the acquisition of Panacon by JWC through its subsidiary Celotex has been, and may be, substantially to lessen competition or to tend to create a monopoly in violation of Section 7 of the Clayton Act, as amended, in the following ways:

(a) Panacon has been eliminated as a substantial, viable competi-

tor in the asphalt and tar roofing industry in national and regional markets;

(b) Concentration in the asphalt and tar roofing product market has been substantially increased;

(c) The competitive position of JWC through Celotex vis-a-vis its competitors in the asphalt and tar roofing industry has been, and may be further, enhanced illegally.

7. The acquisition by JWC through Celotex of Panacon stock violated Section 7 of the Clayton Act, as amended (15 U.S.C. 18). **[60]**

THE REMEDY

Complaint counsel argues for total divestiture (Complaint Counsel's Brief, pp. 56-58), and the first general principle applicable to the corrective action to be taken when a violation of federal law is found is ". . . that once the government has successfully borne the considerable burden of establishing a violation of law all doubts as to the remedy are to be resolved in its favor." *United States* v. *E. I. du Pont de Nemours & Co.,* 366 U.S. 316, 334 (1961). The Commission has said that:

> The most appropriate remedy to redress a Section 7 violation is generally divestiture. It is specified in the enforcement provisions of the amended Clayton Act and normally commends itself as a rational course in restoring competition to the condition which obtained prior to the merger.

Diamond Alkali Co., Dkt. 8592, 72 F.T.C. 700, 742 (1967).

The Commission also has said, however, in deciding upon the appropriate remedy for a Section 7 violation, that it is incumbent upon the Commission to fashion a remedy which will, to the extent possible, restore competition at least to the state of health it might have enjoyed but for the acquisition, *Ekco Products, supra,* 65 F.T.C. at 1216, and if that competition can be improved upon so much the better. In fashioning orders to bring an end to violations of the laws which it enforces, the Commission has broad leeway and may exercise ". . . wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices. . . " *Federal Trade Commission* v. *Ruberoid Co.,* 343 U.S. 470, 473 (1952); *Thiret* v. *Federal Trade Commission,* 512 F.2d 176, 181 (10th Cir. 1975).

The Commission's powers to remedy unlawful corporate acquisitions are broadly equitable, no less so than under Section 5. Hence, in a Section 7 case, the question to be asked 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, supra,* 65 F.T.C. at 1215. **[61]**

In *Reynolds Metals Company* v. *Federal Trade Commission,* 309 F.2d 223, 231 (D.C. Cir. 1962), the Court said:

> Divestiture is an extremely harsh remedy, *see Timken Roller Bearing Co.* v. *United States,* 341 U.S. 593, . . ., and should be decreed as to property obtained by such an acquisition only when necessary to the restoration of the competitive situation altered by the acquisition. *See United States* v. *National Lead Co.,* 332 U.S. 319, 351–352 . . . (1947).

Also see United States v. *Reed Roller Bit Co.,* 274 F. Supp. 573, 586 (W.D. Okla. 1967). To the same end:

> The Court also in *du Pont* [*supra*] reaffirmed that the guidelines set by *United States* v. *American Tobacco Co.,* 221 U.S. 106, 185 . . . (1911) were still to be followed in its determination of the most effective and applicable form of relief, when an antitrust violation is found:
>
> > "[T]hree dominant influences must guide our action: 1, The duty of giving complete and efficacious effect to the prohibitions of the statute; 2, the accomplishing of this result with as little injury as possible to the interest of the general public; and, 3, a proper regard for the vast interests of private property which may have become vested in many persons as a result of the acquisition." 366 U.S. at 327 . . . .

International Telephone and Telegraph Corp. v. *General Telephone & Electronics Corp.,* 351 F. Supp. 1153, 1210 (D.C. Hawaii 1972).

I am not convinced that the divestiture complaint counsel seek would be the most effective way to cure the adverse competitive effects which resulted from the acquisition of Panacon by JWC. Rather, and in keeping with the Congressional purpose, *supra,* p. 54, competition more likely would be fostered if several smaller competitors or new entrants rather than only one were the beneficiaries of the divestiture. The evidence shows that small, single plant competitors can succeed in this industry (Findings 134–135). **[62]**

The record also establishes that the assets of the former Philip Carey Division of Panacon used to produce asphalt or tar roofing products are separable and severable from the Panacon assets acquired which were used for other unrelated products (Finding 37). The Philip Carey Division of Panacon consisted almost exclusively of plants for the manufacture of asphalt and tar roofing products which were sold through sales offices which were different from those used to sell Panacon's non-roofing products (Finding 39; CX 26 at 19).

Inclusion of assets used to produce items not included in the asphalt and tar roofing products line of Panacon would not aid in

restoring competition in that line of commerce. *See Reed Roller Bit, supra,* 274 F. Supp. at 586. In fact, ordering such divestiture could be construed as a punishment; and civil proceedings to punish antitrust violators are not authorized. The relief ordered must not be punitive. *du Pont, supra,* 366 U.S. at 326. The same end was reached in *Union Carbide Corporation,* 59 F.T.C. 614, 659 (1961), where the Commission said:

> . . . total divestiture is not an automatic remedy which must be applied in all cases. The choice of remedies is the Commission's to be exercised with the goal of restoring and assuring the preservation of healthy competition in the relevant markets. Achieving this goal may on occasion require ordering divestment of facilities unrelated to the line of commerce affected by the acquisition as, for example, where the restoration of the acquired company as a healthy competitor requires that it be kept intact. That situation is not presented by this record.

As in *Union Carbide,* and preferably from the number-of-competitors standpoint, each of the Philip Carey/Panacon plants acquired by Celotex producing asphalt and tar roofing products separately should be able to compete strontly and effectively in the lines of commerce identified with those products after the plants are sold. Testimony in the record suggests that success in this industry may be achieved by small firms starting out with a single plant (Finding 134). [63]

I do not agree with complaint counsel's proposal that divestiture by a "spin-off" should be mandated. The remedy called for herein can restore competition without imposition of so stringent a limitation as to how it is done. On the other hand, leaving a spin-off as an option would be desirable but requiring one would not because (1) a spin-off would be expensive, (2) it would involve consideration of and compliance with a variety of corporate, security and tax laws, (3) SEC registration would be required, and (4) there could be seriously adverse consequences to JWC stockholders (Respondent's Reply Brief, p. 39), none of which need be imposed upon JWC in order to protect the public interest here.

Nor do I agree with complaint counsel when they suggest that JWC should be required to guarantee the credit borrowing of a newly created corporation for five years or that JWC should forego sales to certain customer accounts for a three year period (Complaint Counsel's Brief, "Proposed Order," p. 55, Nos. 6 and 7). Such requirements are trade restraints in and of themselves and there has been no proof that the public interest requires their imposition in this case. *See Papercraft Corp.* v. *Federal Trade Commission, supra,* 472 F.2d at 931-32; *cf. Calnetics Corp.* v. *Volkswagen of America, Inc.,* 1976-1 Trade Cases 60, 757, pp. 68234, 68249-68250 (9th Cir. 1976);

Commission Opinion in *Ash Grove Cement Company,* Dkt. 8785, pp. 16–18 [85 F.T.C. 1123 at 1167–8], slip copy June 24, 1975).

The Philip Carey/Panacon plants should be sold as going concerns (1) separately to different buyers, preferably new or small competitors, (2) as a unit, *or* (3) spun off to a newly-created corporation. Under any of these alternatives, the plan is to be approved by the Commission when JWC has a specific proposal to present. In order to do the divesting, six months (Complaint Counsel's proposal) appears to be too short a time, while twenty-four months (the proposal of Counsel for JWC) appears to be too long a period. Instead of either, one year seems reasonable to accomplish a divestiture of this size. **[64]**

Nor do I agree with counsel for JWC that the Commission could not order divestiture of the Goldsboro plant even though the "Notice of Contemplated Relief" in the complaint did not include such a proviso. The notice order contains language to the effect that such relief as was deemed appropriate after the adjudicative hearing was held might be ordered (Complaint, p. 8). *Also see* "Remedy" cases cited, *supra.* However, I do agree with counsel for JWC that sale of the Goldsboro plant is not necessary in order to remedy the violation of Section 7 which occurred when Panacon was acquired. The Goldsboro plant was not completed until a year after the acquisition, it is not comparable in cost or production capacity to the much smaller plant Panacon contemplated building in Hopewell, Virginia, and restoration of the eliminated competition does not demand its divestiture (Findings 27, 43).

In *Reynolds Metals Company* v. *Federal Trade Commission, supra,* 309 F.2d at 231, the court held that an after-acquisition-acquired plant need not be sold because plants obtained by means of the acquisition could be divested without disturbance. The court said that divestiture of such after-acquired properties could be ordered if (1) they "represent reinvestment of capital realized from the sale of property included in a forbidden acquisition and replacement of that property," (2) the record demonstrates a "nexus between continued possession of after-acquired property . . . and the violation of Section 7," and (3) "restoration of the competitive status quo compels divestiture of such property." *Cf. Union Carbide Corporation, supra,* 59 F.T.C. at 657. None of these requirements is present here.

ORDER

1. *It is ordered,* That respondent Jim Walter Corporation (JWC) is to have its wholly-owned subsidiary, The Celotex Corporation (Celotex), divest within one (1) year from the date this order becomes

final, in such a [65] manner that a going concern or concerns result, all stock, assets, properties, rights, privileges and interests of whatever nature, tangible and intangible, including without limitation all plants, equipment, machinery, raw material reserves, inventory, customer lists, trade names, trademarks, goodwill, and other property of whatever description, of the Philip Carey Division of Panacon Corporation (Panacon) acquired by Celotex as a result of the acquisition of the stock of Panacon Corporation, together with all additions and improvements which have been made thereto.

2. *It is further ordered,* That no person who is an officer, director or executive employee of JWC, Celotex, or of any other subsidiary of JWC, or who owns or controls, directly or indirectly, more than one (1) percent of the stock of JWC or of any of its subsidiaries, shall be an officer, director or executive employee of a purchaser or shall own or control, directly or indirectly, more than one (1) percent of such a purchaser.

3. *It is further ordered,* That pending divestiture, JWC is to neither cause nor permit any deterioration beyond fair wear and tear and shall maintain the plants, machinery, buildings, equipment or other property or assets to be divested in prime operating condition so that its present capacity or market value is not lessened. [66]

4. *It is further ordered,* That the plants, machinery, buildings, equipment, or other property or assets divested are in no event to be of less value than that which obtained on the date Panacon was acquired.

5. *It is further ordered,* That JWC shall not acquire, directly, through subsidiaries, joint venture, or otherwise, without the prior approval of the Federal Trade Commission, the whole or any part of the stock, share capital or assets of any concern engaged in the manufacture, sale, or distribution of any asphalt or tar roofing product; nor shall JWC or its subsidiaries enter into any arrangement with any such concern by which JWC or its subsidiaries obtain the market share, in whole or in part, of any such concern for a period beginning with the date this order becomes final and terminating ten (10) years after the divestiture ordered has been completed.

6. *It is further ordered,* That, as used in this order, the acquisitions to which Paragraph 5 pertains include any arrangements by JWC with any other party (1) whereby such other party discontinues the manufacture of any asphalt or tar roofing product under a brand name or label owned by such other party and thereafter distributes any of said products under any JWC, or its

subsidiaries', brand names or labels, or (2) whereby such concern discontinues its participation in the asphalt and tar roofing industry and thereafter transfers to JWC, [67] or its subsidiaries, its customer lists or in any other way makes available to JWC its customers or customer accounts.

7. *It is further ordered,* That respondent shall periodically, within sixty (60) days from the date this order becomes final and every sixty (60) days thereafter, submit to the Federal Trade Commission a detailed, written report of its actions, plans and progress in complying with the provisions of this order, and fulfilling its objectives. All compliance reports shall include, among other things that are periodically required, a summary of all serious discussions and negotiations with any persons who are potential owners or managers of the assets to be divested, the identity of all such persons as well as all internal memoranda, reports and recommendations concerning divestiture.

8. *It is further ordered,* That JWC is to notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in the corporate structure such as dissolution of subsidiaries or any change in the corporation which may affect compliance obligations arising out of the order.

OPINION OF THE COMMISSION

BY CLANTON, *Commissioner:*

The Commission issued its complaint in this matter on July 29, 1974, charging respondent Jim Walter Corporation (hereafter "JWC") with violating Section 7 of the Clayton Act (15 U.S.C. 18) by virtue of its April 1972 acquisition of Panacon Corporation (hereafter "Panacon"). The complaint alleged that the acquisition would have the probable effect of substantially lessening competition in the manufacture and distribution of "all asphalt roofing materials and of built-up roofing and shingles in the United States as a whole, and in certain states" by, *inter alia,* eliminating actual competition between JWC and Panacon in the relevant markets, discouraging entry of other firms, reducing the probability of independent pricing and enhancing the dominant position of JWC in the relevant market. JWC's asphalt roofing operations are conducted through its wholly-owned subsidiary, the Celotex Corporation (hereafter "Celotex"); and prior to the merger Panacon manufactured asphalt roofing products through the [2] Philip Carey Company (hereafter "Philip Carey"), a division of Panacon. (I.D. 15-16, 37)[1] A brief

[1] The following abbreviations will be used throughout this opinion:

(Continued)

review of the history of the merging firms and the acquisition places this merger in perspective.

JWC, one of the nation's largest building and construction materials companies, is a publicly held corporation chartered and operated under the laws of the State of Florida with headquarters in Tampa, Florida. (I.D. 1-2) For its fiscal year ending August 31, 1972, the year of the merger, the firm reported consolidated revenues of $885,172,000; total assets of $983,217,000; and net income of $44,568,000. (I.D. 6) The origins of JWC trace back to 1946 when Jim Walter, now Chairman of the Board, formed a small partnership engaged in the construction of partially finished (or shell) homes. This activity constituted the principal business of the firm through its incorporation as JWC in 1955 until the early 1960's. (CX-28, p. 20) However, beginning with its purchase of a 34 percent stock interest in Celotex in 1962 (and the remainder of the stock in 1964), JWC's most dramatic growth resulted from a series of more than 20 acquisitions during the ten-year period preceding issuance of the complaint. Many of these acquired companies were merged into subsidiaries of JWC, including Celotex. (I.D. 7) As of the time of the instant acquisition, JWC conducted its operations through a large number of subsidiary corporations[2] which were organized into nine operating groups: mineral and fiber products; pipe products; home building; metal and wood products; stone and concrete products; paper; sugar; savings and loan operations; and oil and gas operations. (I.D. 3, 5) [3]

Significantly, JWC's entry and expansion in the asphalt and tar roofing market have been achieved through acquisition. The Celotex purchase gave JWC a one-plant capacity which was increased to eight plants by the acquisition of the Barrett Building Materials Division of Allied Chemical Corporation in 1967. (I.D. 18-19) The Panacon merger added yet five more roofing facilities previously operated by the Philip Carey Division. (I.D. 39)

Celotex is a wholly-owned JWC subsidiary incorporated under Delaware law; the firm shares headquarters with its parent in Tampa, Florida. (I.D. 15, 33) Apart from its asphalt roofing business, Celotex also produces a variety of other building materials including

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I.D. - Initial Decision, Finding No.
I.D. p. - Initial Decision, Page No.
CX - Complaint Counsel's Exhibit No.
RX - Respondent's Exhibit No.
Tr. - Transcript, Page No.
RAB - Respondent's Appeal Brief
CAB - Complaint Counsel's Answering Brief
RPF - Respondent's Proposed Finding No.
CPF - Complaint Counsel's Proposed Finding No.

[2] As of August 31, 1972, JWC had 28 wholly-owned or controlled subsidiaries. (CX-35M)

gypsum wallboard insulation, acoustical products and siding. (I.D. 16) The company's sales of asphalt roofing products amounted to $60,151,000 in 1971 and positioned it as the fifth ranking firm in an industry with total shipments valued at $680,980,400. (I.D. 20, 112; CX-15B *in camera*)[3] In addition to its existing roofing plants, Celotex had under construction at the time of the Panacon merger a new asphalt roofing plant in Goldsboro, North Carolina, estimated to cost $9-12 million. (I.D. 21)

Prior to its merger with JWC, Panacon was a corporation chartered under Michigan law, with its principal place of business at Cincinnati, Ohio. (I.D. 34) The Glen Alden Corporation held 89 percent of the stock in Panacon, the surviving entity of a 1970 merger between the Philip Carey Corporation and Briggs Manufacturing Company. (I.D. 35, 36) For calendar year 1971, Panacon reported revenues of $181,129,000; total assets of $106,008,000; and net profits of $10,591,293. (I.D. 37)

As did JWC, Panacon manufactured a wide range of building products through six operating divisions, including [4] Philip Carey. (I.D. 37) The latter was a major producer of asphalt and tar roofing products, with sales of $59,852,000 in 1971, a volume which made it the number six firm nationally in that market. (CX-15B, *in camera*) Philip Carey also was contemplating construction of a new roofing plant in Hopewell, Virginia at the time of the acquisition. In contrast to Celotex' Goldsboro facility, the Hopewell plant was estimated to cost only about $2 million, with less capacity and no felt mill. Plans for the Hopewell plant were scrapped after the merger. (I.D. 42, 43)

The acquisition of Glen Alden's 89 percent stock in Panacon on April 17, 1972, culminated several months of negotiations between officials of JWC and Glen Alden. (I.D. 46-51) Although Celotex ultimately purchased the stock, the deal was planned, negotiated and approved by JWC. (I.D. 65) The total purchase price, including the price paid for the remaining 11 percent interest, was $73 million. (I.D. 59) Following Panacon's merger into Celotex on June 30, 1972, the various divisions of Panacon were placed under different operating groups of JWC, although Philip Carey continued to be operated by Celotex. (I.D. 63-64) The merger propelled Celotex into the number two position in the asphalt and tar roofing market in 1972, with a market share of 17.2 percent and sales of $131,633,000. (CX-15C, *in camera*)

The administrative law judge, in his Initial Decision, determined that the acquisition violated Section 7 by intensifying concentration

[3] References to *in camera* data and testimony in this opinion reflect the fact that various orders issued by the ALJ providing for such protection expired by their terms on October 30, 1977.

in the already highly concentrated asphalt and tar roofing industry, contributing significantly to an industry trend toward concentration and eliminating Philip Carey as a substantial competitive force in the market. (I.D. 139, 143) The law judge found the relevant line of commerce to be asphalt and tar roofing products and the geographic markets to consist of a national market and a 26-state (plus D.C.) regional market extending from Texas to Maine. (I.D. 80, 114) As relief the ALJ ordered divestiture of the Philip Carey assets and a ten-year ban on future acquisitions without prior Commission approval. Respondent appeals from the Initial Decision on both jurisdictional and substantive grounds. Complaint counsel, although not filing a cross appeal, urge the Commission in their answering brief to modify the ALJ's proposed order to require a spin-off of Panacon plus Celotex' Goldsboro, North Carolina plant. Our review of the issues follows. [5]

I. JURISDICTION

A. Proper Party

Before reviewing the legality of the acquisition, we must address a threshold issue raised by respondent as to the Commission's jurisdiction in this matter. Respondent contends that the complaint should be dismissed because (1) the Commission failed to name JWC's wholly owned subsidiary, Celotex, which bought the stock of Panacon, as a party to the proceeding, and (2) JWC is not "engaged in commerce" within the meaning of Section 7. It is argued that Celotex is an indispensable party, indeed the proper party, since the ALJ's order would require the divestiture of properties owned by Celotex. At most, respondent argues, the Commission's jurisdiction over JWC is only "ancillary" and cannot be exercised without the presence of the party which has committed the alleged wrongdoing, Celotex. (RAB at 12) As for the "commerce" requirement, respondent takes the position that JWC is a holding company which does not engage in the production, distribution or acquisition of goods or services in interstate commerce. We will deal with each of these issues in turn.

The ALJ concluded it was proper to name only JWC as the respondent, stating that:

When the pattern and framework of the whole enterprise are taken into consideration (*see Art National Manufacturers Distributing Co.* v. *Federal Trade Commission,* 298 F.2d 476, 477 (2d Cir. 1962), *cert. denied,* 370 U.S. 939 (1962)), it is clear that naming JWC as the respondent in this matter is proper. The evidence is persuasive that

Celotex and JWC were alter egos in many respects and that JWC is the corporation which played the dominant role in the acquisition. (I.D. p. 41)

Even in the absence of the kind of direct involvement shown here, the law judge noted that a parent corporation, such as JWC, is liable for the acts of its subsidiaries where the facts demonstrate latent control by the former over the latter, citing *P. F. Collier & Son Corp.* v. *FTC*, 427 F.2d 261 (6th Cir. 1970), *cert. denied*, 400 U.S. 926 (1970) and [6] *Beneficial Corp.*, 86 F.T.C. 119 (1975), *aff'd in part and rev'd in part on other grounds*, 542 F.2d 611 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977).

We agree that JWC is properly named and Celotex is not an indispensable party to these proceedings. Where the public interest is at stake, the courts and the Commission have consistently looked to the relevant statutory framework and its underlying policy in determining whether separate corporate identities should be respected. *E.g., Zale Corp. and Corrigan-Republic, Inc.* v. *FTC*, 473 F.2d 1317 (5th Cir. 1973); *P. F. Collier, supra; Bowater Steamship* v. *Patterson*, 303 F.2d 369 (2d Cir. 1962), *cert. denied*, 371 U.S. 860 (1962); *Beneficial Corp., supra; Great Lakes Carbon Corp.*, 82 F.T.C. 1529 (1973). In *Bowater*, a case interpreting the Norris-LaGuardia Act, Judge Friendly explained the kind of analysis required in such situations:

Whether a subsidiary corporation is to be considered a separate entity "cannot be asked, or answered, *in vacuo*," Latty, The Corporate Entity as a Solvent of Legal Problems, 34 Mich. L. Rev. 597, 603 (1936); the issues in each case must be resolved in the light of the policy underlying the applicable legal rule, whether of statute or common law . . . . As the Supreme Court has repeatedly taught, the policy behind the Norris-LaGuardia Act was a strong one; we cannot think Congress would have meant this to be defeated by the fragmentation of an integrated business into a congeries of corporate entities, however much these might properly be respected for other purposes. (303 F.2d at 372–73)

Similarly, in the context of Section 5 of the Federal Trade Commission Act, separate incorporation has not prevented inquiry into the overall nature and operation of a business enterprise. Thus, in *Zale* (a Truth in Lending/Section 5 action), the Fifth Circuit upheld the Commission's finding of liability as to the parent and entry of an order against unnamed subsidiaries, concluding that:

The integrated operation, interlocking directorate and unified advertising strongly militate for finding the enterprise to be the appropriate subject for the Commission's order and for application of the exceptions to recognition of separate corporate entities where to do so frustrates a statutory policy. (473 F.2d at 1321)

[7] In *Beneficial*, the Commission specifically rejected the contention

advanced by respondent here that the common law rule for piercing the corporate veil should govern, quoting the following language from *P. F. Collier:*

"Manifestly, where the public interest is involved, as it is in the enforcement of Section 5 of the Federal Trade Commission Act, a strict adherence to common law principles is not required in the determination of whether a parent should be held for the acts of its subsidiary, where strict adherence would enable the corporate device to be used to circumvent the policy of the statute. *P. F. Collier, supra,* 427 F.2d at 267. *See also, e.g., Goodman* v. *Federal Trade Commission,* 244 F.2d 584, 590 (9th Cir. 1957)." (86 F.T.C. at 159)

The Commission not only found the parent, Beneficial Corporation, responsible for the acts of its subsidiaries but also issued an order running to its unnamed subsidiaries.[4]

In light of these principles we will examine the language and purposes of Section 7 of the Clayton Act as well as the relationship between JWC and Celotex in connection with the instant acquisition. Section 7 provides, in part, that "no corporation engaged in commerce shall acquire, *directly or indirectly,* the whole or any part of the stock or other share [8] capital . . . ." (emphasis added) The House Report on legislation leading to passage of the 1950 amendments to Section 7 explains why the words "directly or indirectly" were originally included in the statute:

The bill retains the language of the present statute which is broad enough to prevent evasion of the central purpose . . . . It forbids not only direct acquisitions, but also indirect acquisitions, whether through a subsidiary or an affiliate or otherwise. H.R. Rep. No. 1191, 81st Cong., 1st Sess. 8-9 (1949).

When viewed in the context of the evils which Section 7 was designed to prevent, the reach of this provision is understandable. In fact, the principal purpose for enactment of the original version of Section 7, prior to its amendment in 1950, was to get at stock acquisitions of competitors by holding companies, a device Congress rightly feared could be used to escape the strictures of the Sherman Act. Underlying consideration of the 1950 amendments was a "fear of what was considered to be a rising tide of economic concentration in the American economy." *Brown Shoe Co.* v. *U.S.,* 370 U.S. 294, 315 (1962). To aid in stemming that tide, the 1950 legislation, among

[4] We reject respondent's contention that these cases require some showing that the corporate device is being used to evade the policy of the statute before separate incorporation can be disregarded. Although there may have been some basis for such a conclusion in *Collier,* neither that case nor the decision in *Beneficial* was premised on a showing of wrongful intent. A similar view was expressed in *Kavanaugh* v. *Ford Motor Co.,* 353 F.2d 710 (7th Cir. 1965), a case interpreting The Automobile Dealers' Franchise Act. In concluding there that the individual dealer had standing to sue under that Act, apart from any standing the corporate dealership might have, the court recognized that the purposes of the statute "would be subverted if the corporate format adopted by the parties were given recognition." The court further noted that "[i]ntention is not controlling when the fiction of corporate entity defeats a legislative purpose." *Id.* at 717. *See also, Anderson* v. *Abbott,* 321 U.S. 349, 357-58 (1944).

other things, extended coverage to asset acquisitions and clarified that all mergers—horizontal, vertical and conglomerate—were subject to the statute's prohibitions.[5]

Enactment of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. Law 94-435, 15 U.S.C. 18 a, adding Clayton Act Section 7A, provides further support of Congress' intent to focus upon the realities, rather than the form, of the challenged acquisition. Section 7A(b)(3)(B) of the Clayton Act, 15 U.S.C. 18a(b)(3)(B), requires that:

> The amount or percentage of voting securities or assets of a person which are acquired or held by another person shall be determined by aggregating the amount or percentage of such [9] voting securities or assets held or acquired by such other person *and each affiliate thereof*. (Emphasis added)[6]

Clearly, then, any assessment of the legality of a merger must take account of the relationship between the acquiring and acquired firms, and the probable impact on competition, from the perspective of their overall operations.

To suggest, as respondent now does, that a far-flung corporate enterprise should be carved up into its component legal entities for purposes of Section 7 merger analysis flies in the face of the express language of the statute and the legislative policy supporting it. The dangers of treating Celotex as the primary respondent, and joining JWC for purposes of relief only, are rather plain. Should JWC desire to acquire other asphalt roofing firms, it presumably could do so through its other non-roofing subsidiaries, thereby excluding from merger scrutiny the horizontal effects of competing sister firms.[7] Even apart from such an obvious loophole, looking only to the operations of the acquiring subsidiary ignores the competitive effects of the parent's resources and market power in other related areas which may bear upon the legality of the [10] merger. Such considerations are fundamental in actions premised on vertical or potential competition theories.[8]

[5] *Brown Shoe, supra,* at 317. Of course, the Supreme Court subsequently ruled that the original Section 7 in fact did apply to acquisitions other than those involving actual competitors. *United States* v. *E. I. DuPont de Nemours & Co.,* 353 U.S. 586 (1957).

[6] Although the House bill originally defined the term "affiliate" as "any person who controls, is controlled by, or is under common control with, a corporation," the final version adopted by Congress left the task of defining this and other terms to the Commission, with the concurrence of the Attorney General. *Compare* H.R. Rep. No. 94-1373, 94th Cong., 2d Sess. 2 (1976) *with* Clayton Act Section 7A(d)(2)(A), 15 U.S.C. 18a(d)(2)(B).

[7] Respondent further argues that even a direct acquisition by a parent holding company of a competitor of the parent's subsidiary can be reached under Section 7 only by suing the subsidiary as the indirect purchaser of the acquired firm. That kind of situation, it is claimed, is what the indirect acquisition language in Section 7 was designed to cover since the holding company by definition would not be engaged in commerce and therefore could not be challenged directly under the statute. (RAB at 16-17) Such an interpretation of Section 7 is so patently illogical as to require no further discussion.

[8] The vertical implications are evident in *Permanente Cement Co.,* 65 F.T.C. 410 (1964), where the Commission deemed the parent, Permanente, to be the acquiring firm although the acquisition was actually made by its wholly owned subsidiary, Glacier. The Commission noted that the critical factor was the supplier-customer relationship

(Continued)

Thus, given the purposes of Section 7, we believe it permissible without more to consider JWC and its wholly-owned subsidiary Celotex a single entity for purposes of assessing the legality of the merger and ordering appropriate relief, even though Celotex has not been joined as a party to this proceeding. In our view the statutory policy at stake here transcends the legal distinctions that might be relevant in other contexts.[9] Nevertheless, despite the strong basis for this conclusion, there is more here which bolsters our decision to hold JWC exclusively responsible for the acquisition of Panacon.

The record is clear that "JWC actively participated in direction of the course of events leading up to and following the acquisition by Celotex of the Panacon stock." (I.D. 65) Such participation, of course, is sufficient by itself to establish that JWC is independently liable for the merger.[10]

[11] The facts, which are largely undisputed, reveal that the negotiations with the Glen Alden Corporation for the purchase of Panacon were initially handled by JWC officials. (I.D. 46, 47) During these negotiations, the representatives of Panacon understood that JWC would acquire Panacon (I.D. 51) and the contract would be assigned to Celotex. Such an assignment provision was included in the draft agreement between JWC and Glen Alden (I.D. 55), and a press release issued jointly by JWC and Glen Alden two weeks prior to the acquisition announced that JWC, not Celotex, would acquire Glen Alden's interest in Panacon. (I.D. 52) The record further shows that on April 14, three days prior to the acquisition, the Board of Directors of each firm met separately to approve the transaction. (I.D. 57, 58) Finally, on April 17, 1972, Celotex purchased a controlling interest in the stock of Panacon from Glen Alden using funds borrowed from JWC. The press release of the same date did not mention Celotex. (I.D. 59)

Furthermore, JWC exercises considerable control and influence over the financial, legal and promotional affairs of Celotex. For example, JWC appointed or elected all of the Celotex' Board of Directors and, in April 1972, there was a substantial overlap between the officers and directors of the two corporations. (I.D. 29, 30) In addition, Celotex could not contract to borrow funds (I.D. 32) or

between Permanente and the acquired firm, Readymix Concrete Company, rather than any competitive relationships between Glacier and Readymix. (*Id.* at 492, n. 7) Although Glacier was named as a respondent there, the Commission's decision did not hinge on that fact.

[9] We do not imply that the separate incorporation of JWC and Celotex should be disregarded for all purposes; that must be determined in light of the applicable facts and legal principles in each case.

[10] By analogy, under Section 5 of the FTC Act, liability for supporting an unlawful scheme or placing in the hands of another the means for committing an unfair or deceptive practice is well established. *See, e.g., FTC* v. *Winsted Hosiery Co.*, 258 U.S. 483, 494 (1922); *Regina Corp.* v. *FTC*, 322 F.2d 765, 768 (3d Cir. 1963); *C. Howard Hunt Pen Co.* v. *FTC*, 197 F.2d 273, 281 (3d Cir. 1952).

arrange for legal services (I.D. 26) without going through JWC. JWC also set general employment policies for Celotex, had a centralized research operation and promoted the JWC name over that of its subsidiaries. (I.D. 24, 27-28)

From this description of the relationship between JWC and Celotex and the circumstances surrounding the Panacon acquisition, there can be little doubt as to which firm "called the shots" and orchestrated the negotiations. JWC's role in this merger appears to be similar to the role it played in previous acquisitions by its subsidiaries. (I.D. 55) As in *Zale* and *Beneficial Corp.,* the facts here indicate that, *insofar as the merger is concerned,* there was, in effect, a "single enterprise." The ALJ was quite correct in concluding that JWC played the dominant role and JWC and Celotex were for all practical purposes alter egos. Indeed, the relationship between JWC and Celotex in the context of this merger suggests that even the more stringent common law standard urged by respondent has been met. *See Beneficial Corp., supra,* 86 F.T.C. at 162.

Accordingly, in light of the facts of this case and the public policy underpinning Section 7, there is ample justification for naming JWC as the only party in this proceeding [12] and for issuing an order that is binding upon Celotex.[11]

However, even were it construed that an order running against JWC does not bind Celotex, it does not follow that Celotex is an indispensable party. Where the proceeding involves "the protection and enforcement of public rights, there is little scope or need for the traditional rules governing the joinder of parties in litigation determining private rights." *Nat'l Licorice Co.* v. *NLRB,* 309 U.S. 350, 363 (1940). There the Court upheld the NLRB's authority to strike down an employer-employee contract to waive provisions of the National Labor Relations Act without joining the employees who were parties to the contract. In so holding, the Court took note of numerous cases under the antitrust laws where offenders have been restrained from carrying out contracts with persons not parties to suits. (*Id.* at 365-66) More recently, the Second Circuit in *Pepsico,*

[11] The uniform absence of any countervailing legislative policy clearly distinguishes those cases cited by respondent where the courts have been hesitant to disregard separate incorporation of related entities in various contexts. For example, respondent cites *Gulf Oil Corp.* v. *Copp Paving Co.,* 419 U.S. 186 (1974) as evidence of the Court's desire to adhere to legal corporate separation in the context of Sections 2(a), 3 and 7 of the Clayton Act. That case is characterized by respondent as one where Clayton Act jurisdiction did not reach to the acts of a wholly-owned subsidiary which was not engaged in interstate commerce, although its parent was so engaged. The argument is off the mark for several reasons. In the first place, the issue as to whether interstate sales by the parent could be imputed to the subsidiary was not before the Court. Moreover, the specific language of Sections 2(a) and 3 not only requires that the person charged be engaged in commerce but that the allegedly illegal activity be "in the course of such commerce," an arguably narrower inquiry than would occur under Section 7. Section 2(a) further specifies that one of the purchases involved in an alleged price discrimination be "in commerce." As for the Section 7 issue in that case, it is wholly irrelevant to respondent's argument in this case that a parent's interstate activity cannot be imputed to its subsidiary prior to their merger.

Inc. v. *FTC,* 472 F.2d 179 (1972), reaffirmed the principle that respondents in public proceedings, such as those before the Commission, may be subject to orders preventing them from carrying out contractual obligations to unnamed third parties. In disputing the argument that such respondents might be held liable to [13] an unjoined third party for complying with an FTC cease and desist order, the court further noted that in agency proceedings "seeking to vindicate public rights against a respondent, the private rights of other parties can be concluded if they have had notice and an opportunity to intervene." (*Id.* at 188, n. 10 and accompanying text)

In the instant proceeding, there are no third party rights in the sense that those rights existed in *Nat'l Licorice.* Whatever rights Celotex has in terms of the merger are derived from the specific authority granted by JWC. There is no contention that Celotex has any interest different from that of JWC or that it has been disadvantaged in any way by not being a party. Counsel for respondents have looked after the interests of Celotex; indeed, Celotex cannot hire counsel without permission from JWC. (I.D. 26)

Furthermore, it cannot be seriously contended that complete relief is feasible only by joining Celotex. As the architect of the acquisition, JWC has complete control over Celotex and there is no reason to believe that it lacks any authority to undo what it created in the first place.[12] Moreover, as the court indicated in *Pepsico,* the Commission's ruling in this matter would appear to be binding on Celotex in any event since it has not attempted to intervene in this matter after having ample opportunity to do so.

For the above reasons, the Commission concludes that JWC is the proper party to this proceeding and there is no necessity to join Celotex. [14]

B. "In Commerce" Requirement

A second challenge to the Commission's jurisdiction advanced by respondent is that it is not "engaged in commerce" within the meaning of Section 7. Relying upon the Supreme Court's decision in *United States* v. *American Building Maintenance Industries,* 422 U.S. 271 (1975), JWC contends that a holding company, with offices located only in Florida, is not "directly engaged in the production, distribution, or acquisition of goods or services in interstate commerce." (*Id.* at 283) The ALJ held to the contrary citing, *inter alia,* the interstate character of JWC's activities in acquiring Panacon and other corporations (including the financing of such

[12] Although the Federal Rules of Civil Procedure are not applicable to administrative proceedings, the facts of this case suggest that joinder is unnecessary even under the criteria set forth in Rule 19(a).

acquisitions), the issuance and sale of securities on public exchanges, and JWC's supervision of the activities of its subsidiaries which are located in various states.

There is no dispute that Celotex is engaged in commerce for Section 7 purposes. (Resp. Admissions, para. 12) Whether JWC is so engaged requires little more discussion. As previously noted, JWC was directly and substantially involved in the affairs of its subsidiaries, exercising control through extensive director/management interlocks, serving as the vehicle for those entities to obtain necessary financing and providing legal services. Given the history of JWC's origin, growth and present activities, it is clear that respondent is more than a mere bystander with respect to its subsidiaries; it is the guiding, indeed dominant, force throughout the entire corporate organization.

Under such circumstances, there can be no question but that JWC is engaged in commerce within the meaning of Section 7 of the Clayton Act. Respondent's rather crabbed interpretation of the Court's language in *American Building,* that "a corporation must itself be directly engaged. . . in interstate commerce," finds no support in that decision. Nowhere in that case is there the slightest hint that a corporation operating through its subsidiaries, which in turn are admittedly involved in interstate commerce, falls outside the reach of Section 7 because it is not deemed to be "engaged in commerce." While Celotex' interstate activities alone suffice to bring its parent, JWC, within the jurisdictional ambit of Section 7, the latter's own activities [15] provide a separate basis for concluding that jurisdiction exists.[13]

In a different but analogous context, the Supreme Court has looked behind the facade of a holding company for purposes of determining jurisdiction under the Public Utility Holding Company Act of 1935. In *North American Co.* v. *SEC,* 327 U.S. 686 (1946), the Court found that the parent's relationship to its subsidiaries justified imputing the interstate activities of the subsidiaries to the parent:

In view of North American's very substantial stock interest and its domination as to the affairs of its subsidiaries, as well as its latent power to exercise even more affirmative influence, it cannot hide behind the facade of a mere investor. These acts are its acts in the sense that what is interstate as to them is interstate as to North American. These subsidiaries thus accentuate and add materially to the interstate character of North American. (Citation omitted.) (*Id.* at 695)

[13] It should also be noted that the Court in *American Building* did not decide whether jurisdiction would have been triggered had there been a showing that the acquired firm purchased supplies from out-of-state suppliers or obtained contracts through interstate solicitation or negotiations. (*Id.* at 285) Even had those factors been present in that case, it is distinguishable from the instant proceeding where the interstate nature of the activities of both JWC and Celotex was far more substantial.

While the issues there were grounded in constitutional terms, the Court concluded that the parent "bears not only a 'highly important relation to interstate commerce and the national economy' (citation omitted), *but is actually engaged in interstate commerce.*" (*Id.* at 695–6) (Emphasis added.) The reasoning in that case seems apropos here in view of the close relationship between JWC and Celotex.[14]

From the foregoing, we conclude that JWC is properly subject to the jurisdiction of the Commission. [16]

II. Product Market

Applying the familiar criteria set forth in *Brown Shoe Co., supra*[15] the Administrative Law Judge concluded that asphalt and tar roofing products constituted the relevant line of commerce for assessing the competitive effects of the merger.[16] Respondent vigorously contests the Administrative Law Judge's finding, asserting instead that the appropriate market consists of all roofing products.

Obviously, in the broadest sense all roofing products serve the same basic purpose of sheltering the interior of a structure from the elements, whether the structure is residential or commercial. Within the confines of factors such as the slope of the roof, fire and wind resistance, aesthetics, price and durability, consumers of roofing products can choose among a variety of goods.[17] Nevertheless, the "outer boundaries" of a roofing market do not preclude the existence of "well-defined" submarkets for antitrust purposes. *Brown Shoe, supra,* 370 U.S. at 325. Of course, in ascertaining the proper market, the Supreme Court has cautioned that the *Brown Shoe* criteria "offer no precise formula for judgment and they necessitate, rather than avoid, careful consideration based on the entire record." *United States* v. *Continental Can,* 378 U.S. 441, 449 (1964).

After reviewing the record within this framework, we conclude that asphalt and tar roofing products are a distinct submarket for purposes of assessing the legality of this merger.

[14] We do not reach the alternative grounds urged by complaint counsel for exercising jurisdiction under the second paragraph of Section 7 which makes no reference to the acquiring corporation's engagement in interstate commerce. Whatever circumstances might necessitate invoking that provision, there is sufficient evidence here for finding JWC to be engaged in interstate commerce.

[15] Those criteria include "[i]ndustry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct prices, sensitivity to price changes, and specialized vendors . . . ." *Id.* at 325.

[16] No offer of proof was made as to the separate submarkets of built-up roofing and shingles alleged in the complaint. (Para. 15)

[17] Roofing products other than asphalt and tar include such products as wood shingles and shakes, clay and cement tile, slate, and plastic shingles and sheets. (I.D. 66)

These products consist of three basic types of materials–asphalt or tar saturated felts, asphalt roll roofing and [17] asphalt shingles.[18] (I.D. 70) Saturated felts are often used as an underlayment for other types of asphalt roofing; they consist of dry felt impregnated with asphalt or coal tar. (CX-1, p. 12) The felt can either be organic (made from wood chips, newspapers, cartons, rags, wood flour, and other cellulose materials) or inorganic (made from asbestos or fiberglass fibers). (I.D. 73) Roll roofing is basically saturated felt which has been sealed by an application of a harder, more viscous coating of asphalt than that used for the saturation process. (CX-1, p. 5) Some roll roofing is surfaced with mineral granules. (CX-1, p. 12) Shingles are basically mineral surfaced roll roofing cut into strips or patterns. All three categories of asphalt and tar roofing products come in different weights and patterns.

Asphalt and tar roofing products can be used on almost every type of roof in the United States. Shingles, which do not completely seal the surface of the roof from water, are used on roofs sufficiently steep so that water runs off, *i.e.,* normally roofs pitched at 4 inches or more per horizontal foot. (CX-1, p. 20) Built-up roofing, consisting of successive piles of asphalt or tar saturated felts, and roll roofing bonded with asphalt or coal tar pitch are used on flat or less-steeply sloped roofs.

In 1972 the asphalt and tar roofing industry included 32 firms operating approximately 108 roofing plants scattered throughout the United States. (I.D. 123; CX-68C) An estimated 80 percent of all residential, commercial and industrial roofing is made from asphalt and tar products.[19] A closer [18] examination of the industry in light of the indicia described in *Brown Shoe,* with particular emphasis upon production considerations and prices, reveals more clearly its commercial significance as a separate market.

Considering the *Brown Shoe* criteria as set forth in that decision, we find that the record confirms industry recognition of asphalt and tar products as a distinct market, based on testimony of industry members as well as the existence of a trade association with regular membership restricted to domestic manufacturers of asphalt and/or tar roofing products. For example, Mr. Snow, a Johns-Manville

[18] Accessory items, such as coatings, cements, fasteners and adhesives, used in connection with the installation of asphalt and tar products (I.D. 70) are excluded from the relevant product market. Although asphalt coatings, for example, are used in the repair or resurfacing of existing roofs (RPF III A.17), and are produced by firms not engaged in the manufacture of asphalt and tar roofing products (RX 53), such materials are properly excluded from the product market because they are not suitable substitutes for original installation.

[19] The 80 percent figure was supplied by the Asphalt Roofing Manufacturers Association, the industry trade organization. (CX-1, p.1) Even higher estimates were provided by two Celotex witnesses who indicated that asphalt roofing products had gained anywhere from 85 to 90 percent of the residential market. (Tr. 1274, 1646) Another witness, Mr. Snow, a vice president of Johns-Manville, estimated asphalt and tar roofing's share of total commercial roofing to be 95 percent. (Tr. 800)

representative, recognized the asphalt and tar roofing industry as a separate industry. (Tr. 699) Even one of respondent's witnesses, Michael Malarkey, president of Herbert Malarkey Roofing Co., an asphalt roofing manufacturer, admitted that he did not run into "any great amount" of competition from other forms of roofing materials. (Tr. 1958) Another industry member was unable to recall any pricing discount policies of non-asphalt manufacturers. (I.D. 101)

The existence of a trade association—the Asphalt Roofing Manufacturers Association (ARMA)—reflects even broader recognition by industry of asphalt and tar roofing products as a separate economic market. (I.D. 82) *See also United States* v. *Pennzoil,* 252 F.Supp. 962, 970 (W.D. Pa. 1965); *United States* v. *Aluminum Co. of America,* 233 F. Supp. 718, 724 (E.D. Mo. 1964), *aff'd per curiam,* 382 U.S. 12 (1965). In addition to promotional activities, ARMA helps finance industry research, assists in the development of product performance standards, and provides tecnhical assistance to roofing contractors (I.D. 82, Tr. 124-25) The managing director of ARMA, Mr. Whittemore, also noted that the organization's compilation of shipping data of member firms was designed to inform them as to how they were faring in the market in relation to each other. (Tr. 128)[20]

[19] The record also justifies the conclusion that asphalt and tar roofing products have peculiar characteristics and uses. The most obvious distinguishing features of these products are their physical appearance and composition. (I.D. 87)[21] Separate standards for weight, composition, fire retardancy and wind resistance, established by the American Society for Testing Materials (ASTM) and Underwriters Laboratories (UL), attest to the unique nature of these products.

More importantly, these characteristics suggest differences in use that are of significance to consumers. For example, asphalt shingles can achieve a higher UL rating (Class A) as to fire retardancy than wood shingles or shakes, the most popular non-asphalt roofing product for homes. (I.D. 90) As the ALJ noted, wood shingles and shakes must be specially treated to merit a Class B or C rating, a process that substantially increases their cost. (I.D. 91) Although

[20] Respondent, however, argues that the trade association here, as in *United States* v. *Amsted Industries, Inc.*, 1974-2 Trade Cases ¶75,208 (N.D. Ill. 1974), exists primarily to assist members in competing with producers of non-asphalt products. *Amsted* affords little support for respondent's contention. There, other factors overshadowed the significance of the trade association, including a steadily dwindling market share for producers of cast iron pipe, considerable efforts by such producers to expand into other lines of pipe and the absence of any significant price advantage for cast iron products. In the face of such evidence, it may be appropriate to discount the importance of a trade association. By contrast, in this case the existence of a trade association, rather than conflicting with other evidence drawn from analysis of supply and demand considerations, bolsters the conclusion that asphalt and tar roofing products constitute a distinct market.

[21] *See General Foods* v. *FTC*, 386 F.2d 936 (3d Cir. 1967), *cert. denied* 391 U.S. 919 (1968); *United States* v. *Kennecott Copper Corp.*, 231 F. Supp. 95 (S.D.N.Y. 1964) *aff'd per curiam*, 381 U.S. 414 (1965).

respondent points out that some roofing products (*e.g.*, metal, clay, concrete) may be equally or more fire resistant than asphalt and tar, the latter have other advantages owing to greater architectural (I.D. 69; Tr. 1261-62) and structural (Tr. 470) flexibility. Slate, for instance, because of its weight, high transportation costs and localized production, is sold primarily in the Northeast. (Tr. 1238-40)

It is true that in particular areas (*e.g.*, the West Coast, Texas and Florida) sales of non-asphalt roofing [20] products, especially for residential purposes, command a greater share of the overall roofing market than they do in other areas. So too have there been efforts by non-asphalt roofing manufacturers to make products which imitate asphalt or tar roofing, and vice versa. (Tr. 1443, 1722, 2102-04) To illustrate, both JWC and Philip Carey were prompted to design asphalt shingles to compete with wood shakes in a premium market. (Tr. 1722, 1798-1802)[22] Yet, as one roofing contractor indicated, the price of asphalt shingles simulated to look like wood shakes was approximately twice that of a standard asphalt shingle. (Tr. 1443)

That some overlapping of competition has occurred in certain segments of the market does not negate the overall significance of asphalt and tar roofing products as an economically meaningful market. The boundaries of any product market are likely to be blurred to some degree on the fringes by cross-competition from substitutes. Here, the wide diversity of uses for which asphalt and tar roofing products can be used, including industrial and commercial applications, sets this industry off as a separate economic entity.

Supply side considerations play an important role in market analysis. If manufacturers can readily switch production from one product to another in response to changing market conditions, those products may be appropriately included in the same market.[23] Conversely, unique production facilities used in the manufacture of a product or class of products suggest that those products may properly be treated as a separate market for antitrust purposes.

In this case, the same basic machinery is used to manufacture all asphalt and tar roofing products, including saturated felts, roll roofing and shingles. The products are run on one continuous line with the termination point determining the end [21] product. The changes necessary to the production machinery to use tar instead of asphalt are not extensive (I.D. 95) and in Celotex' Perth Amboy, New Jersey and Chicago, Illinois plants tar felt is regularly run on the same machinery as asphalt felt. (Tr. 1503) Although additional alterations are required for the production of fiberglass-based

[22] The principal attraction of wood shakes and shingles is their aesthetic appeal. (Tr. 1869)

[23] *See Budd Co.*, 86 F.T.C. 518, 572 (1975).

asphalt roofing, they do not require major modifications (I.D. 95), and at least four major asphalt roofing firms also have fiberglass capability. (RX-53) One witness indicated that in order to run a fiberglass mat, as opposed to an organic mat, it would be necessary to remove the saturator, which accounts for about 20 percent of the existing equipment, and modify an additional 10 percent of the machinery. (Tr. 2142-43) The evidence further indicates that asphalt roofing companies generally produce only asphalt and tar roofing products. (I.D. 97)

In contrast, wood shakes and shingles, clay tiles, cement-asbestos shingles, cement tile, plastic shingles, metal shingles, slate, metal sheet roofing, rubber and plastic sheets, and all other forms of roofing materials must be produced on or by machinery which is completely different from that used to manufacture asphalt and tar roofing. (I.D. 96)

Whether allegedly competing products have distinct prices is a particularly significant issue in determining the bounds of the relevant market. Substantial price differences suggest that the cross-elasticity of demand among such products is relatively low, at least in the near term. In *Reynolds Metals Co.* v. *FTC,* 309 F.2d 223, 229 (D.C. Cir. 1962), the court stated: "We think price differentials have an important if not decisive bearing in the quest to delimit a submarket." The court there went on to find that a difference in price between florist foil at $.75-.85 a unit and decorative foil at $1.15-1.22 a unit was substantial enough to justify treating florist foil as a distinct submarket.

The record here shows that prices for asphalt and tar roofing, like florist foil, are separate and distinct from other kinds of roofing. The ALJ cited the following price ranges for different kinds of roofing products in two states, Illinois and Florida, to show the wide differential [22] in price between asphalt and non-asphalt roofing:[24]

	Illinois (Belleville/St. Louis)	*Florida* (Tampa)
Asphalt Shingles	$ 40 - $ 80	$ 40 - $ 90
Clay Tile	120 - 130	200 - 250
Slate	140 - 150	300 - 360
Wood Shingles	105 - 125	90 - 120

(Source: I.D. 93)

[24] The variations between the two states in the price of individual non-asphalt roofing products indicate the relatively greater impact of plant site location and transportation costs on these products. One witness pointed out that prices for such products as slate, wood shingles and clay tile drop substantially as a customer gets closer to the points of production. (Tr. 1641) The location of natural resources used in the manufacture of these products places greater constraints on pricing and distribution patterns than is true for asphalt roofing products.

Price data contained in respondent's exhibit, RX-73A, and compiled from testimony in the record, corroborates the fact that asphalt and tar roofing products are, for the most part, considerably more economical than other forms of roofing.[25]

[23] An examination of the average prices of asphalt shingles reveals a considerable disparity with the prices of the largest category of non-asphalt residential roofing products, wood shakes and shingles, even at their lower levels. Mr. McMurry of Celotex testified that average asphalt shingle prices were approximately $45-$55 (Tr. 1240), or about 56-68 percent of the lowest reported price ($80) for wood shingles. Where a similar price gap existed between insulated aluminum and copper conductors, the Supreme Court concluded that to ignore price under such circumstances was "to ignore the single, most important, practical factor in the business." *U.S.* v. *Alcoa,* 377 U.S. 271, 276 (1964). There is nothing in this proceeding that persuades us to follow a different course.

Respondent, however, argues that the price of roofing materials must be examined in terms of the installed cost per year over the life of the product, pointing to evidence that the lifespan of other roofing products is longer than for asphalt and tar roofing. The Commission and the Third Circuit specifically rejected a similar argument in *General Foods, supra,* with the court commenting as follows:

> Appellant, however, urges that the proper test is one of comparing the life expectancy of a 28 cent package of steel wool soap pads with the longevity of a similarly priced package of a non-steel wool product. We agree with the Commission's view that the very necessity of resorting to such estimates in order to compare prices tends, by itself, to demonstrate the distinctiveness of the prices of the household steel wool products. (*Id.* at 492)

For similar reasons, we reject that argument here as well. Rather than looking to lifetime costs in setting prices, the record indicates

[25] The following data derived from RX-73A are based on installed costs per 100 square feet:

Shingle and Tile Products	
* Asphalt Shingles	$ 40 - 90
Cedar Shingles/Shakes	80 - 120
Asbestos-Cement Shingles	90 - 110
Aluminum Shingles	100
Clay Tile	100 - 125
Cement Tile	60 - 100
Slate	140 - 360
Metal	25 - 250
Built-Up Roofing Products	
* Asphalt-Saturated (organic)	38 - 44
* Tar-Saturated (organic)	48 - 55
* Saturated Asbestos	47 - 53
* Fiberglass Sheet Elastomeric	38 - 43
	110 - 166

* Included in product market.

that the prime consideration for suppliers and customers alike at any given time was the price differential among competing asphalt roofing manufacturers. (I.D. 98, 100, 102-03) Further evidence that asphalt roofing prices are not particularly sensitive to changes in prices of other roofing products is suggested by price data prepared by respondent's economist depicting price trends for various roofing products between 1970 and 1975. (I.D. 104)

[24] Thus, weighing all of the evidence, especially the distinct methods of production and prices of asphalt and tar roofing products, we believe the record fully justifies the ALJ's finding that these products constitute a relevant market within which to assess the effects of the merger on competition. [25]

III. Geographic Market

The ALJ concluded that both the United States as a whole and a belt of 26 states (plus the District of Columbia) extending from Texas to Maine constitute relevant geographic markets for Section 7 purposes. (I.D. 114) In determining that a national market exists, the law judge noted that JWC and Panacon shipped their products to 47 and 42 states, respectively, in 1971, and that asphalt and tar roofing products are distributed nationally by the major firms. (I.D. p. 51) The contours of the area found by the judge to be an appropriate regional market for testing the effects of the merger encompass those states between Texas and Maine which lie wholly or substantially within a 250-mile radius of JWC and Panacon plants. (I.D. 111) The ALJ observed that this region was where the two companies had most of their plants, did the bulk of their business, and competed to a significant degree. (I.D. pp. 52-53)

Respondent contends that the ALJ erred in finding a national market. JWC asserts that the proper test for defining the geographic market is set forth by the Supreme Court in *U.S.* v. *Marine Bancorporation, Inc.,* 418 U.S. 602 (1974), and is "the area in which the goods or services at issue are marketed to a significant degree by the acquired firm." (*Id.* at 621) Respondent argues that this test has not been met since "there is nothing in the record and no finding to the effect that the Philip Carey Division 'marketed to a significant degree' in all 42 states." (RAB at 29)

Respondent likewise contests the regional market determination, claiming there is no evidence as to the economic significance of the proposed boundaries or any data, such as market shares or concentration ratios, which could be used to measure the competitive effect of the merger in the Texas-Maine region. Furthermore, JWC argues that since complaint counsel presented the case on the basis

of a national market, the law judge's determination violated due process and Section 5(b)(3) of the Administrative Procedure Act, 5 U.S.C. 554(b)(3).

We agree with the ALJ that the appropriate "section of the country" is the nation as a whole. As characterized by the Supreme Court, the relevant market must " 'correspond to the commercial realities' . . . of the industry and be economically significant." *Brown Shoe, supra,* 370 U.S. at 336-37 (footnote omitted). The Court has also described the relevant market as the area where "the effect of the [26] merger on competition will be direct and immediate." *United States* v. *Philadelphia Nat'l Bank,* 374 U.S. 321, 357 (1963).

Applying this test in the instant case, we believe the evidence clearly establishes the existence of a national market within which both JWC and Panacon were effective competitors. To begin with, the largest firms have widely scattered plants, sell their products throughout all or most of the United States, view themselves as national competitors and consider JWC and Panacon to be among their primary competitors. (I.D. 112: Tr. 580, 782-83) Likewise, JWC and Panacon distributed their products in the vast majority of states from plants situated in various parts of the country.[26] Further examination of such factors as transportation costs, shipping distances and consumption patterns reflect the interregional character of competition and point to the reality of competition on a national scale.

While transportation costs are an important consideration, the record reveals a number of other factors significantly influence the distance a product is shipped. (I.D. 106, 109) A representative of Johns-Manville, the fourth largest firm in the industry in 1972, testified that the geographic areas served by his firm's plants are determined by —

> The demand in the various markets, the ability of the producing plants to supply a given quantity, the manufacturing costs of the products, and the freight rates from the plants to reach the given areas.[27]

[27] That freight is not necessarily the most important element in the equation is reflected in the testimony of the President of Tamko

[26] Panacon plants were located in Houston, Tex.; Lockland, Ohio; Memphis, Tenn.; Perth Amboy, N.J.; and Wilmington, Ill. (I.D. 39) JWC had plants in Birmingham, Ala.; Fairfield, Ala.; Camden, Ark.; Chester, W.Va.; Chicago, Ill.; Edgewater, N.J.; Los Angeles, Cal.; Philadelphia, Pa.; and San Antonio, Tex. (I.D. 19).

[27] Tr. 796. To similar effect is JWC's response to the Commission's 6(b) request for a description of the company's marketing areas: "Market areas for the products produced by a given plant may vary from time to time and are generally determined and/or limited by a number of variables such as product availability, service, need for additional sales volume, manufacturing cost, freight absorption, competitors' activities and relative demand." (CX-70Z-76, *in camera*)

Asphalt Products, a manufacturer of asphalt roofing products in the Midwest and South:

> Q: As a matter of preference you prefer to sell closer to your plants?
> A: Oh, yes.
> Q: Do you direct your sales efforts to the area closest to your plant in order to avoid the freight charges?
> A: That is not critical, no.
> Q: Is it a factor?
> A: It is a factor. The most critical factor is to make the wheels turn.
> Q: Make sales?
> A: Keep the plant running.
> Q: For what purposes now?
> A: Simply because if the wheels aren't turning, then you have tremendous overhead and sales costs that are not being applied to any factor of roofing and that is more important than paying excess for the freight in my judgment. (Tr. 2006-07)

Although industry witnesses generally expressed a preference for shipping within a few hundred miles of a plant, shipping distances vary considerably among firms and with respect to individual plants. (I.D. 107, 109-110) For example, despite Panacon's desire to confine shipments as much as possible within a 250-mile radius of its plants (I.D. 111), shipment data shows that substantial output of several Philip Carey plants was shipped beyond that distance, [28] and at times considerably further.[28] In addition to the deliveries to Middle Atlantic states from the Lockland, Ohio plant (I.D. 111), the Memphis, Tennessee plant shipped 41 percent of its production (by value of shipment) in 1971 and 51 percent in 1972 to states completely outside the 250-mile range. (CX-70Z-37-38, 68-69, *in camera*) Philip Carey's Houston plant shipped 20.5 percent of its highest dollar volume product, strip shingles, to Arizona in 1971 and 22.5 percent in 1972. (CX-70X-33, 64, *in camera*) Similarly, Celotex' Los Angeles facility shipped 36.7 percent of its strip shingle output in 1972 to states outside California, mostly well beyond the 250-mile range.[29]

It is not particularly surprising that JWC and Panacon sell a large portion of their output in the eastern half of the United States and compete most intensely in that area. Since that part of the country is

[28] Tr. 423. Mr. Tennesson, the former president of Panacon, testified:

"We like to operate on the golden-circle concept by which we could make most of our sales as close as possible to our plants. Somewhere, I would say, around 250 miles was about the optimum. However, we did, in many instances, ship well beyond that distance particularly from the vicinity of the Lockland plant and the plant in Perth Amboy."

[29] CX-70Z-54, *in camera*. JWC's special report also confirms the interregional nature of competition in this industry. For example, their report indicates Philip Carey's Houston plant and JWC's San Antonio facility both competed with numerous firms in California. Philip Carey's Perth Amboy plant and JWC's Philadelphia plant both competed in Georgia and North Carolina, and Philip Carey's Houston plant and JWC's Los Angeles plant were both in competition with plants in Colorado and Utah. (CX-70A-77-82, *in camera*)

considerably more densely populated and industrialized, it can be expected to account for a large percentage of total demand for asphalt and tar roofing products. In fact, an examination of state-by-state shipments prepared for the Asphalt Roofing Manufacturers Association, reveals that about 67 percent of all [29] shipments of reporting firms in 1972 were to the 26 states and the District of Columbia where the ALJ found that JWC and Panacon had a significant competitive overlap and made a high percentage of their sales.[30] Although the percentage of industry shipments in the 26-state area is somewhat less than it is for JWC and Panacon (which made 78.1 and 86.7 percent, respectively, of their sales in these states),[31] there can be little doubt that these figures provide further proof that both firms were substantial factors in the major marketing areas of the country prior to their merger.[32] That they did not ship extensively [30] to all states does not lessen the significance of their presence on competition throughout the country. *See United States* v. *Jos. Schlitz Brewing Co.,* 253 F. Supp. 129, 134-5 (N.D. Cal. 1966), *aff'd* 385 U.S. 37 (1966), *rehearing denied* 385 U.S. 1021 (1967); *United States* v. *Bethlehem Steel Corp.,* 168 F. Supp. 576, 601 (S.D.N.Y. 1958); *Kennecott Copper Corp.* v. *FTC,* 467 F.2d 67, 71 (1972).

In view of the extensive shipments by JWC and Panacon throughout the country, and the substantial competition between these firms and other industry members in the major consuming areas of the country, we conclude that there is a national market for asphalt and tar roofing and that JWC and Panacon compete directly and substantially in this market. Whatever barriers freight costs pose to shipping asphalt and tar roofing long distances, factors other than transportation prevent sellers in one area from being insulated from competitive forces in other areas.[33] The industry's practice of absorbing freight charges by equalizing to the customer's nearest supplier further reflects the existence of interregional competition.

[30] I.D. 111. The ARMA figures are derived from CX-4-13 and are based on unit shipments (in squares), rather than dollar volume, for roll roofing and shingles. Although ARMA data does not include all industry shipments, it provides a reasonable approximation of relative demand for asphalt and tar roofing products in various regions of the country. ARMA members account for about 85 percent of industry shipments. (I.D. 82)

[31] The figures for JWC and Panacon have also been calculated in terms of unit shipments (in squares) of roll roofing and shingles so as to correspond to the industrywide data cited above. As such, these percentages vary slightly from those shown in I.D. 111, which are based on the value of shipments and include felt products.

[32] By adding the seven surrounding states—Georgia, Florida, Oklahoma, Missouri, Iowa, Minnesota and Maine—to the 26-state region depicted in CX-14, the percentage of all shipments reported by ARMA within this expanded area rises to more than 83 percent. As CX-14 indicates, many JWC and Panacon plants were within close shipping range of large portions of these additional states and in fact the two firms made substantial shipments to some of them, thereby further underscoring the extent of their impact in a market which is national in scope.

[33] *See United States* v. *Bethlehem Steel Corporation, supra,* where the court cited legislative history in support of the proposition that the geographic market in merger cases "can include all areas where the trade in a product is affected by, and is not independent of, the trade in that product in other areas . . ." (footnote omitted). *See also* Bock, *Mergers and Markets,* 39, 42 (1960).

Even Dr. Lanzilotti, the economist called by respondent as an expert witness, agreed that the two firms were competing in a national market:

> Q: You talked yesterday about a national market and interregional competition?
> A: Yes.
> Q: Were the Philip Carey and Celotex Corporations in the national market? [31]
> A: I think that their plants were shipping varying distances within the U.S. from the different plants.
> Q: Do you consider them as part of a national market?
> A: Yes, I would consider them competing in the national market.
> Q: Would you consider them competing interregionally?
> A: Yes, they were shipping interregionally.
> Q: Would you consider that they are competing with each other?
> A: Yes, they were competing with each other.
> Q: Throughout the nation?
> A: Generally, I don't know that in each and every nook and cranny, in each and every village in the U.S., I don't recall that from memory. (Tr. 2478)

In *FTC* v. *Procter & Gamble Co.,* 386 U.S. 568, 571 (1967), the Supreme Court agreed with the Commission that a national market existed in the manufacture and sale of household liquid bleach, even though it was not feasible to ship the product more than 300 miles from its point of manufacture because of high shipping costs, and Clorox, the acquired firm, was the only company having plants located throughout the country. By contrast, in this case freight costs are less significant, interregional competition is substantial, and the merged partners ship throughout most of the country. National markets have also been found by the courts and the Commission in other cases notwithstanding distribution restrictions imposed by high transportation costs. *See, e.g., Kennecott Copper Corp.* v. *FTC, supra; United States* v. *Jos. Schlitz Brewing Co., supra; Bethlehem Steel, supra; British Oxygen Co. Ltd.,* 86 F.T.C. 1241 (1975), *rev'd on other grounds,* 558 F.2d 24 (2d Cir. 1977); *RSR Corp.,* 88 F.T.C. 800 (1976).

[32] Relying upon *Marine Bancorporation, supra,* respondent insists, however, that a national market is inappropriate since Panacon, the acquired firm, did not market its products "to a significant degree" in all 42 states that it shipped to in 1971. We disagree with respondent's characterization of the Court's holding in that case. Such an interpretation would lead to a rather mechanical, one-dimensional approach to market delineation which ignores commercial realities. Not only did *Marine Bancorporation* involve the issue of potential competition, thus making it logical that the Court would focus its analysis on the market in which the acquired firm participated, but the Court recognized that the unique nature of

banking services effectively seals off local markets from outside competitive forces. *Marine Bancorporation, supra* at 622. For individual or small commercial customers, factors of convenience and cost make it totally impracticable for them to turn elsewhere for their banking needs; on the supply side, legal restrictions on bank entry into new markets also serve to diminish to some degree whatever restraining influence the more distant producer may have on competition in the local market. We rejected a similar argument in *RSR, supra,* a case involving a factual context somewhat similar to the one here, noting that in the bank merger cases,

> [r]estriction of the permissible geographic market to the area of the country in which the acquired bank was marketing its services to a significant degree was thus underpinned by the economic realities of the situation. We do not believe that in taking the approach it did the Supreme Court meant to set forth a standard requiring that in widely differing industries economic realities justifying broader markets be ignored. (*Id.* at p. 886), n. 16)

In sum, the commercial realities present here lead us to conclude that the appropriate market for examining the competitive effects of the merger is national in scope. Furthermore, even if the geographical market in this case were to be measured exclusively by the area in which Panacon sold its products, we would reach the same result. While JWC distributed more widely than Panacon, the record evidence, including shipping data, [33] clearly indicates that both firms were competing in a national market.[34]

Having established a national market, we turn to the ALJ's finding that a regional market also exists, consisting of 26 states and the District of Columbia extending from Texas to Maine. Keeping in mind the Supreme Court's admonishment in *United States* v. *Pabst Brewing Co.,* 384 U.S. 546 (1966), that the relevant market need not be marked off by "metes and bounds," we are unable to conclude from the record which, if any, regional markets are appropriate for Section 7 purposes. Although JWC and Panacon shipped a substantial portion of their products within the proposed market, available data is insufficient, for example, to show the extent of shipments into and out of the area by other industry members, or to otherwise establish the degree to which competition within the region is insulated from outside competitive forces. Indeed, the economic feasibility of shipments by the two firms into surrounding states, the location of plants of other competitors within the region and

[34] Respondent appears to suggest there is some inconsistency in our issuance of a complaint and consent order involving another merger in this industry, *Bird & Son, Inc.*, 87 F.T.C. 411 (1976), wherein it is alleged that the relevant market is the Southeastern United States. (RAB at 29-30) That issue, of course, was never litigated and a host of decisions have found both national and regional markets to exist in a particular case. *E.g., United States* v. *Pabst*, 384 U.S. 546 (1966); *United States* v. *Bethlehem Steel Corp., supra.*

adjacent thereto, and ARMA shipment figures, by state, for the industry all suggest that the parameters of an appropriate regional market, or markets, might very well differ from the one selected by the ALJ.[35] Furthermore, there is no market share concentration data for measuring the effect of the acquisition in that region. For these reasons, we reject the ALJ's finding as to the regional market.[36] [34]

IV. Probable Effects on Competition

Having determined the relevant markets, our task is to ascertain whether the probable effect of the merger "may be substantially to lessen competition" in the asphalt and tar roofing industry. The ALJ found the acquisition violates Section 7 because it increased concentration in an already concentrated industry, eliminated an independent and vigorous competitor, and more firmly established JWC in the relevant product market.

Our analysis must commence with an examination of concentration in the relevant industry and the market shares possessed by the leading firms and parties to the merger. Statistical data relating to concentration levels and changes thereto resulting from a merger is easily obtained and often is the most objective information available about possible competitive effects. "Market shares are the primary indicia of market power," *United States* v. *Continental Can Co., supra,* 378 U.S. at 458, although the Court went on to note that a further examination of the structure, history and probable future of the applicable market would be necessary.

Under certain circumstances, concentration and market share data may alone suffice to establish illegality in the absence of convincing proof to the contrary. Thus, a merger is presumptively unlawful if it "produces a firm controlling an undue share of the relevant market, and results in a significant increase in concentration. . . ." *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 363 (1963). In *Continental Can, supra,* the Court reaffirmed its intention to rely primarily on market share data in such cases, stating that "[w]here a merger is of such a size as to be inherently suspect, elaborate proof of market structure, market behavior and probable anti-competitive effects may be dispensed with. . . ." (*Id.* at 458) Particular focus has been directed at two kinds of horizontal mergers: those which contribute to a trend toward concentration and those which increase, however slight, already high levels of

[35] In fact, the use of a national market probably favors respondent by broadening the scope of the comparative analysis. *Procter & Gamble Co.,* 63 F.T.C. 1465, 1561 (1963), *aff'd* 386 U.S. 568 (1967).

[36] In view of our resolution of the regional market issue we find it unnecessary to reach the due process argument raised by respondent.

concentration. As described in *United States* v. *General Dynamics,* 415 U.S. 486, 497 (1974),

[t]he effect of adopting this approach to a determination of a "substantial" lessening of competition is to allow the government to rest its case on a showing of even small increases of market share or market concentration in those industries or markets where concentration is already great or has been recently increasing, since "if concentration is already great, the [35] importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great." (citations omitted)

In *General Dynamics,* however, after a further examination of the "structure, history and probable future" of the coal industry, the Court concluded that despite high levels of concentration in the industry other factors justified the conclusion that the acquisition would not have the requisite anticompetitive effect.

As shown in the following table, the acquisition here combined the fifth largest firm in the industry, JWC, with 8.83 percent of the market, and the sixth largest firm, Panacon, with a market share of 8.79 percent. The resulting firm ranked second with a market share of 17.20 percent in 1972.[37] [36]

1971	Market Share	1972	Market Share
GAF	18.22%	GAF	18.50%
Certain-Teed	11.62	JWC	17.20
Johns-Manville	11.34	Certain-Teed	11.96
Bird & Son	10.59	Johns-Manville	11.56
JWC (Celotex)	8.83	Bird & Son	9.89
Panacon (Philip Carey)	8.79	Lloyd A. Fry	7.76
Lloyd A. Fry	7.89	Flintkote	5.38
Flintkote	5.50	U.S. Gypsum	2.55

(Source: CX-15B-C, *in camera*)

[37] I.D. 124, *in camera.* Respondent also attacks the validity of complaint counsel's 6(b) survey used in obtaining universe figures on the basis of errors in methodology and inclusion of inaccurate information. We are not persuaded by respondent's argument. The procedure employed here of surveying known firms and following up with questionnaires to additional competitors identified by those firms is a time-tested device for developing reliable aggregate industry shipment data. The survey universe exceeds that constructed from census data (I.D. 119, 122) and respondent does not cite to the exclusion of any domestic asphalt and tar roofing firms. There is also little significance in the failure to include imports in the statistical portrait since they amounted to no more than one percent of the domestic market in 1972. (I.D. 117) In short, we conclude that the size of the market depicted by the data is generally accurate. "[P]recision in detail is less important than the accuracy of the broad picture." *Brown Shoe, supra,* 370 U.S. at 342, n. 69. *See also Avnet,* 82 F.T.C. 391, 465 (1973), *aff'd* 511 F.2d 70 (7th Cir. 1975); *Papercraft Corp.,* 78 F.T.C. 1352, 1405–06 (1971), *aff'd* 472 F.2d 927 (7th Cir. 1973).

Two-firm, four-firm and eight-firm concentration ratios for 1971 and 1972 were as follows:

	2-firm	*4-firm*	*8-firm*
1971	29.84%	51.76%	82.78%
1972	35.70	59.21	84.78
Increase	5.86	7.45	2.00

(Source: CX-15B-C, *in camera*)

By combining two strong, viable competitors, with substantial market shares, the merger propelled JWC into the number two position, with a market share only slightly less than the industry leader, GAF Corp., and approximately 44 percent higher in relative terms than the third-ranked firm. The merger thus substantially increased both two- and four-firm concentration—by 5.82 percent and 7.45 percent, respectively—in an industry already experiencing high levels of concentration.[38]

[37] While the relevant market share figures here are not as high as those in *Philadelphia Nat'l Bank, supra,* the Court cautioned there that it was not attempting to specify the smallest market share which would threaten undue concentration, only that "30% presents that threat." (*Id.* at 364) Following *Philadelphia Nat'l Bank,* other mergers with somewhat lower combined market shares and concentration levels were also struck down in *United States* v. *Alcoa, supra,* and *United States* v. *Continental Can Co., supra.* In *Alcoa,* where the top five firms in the aluminum conducter market controlled 76 percent, Alcoa, the leading producer with 27.8 percent of the market, purchased Rome, the ninth ranking firm with 1.3 percent. Despite Rome's small market share, the Court concluded that the firm represented the type of "small but significant competitor" which Section 7 was designed to preserve. (*Id.* at 280–81) In *Continental Can,* 4-firm concentration in the combined container market stood at 63.7 percent prior to the merger of the number two firm, Continental, having a 21.9 percent market share, and Hazel-Atlas, the sixth ranking firm, with 3.1 percent. In finding that a *prima facie* anticompetitive effect had been established, the Court highlighted, among other concerns, the intrinsic effect of a merger between the second and sixth largest firms, the 14 percent increase

[38] Industry structure in this case, as depicted in the statistical data, generally conforms to the "tight oligopoly" model of Professors Kaysen & Turner in their well-known work, Antitrust Policy: An Economic and Legal Analysis 72 (1959). In the view of another commentator, the industry here can be viewed as one having a "high-moderate" degree of concentration, with characteristics just short of those industries classified as "highly concentrated." Bain, Industrial Organization, 139–41 (2d ed. 1968). Post-merger concentration is also well above the 40 percent, four-firm figure that Scherer suggests is the level at which "it is fair to assume that oligopoly is beginning to rear its head." Industrial Market Structure and Economic Performance 60 (1970).

in Continental's own market share which boosted its share to 25 percent, and the possibility that the merger might "trigger . . . other mergers by companies seeking the same competitive advantages . . . ." (*Id.* at 461, 464)

More recently, the Second Circuit in *Stanley Works* v. *FTC*, 469 F.2d 498 (2d Cir. 1972), *cert. denied*, 412 U.S. 928 (1973), agreed with the Commission's finding of a Section 7 violation involving a merger in the cabinet hardware market (top-4 concentration of 49–51 percent) between the tenth ranked firm, Stanley Works, with 1 percent of the market, and the leading manufacturer, Amerock Corp., with 22–24 percent. In dismissing the contention that Stanley's market share was *de minimus*, the court noted the firm's similarity to Rome as a significant independent competitor and concluded that:

> [t]he law is clear in its teaching that in an already concentrated industry with few sellers, in which the four leading companies dominate approximately 50% of the market, a merger involving the leading four, controlling 22-24% of the market, with a firm like Stanley, would seriously threaten substantial anticompetitive consequences. (*Id.* at 508)

[38] Just last year, in *Liggett & Myers, Inc.*, 87 F.T.C. 1074 (1976), *appeal pending* No. 76–1771 (4th Cir.), the Commission found a Section 7 violation where 4-firm concentration in the all dog food market increased from 54.44 percent before the merger to 59.01 percent thereafter. Eight-firm concentration rose on account of the merger from 71.96 percent to 76.54 percent. The merger combined the number four and six firms in the industry with market shares of 10.99 percent and 4.41 percent, respectively, into a number two firm controlling 15.76 percent. That decision, grounded as it was in large measure on statistical data, provides a close analogy to the facts in this proceeding.[39]

Measuring this case against the above decisions leads us to conclude that the market positions of JWC and Panacon before and after the merger, together with the substantial increase in concentration among the leading asphalt roofing companies, clearly suffice to establish a *prima facie* violation of Section 7. In *Alcoa* and *Stanley Works,* notwithstanding the relatively small market share of one party to the merger, the courts stressed the importance of preserving small viable competitors in concentrated markets where their presence might have a restraining influence on the conduct of the dominant firms. Yet the justification for preventing the disappear-

[39] *See also Warner-Lambert Co.*, 87 F.T.C. 812 (1976)(merger violated Section 7 in cough remedies market by combining firms with 4.4 and 4.2 percent of the market, respectively, and increasing 4-firm concentration from 45 to 48 percent).

ance of a Rome or a Stanley from the market applies *a fortiori* to this case where both JWC and Panacon were major, well-established competitive factors in the relevant market. Eliminating Panacon from the scene removed not just a firm with the potential for eroding the market power of the leading firms at some time in the future; it foreclosed a substantial degree of existing competition involving a company having a direct and extensive presence in the market.[40]

[39] Moreover, with the exception of *Philadelphia Nat'l Bank,* the combination of JWC and Panacon increased two- and four-firm concentration more significantly than the other mergers. As a result, JWC leapfrogged from its sixth ranking position in the market to the number two slot. The disruptive effect of such a substantial merger is reflected in the relative market shares of the eight leading firms before and after the merger. Whereas in 1971 the spread in market shares between the number two and number eight firms was only 6.12 percent, that margin increased to 14.65 percent in 1972 following the merger. The impact of eliminating a competitor of Panacon's size is further revealed by the fact that the eighth ranking firm in 1972, U.S. Gypsum, had a market share of only 2.55 percent, less than half that of Flintkote, the number eight firm in 1971.

The heightened disparity among the leading asphalt roofing companies, with two firms rather than one commanding market shares substantially higher than their nearest rivals, poses the danger, described in *Continental Can, supra,* of triggering other mergers by firms intent upon keeping pace with the industry leaders. Indeed, that danger was more than a probability here. The record indicates that following JWC's acquisition of Panacon, two other mergers involving leading firms in the industry were consummated: fifth ranking Bird & Sons' acquisition of Logan-Long,[41] and the purchase by Flintkote (number seven in 1972) of two of the three plants of U.S. Gypsum, the eighth ranking firm in 1972. (I.D. 125) (CX-15B-C, *in camera*) While evidence is lacking as to the quantitative impact of these acquisitions on concentration levels, they do suggest the kind of spawning effect that may result if a merger of the size involved here is approved. [40]

[40] The anticompetitive effects of the merger here are exacerbated by the considerable overlap in competition between the two firms in the immediate marketing areas surrounding each of their plants. An examination of plant location (CX-14), shipping data (CX-70J-70Z74, *in camera*) and testimony of customers (I.D. 141-42) clearly reveals the extent to which JWC and Panacon were competing for each other's business. One scholar has suggested that in addition to proscribing mergers which substantially increase concentration, acquisitions of substantial competitors (with market shares of 5 percent or more) should also be banned because such firms are generally large enough to take advantage of production scale economics and usually are major factors in the market. Bok, "Section 7 of the Clayton Act and the Merging of Law and Economics," 74 *Harv. L. Rev.* 226, 327-29 (1960). Putting aside the increase in concentration which actually occurred, that test is more than met here.

[41] The Commission issued a consent order against Bird & Son, note 34, *supra,* requiring divestiture of one of the three plants acquired from Logan-Long.

It is also useful to bear in mind, as we noted earlier, *supra,* p. 2, that JWC's entry and growth in the asphalt roofing business have been achieved primarily through acquisition. Whatever justification exists as to those earlier acquisitions—first, the 1962 purchase of Celotex and its Los Angeles roofing plant, and later, the 1967 acquisition of Barrett Building Materials Division of Allied Chemical Corporation with its seven roofing plants—fails here in the context of this substantial horizontal merger. As the *Brown Shoe* Court pointed out, "expansion through merger is more likely to reduce available consumer choice while providing no increase in industry capacity, jobs or output. It was for these reasons, among others, Congress expressed its disapproval of successive acquisition." (*Id.* at 345, n. 72)

Thus, there is ample evidence in our view for concluding that the instant acquisition falls within that class of mergers deemed presumptively unlawful where concentration is already great, and "the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great" *Alcoa, supra,* 377 U.S. at 279. Concentration is undeniably high in the asphalt roofing market and the increase caused by the merger can hardly be characterized as slight.

The significance of the market share data in this case is further underscored when viewed alongside statistical evidence presented in a number of other cases involving mergers found unlawful under Section 7. Although those decisions were premised in part on evidence of a trend toward increasing concentration,[42] a comparison is useful to show the substantially higher market shares and concentration levels present here. [41]

For example, in *United States* v. *Von's Grocery,* 384 U.S. 294 (1966), market shares of the acquiring and acquired firms were 4.7 and 4.2 percent, respectively. There the acquisition boosted four-firm concentration from 24.4 percent to 28.8 percent, and increased the eight-firm ratio by 3.1 percent to 44 percent. The contrast with the pending case is rather striking. Similarly, in *United States* v. *Pabst, supra* where the Court found a violation of Section 7 in three separate markets, the combined share held by the two merging firms, Pabst and Blatz, was only 4.49 percent in the national market.

[42] The ALJ found a trend toward concentration in the asphalt roofing industry, citing the fact that six other mergers were consummated between 1969 and the time of trial, including the acquisitions by Bird & Son and Flintkote cited above. (I.D. 125) The absence of quantitative evidence demonstrating the effect of these mergers on concentration levels precludes us from ascertaining the precise dimensions of this trend. Nevertheless, we believe that acquisitions by major firms have a significant anticompetitive impact above and beyond the backdrop of a trend toward concentration in the industry. Temporal comparisons of concentration levels are helpful but unnecessary where the record shows, as it does here, that the market is already concentrated and the acquisition substantially enhances the share of one of the leading firms.

In the three-state market, Pabst's market share stood at 5.48 percent prior to the merger and Blatz held 5.84 percent. Ten-firm concentration in the national market stood at 45.06 percent in 1957, the year prior to the merger, and eight-firm concentration in the three state market was 58.93 percent in 1957. Even in the more highly concentrated Wisconsin market, four-firm concentration of 47.74 percent was somewhat lower than the level in the pending case. (*Id.* at 550–51)

The market share data in *Beatrice Foods Co.,* 86 FTC 1 (1975), *aff'd,* 540 F.2d 303 (7th Cir. 1976), also reveals a less concentrated market than is presented in the case now before us. The acquiring and acquired firms there possessed 7.6 and 2.3 percent, respectively, of the brush and roller market. As a result of the merger, four-firm concentration rose from 41.3 percent to 43.6 percent, after having increased from 36.6 percent in 1967, two years prior to the merger. In our recent decision in *American General Ins. Co.,* 89 F.T.C. 557, (1977), four-firm concentration in the fidelity bond market rose from 31.3 percent to 34.6 percent as a result of the merger; in the surety market concentration climbed from 30.6 percent to 35 percent. Combined shares of the merging firms in the two markets were 10.7 percent and 12.4 percent, respectively. Taken together, the effect of the merger and the pre-existing trend boosted concentration 8.65 and 9.64 percentage points in the two markets. JWC's acquisition of Panacon is well [42] within the statistical range established by these cases inasmuch as the acquisition itself increased four-firm concentration by 7.45 percentage points.[43]

However viewed, we can only conclude that the statistical evidence presented establishes a *prima facie* violation of Section 7. This conclusion is bolstered by JWC's own tendency to expand through acquisition as well as the acquisitions by other leading firms in the industry.

Unlike the defendant in *General Dynamics,* however, JWC has failed to present evidence pertaining to the structure, history, and probable future of the asphalt and tar roofing industry sufficient to overcome the presumption that the merger threatens a substantial lessening of competition. [43]

[43] Even the statistical data in *General Dynamics, supra,* which the Court indicated would have established a *prima facie* violation in the absence of countervailing factors, is not inconsistent with the figures in this case. There, the combined shares of the two firms at the time of the acquisition in 1959 were 12.4 percent. Although concentration in the Illinois market was somewhat greater than exists here, concentration in the broader Eastern Interior Coal Province market was less with a four-firm level of 43 percent before the merger. The increase in the share of the top two firms in the Province market in 1959 also is similar to that which occurred as a result of the JWC/Panacon merger: two-firm concentration in the Province market rose 4.8 percentage points to 37.9 percent; in contrast, two-firm concentration in the asphalt and tar roofing industry jumped as a result of the instant merger 5.86 percentage points to a level of 35.7 percent. (Id. at 495)

Respondent argues that no anticompetitive effects have resulted from the merger, citing testimony of its competitors and expert witness, Dr. Lanzilotti, that prices did not rise significantly and that smaller firms in the market have been successful. (RAB at 33) JWC also contends that low entry barriers, the entry of new firms in the market after the acquisition, the growth rate of smaller firms and the presence of potential competition provide further evidence that the merger will not adversely affect competition. We will take these arguments in turn.

The absence of any discernible effect on pricing[44] or the lack of small company failures attributable to the merger can be given little weight in analyzing the merger's probable effect on competition. At best such effects are difficult to measure, particularly if prices are already at non-competitive levels. Indeed, a high survival rate among firms on the fringe of the market may actually signal the existence of anticompetitive behavior, with smaller inefficient firms sharing some of the benefits derived from collusive arrangements among the industry leaders. *American General Ins. Co., supra,* 86 F.T.C. at 636.

More significantly, the merger's actual impact on competition is to a large extent within the control of the parties. As the courts and the Commission have repeatedly emphasized, if such evidence were allowed as a defense to a Section 7 suit, violators would be able to escape the law's reach by simply exercising restraint until the litigation is [44] concluded. So too, testimony by competitors must be viewed with skepticism since they may be interested in making acquisitions the legality of which could be affected by the pending suit. *See, e.g., General Dynamics, supra,* 415 U.S. at 504; *American General Ins. Co., supra,* 89 F.T.C. at 632-33. Futhermore, as the Court noted in *General Dynamics,* "the mere non-occurrence of a substantial lessening of competition in the interval between acquisition and trial does not mean that no substantial lessening will develop thereafter; the essential question remains whether the probability of such *future* impact exists at the time of trial." (*Id.* at 505) There is also no assurance that the state of competition following the merger is an accurate indicator of the competitive environment that would

[44] Dr. Lanzilotti, the economist called by respondent, testified that after factoring out cost increases due to higher petroleum prices and inflation, net prices for asphalt roofing rose only slightly during the period from early 1973 to mid-1975 (Tr. 2402-05; RX 94). Aside from the reservations noted below about relying on such pricing trends, and the fact that the figures were based upon estimated changes in cost rather than actual data, we have some concern regarding the foundation for Dr. Lanzilotti's conclusion that the net change in roofing prices was only 1.8 percent from March 1973 to August 1975. His assumption that asphalt represented 25 percent of the cost of asphalt roofing during this period is contradicted by first-hand testimony of an industry witness showing that when labor costs are properly included the percentage was as low as 15 percent. (Tr. 2237, 2239, 2406-2413) Reworking RX-94 using the 15 percent figure results in a net increase for roofing prices of 10.2 percent.

have existed but for the merger. *See FTC* v. *Consolidated Foods,* 380 U.S. 592, 598 (1965).

As for entry barriers, the ALJ found that the principal hurdle is the capital investment required for production facilities. Such factors as patents, technology, trained personnel and advertising do not appear to pose significant obstacles to would-be entrants. (I.D. 126, 132–33) Insofar as capital costs are concerned, the record reveals some divergence among industry witnesses as to the cost of an efficient size plant. For example, the Board Chairman of Bird & Son (Mr. Jenkins) testified that the kind of roofing plant his firm would build would cost about $6.75 to $7 million, with an additional $7.5 to $8 million required for a felt mill. (I.D. 127) Another estimate provided by Mr. Snow of Johns-Manville was somewhat higher—$8 to $10.35 million for a roofing plant, with the higher figure including production of both fiberglass and organic based asphalt roofing products, and $12 to $15 million for a dry felt mill. (CX–71, *in camera;* Tr. 711–12, *in camera*) Perhaps a more reliable cost indicator is the $9 to $12 million estimate for Celotex' Goldsboro, N.C. plant, a combination roofing/felt facility completed after the acquisition of Panacon. (I.D. 129; Tr. 1825)

Yet, representatives of smaller firms in the industry testified that their companies successfully built facilities for as little as $1.8 million in one instance (Consolidated Fiberglass), and $2.4 million in another (Tamko), excluding the cost of adding felt (or fiberglass mat) production capacity and additional lines. (I.D. 130) Although the ALJ concluded that it was not essential that a firm produce its own felt (I.D. 131), most firms have such capacity (CX–2,3) [**45**] and it is not clear whether supplies are readily available from non-roofing sources.[45] In fact, Tamko had a felt plant (Tr. 1987), the cost of which was unspecified, and Consolidated at the time of trial was planning to construct a fiberglass mat facility. (Tr. 2261–62) In describing the plans for Panacon's proposed Hopewell, Va. roofing plant, which would not have had a felt mill, the former president of Panacon indicated that "an optimum roofing plant has a paper [or felt] mill and a roofing plant together." (Tr. 468)

Apart from the cost of individual plants, there is also disagreement as to the advantages and disadvantages of single- vs. multi-plant operations. (I.D. 136) While small one-plant firms may have some advantages over their larger rivals, as the ALJ noted, there is evidence that multi-plant locations enable the latter to penetrate the

[45] While Mr. DiSalvo, a vice president of Celotex, testified that non-roofing firms, such as paper companies, can produce roofing felt (Tr. 1727–30), he also acknowledged that the asphalt roofing industry, including those members with felt capacity, periodically experiences shortages of dry felt. (Tr. 1817–19)

major markets more effectively through expanded capacity, more direct access to customers and relative savings in distribution costs. (Tr. 432, 1396) Further, given the fluctuations in housing demand, both seasonally and regionally, multi-plant capability would appear to afford manufacturers greater flexibility in responding to shifting market conditions. The importance of multi-plant capability is reflected by the fact that the 8 largest firms in the industry all have multi-plant operations (CX-68) and own more than 70 percent of the asphalt and tar roofing plants in the United States. Such an industry structure is consistent with Professor Scherer's conclusion that "multi-plant operation is a crucial contributor to high concentration." *Industrial Market Structure, supra* note 38, at 93.

The record, on balance, however, affords only a rough estimate of the costs associated with *de novo* entry. More precise comparisons of the relative cost advantages of different size plants and/or firms were not provided. Nevertheless, in our view the resource commitment required for a new entrant to challenge the major firms successfully on a national scale is not insignificant. Though perhaps not high, entry barriers here are at least in the moderate range. More importantly, relative ease of entry and the concomitant [46] prospects for potential competition are not a substitute for the loss of substantial actual competition. As we have said before, "even proof of low entry barriers . . . can be at most of slight exculpatory value in the face of probable anticompetitive effects, since all it suggests is that such effects may be smaller or shorter lived, not that they are unlikely to occur." *RSR, supra,* 88 F.T.C. at 289.[46]

Respondents also advance a related argument by contending that actual entry by several new firms, both before and after the merger, satisfactorily rebuts any inference of probable anticompetitive effect based on the market share data alone. There have been eight new entrants in the industry since 1960, including two subsequent to the JWC-Panacon acquisition. (I.D. 137) There is no evidence, however, that these new firms have eroded the market position of the industry leaders. Their combined market share in 1972 was 3.9 percent, with only one company, Royal Brand, having a share in excess of 1 percent of the market. Nor has the entry of the two firms after the acquisition had a significant impact. (I.D. 138, *in camera*) Although respondent points to the faster growth rate of the smaller firms during 1970–72 as further evidence that the instant merger is

[46] Respondent's assertion that the large number of potential entrants serves to nullify any anticompetitive effect is likewise rejected since it is highly unlikely that potential competition would restore the actual competition eliminated by this acquisition. *Ekco Products Co.*, 65 F.T.C. 1163, 1207–08 (1964), *aff'd*, 347 F.2d 745 (7th Cir. 1965); *Beatrice Foods Co.* 67 F.T.C. 473, 718 (1965); *American Brake Shoe Co.*, 73 F.T.C. 610, 684 (1968), *modified* 77 F.T.C. 148, (1970).

unlikely to have any anticompetitive effects, we do not draw the same conclusion. Although market shares of the leading firms dropped slightly during this period, overall concentration increased and sales of four of the top eight firms rose faster than overall industry sales. (CX-15A-C, *in camera;* RX 83) Given an expanding market,[47] the rise in sales of smaller firms is not particularly surprising. And, as noted earlier, the success of smaller firms could also be facilitated by an umbrella of weakened competition resulting from the high levels of concentration in the market.

Thus, we find nothing in the record here that contradicts the *prima facie* case established by the statistical data. We conclude, therefore, that the acquisition has the probable effect of substantially lessening competion in violation of Section 7 of the Clayton Act. [47]

V. The Remedy

Noting that the appropriate remedy for a Section 7 violation is to "restore competition to the state of health it might have enjoyed but for the acquisition," the ALJ ordered divestiture of the stock and assets of Panacon's Philip Carey Division, while rejecting complaint counsel's request for total divestiture of the Panacon assets. The ALJ determined on the basis that the roofing and non-roofing lines of the Panacon business are severable and inclusion of the latter is not essential to the viability of the roofing operation. The law judge also turned down complaint counsel's call for a mandated "spin-off" of the acquired assets, expressing instead a preference that the divestiture be accomplished by sale of each Philip Carey plant as a going concern to separate buyers. Finally, the law judge disagreed with complaint counsel that divestiture of Celotex' Goldsboro, North Carolina plant (under construction at the time of the acquisition) was necessary to compensate for the plant that Panacon contemplated building in Hopewell, Virginia. On appeal, Commission counsel renew their request for a spin-off of the Panacon assets, including the Goldsboro plant.

Respondent, for its part argues that the relief granted by the ALJ is excessive and not reasonably related to the violation. If any relief is granted in this matter, respondent urges that the maximum corrective action should be a five-year injunction against future acquisitions without prior Commission approval. To support its claim, respondent relies on the Commission's decision in *National Tea Co.,* 69 F.T.C. 226 (1966), and a series of consent agreements.

[47] Shipments rose 58 percent between 1970 and 1972—a substantial figure even after taking inflation into account.

We agree with the ALJ that divestiture is the proper remedy in this case. As we have said previously, "[t]he most appropriate remedy to redress a Section 7 violation is generally divestiture. It is specified in the enforcement provisions of the amended Clayton Act and normally commends itself as a rational course in restoring competition to the condition which obtained prior to the merger." *Diamond Alkali Co.,* 72 F.T.C. 700, 742 (1967). Divestiture is particularly desirable where, as here, the Section 7 violation is premised in part on the elimination of a substantial independent competitor. No other form of relief can compensate for such loss as well as the restoration of that competitive force in the market. [48]

It is also clear that a ban on future acquisition, by itself is inadequate.[48] Unlike *National Tea,* barriers to entry here are not so low as to obviate the need for something stronger than a merger ban to restore competition. To the contrary, the fact that entry by a few small firms has not diminished the market power of the leading firms in the asphalt and tar roofing industry suggests that it will take some time before natural market forces can replace the competition lost by the acquisition of Panacon. More importantly, actual, or horizontal, competition was involved in only a fraction of the store acquisitions in *National Tea,* not to mention the enormous difficulties inherent in the divestiture of 485 stores. *National Tea, supra* at 266. We believe, however, that in addition to divestiture the record of this case, particularly as it indicates respondent's history of growth in this industry by acquisition, justifies a 10-year ban on further acquisitions by JWC in the asphalt and tar roofing industry.

We also concur in the ALJ's conclusion that it is not essential to mandate divestiture of all the Panacon assets in order to remedy the violation of Section 7 that has occurred here. While it is certainly within our power to order divestiture of assets unrelated to the asphalt roofing business, particularly if such action is needed to assure the viability and attractiveness to would-be purchasers of the divested entity, the evidence indicates that reestablishing the original Panacon operation is unnecessary. Complaint counsel's assertion that only a restored Panacon can provide sufficient diversification to afford corporate earnings stability is undercut. Philip Carey's record as part of Panacon, and prior thereto, suggests that it can be successfully operated on an independent basis. Indeed, complaint counsel in their proposed findings paint a bright picture of the Philip Carey operation, noting that it has been in the roofing

[48] Respondent's reliance on negotiated consent orders is likewise inappropriate. Each consent order was negotiated in light of the facts of the case at hand and the likelihood of success if litigation were pursued. Such orders have no bearing on the type of order which the Commission can impose when it finds that Section 7 has been violated.

business for nearly a century, produces more than 200 different building and industrial products, and in terms of profitability contrasts favorably with the losses experienced by Briggs Manufacturing Company before their merger and the formation of Panacon. (CPF 32–50) Even after creation of Panacon, [49] there is evidence that Philip Carey contributed more to the profitability of the parent firm than did its merging partner. (CPF 37; Tr. 440) Under Panacon, Philip Carey operated as a separate profit center with a separate sales force and separate plants. (RPF I–A 8–12) For these reasons, we decline to order divestiture of the former Panacon organization in its entirety.

We do, however, include within our divestiture order the assets of Carey-Canadian Mines, Ltd., a former subsidiary of Panacon engaged in asbestos mining operations in the Quebec area. This operation supplied between 40 and 55 percent of Philip Carey's asbestos fibre requirements during the four years preceding the acquisition by JWC. (CX–39P) Conversely, Philip Carey's purchases accounted for approximately 13 percent of the total value of fibre sales by Carey-Canadian in 1971. (CX–39S) While the availability of alternate sources of supply or the volume of Philip Carey's business dependent on these supplies is unclear, inclusion of Carey-Canadian is relevant to the line of commerce in question here and should assist in the restoration of Philip Carey as a viable competitive force in the market.

Turning to complaint counsel's call for a spin-off of the divested entity, we agree with the ALJ that a spin-off of JWC stockholders should not be the only permissible form of divestiture. Notwithstanding the desirability of having an independent Philip Carey reestablished, the difficulties involved in spin-offs plus the possibility that purchase by a non-roofing firm might expedite Philip Carey's successful reentry into the market persuade us that a more flexible divestiture order should be issued.

As for complaint counsel's request for divestiture of Celotex' Goldsboro, N.C. plant, we are not convinced such action is necessary to assure a viable new Philip Carey. As we have noted, *supra,* plans for Philip Carey's Hopewell, Va. plant were abandoned by JWC after the merger in view of its ongoing construction of the proximate Goldsboro facility. Nevertheless, the former president of Panacon testified that the Hopewell plant would have been built in a "very cheap fashion" and would have had a significantly smaller capacity than JWC's Goldsboro plant and no felt mill. (Tr. 442, 467–69) Given the lack of evidence in the record as to the significance of the

Hopewell facility to Philip Carey, we see no compelling basis for divestiture of the Goldsboro plant. [50]

Our order here requires divestiture of the Philip Carey and Carey-Canadian assets as a going concern, rather than through piecemeal sale of the individual plants as recommended by the ALJ. While we have no quarrel with the proposition that more, rather than fewer, competitors would be desirable, our choice of relief is dictated by the fact that we have found a violation of Section 7 in the nation as a whole, rather than in smaller submarkets. We repeat our earlier observation that an effective challenge to the major firms in the industry requires a large, multi-plant operation capable of doing business on a national scale. Even were that not essential, there is nothing in the record which enables us to evaluate the prospects of each plant operating successfully as an independent going concern. Not only does output among the plants vary considerably but there are also differences in the age and product mix of the various plants. (CX-39U) An infusion of outside capital, of course, might readily correct whatever deficiencies, if any, may exist; but it is likely that the efforts (in time and cost) required to make five separate firms as effective as one unified company will assist JWC and other leading firms to entrench further their positions in this already concentrated market.

An appropriate order is appended.

Final Order

This matter having been heard by the Commission upon the appeal of respondent from the initial decision, and upon briefs and oral argument in support thereof and opposition thereto, and the Commission for the reasons stated in the accompanying opinion having determined to deny the appeal of respondent:

It is ordered, That the initial decision of the administrative law judge, pages 1-64 be adopted as the findings of fact and conclusions of law of the Commission, except to the extent inconsistent with, and as indicated in, the accompanying opinion.

It is further ordered, That the following order to divest and to cease and desist be, and it hereby is, entered: [2]

I

It is ordered, That respondent Jim Walter Corporation (hereinafter "JWC"), a corporation, and its officers, directors, agents, representatives, employees, subsidiaries, affiliates, successors and assigns, divest all stock, assets, title, properties, interests, rights and

privileges, of whatever nature, tangible and intangible, including without limitation all buildings, plants, equipment, machinery, raw material reserves, inventory, customer lists, trade names, trademarks, and other property of whatever description, of the Philip Carey Company and Carey-Canadian Mines, Ltd., both divisions of Panacon Corporation ("Panacon") acquired by JWC through its wholly-owned subsidiary the Celotex Corporation ("Celotex"), as a result of the acquisition of the stock of Panacon, together with all additions and improvements which have been made thereto. Such divestiture shall be absolute, shall be accomplished no later than one (1) year from the effective date of this order, shall restore the Philip Carey Company and Carey-Canadian Mines, Ltd. as a going concern and effective competitor in the asphalt and tar roofing industry, and shall be subject to the prior approval of the Federal Trade Commission.

II

It is further ordered, That pursuant to the requirements of Paragraph I, none of the stock, assets, properties, rights, privileges and interests of whatever nature, tangible or intangible, acquired or added by Celotex or JWC shall be divested, directly or indirectly, to anyone who is at the time of the divestiture an officer, director, employee or agent of, or under the control, direction or influence of JWC or Celotex or any other subsidiary of JWC or Celotex or anyone who owns or controls, directly or indirectly more than one (1) percent of the outstanding shares of the capital stock of JWC or any of its subsidiaries or anyone who is not approved in advance by the Federal Trade Commission.

III

It is further ordered, That pending any divestiture, the assets and business specified in Paragraph I shall be maintained and operated as a separate corporation with separate books of account, separate management, separate assets, and separate personnel. [3]

IV

It is further ordered, That pending any divestiture required by this order, JWC shall not cause nor permit any deterioration of the assets and business specified in Paragraph I in a manner that impairs the marketability of any such assets and business.

V

It is further ordered That, for a period commencing on the effective date of this order and continuing for ten (10) years from and after the date of completing the divestiture required by this order, JWC shall cease and desist from acquiring directly or indirectly or through subsidiaries, joint venture, or otherwise, without the prior approval of the Federal Trade Commission, the whole or any part of the stock, share capital or assets, any interest in or any interest of any domestic concern, corporate or non-corporate, engaged in the manufacture, production, sale or distribution of any asphalt or tar roofing product; nor shall JWC or its subsidiaries enter into any arrangement with any such concern by which JWC or its subsidiaries obtain the market share, in whole or in part, of any such concern in the above described product line.

VI

It is further ordered, That, as used in this order, the acquisitions to which Paragraph V pertains include any arrangements by JWC with any other party (1) whereby such other party discontinues the manufacture of any asphalt or tar roofing product under a brand name or label owned by such other party and thereafter distributes any of said products under any JWC, or its subsidiaries', brand names or labels, or (2) whereby such concern discontinues its participation in the asphalt and tar roofing industry and thereafter transfers to JWC, or its subsidiaries, its customer lists or in any other way makes available to JWC its customers or customer accounts. [4]

VII

It is further ordered, That on the first anniversary date of the effective date of this order and on each anniversary date thereafter until the expiration of the prohibitions in Paragraph V of this order, JWC shall submit a report in writing to the Federal Trade Commission listing all acquisitions, mergers and agreements to acquire or merge made by JWC or its subsidiaries; the date of each such acquisition, merger or agreement; the products involved and such additional information as may from time to time be required.

VIII

It is further ordered, That within thirty (30) days from the effective date of this order and every sixty (60) days thereafter until it has

fully complied with Paragraph I of this order, JWC shall submit a verified report in writing to the Federal Trade Commission setting forth in detail the manner and form in which it intends to comply, is complying or has complied therewith. All such reports shall include, in addition to such other information and documentation as may hereafter be requested, (a) a specification of the steps taken by JWC to make public its desire to divest the interests described in Paragraph I of this order, (b) a list of all persons or organizations to whom notice of divestiture has been given, (c) a summary of all discussions and negotiations together with the identity and address of all interested persons or organizations, and (d) copies of all reports, internal memoranda, offers, counteroffers, communications and correspondence concerning said divestiture.

IX

It is further ordered, That JWC shall notify the Commission at least thirty (30) days prior to any proposed changes which may affect compliance obligations arising out of the order, such as dissolution, assignment or sale resulting in the emergence of successor corporations, and that this order shall be binding on any such successor.

Chairman Pertschuk not participating.