

Complaint

91 F.T.C.

IN THE MATTER OF

REICHOLD CHEMICALS, INC.

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

Docket 9076. Complaint, March 11, 1976 — Final Order, Feb. 22, 1978

This order, among other things, requires a White Plains, N.Y. manufacturer and distributor of various products, including fiberglass reinforced panels (frp panels) to divest itself completely, within one year from service of this order, of The Corrugulux Corporation, a Houston, Tex. producer of frp panels. Further, the firm is prohibited, for a two-year period, from soliciting (for the purpose of selling fiberglass reinforced plastic panels) those customers who had purchased such panels from Corrugulux during the year prior to its acquisition by RCI. Additionally, the order prohibits RCI from acquiring, for ten years, any domestic company engaged in the production, sale or distribution of frp panels.

Appearances

For the Commission: *Charles W. Corddry, III, Steven A. Newborn and Max C. Dorian.*

For the respondent: *John Boyer and Adrian C. May, Jr., Cadwalader, Wickersham & Taft, New York City and Washington, D.C.*

COMPLAINT

The Federal Trade Commission having reason to believe that Reichhold Chemicals, Inc., a corporation subject to the jurisdiction of the Commission, has acquired Corrugulux Corporation, a corporation subject to the jurisdiction of the Commission in violation of Section 7 of the Clayton Act, as amended, (15 U.S.C. 18) and Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45), and that a proceeding in respect thereof would be in the public interest hereby issues this complaint, stating its charges as follows:

I. Respondent

1. Respondent, Reichhold Chemicals, Inc. (hereinafter "RCI") is now and was at the time of the acquisition a publicly held corporation chartered and operating under the laws of the State of Delaware, with a principal place of business at the RCI Building, 525 North Broadway, White Plains, New York.

2. RCI is a leading manufacturer and marketer of a wide range of

synthetic resins and industrial chemicals as well as the nation's largest producer of fiberglass-reinforced plastic panels.

3. In 1973, RCI had revenues in excess of \$294 million and net income in excess of \$11 million. In that year RCI was the 448th ranked industrial corporation in the Fortune 500.

4. In 1974, RCI had revenues in excess of \$480 million, assets in excess of \$229 million and net income in excess of \$24 million. In that year RCI was the 347th ranked industrial corporation in the Fortune 500. [2]

5. At all times relevant herein, RCI sold and shipped its products in interstate commerce throughout the United States and was and is now engaged in commerce as "commerce" is defined in the Clayton and Federal Trade Commission Acts.

II. *Corrulux Corporation*

6. Prior to the acquisition hereinafter set forth, Corrulux Corporation (hereinafter "Corrulux") was a corporation chartered and doing business under the laws of the State of Texas with a principal place of business located at 410 Holmes Road, Houston, Texas.

7. In 1973, Corrulux had revenues of approximately \$3 million and assets in excess of \$1.2 million.

8. Corrulux was, prior to the acquisition, hereinafter set forth, an independent and profitable company. In 1973 substantially all of Corrulux's sales were of fiberglass-reinforced plastic panels.

9. At all times relevant herein, Corrulux sold and shipped its products in interstate commerce throughout the United States, and was and is now engaged in commerce as "commerce" is defined in the Clayton and Federal Trade Commission Acts.

III. *The Acquisition*

10. On or about August 19, 1974, pursuant to an agreement between RCI and Corrulux, respondent purchased the assets of Corrulux for approximately \$675,000 and assumed debts of approximately \$1 million.

IV. *Trade and Commerce*

11. The relevant geographic market is the United States as a whole.

12. The relevant product market is the manufacture, and sale of fiberglass-reinforced plastic panels (hereinafter "frp panels").

13. Frp panels are light weight, predominantly translucent,

shatter-resistant building products composed primarily of polyester resins reinforced with fiberglass matting. [3]

14. In 1973, the year prior to the acquisition, total sales of frp panels at the manufacturing level were approximately \$60 million in the United States. In 1974, the year of the acquisition, total sales of frp panels at the manufacturing level were approximately \$75 million in the United States.

15. Frp panels have many different uses, some of which are, residential patios and awnings, greenhouses and the skylights of prefabricated metal buildings.

16. Before the acquisition of Corrulux there were nine major producers of frp panels accounting for over 95 percent of all frp panels sold nationally. Concentration was extremely high in 1973 with the top four and eight ranking firms accounting for over 72 percent and over 94 percent respectively. After the acquisition the top four and eight ranking firms accounted for over 77 percent and 98 percent respectively.

17. In 1973, RCI was the second ranked domestic producer of frp panels with sales in excess of \$11 million. In that year RCI accounted for approximately 18.9 percent of total domestic sales of frp panels.

18. In 1973 Corrulux was the seventh ranked domestic producer of frp panels with sales of approximately \$3 million. In that year Corrulux accounted for approximately 5.0 percent of total domestic sales of frp panels.

19. As a result of the aforesaid acquisition, RCI became the first ranking firm in the frp market, accounting for approximately 24.0 percent of total domestic sales of frp panels.

20. As a result of the aforesaid acquisition, concentration among the top four and eight firms increased from approximately 72 percent and 94 percent to approximately 77 percent and 98 percent respectively.

21. Prior to the aforesaid acquisition RCI and Corrulux were substantial and actual competitors in the manufacture and sale of frp panels.

V. *Effects of the Acquisition*

22. The effect of the aforesaid acquisition may be substantially to lessen competition or to tend to create a monopoly in the manufacture and sale of frp panels throughout the United States in the following ways, among others: [4]

(a) Substantial actual competition between RCI and Corrulux has been eliminated;

(b) The ability of RCI's competitors to compete in the manufacture,

sale and distribution of frp panels has been, and/or may be, further substantially diminished;

(c) Concentration has been and/or may be increased to the detriment of actual as well as potential competition;

(d) RCI has become the dominant producer of frp panels.

VI. *The Violation Charged*

23. The acquisition by RCI of Corrulux constitutes a violation of Section 7 of the Clayton Act, as amended, (15 U.S.C. 18).

24. The acquisition by RCI of Corrulux constitutes an unfair method of competition in commerce and an unfair act or practice in commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45).

INITIAL DECISION BY MORTON NEEDELMAN, ADMINISTRATIVE
LAW JUDGE

JULY 19, 1977

I

STATEMENT OF THE CASE

The complaint in this proceeding issued on March 11, 1976. It charges that respondent, Reichhold Chemicals, Inc., has violated Section 7 of the Clayton Act (15 U.S.C. 18) and Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) by acquiring the assets of The Corrulux Corporation on August 19, 1974. According to the complaint, the effects of the [2] acquisition may be substantially to lessen competition or tend to create monopoly in the manufacture and sale of fiberglass-reinforced plastic panels (hereinafter frp panels) throughout the United States.

Respondent filed an answer on April 27, 1976, in which it admitted making the challenged acquisition. It also admitted certain corporate and jurisdictional facts, but Reichhold denied the substantive allegations of the complaint relating to the existence of an frp panel relevant product market and the charges respecting the alleged anticompetitive effects of the acquisition in this market. In addition, respondent said in its answer —

... that on or about October 1, 1975, the manufacturing facilities of Corrulux were shut down as a result of the fact that Corrulux's physical production facilities could not be preserved as a viable production unit without virtual replacement of such facilities. Respondent avers that at all times relevant to this proceeding, Corrulux was and is a failing company. (Answer, ¶ 25.)

In the prehearing stage both sides were allowed limited discovery, complaint counsel's requests for admissions were answered, and stipulations were filed. Upon completion of the prehearing stages, the case-in-chief began on January 17, 1977 and ended on January 28, 1977. The defense case was presented between February 28, 1977 and March 9, 1977. A hearing for rebuttal was held on April 20, 1977.¹ During the hearings all counsel were given full opportunity to be heard, and to examine and cross-examine witnesses. [3]

The record was closed on April 20, 1977. Proposed findings of fact and briefs were filed by the parties on May 20, 1977. Answering briefs were filed on June 6, 1977.

After reviewing all the evidence as well as the proposed findings and briefs submitted by the parties, and based on the entire record, I make the following findings of facts:²

¹ This unusually long interval between hearings was allowed to encourage the parties to explore the possibility of a settlement. (See Tr. 2235.)

² Proposed findings not adopted in the form proposed or in substance are rejected, as either not supported by the entire record or as involving immaterial or irrelevant matters.

The following abbreviations are used throughout in citing to the record: "Tr." (transcript of testimony); "CX" (complaint counsel's exhibit); "RX" (respondent's exhibit); CX 1, an index to complaint counsel's exhibits, contains a description of each document and the date received in evidence or rejected. The same information for respondent's exhibits appears on RX 1. CX 1 and RX 1 also indicate which exhibits are *in camera*. By the terms of my *in camera* rulings there is no limitation whatever on the public use of this material in decisions written by the undersigned, the Commission, or other reviewing authorities. (Tr. 294-96.) As I indicated on the record (Tr. 295-96) it is my intention that *in camera* status will end on January 1, 1979 when *in camera* exhibits are to be placed on the public record except for CX's 308A-C, *in camera*, which are to remain *in camera* without time limitation. (Tr. 298.)

The appearances of the witnesses were as follows: [4]

NAME	CALLED BY	TR. PAGES
Joseph S. McDermott	Complaint	223-274
Reinforced-Plastic Composites	Counsel	
Institute, a Division of the	("c.c.")	
Society of the Plastics		
Industry, Inc.		
(Trade Association)		
Victor Alfred Maynard	c.c.	304-446
Filon Division of Vistron,		
a subsidiary of the Standard		
Oil Company of Ohio		
(Frp Panels Manufacturer)		
David A. Yundt	c.c.	452-529
Resolite Division of H.H. Robert-		
son Company		
(Frp Panels Manufacturer)		
Jay Paul Feder	c.c.	533-620
Barclay Industries, Inc.		
(Frp Panels Manufacturer)		
Michael Cafarchia	c.c.	625-692
Lasco Division of Phillips		
Industries, Inc.		
(Frp Panels Manufacturer)		
Robert E. Simpson	c.c.	702-828
(Former owner of Corrulux)		
Alfred B. Menzer	c.c.	832-915
Kemlite Corporation		
(Frp Panels Manufacturer)		

[9] II

FINDINGS OF FACTS

REICHOLD AND CORRULUX

1. Respondent, Reichhold Chemicals, Inc. (hereinafter Reichhold) is a Delaware corporation with its principal place of business located at 525 North Broadway, White Plains, New York. (Complaint and Answer ¶ 1.)

2. Reichhold is a major manufacturer and marketer of a wide range of synthetic resins and industrial chemicals, as well as frp panels. (CX's 6F, J, K.)

3. In 1973, the year prior to the subject acquisition, Reichhold's total sales were \$294 million. (Complaint and Answer ¶ 3.)

4. In 1973, Reichhold's sales of frp panels were about \$12 million. These panels were produced by Reichhold's Reinforced Plastics Division at plants located in San Diego, California and Grand Junction, Tennessee. (Admissions 2, 3, CX's 305B, M, CX's 13C-E; Tr. 1891.) Frp panels are the only end-use or consumer products produced by Reichhold — basically, respondent is a manufacturer of raw materials such as the resins and chemicals used by the plastics industries. (CX's 5A-10Z-19.)

[5] Jerry G. Christopher Glasteel, Inc. (Frp Panels Manufacturer)	c.c.	920-1045
Davis Allen Marathon Metallic Building Co., a subsidiary of Marathon Manufacturing Company (Pre-engineered Metal Building Manufacturer)	c.c.	1051-1091
Roger D. Hertel IBG-Roper Industries, Inc. (Greenhouse Manufacturer)	c.c.	1093-1129
Frederick E. Reiling Fiber Glass Plastics, Inc. (Frp Panels Manufacturer)	resp.	1140-1169
David Clair Bush Idaho Chemicals Industries, Inc. (Frp Panels Manufacturer)	resp.	1170-1232
Waldo Everett Stransky Thorolyte Fiberglas, Inc. (Frp Panels Manufacturer)	resp.	1233-1279
Robert S. Morrison Molded Fiberglass Companies (Frp Panels Manufacturer)	resp.	1284-1375
[6] James Veenema Lunn Laminates, Inc. (Manufacturer of "sandwich" pa- nels)	resp.	1376-1423

(Continued)

Initial Decision

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5. Prior to the acquisition, The Corrulux Corporation (hereinafter Corrulux) was a Texas corporation with its principal place of business and manufacturing facility located at 410 Holmes Road, Houston, Texas. (Complaint and Answer ¶ 6.)

6. In fiscal 1973 (year ending June 30, 1974) Corrulux had sales of approximately \$3 million. Virtually all of Corrulux's business was derived from the sale of frp panels. (Complaint and Answer ¶ 8; CX's 3D, 307C, *in camera*; Tr. 710.) [10]

7. Prior to the Reichhold acquisition, all the stock of Corrulux

James Allemand	resp.	1434-1471
M.C. Gill Corp. (Specialty Panels Manufacturer)		
Robert P. McCarthy	resp.	1483-1521
Butler Manufacturing Company (Pre-engineered Metal Building Manufacturer)		
Charles Pope	resp.	1522-1561
Wrisco Inc. (Distributor to Custom Awning Fabricators)		
Edward J. Liczwek	resp.	1580-1616
Sears, Roebuck & Co. (Chain retailer)		
Donald M. Reynolds	resp.	1620-1662
Aetna Plastics Co. (Distributor of plastics)		
Vincent Pisano	resp.	1663-1693
Reichhold Chemicals, Inc. (Comptroller)		
Gerhard L. Schultz	resp.	1699-1789
IBG-Roper Industries, Inc. (Manufacturer of Greenhouses)		
[7] John F. Doherty	resp.	1798-1816
<i>Industrial Equipment News</i> (Trade Publication)		
Edward E. Shea	resp.	1822-1887
Reichhold Chemicals, Inc. (Chairman of the Board)		
Charles Frizzelle	resp.	1888-2002
Reichhold Chemicals, Inc. (General Manager, Reinforced Plastics Division)		
John Marshall Mitchell	resp.	2008-2029
Cincinnati Milacron Inc. (Frp Panels Manufacturer)		
Thomas P. Shumaker	resp.	2029-2088
Reichhold Chemicals, Inc. (Executive Vice President)		
Sidney Graham Winter, Jr.	resp.	2089-2221
Yale University (Economist — expert witness)		
James I. Sturgeon	c.c.	2250-2358
Federal Trade Commission (Economist — expert witness)		

[8] In addition to this formal testimony, the record contains two depositions identified as follows:

RX 83 (62 pages) Deposition of Richard R. Keller Kalwall Corporation (Frp Panels and Sandwich Panels Manufacturer)

DX 90 (21 pages) Deposition of Maurice Horn Ornyte Division of Berdon, Inc. (Frp Panels Manufacturer)

was owned by one Robert E. Simpson. (Admission 17, CX's 305C, M; Tr. 703.)

8. On August 19, 1974, Reichhold purchased the assets of Corrulux from Simpson for \$675,000 and assumed Corrulux's liabilities of approximately \$1 million. (Complaint and Answer ¶ 10.) The assets purchased by Reichhold included cash, receivables, inventories, machinery and equipment, trucks and autos, deposits, leases, option rights, contracts and agreements, the corporation name, patents, trademarks and technology, and all other assets including intangibles. (CX 14A.)

"COMMERCE"

9. At all times relevant to this case Reichhold and Corrulux were engaged in commerce in the manufacture, sale, and distribution of frp panels as "commerce" is defined in the Clayton and Federal Trade Commission Acts. (Complaint and Answer ¶ 5; Admission 26, CX's 305D, N.)

THE GEOGRAPHIC MARKET ("SECTION OF THE COUNTRY")

10. The parties have stipulated that the relevant geographic market ("section of the country") for evaluating the Reichhold acquisition of Corrulux is the entire United States. (Admission 74, CX's 305J, O.)³ [11]

THE PRODUCT MARKET ("LINE OF COMMERCE")

11. Frp panels are building materials made mainly of polyester resin⁴ reinforced with fiberglass. (Complaint and Answer ¶ 13.)⁵ According to the complaint, the manufacture of frp panels is the only relevant product market for evaluating the effects of Reichhold's acquisition of Corrulux. Definition of the relevant product market is the threshold issue in this horizontal acquisition case, and the issue which most sharply divided the parties throughout this proceeding.

12. It is complaint counsel's position that frp panels constitute a

³ Frp panels are light and can be packaged in compact bundles for shipment at relatively low freight cost throughout the United States. They are also relatively easy to handle in a warehouse. While the frp panel producer located closest to a particular customer has a freight advantage, there is no evidence that this advantage is decisive. (See CX 3F.)

⁴ Polyester resin is a thermosetting plastic which converts from liquid to solid by the chemical reaction of heat and catalysts. Once the resin has been cured, it cannot be reformed into a liquid state. In contrast, the more expensive thermoplastic resins such as acrylics, polycarbonates, polyethylene, polystyrene, polypropylene and butyrates can be reformed by the application of heat and pressure. (Tr. 327-29.)

⁵ Other raw materials used in frp panel manufacture are styrene monomer, acrylic monomer, peroxides, filler materials, cellophane, pigments, methyl methacrylate monomer, and Tedlar. The fiberglass reinforcing material constitutes 22 to 25 percent of the panel; most of the balance is made up of polyester resin. (Tr. 309, 424, 477-78, 640-41, 835-36, 1171.)

relevant market because the product meets some but by no means all of the criteria of *Brown Shoe*⁶ in which the Supreme Court said that within broader general markets, relevant submarkets may exist for Section 7 analysis by reason of industry or public recognition, peculiar characteristics and end [12] uses, unique production facilities, distinct prices, sensitivity to price changes, and the existence of specialized vendors.

13. Respondent, on the other hand, contends that frp panels are only one of many building materials that compete against each other for use in certain applications. As respondent would have it, the production of frp has no independent economic significance and the relevant market for evaluating this acquisition should at least include aluminum panels, glass, polyethylene film, and other plastic glazing materials which can be used in the same applications as frp panels.

Physical Characteristics

14. The physical characteristics of frp panels are not in dispute. Frp panels combine lightness of weight with a high degree of tensile strength and durability. The product is rigid, shatter-resistant, unaffected by moisture or moderately high temperatures, and withstands the corrosive effects of caustics, acids, and solvents.

Frp panels can be formed into configurations which "nest" with other building materials and frp panels can be made with varying degrees of translucence (up to 95 percent light transmission) thus permitting the passage of diffused light. Frp panels cannot be made transparent because of the light deflecting quality of the fiberglass ingredient. Completely opaque frp panels are used in certain applications. (Complaint and Answer ¶ 13; CX's 122F, 190-o; Tr. 227, 329, 332-34, 455-56, 559-60, 643, 833, 944-45, 1171-72.)

15. No other single product has the same combination of physical characteristics as frp panels. (Tr. 329, 550, 944.)

16. Frp panels are produced in various weights and sizes ranging from less than three ounces per square foot to 16 ounces per square foot. The most common [13] sizes are approximately 26 to 50 inches in width, six to 16 feet in length. The surface finish of the panels can be either smooth or textured. The configuration of frp panels can be flat, corrugated, or ribbed and the panels can be produced in many different colors. (CX 190-o; Tr. 330-35, 558-60, 641-42, 833-34.)

Production Facilities

17. Frp panels have been produced by three processes: the hand lay-up, the molded press, and the continuous line methods. (Findings 18-20.)

18. Production of frp panels originated in the early 1950's with the use of the hand lay-up method in which panels were made one at a time. In this process a cellophane sheet is placed in a frame shaped to the desired configuration. A fiberglass mat (fiberglass in gauze-like form) is then placed on top of the cellophane sheet and polyester resin is poured over and through the mat. A second cellophane sheet is laid on top of the resin and fiberglass. The panel is cured in an oven and cut to the desired size. (Tr. 479-82, 524-25, 571, 848-49, 926, 1176-77, 1237-38, 1700.) Although the hand lay-up method is no longer suitable for production of large volume runs, it is still the best and sometimes the only practical method for making panels of special weights, colors, and other properties, and for limited production runs. (CX 3G; Tr. 482-85.) The hand lay-up method entails significantly higher labor and raw material costs than the continuous line process and does not produce panels of uniform thickness. (Tr. 480-81, 846-47.)

19. The press molding method is similar to the hand lay-up method; in place of the frame, however, the manufacturer uses an hydraulic press containing a matched set of metal dies mounted on the faces of the press. A fiberglass mat is placed on the lower of the two faces and polyester resin mixed with pigment and fillers is spread over the mat. The press, which is heated [14] either by electricity or by steam, is closed to start the curing process. A cured panel is made in two minutes. The dimensions of the panel are determined by the dimensions of the dies. (CX 122H; Tr. 839-40, 2016-17.) The press molding method is used exclusively by two firms, Cincinnati Milacron and Molded Fiberglass, which manufacture panels for the liner application. (Tr. 1290-91, 2010, 2016; see Findings 45-54.) In addition, both Reichhold and another producer, Kemlite, use press molding for limited production runs and for specialty items.⁷ (Tr. 838-39, 851, 926-27, 1977-78.) The molded press method produces perhaps the best panels because this method allows for strict control over thickness and color distribution. (Tr. 927-28.)

20. The continuous line process, which now predominates throughout the industry, is the only competitively feasible way to produce panels in large volume. In addition to speed of production,

⁷ Kemlite, for example, uses a press mold to make a high-priced ribbed liner panel which cannot be made on a continuous line. Sales of this product are being phased out. (RX's 15A-B; Tr. 852-53.)

the continuous line process reduces labor and raw material costs and produces products of uniform dimensions and quality. The process, which was originated by Filon in 1952, involves the production of frp panels on machinery which in effect produces one continuous sheet so long as raw materials are fed into the machine.⁹ The continuous line machine, which typically varies in length between 250 to 385 feet, uses cellophane as a moving carrier [15] belt. Polyester resin and fiberglass rovings⁹ (chopped fiberglass fibers) are dropped onto the moving cellophane belt. Pigments and fillers are added as required by a particular order. A second layer of cellophane is pressed upon the mixture of resin and fiberglass, and the carrier moves through a series of ovens which accelerate the chemical curing process. Finally, the carrier reaches forming "shoes" or dies which create the desired configuration such as the widely used sine-shaped corrugation.¹⁰ After passing over the forming shoes, the layers of cellophane are removed and the hardened panels are trimmed and then sheared or sawed to standard lengths or to a custom length specified by the user. Continuous line machines are used solely for the production of frp panels. (CX 3H; Tr. 231, 310-14, 377-78, 479, 484, 490, 535-39, 628-32, 835-36, 849, 924-29, 1158, 1179.)

21. Except for the limited number of instances noted earlier (see Findings 19, 20), all of the producers of frp panels essentially use the continuous line process. (CX's 306A, B; RX 83, pp. 9-10; Tr. 311, 313-14, 928, 1180.)

End Uses

22. Most frp panels are sold for use in the residential, industrial, and greenhouse applications. [16]

TABLE 1: 1974 SHIPMENTS OF FRP PANELS BY USE

	<i>% of Total Square Feet Shipped</i>
Residential	46.5%
Industrial	36.1%
Greenhouses	10.8%
Farm	4.0%
Others	2.9%

(Source: CX 316)¹¹

⁹ A modern continuous line machine can produce frp panels at linear speeds as high as 75 feet per minute for light panels but speeds of 20 to 50 feet per minute are more common. Heavier industrial panels (usually weighing eight to 12 ounces) are produced at lower line speeds of 12 to 18 feet per minute. (RX 89, p. 6; Tr. 313, 409, 539, 629, 662, 836-37, 925-26, 990, 1158-59.)

¹⁰ One producer has an inefficient continuous line machine which requires the use of more expensive fiberglass

23. No other building material identified in the record has the same range of applications as frp panels. (Tr. 329; see RX 14.)

The Residential or Patio Application

24. Conspicuous on the suburban landscape of the United States is that part of the single-family home known as the "patio."¹² This backyard area may or may not have an awning-like covering. If the homeowner opts for such a cover, there is a good likelihood that a choice will be made between a covering made of either aluminum panels or frp panels. (Tr. 1909-10, 1585-86.)

25. The so-called residential or patio application, which includes such other residential uses as fences around swimming pools, carports and carport covers, windbreakers, room dividers, decorator screens, and the [17] "skirts" of mobile homes (when they are not mobile),¹³ accounted for approximately \$20 million in sales at the manufacturing level in 1974. (CX's 69B, 71F, 76A, 93D, 95C, 96A, 216A-232T; Tr. 335, 945, 1581.)¹⁴

26. Patio covers are the most important single "residential" application for frp panels. (Tr. 1619.)

27. The basic frp panel product used in the residential or patio application is the four ounce, 2 1/2 inch sine-wave corrugated panel,¹⁵ which is six to 12 feet long and 26 inches wide. (Tr. 435-36, 557, 956-57.)¹⁶

28. The functional advantage of diffused light transmission — i.e., translucency — is the primary reason for the purchase of frp panels for the patio application. (Tr. 336, 583, 644, 946-47, 1590.)¹⁷ [18]

29. Manufacturers of frp panels stress the translucence of their products in promoting them for the patio application.¹⁸

30. Aluminum panels, in contrast to frp panels, provide the

¹² See Tr. 337.

¹³ See CX 24B.

¹⁴ Manufacturers who reported their sales to the Fiberglass Reinforced Panel Council in 1974 sold 101.5 million square feet of frp panels for residential use. (CX 57-o.) Typically, these panels were sold at 19¢ per square foot by frp manufacturers (Tr. 437, 1966) which would mean residential use frp sales in excess of \$19 million. Ornyte did not report its sales to the Council. If Ornyte's sales are included, the dollar volume of residential sales may be as high as \$24 million. (See RX 89, p. 7, 11.)

¹⁵ See CX 194E.

¹⁶ Some lighter panels and some five ounce panels are sold for residential use. (Tr. 686, 957.)

¹⁷ There are some frp panels used in the patio application which are designed to reduce translucency. (CX 69A; Tr. 663.)

¹⁸ This includes the promotions of Reichhold ("The panels block out the sun's harsh ultra-violet rays. Only soft, glare-free light passes through Alsynite/Structoglas," CX 26B; see also CX's 24A, 76A, B); Glasteel ("Wherever you want to keep the glare out - let the light in - Glasteel Fiberglass Panels," CX 95B; see also CX's 93D, 99A, 100A,

(Continued)

functional advantage of shade in the patio application. (Tr. 552, 583-84, 1541, 1590-91.)

31. In the patio application, frp panels and aluminum panels are sold to homeowners in the following ways:

(a) Custom awning fabricators use aluminum panels overwhelmingly in their installation of patio covers.¹⁹ Only relatively small amounts of frp panel patios are installed by custom fabricators. Thus, Wrisco, identified in the record as the only national distributor of frp panels to the custom awning trade (Tr. 1533-34), [19] had 1974 sales of frp panels of \$663,000 while its sales of aluminum panels were \$2,775,000. (Tr. 1535.)²⁰

(b) Sears, Roebuck sells complete patio kits which include both the support and the cover. The covers for these kits are made of aluminum only. (Tr. 1605.) These kits may be purchased through the Sears catalog and are installed by the homeowner on a do-it-yourself basis, or Sears will arrange for professional installation. (Tr. 1604-05.)

(c) The "do-it-yourself" homeowner, who is in the market for panels *only*, leans heavily towards frp panels. (Tr. 1596-97.) In general the bulk of the sales of frp panels for the patio application are in the form of sales of panels only through mass merchandisers like Sears. (Tr. 1546, 1596-97, 1603-05.) In contrast, aluminum panels are usually sold in the form of complete patio kits or are installed by custom awning fabricators. (See Finding 31(a), (b).) [20]

The record does not contain a satisfactory explanation for either the frp or the aluminum patterns of distribution and consumption except for evidence that custom awning fabricators clearly favor aluminum as an awning material. (Tr. 1543.) The shading and color qualities of aluminum were cited as factors behind this preference, but it is also apparent that there are higher margins to be had on the custom installation of aluminum. (See note 22, *infra* and Tr. 1543, 1554-55.)²¹

32. In setting their prices, producers of frp panels do not take into account the prices for aluminum panels nor are their prices for frp panels sensitive to the demand or to the prices for aluminum panels. (Tr. 336, 413-14, 582-83, 615-16, 636-40, 934-39, 1208, 1231-32.)

33. At the homeowner level, the prices of frp panels and aluminum panels in the patio application tend to be different. As indicated earlier, with the exception of custom installation (see

101, 102, 103); Filon ("Filon translucent panels give you shelter - yet let you keep your sky" CX 217B; see also CX's 216A, B, 217A, 220A, B, 226A, B, 227A, B, 228A-E, 229A-E, 232A-T); and Barclay ("Barclite is able to take full advantage of the free daylight yet remove the harmful, glaring qualities of raw sunlight," CX 229B).

¹⁹ Custom awning fabricators are part of the home improvement industry. They buy component parts including panels from a distributor and construct patios and carports for homeowners on a custom basis. (Tr. 1523-24.)

²⁰ In the custom installation of frp panels the more expensive six and eight ounce panels are used in contrast to the four ounce frp panels bought by the do-it-yourself homeowner. (Tr. 1526.) The use of six ounce frp panels in the custom trade tends to produce sharp differences in the prices paid by custom awning fabricators for frp and aluminum. Six ounce frp panels are sold to custom fabricators at 61¢ per square foot as compared to 43¢ for aluminum. (Tr. 1528, 1532.) Differences and fluctuations in the prices of the two materials, however, have had little effect on sales to custom fabricators: sales of aluminum to the custom trade are consistently going up, while frp panel sales to installers have been on the decline. (Tr. 1549-51.)

²¹ There is no substantial evidence that this pattern is based on ease of installation. While frp panels are easy to work with, and do not require either special skills or special tools for installation — a selling point which frp panel producers have emphasized (CX's 24B, 26B, 69A, 76A, 93C, D, 96B; Tr. 227, 550, 946, 1987) and which might explain why do-it-yourselfers choose frp panels rather than kits or professional installation — the record indicates

Findings 27, 31, note 20 and Tr. 1586, 1610-11), the principal frp product used in the patio application is the four ounce, sine-wave corrugated panel. This panel was sold by Sears for 35¢ per square foot in 1976. (CX 309-Z-76; Tr. 1586, 1610-11.) At the same time, mill-finished four ounce aluminum panels, metallic color, were sold [21] through the Sears catalog for 44¢ per square foot, and white-finished aluminum panels were sold by Sears for 56¢ per square foot. (CX 309-Z-76; Tr. 1587.)²² Heavier (five ounce) frp panels are sold by Sears at approximately the same price as aluminum panels. (CX 309-Z-76; Tr. 1586-88.)

34. The overall pattern in the patio application is that most homeowners choose aluminum either in the form of custom installed aluminum patios or aluminum patio kits. (Tr. 946, 1589-90, 1598-99, 1603-05.) Frp panels are favored by "do-it-yourself" homeowners who economize by neither buying kits nor using custom installers, and prefer the muted light transmitting quality of frp panels over the shading quality of aluminum. (Tr. 336, 583, 946, 1541-42, 1590, 1598.)

THE INDUSTRIAL APPLICATION

Skylights and Sidelights

35. One of the principal industrial applications for frp panels is their use as skylights and sidelights by manufacturers of pre-engineered metal buildings. (Findings 36-44.) [22]

36. The pre-engineered metal building, which is basically made of corrugated steel, is well-accepted as an economical method of constructing manufacturing plants, warehouses, retail stores, small office buildings, schools, gymnasiums, and agricultural buildings. (CX's 288A-H; Tr. 522, 1054-55.)

37. Typically, a pre-engineered metal building manufacturer produces a package containing all the components and accessories of the building including primary framing members, wall and roof coverings. This package or "knockdown building" is distributed through franchised dealers who erect the building for the ultimate user. (Tr. 523, 1052-54.)

38. The pre-engineered metal building industry is substantial. In 1974, the 29 members of the Metal Building Manufacturers

²² As indicated in Finding 31 patio kits are sold by Sears in aluminum only. The prices of these kits (for standard 8 x 16 ft. patio) range from \$114.95 for mill finish aluminum to \$234.95 for white enamel finish aluminum. (CX 309-Z-72). A professionally custom installed patio cover costs approximately \$3.75 per square foot for aluminum and up to \$4.00 per square foot for frp, but in many cases the installed prices are the same for both materials (Tr. 1529, 1539) despite the fact that the cost of frp panels sold to custom installers is higher than the cost of aluminum. See note 20, *supra*.

Association (an association of pre-engineered metal building manufacturers accounting for approximately 75-80 percent of the market) had sales of \$790 million. (CX 286A; Tr. 1064-65.)²³

39. The basic covering materials used in pre-engineered metal buildings are corrugated steel panels. Corrugation imparts strength to the surface. (Tr. 524, 1052-53, 1078.)

40. Frp panels, most commonly corrugated eight ounce per square foot panels, are used in these corrugated metal buildings as the skylights or sidelights [23] which transmit natural light to the working area. (CX 289-Z-8; Tr. 457, 460, 713, 1058-61, 1223.)²⁴

41. Because frp panels can be corrugated to the same specifications as steel, they easily "nest" with the steel corrugated panels and are installed in exactly the same manner as the steel skin of the pre-engineered building. Costly wooden frames or sashes are not required in order to install frp panels in corrugated metal buildings. (CX's 67C, E, 289-Z-8; Tr. 343-44, 455, 460, 524, 646, 713, 1058, 1175.)

42. Frp panels are the only materials used as skylights or sidelights in corrugated metal buildings.²⁵ It is the standard material for this purpose and there is no feasible substitute at this time. (Tr. 713, 953-55, 1060-64, 1080-81.) [24]

43. Manufacturers of frp panels do not consider the prices of glass, acrylic, polycarbonate, PVC or any other material in setting their prices for frp panels to be used for nesting in corrugated metal buildings. (Tr. 320-24, 471-72, 636-40, 715-16, 934-39, 1208.)

44. While frp panels are only a relatively small part of a corrugated metal building (Tr. 1052-53), the volume of sales by frp manufacturers to the pre-engineered metal building industry is substantial. In 1974, five frp panel manufacturers — Thorolyte, Idaho Chemicals, Lasco, Reichhold, and Glasteel — had sales of approximately \$6.8 million to corrugated metal building manufac-

²³ It has been estimated that pre-engineered metal buildings account for about 20 percent of the single-story non-residential construction in the United States. (CX's 288D, 289A-Z-17; Tr. 1077-78.) In addition to the pre-engineered metal buildings, there is a large volume of corrugated metal building construction done by custom builders. (Tr. 523-24, 1069-70.)

²⁴ Typically, such panels were being sold in 1977 for 50¢ per square foot. (Tr. 458.)

²⁵ Because glass cannot be corrugated it must be placed in a sash or a frame — in other words, glass does not naturally "nest" with corrugated steel panels. The substantially higher installed cost of glass as well as its breakability has meant that use of glass in industrial or commercial buildings is confined to showroom or office areas. Similarly, other materials such as acrylic and polycarbonate sheet not only are substantially more expensive than frp panels but in addition they are not available in corrugated form and require the high installation costs of sashes or frames. Polyvinyl chloride (PVC) has been tried in corrugated metal buildings and has been rejected for lack of chemical stability, tendency to warp or yellow, and its low level of structural integrity. (Tr. 357, 59, 460, 63)

turers. (Tr. 668, 683-84, 997, 1043, 1189, 1205, 1245, 1259, 1962, 1973.)²⁶ Prior to the Reichhold acquisition, Corrugulux, too, sold panels to the same class of users. (CX's 56A-D; Tr. 712.)

"Liners"

45. Frp panels are used to line the interiors of truck trailers, railroad cars, and marine cargo containers. They are also used as liners in food processing plants and farm buildings. (CX's 21, 22, 122F, G; RX's 15, 17; Tr. 834-35, 844, 862-63.)

46. Frp panels used in the liner application are generally flat (but some are ribbed), opaque, and usually weigh above 12 ounces per square foot. (Tr. 833-34, 837.)

47. Frp panels possess several physical characteristics which make them particularly well-suited for use as liners in refrigerated trailers, railroad cars, as well as food processing plants. They are light (an important consideration to cargo carriers), [25] durable (and thus do not crack allowing the entry of bacteria), can be installed without seams (again, retarding the growth of bacteria) and provide an easily cleanable surface which is essential for the maintenance of high standards of sanitation. (CX's 21-22, 159, 174B, 176A, B; RX's 15, 17; Tr. 862-63.)

48. Other materials such as ordinary steel and aluminum are not as well-suited as frp panels for use as liners in refrigerated trailers or railroad cars. Steel has a tendency to rust and aluminum produces a black oxide²⁷ which could damage food products. (Tr. 868-69.)

49. Approximately 99 percent of newly built refrigerated truck trailers and refrigerated railroad cars are lined with frp panels. (Tr. 863-64, 867-68.)

50. Frp panels are also installed in trailers, moving vans, and railroad cars which are used for transporting non-food products. They are preferred for this general transportation application because they provide a surface that does not damage cargoes, resists the corrosive effects of acids,²⁸ and can withstand forklift damage. (Tr. 864-66.)

51. For the interior of food processing plants, the United States Department of Agriculture is encouraging the use of frp panels in place of porcelain enamel or stainless steel since the high-impact

²⁶ See also Tr. 416 for evidence of sales of frp panels to corrugated metal building manufacturers by Filon. Also, in 1973 Resolite had sales of about \$2 million to the pre-engineered metal building industry. (Tr. 456-57; Table III, *infra*.)

²⁷ While stainless steel will not rust, it is not used to line refrigerated truck trailers or railroad cars because its cost is considerably greater than frp panels. (Tr. 869.)

²⁸ An important consideration in transporting such corrosive products as batteries, salt, and leather. (Tr. 864-66.)

resistance and cleanability of the product tends to prevent [26] the collection of dirt and bacteria. (CX 114; RX's 18A, B; Tr. 1029-30.) As a result, many food processors are using frp panels in new construction and in refurbishing existing food plants. (Tr. 870, 1029-30.)

52. The "liner" segment of the industrial application of frp panels has become important. In 1974, the combined total of liner frp panels sold by just three companies — Kemlite, Molded Fiberglass, and Cincinnati Milacron — was approximately \$15.5 million. (RX's 28E, 68; Tr. 909, 1285-86, 2019.) In addition, liner panels were produced by Kalwall, Glasteel, Ornyte, Reichhold, and Lasco. (Tr. 644, 1901-02.)

53. No producer of frp panels for the liner application takes into account the prices of ceramic tile, steel, aluminum or any other material in setting his price for frp panels. (Tr. 636-40, 878-79, 934-39.)

54. It is anticipated that the industrial applications for frp panels, particularly their use as liners, and as skylights and sidelights will be the area of the greatest future growth for this product. (Tr. 995, 1044, 1252-53.)

"Garage Doors"

55. Frp panels are used by manufacturers of garage doors. These garage doors are typically the sectional overhead variety in which the frp panels are installed in an aluminum frame. (Tr. 337.)

56. Other materials including steel, wood, fiberglass, and aluminum are used by manufacturers of garage doors. (Tr. 947, 1005.) There is some indication in the record of functional and price distinctions between these other materials and frp panels in the garage door application (particularly frp's light weight and ability to transmit natural light. (CX's 28, 309-Z-63; Tr. 337-39, 645, 947-49).) Complaint counsel's evidence, however, with respect to this application is [27] flimsy at best and they failed to prove that any differences which may exist among various materials used in the garage application are so substantial as to indicate a relevant market or submarket.

"Glazing Material"

57. Flat frp panels can be used as replacements for glass in window sashes in conventional buildings.²⁰ (See, e.g., RX's 19A, B.)

²⁰ Use of frp panels as window glazing — i.e., as a replacement for glass or other materials in a sash — should

Generally, frp panel manufacturers testified that use of flat panels as a glazing material — i.e., as a replacement for glass in sashes — constitutes a minor part of their businesses. (Tr. 345, 555-56, 643-44, 955, 1044, 1971; but see Tr. 1924-25, for evidence that Reichhold has been able to sell substantial amounts of frp panels as replacement for entire glass systems including sashes.)

58. Thermoplastics, such as acrylics and polycarbonates, as well as glass itself, are by far the most widely used window replacement materials. (RX 2; Tr. 1622-23, 1635.) Because these other plastics are transparent and frp panels are not, frp panels are not an important glazing material even though they are less expensive than acrylics and polycarbonates. (CX 105; Tr. 1622-28, 1637-38, 1639-40, 1643-45, 1649, 1651-53, 1661-62.) Complaint counsel failed to prove that use of frp panel in the glazing application indicates a relevant market or submarket.

59. There are still other industrial applications for frp panels, such as their use as sign material and as "cladding" for water cooling towers³⁰ in which [28] they compete directly with acrylics, other plastics, asbestos cement, and wood. (RX's 18D, 36-37D; Tr. 419, 1905-08.) Complaint counsel's proof with respect to these applications is anecdotal and thus they failed to prove that use of frp panels in these applications indicates a relevant market or submarket.

The Greenhouse Application

60. The manufacture of commercial greenhouses is a substantial industry. In 1976, the dollar volume of sales of greenhouses to commercial growers was approximately \$50 million. Of this total, 50 percent was derived from the sale of frp glazed greenhouses, 30 percent from the sale of polyethylene film greenhouses, and 20 percent from glass greenhouses. (Tr. 1095.) Sales of commercial greenhouses are usually made on a "turnkey" basis in which a complete, operating structure is built by the greenhouse manufacturer. To offset the cost of labor, a recent development has been the sale of do-it-yourself greenhouse kits which are assembled by the growers. (CX 64-o; Tr. 1703-04.)

61. In addition to commercial greenhouses, institutional greenhouses are constructed for universities and high schools which are mostly made of glass. Hobby greenhouses are made mostly of polyethylene film but glass and frp panels are also used by hobbyists. (Tr. 1096.)

³⁰ See, CX 261B.

62. The basic frp panel sold to greenhouse manufacturers³¹ is 50 inches wide by 22 feet long. Typically, the frp panels for the greenhouse application weigh four [29] ounces;³² are coated with Tedlar;³³ and are made in a corrugated configuration. (Tr. 1098-99.)

63. Based upon total sales of 23.5 million square feet as reported by frp manufacturers to the Fiberglass Reinforced Panel Council, total sales by frp panel manufacturers to the greenhouse trade was approximately \$6.6 million in 1974. (CX 57-o.)³⁴

64. The installed costs of the three basic glazing materials used in commercial greenhouses vary substantially. Frp panels, which are relatively easy to install, are sold on the basis of an installed cost of \$1.65 per square foot as compared to \$1.90 per square foot for glass which requires an expensive glazing operation. The installed cost of polyethylene film is approximately \$1.00 per square foot. (CX 64W; Tr. 340-41, 1101-02.)³⁵ [30]

65. The following are the physical characteristics of frp panels, glass, and polyethylene film which are relevant to the greenhouse application:

(a) Frp panels have a fairly long life-span before darkening (about 25 years if Tedlar coated), high resistance to hail but are inflammable.³⁶ They transmit diffused light,³⁷ but their translucency also means that they cannot be double-glazed for fuel-conservation purposes. (CX's 35, 64i, W, X, 65, 67E, 68B, 184; RX's 11C, 12C, D; Tr. 464-68, 1101, 1704-05, 1710.)

(b) Glass has an indefinite life-span. A glass panel is susceptible to hail damage, but presents no fire hazard. Glass panels give clear undiffused light which is important in geographic areas of low light intensity. (Tr. 466, 1118, 1710, 1748.)

(c) Polyethylene film has a short life-span (one to three years) but it can be removed easily to allow exposure for the purpose of hardening the flowers. Polyethylene film, which is transparent, can be double-glazed thus creating an air space between the layers which serves to [31] conserve energy.³⁸ Seasonal removal, however, of a double-layered polyethylene film greenhouse would not be feasible. (RX's 9, 12i; Tr. 466-67, 1116, 1704, 1788-89.)

66. The physical characteristics of the three principal greenhouse materials, as well as the installed cost differences described earlier,

³¹ Frp panel producers sell to greenhouse manufacturers, greenhouse equipment distributors, and directly to nurseries. (Tr. 1129, 1142, 1905.)

³² Five ounce panels are also used in the greenhouse application. (Tr. 457, 1098.)

³³ "Tedlar" is a du Pont polyvinyl fluoride film that retards discoloration and loss of light transmission. (CX's 64T, U; Tr. 331, 367-68.)

³⁴ In 1974, the Tedlar-coated four ounce panels used widely in the greenhouse trade sold for approximately 28¢ per square foot; that is, 19¢ for the panel, 9¢ for the coating. (Tr. 979, 1966.)

³⁵ The leading greenhouse manufacturer sells four ounce Tedlar-coated frp panels for 40¢ per square foot, glass for 36¢ per square foot, and polyethylene film for 1¢ per square foot. (CX 64-Z-1, Z-4, Z-6.) This manufacturer pays approximately the same price, 22¢ to 25¢ per square foot, for glass and frp panels. (Tr. 1099.)

³⁶ With special treatment, frp panels can be made fire resistant. (CX 64i; RX 11B but see CX's 65G, H.)

³⁷ Diffused light not only reduces burning and spotting of plants (see Finding 67) but also creates a larger growing area. (Tr. 464.)

³⁸ A double-layer of polyethylene film allows 92.4 percent of the light transmission of glass. (RX 9.)

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Initial Decision

have created historical preferences for each material depending upon the crop grown and the geographic area where the crop is grown. Thus Roper-IBG, the largest commercial greenhouse manufacturer in the United States,³⁹ which sells greenhouses made of all three covering materials, experienced the following sales pattern in 1976: [32]

TABLE 2: ROPER-IBG 1976 SALES OF FRP, GLASS, AND POLYETHYLENE BY CROP AND AREA AS PERCENT OF TOTAL SALES OF \$8.5 MILLION

	<i>Northwest</i>	<i>Northeast</i>	<i>Southwest</i>	<i>Southeast</i>	<i>Total</i>
Cut Flowers					
FG (frp panels)	3%	0	19%	2%	24%
Glass	2%	0	09%	0	2%
Poly	0	0	0	0	0
Potted Plants					
FG	0	0	23%	3%	26%
Glass	0	2%	0	0	2%
Poly	0	0	0	0	0
Bedding Plants					
FG	0	0	0	0	0
Glass	0	0	0	0	0
Poly	1%	15%	3%	1%	20%
Foliage Plants					
FG	2%	0	4%	8%	14%
Glass	0	0	0	0	0
Poly	0	0	0	2%	2%
Vegetables					
FG	0	0	8%	0	8%
Glass	0	0	0	0	0
Poly	0	2%	0	0	2%

Source: (CX 66)

[33] 67. As shown in Finding 66, cut flower growers, the most important greenhouse growers (CX 65B), prefer frp covered greenhouses.⁴⁰ The geographic centers for the cultivation of cut flowers are in the Salinas Valley area of California, and in the Denver, Colorado area. Since these are areas of high-intensity light which could cause burning and spotting of the flowers if the light were not diffused, the light-diffusing quality of frp panels is preferred. (CX 65D; Tr. 341, 465-66, 950, 1104-06, 1119.) In addition, light diffusion has been

³⁹ Roper-IBG has about 17 percent of the greenhouse market. (Tr. 1095, 1097.)

⁴⁰ The preference appears to be particularly strong among growers of carnations, chrysanthemums, and southern growers of roses, but it is not as strong with northern producers of roses, who require more intense light transmission. (Tr. 466, 1119.)

found to stimulate stem and lower leaf growth, thus producing larger blooms. (Tr. 1104.)

68. Growers of potted plants⁴¹ are more geographically dispersed than the cut flower growers. Potted plants are difficult to ship and growers tend to be located near large urban population centers irrespective of climatic conditions. Climatic conditions, however, tend to dictate the material used in constructing a greenhouse for potted plant cultivation. As a result, in low intensity light areas such as the Northeast or Northcentral glass is favored, but in southern and western areas where there is high intensity light, frp greenhouses are favored. (CX 65D; Tr. 465, 1106-07, 1781.)

69. Bedding plants⁴² are widely grown all across the country but are usually cultivated by smaller growers. The cultivation of bedding plants tends to be a short-term operation confined to the early part of the year. Accordingly, bedding plant growers prefer [34] to use the temporary covering of polyethylene film which can be removed easily for hardening of the plants. (CX's 65D, E, 66; RX 9; Tr. 1107-08, 1126-27.)

70. Foliage plants for indoor decoration are mainly grown in the high intensity light areas of Florida and California. As in the case of cut flowers, frp panels are favored for their light diffusion quality. (Tr. 1108-09, 1760-61.)

71. The experience of Roper-IBG has been that vegetable growers who use greenhouses⁴³ (a very small segment of the greenhouse market) favor frp greenhouses. (CX's 65E, 66.)

72. As the market for various kinds of flowers changes so does the market for the various greenhouse coverings. To illustrate, because of the recent massive importation of cut flowers from Latin America (Columbia) domestic cut flower growers have limited their expansion with the result that there has been a decline in new frp greenhouse construction by cut flower growers. (CX's 65A, B; Tr. 1109, 1746.)⁴⁴ On the other hand, the sharp increase in the popularity of foliage plants has resulted in an equally sharp increase in the demand for frp panels by the growers of these crops. (Tr. 1127, 1760-61.) Similarly, the boom in the bedding plant market and the sharp increase in energy costs in the northern parts of the country, where many bedding plants growers are located, have increased the demand for double-layered polyethylene film. (CX 66; RX's 9, 10; Tr. 1109-10, 1120-21, 1127, 1750-51.) [35]

⁴¹ Lillies, poinsettias, and geraniums, for example. (Tr. 1103.)

⁴² Carnations, petunias, and gloxinia, for example. (Tr. 1103, 1747.)

⁴³ Predominantly tomato growers. (Tr. 1103.)

⁴⁴ There are indications, however, that bad weather, disease, and import quotas may combine to limit severely

73. The consumption patterns described above, reflecting the area in which the grower is located and the crop produced, are not immutable. (Tr. 1747-48.) The traditional installed cost advantage of frp panels has recently been challenged by the importation of the so-called "Dutch Greenhouses" from the Netherlands. On occasion, these glass greenhouse imports have undersold frp panel greenhouses in geographic areas which have traditionally been considered frp panel strongholds. (Tr. 1706-09, 1715.) Even polyethylene film, which in a double-layer application can conserve fuel, may become a feasible alternative to the traditional uses of frp if the cost of energy exceeds the cost of replacing relatively short-lived film.⁴⁵ This threat is less likely to emerge in the warm growing areas in the Southwest and Florida where energy costs are not a major factor. (Tr. 1120-21.)

74. While these threats to the historical frp preference must be recognized, especially in a changing flower industry in which large commercial growers and the use of cost analysis are becoming more evident (Tr. 1711-13, 1714), it would be a distortion of current trade realities to conclude that the emerging challenges are more significant than the established patterns. The preference of many growers for frp is not a fly-by-night phenomenon. It has developed over a nearly twenty year period,⁴⁶ to the point that despite the importation of some glass greenhouses, there has not been a significant number of glass greenhouses [36] installed by cut flower growers within the past six years. (Tr. 1105, 1124-25.) Moreover, the record shows that the three greenhouse materials are still largely price insensitive to each other. For example, a 5 percent increase in the cost of frp panels would not cause greenhouse buyers to shift their purchases from frp panels to glass. (Tr. 1117.) Similarly, a price change in polyethylene film does not affect frp panel sales. (Tr. 413, 660.) And it has been estimated that the price of frp panels would have to go up more than 10 percent to cause frp panel greenhouse purchasers to shift to polyethylene film, and some cut flower growers probably would not change from frp panels to glass even if glass were cheaper. (Tr. 1118-19, 1125.)

75. Most important, the current preference for frp in the greenhouse application is such that frp panel manufacturers simply do not take into account the prices of glass or polyethylene film in setting their prices for frp panels. (Tr. 323, 413-14, 471-72, 561, 589, 636-40, 659-60, 934-39, 1208, 1227-28.)

⁴⁵ Double-layered polyethylene can save 40 percent on heating cost as compared to a single wall system. (RX 9.) Since 1973 the cost of energy used by growers in the Northeast has increased 250 percent. It now comprises 30 percent to 35 percent of a grower's operating cost in the northcentral and eastern portion of the country. (Tr. 1116-17.)

⁴⁶ See CX 65A; Tr. 1700-01.

Supply-Side Perception of Competition

76. Apart from the industrial application for skylights and sidelights and as liners for refrigerated cars where no reasonable alternatives are available, there clearly are alternatives to frp panels in their other key applications as shown in Findings 24-34, 55-75. What the record shows, however, is that the different physical characteristics of frp and aluminum in the patio field, as well as the physical characteristics and costs of frp panels as compared to glass or polyethylene film in the greenhouse application, have established a preference for frp panels among a large number of users who want low cost installation, light transmission, light diffusion and the other qualities of frp panels. (See Findings 24-34, 60-75.) Not only is this preference measurable (total frp sales are not insubstantial) but the frp panel producers function competitively as if the contest to fulfill this preference was indeed a commercially recognizable market. (Findings 77-87.) [37]

Distinct Prices and Price Sensitivity

77. Producers of frp testified overwhelmingly that their competition comes solely from other frp producers. The frp producers said (1) that they do compete against other frp panel producers, and (2) that they do not compete against producers of aluminum, glass, polyethylene film, ceramics, pvc, wood, steel, acrylic, polycarbonate, or any other material. (Tr. 320-24, 336, 469, 471-72, 542-48, 560-62, 632, 636-40, 659-60, 715-16, 878-79, 934-39, 1208, 1223-24, 1260.)

78. In setting their prices for frp panels, the *only* prices which frp producers take into account are the prices of other frp producers. (Tr. 320-24, 469-72, 542-48, 615-16, 636-40, 659-60, 715-16, 878-79, 934-39, 1208.)

79. The frp panel producers neither consider nor monitor the prices of other materials. (Tr. 320-24, 469-72, 542-48, 582-83, 615-16, 636-40, 659-60, 715-16, 878-79, 934-39, 1208, 1227-28, 1232.)

80. The prices charged for frp panels are not sensitive to changes in either the demand or the prices of other materials. (Tr. 320-24, 336, 413-14, 469-72, 542-48, 582-83, 615-16, 636-40, 659-60, 715-16, 878-79, 934-39, 1208, 1227-28.)

Recognition of an Frp Panel Industry

81. For the most part, frp panel producers treat frp panel production as a distinct business: that is, they only manufacture frp panels or produce frp panels in a separate part of multi-product

firms. (CX 122F; RX 89, p. 4; Tr. 307-09, 454-55, 534, 710, 832-33, 923, 1141, 1185, 1234, 1247-48, 1891.)⁴⁷ For example, [38] Reichhold's frp panel business is conducted through its Reinforced Plastics Division which only sells frp panels and the accessories used to install frp panels. (Admissions 1, 2, 3, CX's 305B, M; Tr. 1891.)

82. Frp producers such as Reichhold, Filon and Resolite refer to an frp "industry" in their promotional literature. (CX's 36C, 215, 258D; Tr. 324, 477-78.) See also CX's 304A and 311M, N for recognition of a "Fiberglass Reinforced Panel Industry."

83. The main frp panel producers have joined together to form an association of producers and suppliers who have common marketing and technical concerns. (See Findings 84-87.)

84. The Society of the Plastics Industry (SPI), which has over 1,000 members, is the major plastics trade association in the United States. Within SPI there is a Reinforced Plastics Composites Institute which carries out various technical and promotional activities on all reinforced plastics. The Fiberglass Reinforced Panel Council, a subsection of the Reinforced Plastics Composites Institute was formed over 25 years ago "To bring about the establishment of a stable and integrated growth into the Fiberglass Reinforced Panel Industry" and "to advance the best interest of the . . . Fiberglass Reinforced Panel Industry." (CX 304A.) The membership of the Fiberglass Reinforced Panel Council is composed solely of manufacturers of frp panels who use the continuous line process and their suppliers. With the exception of Kemlite,⁴⁸ all of the significant manufacturers of frp panels are members of the Fiberglass [39] Reinforced Panel Council. The Council, which holds three meetings each year, has its own by-laws, elects its own officers, administers its own business affairs, and appoints its own committees to carry out special projects. (Admissions 42, 43, 44, CX's 305F, N; CX's 304A-C; Tr. 225-28, 230-32, 241, 325, 472-73, 548-49, 650-51, 720, 939-42, 1989.)

85. The Fiberglass Reinforced Panel Council collects frp panel sales data from eight major manufacturer-members and disseminates this information to its membership in quarterly reports. (CX's 57A-o; Tr. 233-34.)

86. The Fiberglass Reinforced Panel Council has taken the initiative in promulgating a voluntary product quality standard for frp panels. The standard, P.S. 53-72 "Glass Fiber Reinforced

⁴⁷ But see Tr. 627 for exception in case of Lasco; Lasco, however, has a separate frp panel sales force.

⁴⁸ Kemlite left the Council in 1965 to concentrate its efforts on transportation industry associations in which it could promote its liner panels. (Tr. 848.)

Polyester Structural Plastic Panels" which covers five, six, and eight ounce panels,⁴⁹ was published by the National Bureau of Public Standards, U.S. Department of Commerce in April 1972. All significant manufacturers of frp panels have accepted this voluntary product standard and many use it in promoting their products. (Admission 49, CX's 305G, N; CX 190; Tr. 232-33, 326-27, 473, 549, 650-51, 941-42.)

87. In addition, the Fiberglass Reinforced Panel Council has engaged in such activities on behalf of frp panels manufacturers as performance testing, the publication of technical information about frp panels, the monitoring of building codes to anticipate their potential effects on frp producers and the convening of meetings to discuss marketplace trends. (Admissions 52, 53, CX's 305G, H, N; CX's 57, 194; Tr. 225-27, 235-40.) [40]

Specialized Vendors

88. Frp panels, like aluminum panels, glass, or polyethylene film, are distributed through mass merchandisers, distributors, and original equipment manufacturers. The customers of frp manufacturers who buy frp for the patio application (mass merchandisers and distributors to lumberyards and custom awning fabricators) also buy aluminum panels for use in the patio application. Similarly, the same greenhouse manufacturers who buy frp panels also buy glass, and polyethylene film for use as greenhouse covering. Distributors of industrial glazing materials simultaneously handle frp panels, acrylics, and polycarbonates. (RX's 4-7, 11A-12J, 53, 73B; Tr. 509-10, 1525, 1582, 1622-23, 1702-03.) The only exceptions to this pattern — that is, *no* specialized vendors of frp panels — are the manufacturers of pre-engineered metal buildings and refrigerated vans who apparently use no material other than frp panels for the skylighting and refrigerated car liner applications. (See Findings 42, 49.)

Conclusion on Market Definition

89. On the basis of buyer preference for frp panels in certain applications, which derives from the physical characteristics and cost of the material, as well as the suppliers' perception of competition, I have concluded that the production of frp panels represents a relevant market or "line of commerce." (Findings 14-88.)

MARKET STRUCTURE AND ENTRY

Concentration

90. In assembling its proposed frp panel universe, complaint counsel argue for exclusion of Butler Manufacturing Company, an important manufacturer of pre-engineered metal industrial buildings. Butler's [41] production of frp panels is for "captive" use only as skylights and sidelights in its own steel buildings. (Tr. 1484-87, 1495.)⁵⁰ Butler's production is not sold in the merchant market and Butler has no intention of entering the merchant market. (RX's 25A, C, *in camera*; Tr. 349, 541-42, 634-35, 718-19, 1066-67, 1484-87, 1497, 1500-02, 1508, 1519.) Inclusion of Butler in an frp panel universe would tend to distort an assessment of potential anticompetitive effects which depend upon market structure and concentration ratios since the record shows overwhelmingly that frp producers do *not* consider Butler to be a competitor, and Butler is so far removed from considering itself in competition with frp panel producers that it knows little about the prices of these producers. (RX 25A, C, *in camera*; Tr. 349, 541-42, 634-35, 718-19, 1508.)

91. With the exclusion of Butler's captive production, the frp panel universe appears as follows: [42]

⁵⁰ Butler produces and sells a small amount of replacement panels for its pre-engineered metal buildings. (RX 26B.) Since the panels produced by other manufacturers are not compatible with Butler's components, purchases of non-Butler replacements by owners of Butler buildings are rare. (CX 25C, *in camera*; Tr. 1503-04.)

TABLE 3; MARKET SHARES OF FRP PRODUCERS, 1972-1973; 1973 RESTATED
TO SHOW EFFECTS OF ACQUISITION

Name of Manufacturer	1972			1973			1973 Restated		
	Rank	Dollar Sales	Percentage Share of Total Dollar Sales	Rank	Dollar Sales	Percentage Share of Total Dollar Sales	Rank	Dollar Sales	Percentage Share of Total Dollar Sales
Reichhold Chemicals, Inc.	3	8,629,690	16.61	2	11,916,853	18.85	1	14,727,038	23.30
Vistron Corp. (Filon Division)	1	11,649,795	22.42	1	12,710,000	20.11	2	12,710,000	20.11
Lasco Industries, Inc.	2	8,700,170	16.74	3	11,110,029	17.57	3	11,110,029	17.57
Kemlite Corporation	4	6,402,719	12.32	4	7,775,333	12.30	4	7,775,333	12.30
Berdon, Inc. (Ornyte Division)	5	3,493,540	6.72	5	4,451,736	7.04	5	4,451,736	7.04
Glasteel, Inc.	10	1,321,309	2.54	6	2,905,892	4.60	6	2,905,892	4.60
Barclay Industries, Inc.	8	2,283,149	4.39	8	2,744,545	4.34	7	2,744,545	4.34
H. H. Robertson Co. (Resolite Division)	7	2,726,345	5.25	9	2,272,834	3.60	8	2,272,834	3.60
Molded Fiberglass Co.	9	1,970,709	3.79	10	2,209,306	3.49	9	2,209,306	3.49
Cincinnati Milacron	11	1,018,000	1.96	11	1,058,000	1.67	10	1,058,000	1.67
Fiber Glass Plastics, Inc.	12	377,920	0.73	12	441,534	0.70	11	441,534	0.70
Thorolyte Fiberglass, Inc.	13	371,506	0.71	13	420,992	0.67	12	420,992	0.67
Idaho Chemical Industries, Inc.	14	268,570	0.52	14	309,572	0.49	13	309,572	0.49
Kalwall Corp.	-	-0-	-0-	15	80,000	0.13	14	80,000	0.13
Corrulux Corp.	6	2,745,579	5.28	7	2,810,185	4.45	-	-	-
Total of All Manufacturers		51,959,001	100.00		63,216,811	100.00		63,216,811	100.00
Total of Top Four Manufacturers		35,382,374	68.10		43,512,215	68.83		46,322,400	73.28
Total of Top Eight Manufacturers		46,630,987	89.75		56,424,573	89.26		58,697,407	92.85

Source: CX 302 except as follows: Kemlite (CX 307B, in camera); Molded Fiberglass (RX 27; Tr. 1318); Cincinnati Milacron (RX 68); and Kalwall (RX 83, p. 28).

[43] 92. Table 3 includes a Kemlite liner panel consisting of a sheet of plywood to which a layer of frp is bonded. (See RX's 30-32B.) Table 3 does *not* include the "sandwich" panels produced by Lunn Laminates which consists of two frp skins enclosing a plywood or urethane core. Lunn's products are *not* intended as liners — they are used as the entire sidewall of a truck trailer. (RX's 21A-H; Tr. 1382, 1393-94.) Lunn does not consider itself to be in competition with any firm in the frp panel business and no frp panel producer testified that it competes directly with Lunn, and most never heard of it. (Tr. 318, 475, 541, 634, 719, 1207, 1261, 1382-83.) The Lunn product sells between \$1.50 to \$2.00 per square foot as compared to about 50¢ to 65¢ for frp liner panels.⁵¹ (RX 83, p. 61; Tr. 853, 905, 1405-06, 2019.)

Since Table 3 is confined to pre-acquisition sales it necessarily excludes the "sandwich" panels which were first sold by Kalwall in commercially significant quantities during the period 1975-1977 and which now constitute the largest part of Kalwall's business. Even if Table 3 had included these post-acquisition years, production of this product is not properly part of the frp panel universe. The Kalwall "sandwich" product consists of two frp facings and a grid core constructed of structural aluminum I-Beams. (CX 158B; RX 83, pp. 5-6, 51-52.) This product is not a liner: it is intended to be used to build the entire wall or roof of a building. (CX's 158B, C; RX 83, pp. 6, 45-47.) Kalwall's sandwich panels are produced on a [44] custom basis and most often are sold with installation included. (RX 83, pp. 14, 33, 48.) The Kalwall "sandwich" panels alone (that is, excluding cost of installation) cost between \$4.50 to \$12.00 per square foot. (RX 83, p. 49.) Table 3 *does* include Kalwall's 1973 sales of non-sandwich frp panels for the merchant market (RX 83, p. 28), but does not include such sales for the post-acquisition years 1974-1976. The officers of Kalwall made it plain that their principal product — a high technology "sandwich" panel — is not part of the frp industry, (CX's 157A, B; RX 83, pp. 55-56), and a producer of frp panels for the liner application does not consider the Kalwall "sandwich" a competitive product. (Tr. 912-14.)

Table 3 also excludes the production of M.C. Gill, a producer of high-engineered, custom-designed, and FAA-approved laminates for the aircraft industry which sell at prices as high as \$8.00 per square foot. (Tr. 1434-37, 1449-50, 1452, 1456-60, 1465-67.) The head of marketing for M.C. Gill does not consider himself part of the frp industry and he does not compete with frp panel producers. Frp

⁵¹ Frp coated plywood panels which are used in the liner application, and which are included in Kemlite's sales as reported in Table 3, sell at a price of about 75¢ per square foot. (Tr. 854.) Kemlite also produces ribbed panels for the liner application which are priced at 77¢ per square foot. These ribbed panels are included in Table 3. (Tr. 853.)

panel producers, including one producer who was located six miles away from the M.C. Gill plant, never heard of the firm. (Tr. 475, 540-41, 634, 719, 1002-03, 1434, 1458-60, 1464-65, 1469-70.)

Entry

93. There are no significant capital barriers to entry into the frp market.⁵² [45]

94. There is no evidence that advertising is a significant entry barrier in this industry, although point of purchase advertising is a factor in selecting a supplier of frp panels. (Tr. 1920.)

95. There are no patent barriers to entry into the frp panel industry. (CX 3F; Tr. 378-79, 491-92, 611-12, 1197-98, 2031-32.)

96. Complaint counsel failed to prove that technical expertise was a significant entry barrier in the frp panel industry. While the chemical know-how required in frp panel production is considered complicated (Tr. 648-49, 1728) the weight of the evidence is that the technical expertise necessary for handling resins is readily available from resin producers. (Tr. 492-93, 612-13, 1198-1200, 2035.) Complaint counsel also make much of the fact that a continuous line consists of various pieces of machinery produced by different manufacturers and that no company produces or sells the entire continuous line as a package. (Admissions 31, 32, CX's 305E, N; Tr. 312, 486, 537-38, 572, 629, 928-29.) Although the continuous line must be designed and assembled by the frp panel producer himself, it is a relatively uncomplicated engineering process and it is common practice in the industry to hire a qualified engineer from another manufacturer, or to retain a consultant who can offer a "turnkey" construction contract. (CX's 3F, G, 311; RX's 14A-D, 43; Tr. 230-31, 355, 378, 612, 960-61, 1019, 1238, 1726.)

97. A new entrant into the frp panel industry, however, may be deterred by the prospect of competing against Reichhold and the Filon Division of Vistron, a subsidiary of Standard Oil of Ohio. These large corporations, which already control close to 45 percent of the market (see Finding 91), also have a competitive advantage because of their captive source of polyester [46] resin.⁵³ (Tr. 351-56, 564-65, 648, 860-61, 966-67, 971-72, 1168-69, 1213-14, 1257-58.)

⁵² Current replacement costs for a continuous process machine range between \$30,000 to \$700,000 depending on the degree of automation and the quality of the control systems desired. (CX's 3H, 136H, 312A; RX 25E, *in camera*; Tr. 517, 520, 613-14, 885, 959-60, 963, 1185, 1239.)

⁵³ Reichhold, for example, transfers resin to its Reinforced Panel Division at cost plus freight, which is below the market price. Reichhold is willing to forego its profit on the sale of resin and realize the profit, instead, on the sale of finished panels. Other raw material used by Reichhold in frp panel manufacture are transferred internally on the same basis. (Tr. 2032-33, 2064-66.)

In addition to the price advantage, integration can mean an assured source of supply. During the period 1979-74, frp panel manufacturers experienced a severe shortage.

98. Beginning in the late 1950's and early 1960's, there were a large number of firms which left the frp industry. These exits were attributable to the conversion by many firms to the continuous method process, which meant that small producers then using the hand lay-up method and without adequate resources to make the conversion, were no longer competitively viable. (Tr. 490-91, 494, 900-03, 967-68, 1025-26.) [47]

99. In the last ten years, there has been only one new entrant into the frp market, the Kalwall Corporation. (RX 25D, *in camera*; Tr. 967.)

100. In addition to the acquisition of Corrugulux, Reichhold has acquired two other producers of frp panels — Alsynite (Reichhold's San Diego plant) in 1960 and Structoglas (Reichhold's Grand Junction plant) in 1965.⁵⁴ (Admissions 12, 14, 15, CX's 305C, M; CX's 13C, D.)

101. There is a trend in the frp panel market toward the acquisition of independent frp panel manufacturers by large firms: Alsynite, Structoglas, and Corrugulux were acquired by Reichhold; Resolite was acquired by H. H. Robertson; Filon was acquired by Standard Oil of Ohio; and Lasco was acquired by Phillips Industries. (CX's 13C, D; Tr. 306-07, 454, 626, 860.)

EFFECTS OF THE ACQUISITION

102. The effect of Reichhold's acquisition of Corrugulux may be substantially to lessen competition or tend to create a monopoly in the manufacture and sale of frp panels. (Findings 103-109.) [48]

103. In 1973, the pre-acquisition year, Reichhold ranked second in the frp panel market with 18.85 percent of sales and Corrugulux ranked seventh with 4.45 percent of sales. The acquisition of Corrugulux raised Reichhold's standing to first, and its market share to 23.3 percent. (See Finding 91.)

104. The acquisition directly increased the level of four firm concentration from 68.83 percent to 73.28 percent, and eight firm concentration from 89.26 percent to 92.85 percent. (See Finding 91.)

105. Corrugulux was recognized by other frp panel producers,

of this shortage, the industry's polyester resin needs could not be met. (Tr. 580, 2033.) Reichhold, however, usually has the capability of producing internally its requirements of polyester resin. (Admissions 4, 5, CX's 305B, M; see also Tr. 353.) Filon did not have an adequate internal supply of resin in 1973-74 (Tr. 428-29), but the company increased its polyester resin capability with the competition of a Covington, Kentucky plant in late 1973. (Tr. 405-06.) Resolite, too, receives at least part of its resin requirements from an integrated source of supply. (Tr. 478.) Uncertainty about resin supply was the reason Simpson sold Corrugulux to Reichhold. (Tr. 820.)

⁵⁴ Structoglas, which had sales of about \$3 million, was recognized as a significant competitor and may have ranked within the top five companies in the industry. (Tr. 351, 487, 563, 862, 970-71.) Alsynite, too, ranked near the top five. (Tr. 487, 562-63, 861-62, 969-70.) Structoglas was a division of a manufacturer of melamine dinnerware and toys ("Brookpark") which was in dire financial straits. Structoglas was acquired as payment for a debt owed Reichhold by Brookpark on a purchase of melamine. (CX 13C; Tr. 1890.)

including Reichhold, as a competitor during the Simpson years. (Tr. 575, 632, 665, 932, 972.) Prior to the acquisition Reichhold and Simpson solicited and sold to the same customers. (CX's 303, 310, 312; Tr. 972, 1070-72; see also Finding 44.) Simpson considered Reichhold one of his principal competitors. (Tr. 715-16.)

106. As a result of Reichhold's acquisition of Corrulux, actual competition between the second and seventh ranked sellers of frp panels has been eliminated. (See Findings 103, 105.)

107. As a result of the acquisition, competition between Corrulux and other frp panel producers has been eliminated. (See Finding 105.)

108. Respondent has acquired three significant firms in the frp panel market. (See Finding 100.) If this latest acquisition were to be approved, it may tend to trigger an increase in merger activity in the frp panel market since Reichhold's principal competitors may seek approval for acquiring similar market shares.

109. As a result of the acquisition, barriers to entry into the frp panel market have increased. A potential entrant, examining the post-acquisition [49] market shares of 43 percent for the two largest firms, may be deterred from entering because of uncertainty as to its ability to obtain a large enough market share in a relatively small total market. (See Finding 97.)

MARKET CONDITIONS

110. Given the structure of the frp panel industry and the increase in concentration which resulted when Corrulux was acquired, this horizontal acquisition is at least presumptively illegal. According to respondent, however, there are market conditions in the frp panel industry which assure that price competition will remain vigorous, whatever the level of concentration. In Part III, below, I have said that this argument misconceives the purpose of Section 7 which is intended to eliminate the growth or perpetuation of anticompetitive market structures that *may* substantially lessen competition irrespective of the existence of some other pro-competitive aspects of an industry. Moreover, as Findings 111-115 below show, the market conditions cited by respondent are not so inevitably pro-competitive as to excuse a permanent structural change which results when an actual competitor is eliminated.

111. Competition in the frp panel industry is in terms of price, quality, and service. (Tr. 977-78, 985-86, 1188, 1245.) Some important users do not believe that the products of all producers are interchangeable and a reputation for quality can be a crucial

for example, price is not always a primary consideration, and if a supplier has a proven record for quality, only at a 10 percent differential would a leading greenhouse manufacturer even begin to start looking at an alternative supplier. (Tr. 1730-31, see also CX's 65F, G.) While price is very important in the sale of staple products such as four ounce corrugated patio and greenhouse panels, it would take a not insubstantial price difference — a 1/2¢ to 2¢ differential on products which sell below 20¢ per square foot — [50] to induce a switch from a supplier of proven quality and service to another unproven manufacturer. (Tr. 977, 980, 1146-48, 1188, 1192-93, 1544, 1921.) Moreover, despite the claimed vigor of price competition, some producers seem to be able to charge prices which are considerably above the level of their competitors. To illustrate, for the four ounce panel, Idaho Chemical and Thorolyte charged 19¢ recently (Tr. 1224-25, 1243) as compared to about 15¢ charged by Filon, Barclay, and Glasteel. (Tr. 437, 578, 957.) As for the heavier eight ounce panels, Resolite sets its prices at 50¢ (Tr. 458) while Glasteel's price is 40¢. (Tr. 1040.)

112. From the early 1960's to 1973 there was a gradual decline in average frp panel prices, although the decline was by no means constant and there were periods when prices rose. (CX 314; RX's 38H, 39.) This overall decline is mainly attributable to a sharp reduction in the cost of resin and the production of lighter panels as well as the introduction of the continuous line process and its attendant savings in raw material and labor costs. (Tr. 392, 572-73, 897-98, 903-04, 1180-82, 1243-44.) Prices went up precipitously in 1974 reflecting the rise in the cost of oil-based resins; there was a decline in prices from the 1974 high's during the recession and post-recession period of 1975-1976; and at the time of the hearings herein selective prices were increasing again. (CX 314; RX 39; Tr. 392-94, 428-29, 579-80, 609-10, 1145, 1215-16, 1243-44.)

113. The conversion to the continuous line process in the 1950's and 1960's resulted in a substantial increase in frp panel manufacturing capacity. This in turn has meant that during most of the period from the 1960's to the present the industry has had over-capacity. (RX's 38H, 89, pp. 6, 13-14; Tr. 500, 504-05, 595, 1182, 1732.) Unused capacity, however, is to some extent a [51] function of the seasonal nature of the business since production is usually concentrated within the period April to September. (Tr. 594-95, 1036, 1068, 1183-84, 1259, 1551, 2018.) It should also be noted that there have been periods when the entire industry has operated at close to full capacity. Thus in the period late-1973 to mid-1974, almost all plants were operating either at or near full capacity or at the highest level

of production compatible with adequate maintenance, the supply of resin, and the availability of technical personnel. (CX 17A; Tr. 504-05, 580, 592-94, 974, 1728-29, 2036-37.) Moreover, there are indications that underutilization of capacity will diminish as the business recovery from the deep 1974-1975 recession continues. Reichhold's two continuous lines at Grand Junction are presently operating near full capacity and respondent is contemplating adding still additional capacity. (Tr. 2057-58.) One of Filon's plants was closed during the recession and has not yet been reopened, (see, however, Tr. 431 for an indication that soon it will reopen) but the other is now operating at full capacity. (Tr. 400-02, 433.) Glasteel, which was operating its plant in 1976 at 80 percent of maximum feasible capacity, is actively considering construction of another plant. (Tr. 1039-40.) See also Tr. 595, 2017-18.

114. While several manufacturers testified that unused capacity has led to price competition (Tr. 380, 496-97, 1970, 2038-39) there is no evidence of *actual* over-production which may have served as a severe price-depressant. To the contrary, producers seem to operate on the basis that excess capacity is simply taken out of production since the cost of maintaining unused equipment is low. (RX 89, pp. 13-14; Tr. 397-98, 1969; see also Tr. 1517-18.)⁵⁵ [52]

115. In the recession and post-recession years of 1974 to 1976 profits of some frp producers have been low, and Reichhold has operated at a loss. (RX's 42A, B, 44, 88, *in camera*; Tr. 1143-44, 1684, 2037.) Low or no profits resulted from a combination of price competition, the recessionary decline in demand for light corrugated frp panels used in the residential and greenhouse segments of the markets, and the increase in raw material costs. (CX's 65A, 286A, B, F; Tr. 413, 427-29, 437-38, 1028-29, 1065-66, 1164-65; but see Tr. 1037-38 for evidence of an upward trend in profits at Glasteel on the sale of residential and greenhouse panels.)⁵⁶ Margins on the sale of heavier industrial panels have been higher than the returns on the more competitive light, corrugated panels and producers of these heavier products have experienced a favorable level of profit. (CX's 122D, R; Tr. 871, 906-07, 1028-29, 1039, 1161-62, 1254-55, 1922.)

⁵⁵ The major unit cost involved in frp production is raw material. Thus in 1972, even before the sharp rise in resin prices, raw material costs were estimated at 8.25¢ per square foot as compared to 3/4¢ for direct labor. (RX 14B.)

⁵⁶ Low profits may also reflect a particular company's objectives. Idaho Chemical's profits ranged from \$1,000 to \$13,000 in the years 1974 to 1976. With respect to profits, the head of the company testified "we try not to make any." (Tr. 1211-12.) The company apparently operates on the philosophy of adequate compensation for executives.

THE CONDITION OF CORRULUX

116. At the time of the Reichhold acquisition in 1974, Corrulux was a small, struggling, but viable company. (Findings 117-132.)

117. Simpson had previously acquired Corrulux in December 1971 from the Johns-Manville Corporation which had operated the business as the Corrulux Division of Johns-Manville. (Admission 18, CX's 305C, M; Tr. 703.) [53]

118. In several of the years between 1963-1970 when Corrulux was owned by Johns-Manville, the business apparently had losses while in other years, there were small profits.⁵⁷ These losses or low profits, however, may have reflected the fact that as part of its intercorporate management policy, Johns-Manville allocated substantial general corporate expenses (for example, part of the cost of operating corporate jet aircraft) to the small Corrulux frp panel operation in Houston. (Tr. 708-09, 741, 743.)⁵⁸

119. Johns-Manville had decided in 1970 either to close the Corrulux plant or to sell it. (RX 38; Tr. 790-91.)

120. In late 1971, Johns-Manville sold Corrulux to Simpson for notes and the assumption of liabilities. No cash was paid. Payment by Simpson consisted of a note for the full purchase price of \$183,411. The plant and land were retained by Johns-Manville and leased to Simpson with an option to buy. (RX 47; Tr. 750.) [54]

121. After Simpson took over the Corrulux business, he attempted to eliminate inefficiencies which were traceable to the size, neglect, over-staffing, and extravagances of the Johns-Manville operation. (Tr. 709, 740-41, 748, 826.) Simpson described his business from the time he acquired Corrulux in December 1971 to the time he sold it in August 1974 as follows:

We were carefully working our way toward a very substantial, profitable business . . . (Tr. 826.)

. . . we demonstrated that [Corrulux] was a valuable, ongoing, viable business. (Tr. 827.)

122. The operation of Corrulux under Simpson was at least viable enough that a local bank in Houston and the Small Business Administration were persuaded to advance, renew, and guarantee

⁵⁷ There is a difference between the parties as to whether Johns-Manville accurately reported earnings to Simpson prior to the sale. CX 74, which was given to Simpson by Johns-Manville, indicates profits in two of the three years between 1969-71. Respondent introduced RX's 38G and 46, Johns-Manville documents which seem to show losses in the time period 1963-1970. Neither side called a witness from Johns-Manville, and the exact condition of Corrulux prior to the Simpson acquisition remains an unresolved non-issue in this case.

⁵⁸ In addition, in 1971 Johns-Manville incurred extraordinary expenses in connection with the installation of certain machinery. (Tr. 707-08.) Simpson also testified that Johns-Manville neglected the business, and used it mainly as a training ground for plant managers. (Tr. 826.)

substantial loans to keep the business going. (CX's 12K, 14S; Tr. 721-23, 751-52, 816-17.)

123. The financial records of Corrulux show a profit of \$58,374 for the fiscal year ending June 30, 1972, a loss of \$35,761 for fiscal 1973, and a profit of \$65,871 for fiscal 1974.⁵⁹ (CX's 11F, 12F, 14-o.) [55]

124. Although Corrulux produced frp panels in weights ranging from four to 12 ounces per square foot, most of its production was in the six to eight ounce industrial panel range. Almost all of Corrulux's production was of the heavier corrugated panels used in industrial applications such as skylights for pre-engineered metal buildings. Corrulux also produced some panels for the greenhouse application but little for use in the residential application. (CX's 53A-56D; Tr. 710-12, 784-85, 1723.)

125. There is no evidence in the record that the condition of Corrulux prior to the acquisition was such that bankruptcy was imminent.

126. There is no substantial evidence that the quality of Corrulux panels was below industry standards. The weight of the evidence is that Corrulux turned out commercially-acceptable panels which were regarded as [56] competitive in the industry. (CX's 18A, 311F, H; Tr. 356, 486, 565, 723-36, 972.)⁶⁰

127. There is no evidence that Reichhold was the only available purchaser of Corrulux or that Corrulux made a serious effort to seek an alternative purchaser. Reichhold initiated the negotiations which resulted in the purchase of Corrulux in just two months. (Tr. 726-28.) No offer to sell Corrulux to any alternative purchaser was made by Simpson. (Tr. 486, 677, 731.) Simpson never advertised in any publication an offer to sell Corrulux; nor did Simpson ever contact a broker about selling Corrulux. (Tr. 732-33.) At least one other producer with a smaller market share than Reichhold, would have been "very interested" in at least examining the possibility of purchasing Corrulux had it been aware that Corrulux was for sale. (Tr. 974-75.)

⁵⁹ According to respondent the fiscal 1974 profit was achieved entirely through an inventory write-up of \$149,169 to reflect increase cost of resin. Reichhold argues that its corporate accounting practice was to reduce the value of its inventory (and its tax liability) by switching from FIFO (first-in, first-out) to LIFO (last-in, last-out) in 1974. Apparently, Internal Revenue Service allowed this change to be made to reflect the sharp increase in the value of inventories which resulted from the precipitous 1974 rise in the cost of resins produced from crude oil. Internal Revenue, however, indicated that later changes back to a LIFO system from FIFO might create serious tax consequences. (Tr. 1842-74.) Simpson considered making the accounting change and decided against it. (Tr. 811-12.) In any event, an independent certified accountant verified Corrulux's 1974 profit figure as consistent with accepted accounting procedure (Tr. 821) and it is not the function of an antitrust proceeding to weigh the tax and other considerations which may have motivated Reichhold to adopt one form of inventory costing while Corrulux decided to follow another.

⁶⁰ The former West Coast regional manager of Reichhold testified that prior to the acquisition "Corrulux was known to make a very good product. Corrulux made a very fine panel." (Tr. 972.) If Corrulux had some

128. Reichhold acquired the Corrulux facilities in order to meet the sharp increase in demand for frp panels which appeared in late 1973 in the wake of the oil boycott and the fear by many frp panel buyers that there would be a permanent shortage of panels produced from oil-based resins. (Tr. 1876, 2039-40.)

129. This large demand for frp panels was almost immediately followed by the deep recession beginning in late 1974 which impacted severely on the frp panels business. (Tr. 580, 1729-30, 2035-36.) In the context of this drastic decline in frp sales, respondent reevaluated the entire Corrulux situation. This [57] reevaluation led to a conclusion by Reichhold management that the Corrulux operation produced an inferior product, that its equipment and building were in poor condition requiring a large capital outlay to correct, and that its product line was insufficiently automated to operate competitively. (RX 50; Tr. 2043-54, 2062.) This post-acquisition evaluation (at a time of deep recession) should be contrasted with a pre-acquisition report by a high Reichhold official that Corrulux's equipment "appeared well-kept and turned out commercially acceptable panels" (CX 18A; see also CX 6 and Tr. 805-06, 2043) and an independent pre-acquisition evaluation of Corrulux which concluded that the company was staffed with capable people (CX 311H) and that "The existing production line is a good piece of equipment, capable of producing competitive quality material at average line speeds in the order of magnitude of 25-30 ft. per minute." (CX 311F).⁶¹ [58]

130. The Corrulux plant was shut down by Reichhold in October 1975. (Answer ¶ 25.) At the present time Reichhold has not decided on whether to reopen the former Corrulux facility in Houston, Texas. (CX 313; Tr. 2057-58.)

131. As indicated in Finding 120, the building and land in Houston where Corrulux operated its business prior to the acquisition were not owned by Corrulux. Corrulux merely leased the building and land from Johns-Manville with an option to buy. One of

⁶¹ A high official of Reichhold even conceded that in one respect — catalyst injection — the Corrulux equipment was superior to Reichhold's and Reichhold modified its Grand Junction operation to conform to the Corrulux system. (Tr. 2072.) But another Reichhold officer testified that Corrulux's pre-acquisition expenditures for repairs, research, and quality control were "problems" and that its debt structure, compliance with safety and clear air regulations, collective bargaining agreement, dirty walls, uncut grass, age and inexperience of Mr. Simpson's son, Mr. Simpson's other business interests, and the unneat appearance of the storage areas troubled him. (Tr. 1827-42.) This evaluation may reflect in part a difference in standards between large, centrally controlled firms and small businesses. For example, when Simpson discovered that his resin tanks had jelled, he simply parked two milk trucks on the back lot and used these in place of the tanks. (Tr. 775, 821.) While a Reichhold official described this procedure as "remarkable" (Tr. 1838), he did not explain why it was not an acceptable innovation. Significantly, none of these "problems" described above were so overriding as to dissuade Reichhold from making the subject acquisition. (See Tr. 1964.) It should also be noted that a list of "problems" almost equally as long as the Corrulux list was drawn up by a Reichhold official for Reichhold's frp panel facility in Grand Junction, Tennessee. (RX 41E-1.)

the assets acquired by Reichhold from Corrulux was this option, and in 1975 Reichhold exercise the option by purchasing the building and land (8.3 acres) from Johns-Manville for about \$300,000. (Admissions 23, 24, 25, CX's 305D, N; CX's 14F, 15A; Tr. 745, 1882-83.)

132. The Houston, Texas area is an especially attractive location for a potential frp panel producer because of its importance as a distribution center and its proximity to a large number of markets in which frp panels are used, especially the pre-engineered corrugated metal building market. (CX 17B; Tr. 1163, 2086-87.) [59]

III

DISCUSSION

This case involves a horizontal acquisition of a struggling company doing business in a relatively small industry. But neither the less than robust condition of Corrulux nor the size of the frp panel industry can somehow combine to immunize this acquisition from the reach of Section 7. *United States v. Third Nat. Bank*, 390 U.S. 171 (1968); *FTC v. Food Town Stores, Inc.*, 539 F.2d 1339 (4th Cir. 1976). Instead, this case must turn on resolution of the usual legal and factual issues which arise when one competitor acquires another.

On the threshold question of market definition, it is important that the frp panel producers themselves act as if the production of frp panels is a market. By this I mean that the frp panel producers, (a readily identifiable cluster of suppliers) conceive of competition as vying against each other to serve a perceived preference for frp panels. The panel producers testified with almost complete unanimity that they were only concerned about the prices charged by other frp panel producers, that they only compete against other frp panel producers, that they do not compete against producers of other materials, and that they do not react competitively to the prices charged by producers of these other materials.⁶² Such supply-side perceptions are important because a significant reduction in the number of frp panel producers and the creation of a more concentrated market structure may lead in turn to a heightened potential for oligopolistic pricing among the survivors who commonly share this insulated view of competition. *United States v. Philadelphia Nat. Bank*, 374 U.S. 321 (1963). Thus, it is of small comfort to frp users to suggest that aluminum, glass, or polyethylene film may be substitutes for frp panels in some appli[60]cations when the record plainly shows (1) that frp panel producers set their prices

⁶² Evidence 29, 49, 52, 75, 77, 79.

without reference to what manufacturers of other materials may do, and (2) in actual practice, the prices charged for frp panels show little or no sensitivity to the prices charged for other materials.⁶³

This supply-side view of competition as well as the price insensitivity derives initially from the existence of a demand for frp panels for use in such applications as industrial skylights and sidelights, liners, patios, and greenhouse covers. In some of these applications (patios and greenhouses) clearly other materials can be used and are being used, but frp panels are preferred by a not insignificant number of buyers.⁶⁴ In other applications (corrugated building skylights and sidelights and refrigerated car liners), the preference is so marked that frp panels have for all practical purposes become the standard, non-substitutable material.⁶⁵ In all of their applications, the preferences for frp panels are based on either physical characteristics or cost considerations or both.

Although the preference for frp panels varies in intensity depending upon the use to which the product is being put, the frp panel producers, as I indicated above, essentially conceive of themselves as competing to sell to customers located somewhere within this spectrum of preferences. This view of competition, shared by all major frp producers, is fortified by other circumstances. [61]

First, the supply-side view of competition is influenced by the fact that most firms in the industry share a common production technique which is not used to produce any other product. In addition, the frp manufacturers all face roughly similar raw material costs, and even when there are certain exceptions to this pattern, as in the cases of vertically integrated Reichhold and Filon, the exceptions are recognized by non-integrated producers as competitive advantages within the frp panel industry itself.⁶⁶

Second, the frp panel producers are either companies which make only frp panels, or as divisions of multi-product corporations they function as separate entities whose main products are frp panels. This means that organizationally frp panel producers operate in such a way that their efforts are directed solely to the market for frp panels.⁶⁷

Third, because the main frp producers are confronted with common technical and marketing problems they find themselves joined together in a single trade group formed to solve these

⁶³ Findings 31 (note 20), 32, 33, 43, 53, 64, 74, 75, 77-80.

⁶⁴ Findings 28-31, 34, 66-74.

⁶⁵ Findings 35-54.

⁶⁶ Findings 17-21, 97.

⁶⁷ Finding 81.

problems. This further tends to identify and limit their perceptions of competition.⁶⁸

Following *Brown Shoe*,⁶⁹ similar considerations — industry or public recognition of a separate economic entity, peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized [62] vendors — have been used to delineate submarkets within broader product markets which include products that may be substitutable.

It is well-settled that not all the *Brown Shoe* criteria must be met before a relevant product submarket is found.⁷⁰ See, *General Foods Corporation v. FTC*, 386 F.2d 936 (3rd Cir. 1967), *cert. denied*, 391 U.S. 919 (1968); *Reynolds Metals Company v. FTC*, 309 F.2d 223 (D.C. Cir. 1962). The courts and the Commission have only required the existence of practical indicia of an area of effective competition. See, e.g., *United States v. Aluminum Co. of America (Rome Cable)*, 377 U.S. 271 (1964) (Aluminum conductor was held to be a submarket despite the existence of copper competition. The Supreme Court said that user preference for aluminum in certain conductor applications and the lack of price sensitivity between the two materials were enough to establish a separate market.); *Beatrice Foods Co. v. FTC*, 540 F.2d 303 (7th Cir. 1976) (Paint brushes and rollers were held to be a separate line of commerce distinct from aerosols and sprayers even though all were interchangeable for some applications. A separate market was defined on the basis of different manufacturing processes and raw material costs, distinct prices, and the fact that brush and roller manufacturers did not take into account the prices of aerosols and sprayers.); *Avnet, Inc. v. FTC*, 511 F.2d 70 (7th Cir. 1975), *cert. denied*, 423 U.S. 833 (1975) (New automotive electrical units held to be a separate market from reconditioned units since there was an absence of any substantial interaction in price between the two lines.); *Reynolds Metals Company v. FTC*, 309 F.2d 223 (D.C. Cir. 1962) (Florist foil constitutes a relevant market although it was largely indistinguishable from other types of decorative aluminum foil, but buyer preference had [63] established distinct prices.); *United States v. Mrs. Smith's Pie Company*, No. 74-419, slip op. (E.D. Pa. November 18, 1976) (Frozen pies constitute a separate submarket although they are interchangeable with many other desserts and there is a degree of price sensitivity among all desserts. Separate market found on basis of unique production facilities, unique distribution channels, preferences of some consumers, and percep-

⁶⁸ Findings 82-87.

⁶⁹ *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

⁷⁰ Here, for example, in the patio and greenhouse applications there are no specialized vendors of frp panels. See Finding 88.

tions of frozen pie producers as to their competition.); *United States v. American Technical Industries, Inc.*, 1974-1 Trade Cases ¶ 74,873 (M.D. Pa. 1974) (Artificial Christmas trees constitute a separate line of commerce even though interchangeable with natural Christmas trees in the sense that both products are sold to the same class of ultimate consumer for the same end use. Separate market finding based on the existence of a separate group of manufacturers for each kind of tree, differences in production facilities and prices, as well as general recognition of an artificial tree submarket.); *United States v. Pennzoil Company*, 252 F. Supp. 962 (W.D. Pa. 1965) (Penn Grade oil was found to be a relevant submarket although other oils served the same end use as lubricants. Separate submarket based on physical characteristics — Penn Grade has a paraffin base and is freer of impurities — as well as existence of separate trade association, distinct customers, and price differences.); *United States v. Aluminum Company of America (Cupples)*, 233 F. Supp. 718 (E.D. Mo. 1964), *aff'd per curiam*, 382 U.S. 12 (1965) (Aluminum curtain wall held to be distinct from precast concrete and stainless steel curtain walls on basis of separate trade association, distinct physical characteristics — i.e., colors and pliability — and distinct prices.); *Union Carbide Corp.*, 59 F.T.C. 614 (1961) (The existence of adequate substitute packaging material does not erase the fact that buyers who prefer polyethylene film constitute a separate market.).

These precedents tend to support the conclusion that even in the greenhouse and patio applications frp panels constitute a relevant submarket although other [64] materials may serve the same general purpose. The trade realities are that irrespective of the existence of possible substitutes, the frp producers compete to serve the perceived preference for frp panels among consumers who, for example, desire muted light rather than shade for their patios, or cut flower growers who select frp panels over glass or polyethylene film for reason of diffused light transmission, durability, and cost.⁷¹ Moreover, for at least two important applications of frp panels — the corrugated metal building and refrigerated van liner uses — there is no evidence whatever of any practical substitutes.⁷²

On the basis of all the factors outlined above, I have concluded that the manufacture of frp panels is a submarket for Section 7 analysis. I reach this conclusion from the record evidence relating to

⁷¹ While the record indicates that frp panels fulfill a unique range of applications (see Findings 23), complaint counsel failed to prove that this range, taken alone, has any special economic significance on either the supply or demand sides. In addition, with respect to use of frp panels in several specific applications — garage doors, glazing, water towers, and signs — complaint counsel failed to offer adequate proof that these uses constitute proof of a relevant frp submarket. (Findings 55-59.)

⁷² Findings 42, 49.

the preference of buyers based upon physical characteristics and costs, as well as the proof relating to how frp panel producers perceive the competitive significance of these preferences. These preferences on the demand side and perceptions on the supply side combine to form as "area of effective competition."⁷³ Within this area of effective competition, any significant reduction in the [65] number of frp producers may have anticompetitive consequences irrespective of what the aluminum, glass, polyethylene film, acrylic or other manufacturers may do.

That this frp panel market is small in over-all size is not a material consideration for Section 7 purposes. Buyers of frp panels, like customers of major industrial products, are fully entitled to be protected from the potential anticompetitive effects of concentration and the elimination of actual competition. *United States v. Phillipsburg Nat. Bank*, 399 U.S. 350 (1970); *Ekco Products Co.*, 65 F.T.C. 1163 (1964), *aff'd*, 347 F.2d 745 (7th Cir. 1965); *Reynolds Metals Co.*, 56 F.T.C. 743 (1960), *aff'd*, 309 F.2d 223 (D.C. Cir. 1962).

Even before the acquisition, the frp panel market was highly concentrated with four firms, including Reichhold, controlling 68 percent of production.⁷⁴ Prior to the acquisition, Reichhold ranked second with 18.85 percent of the market and Corrulux ranked seventh with 4.45 percent.⁷⁵ The 1974 Corrulux acquisition raised Reichhold to first in market share with 23.3 percent and increased the level of four firm concentration from 68.83 percent to 73.28 percent.⁷⁶ Eight firm concentration rose from 89.26 percent to 92.85 percent.⁷⁷

Considering the concentrated state of this industry, even a small increase in concentration may have been suspect. The Corrulux acquisition, however, was not *de minimis* by any standard. Horizontal acquisitions involving much smaller market shares have been proscribed [66] under Section 7, *Stanley Works v. FTC*, 469 F.2d 498 (2nd Cir. 1972), and, in general, the well-established precedents simply do not permit the second ranking company to eliminate the seventh ranking firm in concentrated industries. *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966); *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966); *Aluminum Company of America v. United States*, 377 U.S. 271 (1964); *United States v. Philadelphia Nat. Bank*, 374 U.S. 321 (1963).

⁷³ *United States v. du Pont & Co. (General Motors)*, 353 U.S. 586, 593 (1957), quoting from, *Standard Oil Co. of California v. United States*, 337 U.S. 293, 299, n. 5 (1949).

⁷⁴ Finding 104.

⁷⁵ Finding 103.

⁷⁶ Findings 103, 104.

Given the existing state of concentration and the increase in concentration resulting from the Corrulux acquisition, it is irrelevant that the industry may have retained some characteristics which could conceivably lead to price competition. Respondent thus seeks to attach undue importance to whatever over-capacity exists in the industry, and the argument that this condition may constitute a countervailing influence which diminishes the effects of concentration is not persuasive for several reasons. In the first place, the rate of plant utilization fluctuates to the point where it can hardly excuse a permanent structural change brought about by a horizontal acquisition. For example, from mid-1973 to early 1974 the over-capacity condition largely evaporated, and this appears to be happening again in 1977.⁷⁸ Also, the seasonal nature of frp production tends to distort the industry's annualized utilization rate.⁷⁹ Moreover, there is no proof in the record of actual excess production, and there is evidence that over-capacity is not so costly to maintain that it acts as a constant spur to price competition.⁸⁰

Assuming, however, that the historical pattern in the industry has been one of chronic over-capacity and that over-capacity has inspired some price competition, [67] it is somewhat incongruous for respondent to argue that this condition can justify an acquisition which gives the second ranking company the power to reduce that very over-capacity by summarily shutting down the acquired plant of the seventh ranking company. Respondent has not yet satisfactorily explained how, on the one hand, it can say that over-capacity tends to keep the industry competitive, while, on the other hand, it seeks to justify an acquisition which resulted in an almost immediate reduction in industry capacity when Reichhold decided to close down the Corrulux plant after the acquisition.⁸¹ Besides, even if over-capacity is endemic to the frp panel industry, by concentrating production in fewer hands respondent has created a market structure which is more conducive to an industry-wide agreement, tactic or otherwise, which may attempt to solve this "problem" by fixing prices or limiting production.⁸²

As to respondent's arguments about present-day low profits and the vigor of competition in the industry, even if the facts were so⁸³ these conditions would hardly justify a substantial horizontal acquisition. Section 7 was intended to arrest anticompetitive

⁷⁸ Finding 113.

⁷⁹ Finding 113.

⁸⁰ Finding 114.

⁸¹ Finding 130.

⁸² Bain, INDUSTRIAL ORGANIZATION 170 (1959).

⁸³ See Findings 110-115.

tendencies in their incipency: the Congressional assumptions being that competition is best served by having competitively structural markets and, conversely, that as markets gravitate toward domination by a few firms the potential for adverse consequences grows. Considering the basic purpose of Section 7 — to stop the trend toward potentially anticompetitive market structures — the acquisition of one competitor by [68] another and the creation or perpetuation of a tendency toward a concentrated market cannot be excused on the grounds that some indicia of competition still remain or that the industry is competitive enough. *United States v. Von's Grocery Co.*, 384 U.S. 270 (1965); *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

Respondent's reliance on *United States v. Crowell, Collier and Macmillan Inc.*, 361 F. Supp. 983 (S.D.N.Y. 1973) as suggesting a contrary rule, namely, that low profits may indicate no adverse effect from concentration is misplaced. For even in *Crowell, Collier*, in which a district court said that an acquiring company with a 41.9 percent market share had little ability to affect competition and that a market in which the top four firms accounted for 69.6 percent showed "no indication of a trend toward concentration" (*Id.* at 994), the court did *not* say that a significant increase in concentration and the resulting potentiality for anticompetitive effects are to be weighed against a past history of low profit margins or unused capacity. *Crowell, Collier* rests on *de minimis* analysis: the acquired company accounted for less than 1 percent of the relevant market, and the court intimates the likelihood of an entirely different result were the acquired firm's market share as much as the 1.3 percent involved in *Stanley Works*.

As for the existence or non-existence of entry barriers, this too is also largely beside the point in a market in which concentration is already great and a high-ranking actual competitor is eliminated. The Commission has plainly held that the elimination of an actual competitor is *not* to be balanced against the possibility that because entry barriers may be low, a new entrant may sometime appear. *Ekco Products Co.*, 65 F.T.C. 1163 (1964), *aff'd*, 347 F.2d 745 (7th [69] Cir. 1965).⁸⁴ As it happens, while the capital outlay required to enter

⁸⁴ In *Ekco*, the Commission said:

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. See Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 Harv. L. Rev. 226, 260 (1960). Ease of entry may also induce the firms active in the relevant market to keep their prices down to an entry-dissuading level; but that does not mean that such an entry-dissuading price level is likely to be as low as the level that would prevail if there were actual competition in the market. . . . In short, the absence of high entry barriers . . . does not mean that new firms can enter effectively competitive conditions. Cf. Bain, *Barriers To New*

the frp panel market is not large, a potential entrant may be deterred from trying to wrest away a more than insignificant market share in an industry where Reichhold and Filon control close to 45 percent of the market and both of these large companies enjoy the obvious advantage of having an assured and integrated supply of the raw material.⁸⁵ The track record of the industry has been that with one exception, Kalwall, there have been no entrants *de novo* in the past 10 years or more.⁸⁶ On the other hand, there is indication of a trend toward acquisitions of frp panel producers by large firms, including three such acquisitions by respondent Reichhold.⁸⁷ [70]

Respondent also argues that because Corrulux at the time of the acquisition was a high cost, low profit producer, and had not been able to penetrate the residential market, this somehow brings this acquisition within the *General Dynamics*⁸⁸ decision. Not only does this argument totally ignore the record facts — Corrulux was the seventh ranking firm, made a small profit before the acquisition, and, in general, was a struggling but viable company which was making progress⁸⁹ — but more important, it is inadequate as a matter of law. Complaint counsel had no burden to prove that the acquired company was an aggressive price cutter whose acquisition eliminated actual price competition. Again, it must be noted that Section 7 is an incipency statute aimed at preventing the creation or perpetuation of concentrated market structures which *may* lead potentially to anticompetitive effects. *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966). No proof of *actual* anticompetitive effects on price has been required in any case including *General Dynamics*.⁹⁰ Nor can *General Dynamics Corp.* be read as saying that evidence of high concentration ratios in a relevant market must be balanced against the "problems" facing the acquired company, or that these everyday problems of a business somehow excuse its elimination. In *General Dynamics*, The Supreme Court was looking to deep-rooted and permanent changes (in that case, the ability of the acquired company to compete for long-term requirement contracts in the face of depletion of its coal reserves) which impacted on the quantitative significance of the acquisition. There is nothing, however, in *General Dynamics* which says that fluctuations in prices, costs, or profits are to be weighed routinely in Section 7 cases as countervailing factors which may diminish the effects [71] of a permanent structural

⁸⁵ Finding 97.

⁸⁶ Finding 99.

⁸⁷ Findings 100-101.

⁸⁸ *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974).

⁸⁹ Findings 91, 116-126, 129.

⁹⁰ 415 U.S. at 505.

change brought about by the acquisition. *United States v. Amax, Inc.*, 402 F. Supp. 956, 970-71 (D. Conn. 1975).

General Dynamics also confirms the rule, earlier stated by the Commission in *Procter & Gamble Co.*,⁹¹ that postacquisition evidence is of "extremely limited" probative value for the obvious reason that divestiture under Section 7 could be avoided "merely by refraining from aggressive or anticompetitive behavior when such a suit was threatened or pending." 415 U.S. 486, 504-05. Consistent with this precedent, it is of no moment that Reichhold's market share may have declined in the period 1974 to 1976 from the 23 percent which resulted from the acquisition. (See Respondent's Reply Brief, p. 29.) This decline may be attributable to any number of temporary influences (including the special vulnerability of the Reichhold line to the severe 1974-75 recession), as well as internal business decisions which could be reversed once this litigation is over, say, a decision to reopen the Corrulux plant.

As for the condition of Corrulux, respondent seems to be saying not only that Corrulux was weak at the time of the acquisition in August 1974, but also that it "failed" permanently in October 1975 when Reichhold closed the former Corrulux plant. If this argument is intended (as respondent's answer to the complaint intimates) as a strained version of the strict requirements of the failing company defense as stated in *International Shoe Co. v. FTC*, 280 U.S. 291 (1930) and *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969),⁹² it misses the mark by a wide margin. [72]

The record indicates that notwithstanding its low profits, Corrulux was a viable company prior to the acquisition. According to Reichhold, however, *after* the acquisition, the corporate officials of Reichhold made an assessment of Corrulux and decided that Corrulux did not meet Reichhold's standards of quality and efficiency; therefore, they decided to close the plant, and thus Corrulux "failed" in a fashion. As respondent would have it, there is a defense to a Section 7 charge which allows a major corporation to acquire a smaller competitor, evaluate that competitor in terms of *Reichhold's* criteria and then discard the acquired company as a

⁹¹ 63 F.T.C. 1465 (1963), *aff'd*, 386 U.S. 568 (1967).

⁹² The usual statement of the "failing company" defense is that (1) the prospects of reorganization under Chapter X or Chapter XI of the Bankruptcy Act were dim or nonexistent and (2) there was no other, less anticompetitive sale feasible. *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969). The "failing company" defense is not easily made. There must, for example, be a showing of unsuccessful attempts to get financing, evidence of deep concern by creditors, a generally tenuous and debilitated financial situation, threats of withdrawal of lines of credit, check "kitting," and failure to pay bills. As for the second leg of the defense — no other feasible buyer available — the proponent of the defense must show a deliberate attempt to locate a prospective purchaser by contacting brokers and other means. *United States v. M.P.M. Inc.*, 397 F. Supp. 78 (D.C. Colo. 1975). Respondent herein met *none* of the requirements of the "failing company" defense. See Findings 116-

"failure," in the sense that it fails to come up to *Reichhold's* intra-corporate standards for profitability and efficiency.

There is no such quasi-failing company defense available under Section 7 of the Clayton Act. The market is supposed to determine whether firms fail or not, and the very purpose of the "failing company" doctrine is to preserve (and not discard as Reichhold did) an entity which would have collapsed but for the acquisition. *International Shoe Co. v. FTC*, 280 U.S. 291 (1930). As for the use by a large firm of its [73] internal standards to determine whether a small competitor fails or not, the legislative history of Section 7 indicates that the Congressional intent was just the opposite — Congress wanted to stop acquisitions which give large firms discretionary power over the continued development or, for that matter, the existence of their smaller competitors. *Crown Zellerbach Corp. v. FTC*, 296 F.2d 800 (9th Cir. 1961), *cert. denied*, 370 U.S. 937; see also concurring opinion of Mr. Justice Douglas in *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 538 (1973).

In sum, this acquisition is patently illegal and indefensible, and respondent must bend every effort to restore Corrulux as a viable, independent competitor. *Ford Motor Co. v. United States*, 405 U.S. 562 (1972); *Ekco Products Co.*, 65 F.T.C. 1163, 1212-17 (1964), *aff'd*, 347 F.2d 745 (7th Cir. 1965). It is especially important that divestiture should be required of *all* of the property which Reichhold acquired as a result of the acquisition including the plant and land which were obtained when Reichhold exercised the option originally owned by Corrulux.⁹³ The record indicates that Houston is a particularly attractive location for an frp panel plant, and the prospect of obtaining a desirable Houston location may constitute the best hope for attracting a new entrant.⁹⁴ Certainly Reichhold should not be allowed to delay or manipulate the sale of the former Corrulux assets (which included the option to buy the plant and land) in such a way that profit from the possible appreciation in the value of the real estate becomes a material consideration in the divestiture process to the point where prospective entrants are discouraged. Reichhold has no right to [74] profit from this unlawful acquisition, *United States v. Papercraft Corporation*, 393 F. Supp. 415 (W.D. Pa. 1975), *rev'd on other grounds*, 540 F.2d 131 (1976), and any insistence on a profit from the sale of plant and land, which may indeed have appreciated in value, may only result in establishing such a high value for Corrulux that no prospective buyer will emerge. The order which I will issue, therefore, will require that

⁹³ Finding 131.

⁹⁴ Finding 132.

respondent divest itself absolutely within one year of all the assets which it acquired as a result of the Corrulux acquisition including the plant and real estate. Furthermore, given the high level of concentration in the frp panel industry, the small number of independent firms which remain, and Reichhold's proven proclivity to acquire frp panel manufacturers,⁹⁵ a ten year ban on future acquisitions unless the Commission gives its approval is fully warranted. *Ekco Products Co.*, 65 F.T.C. 1163 (1964).

In addition, the order will require that any improvements in the Corrulux equipment which were made subsequent to the acquisition be divested. The record shows, for example, that Reichhold installed new machinery for cutting panels at the Corrulux plant and then removed this equipment when the plant was closed. (Tr. 2055-56.)⁹⁶ This new cutting equipment was an improvement dictated by the decibel requirements of OSHA. (Tr. 2051-52.) This equipment should be restored to the Corrulux plant for inclusion in the divested assets. An industry does not remain frozen during the period of unlawful retention of the acquired company and divestiture of an outmoded firm with no [75] chance of survival makes neither technological nor competitive sense. The Commission may properly order that the acquired firm be recreated in such form as would reflect the firm's probable growth, including improvements it may have added itself. *Union Carbide Corp.*, 59 F.T.C. 646 (1961); Elzinga, *The Antimerger Law: Pyrrhic Victories*, 12 Journal of L. & Econ. 43 (1969).

To further the goal of creating at least a reasonable opportunity for a restored Corrulux to succeed, the order also will contain provisions for (1) an assured source of supply of resin from Reichhold at the best market price and a requirement that Reichhold provide the acquirer with know-how; (2) a two-year prohibition against a solicitation by Reichhold of former Corrulux customers; and (3) a requirement that respondent make available to the new owners Reichhold's frp panel customer list. These provisions are all designed, in the language of *Ford Motor Co.*, ". . .to give the divested plant an opportunity to establish its competitive position" and the time it needs to "obtain a foothold in the industry."⁹⁷

⁹⁵ Finding 100.

⁹⁶ Still other improvements have not been removed. (Tr. 2051-52.) The order is intended to cover all improvements, whether removed or not.

⁹⁷ 405 F.T.C. at 575.

IV

CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over respondent Reichhold.
2. On or about August 19, 1974, Reichhold acquired all of the assets of Corrulux.
3. At all times relevant to this proceeding, Reichhold and Corrulux were engaged in commerce within the meaning of the Clayton Act and the Federal Trade Commission Act. [76]
4. For the purpose of assessing the legality of the acquisition under Section 7 of the Clayton Act, the appropriate line of commerce is the manufacture and distribution of frp panels.
5. The United States as a whole is an appropriate section of the country within which to test the effects of the acquisition.
6. Prior to and at the time of the acquisition, Reichhold and Corrulux were actual competitors in the United States frp panel market.
7. The acquisition eliminated substantial actual competition between Reichhold and Corrulux in the frp panel market.
8. The acquisition substantially increased concentration in the frp panel market.
9. The effect of the acquisition of Corrulux by Reichhold may be substantially to lessen competition in the frp panel market in the United States, in violation of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act.
10. Divestiture including all improvements and all after-acquired property is both necessary and appropriate to remedy the anticompetitive effects of this unlawful acquisition. In addition, Reichhold should be required to supply resin to the divested Corrulux for three years and to forbear from contacting former Corrulux customers for two years. Reichhold should also be prohibited from acquiring any frp panel producer, without prior approval of the Federal Trade Commission, for a period of 10 years.

Accordingly, the following order will be issued: [77]

ORDER

I

It is ordered, That respondent, Reichhold Chemicals, Inc. (hereinafter "Reichhold"), a corporation, and its officers, directors, agents, representatives, employees, subsidiaries, affiliates, successors and assigns, shall divest all assets, title, properties, interest, rights and

privileges, of whatever nature, tangible and intangible, including without limitation all real property, buildings, machinery, equipment, raw material reserves, inventory, customer lists, trade names, trademarks, and other property of whatever description acquired by Reichhold as a result of its acquisition of The Corrulux Corporation (hereinafter "Corrulux") together with all additions and improvements to Corrulux which have been made subsequent to the acquisition. Such divestiture shall be absolute, shall be accomplished no later than one (1) year from the service of this order, and shall be subject to the prior approval of the Federal Trade Commission. [78]

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 Reichhold, 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 Reichhold, or anyone who owns or controls, directly or indirectly more than one (1) percent of the outstanding shares of the capital stock of Reichhold or to anyone who is not approved in advance by the Federal Trade Commission.

III

It is further ordered, That pending the divestiture required by this order, respondent shall not knowingly cause or permit the deterioration of the assets and properties specified in Paragraph I in a manner that impairs the marketability of any such assets and properties. [79]

IV

It is further ordered, That at the time of the divestiture required by this order, respondent shall make available to the acquirer of the divested assets a list of all of respondent's customers for fiberglass reinforced panels who have purchased said panels from respondent within three years prior to the date this order becomes final.

V

It is further ordered, That respondent, for a period of two (2) years from the date this order becomes final, shall not solicit (for the

who purchased said panels from Corrulux during the year prior to the acquisition by respondent of Corrulux.

VI

It is further ordered, That for a period of one (1) year following the divestiture required by this order, respondent shall provide the acquirer of the divested assets, if the acquirer so requests, such know-how as [80] may reasonably be required to enable such acquirer to manufacture and sell fiberglass reinforced plastic panels. For a period of three (3) years following the divestiture required by this order, respondent shall provide the acquirer of the divested assets, if the acquirer so requests, such amounts of suitable polyester resin as the acquirer may reasonably need to produce fiberglass reinforced plastic panels. Respondent shall charge the acquirer no more than its own costs for providing know-how. Respondent shall charge the acquirer no more than the lowest price that it is then charging, on the open market, regardless of volume, for polyester resin.

VII

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, Reichhold shall cease and desist from acquiring, directly or indirectly, without the prior approval of the Federal Trade Commission, the whole or any part of the stock, share [81] capital, assets, any interest in or any interest of, any domestic concern, corporate or noncorporate, engaged in the manufacture, production, distribution or sale of frp panels nor shall Reichhold enter into any arrangement with any such concern by which Reichhold obtains the market share, in whole or in part, of such concern.

VIII

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 VII of this order, Reichhold shall submit a report in writing to the Federal Trade Commission listing all acquisitions, mergers and agreements to acquire or merge made by Reichhold; the date of each such acquisition, merger or agreement; the products involved and such additional information as may from time to time be required.

IX

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 [82] Paragraph I of this order, Reichhold 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 Reichhold to make public its desire to divest Corrulux, (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.

X

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the [83] emergence of a successor corporation, or any other proposed change in the corporation, which may affect compliance obligations arising out of this order.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of respondent from the initial decision; and

The Commission having considered the oral arguments of counsel, their briefs, and the whole record; and

The Commission having denied in full the appeal of respondent's counsel; and

The Commission having determined that the initial decision and order contained therein shall become the decision and order of the Commission, with the following changes:

Page 15, substitute for Finding 21:

21. Except for the limited number of instances noted earlier which amount to no more than about 7 percent of industry frp panel production (Findings 19, 20), all of the producers of frp panels use the continuous line process (CX's 306A, B; RX 83, pp. 9-10; Tr. 311, 313-14, 928, 1180). [2]

Page 46, footnote 53, line 21, change "competition" to "conversion."

Page 52, Finding 115, add at end of line:

The rates of return on equity in 1974 for frp panel producers Fiberglass Plastics, Inc. and Kemlite Corporation were 35 percent and 28 percent respectively (CX's 189B, C, 122R). Kemlite's average annual rate of return on equity for 1965-74 was 23 percent (CX 122R).

Page 64, substitute for footnote 71:

⁷¹ The record indicates that frp panels fulfill a unique range of applications (See Finding 23). While such versatility may constitute a "peculiar characteristic" under *Brown Shoe*, or otherwise contribute to the finding of a relevant submarket, see, e.g., *General Foods Corp.*, 69 F.T.C. 380, 415 (1966), *aff'd*, 386 F.2d 936 (2d Cir. 1967), *cert. denied*, 391 U.S. 919 (1968); *Brillo Mfg. Co., Inc.*, 64 F.T.C. 245, 253-54 (1963); *Union Carbide Corp.*, 59 F.T.C. 614, 654 (1961), we are not persuaded of its relevance here. The record does not show, for example, that this versatility is a basis for consumer preference or that it enables producers to withstand fluctuations in demand for particular end uses better than producers of substitute products which are less versatile.

In addition, complaint counsel failed to demonstrate the significance to an frp submarket of the use of frp panels in garage doors, glazing, water towers, and signs (Findings 55-59).

Page 72, footnote 92, line 7, change "kitting" to "kiting."

Page 75, delete lines 5-8 beginning with "*Union Carbide*" and substitute:

United States v. Aluminum Co. of America, 247 F. Supp. 308, 316 (E.D. Mo. 1964), *aff'd mem.*, 382 U.S. 12 (1965) (order required divestiture of plant built after unlawful acquisition); *Union Carbide Corp.*, *supra*, 59 F.T.C. at 657, 673 (divestiture of all post-acquisition improvements and equipment installed on premises of acquired company); see generally Elzinga, *The Antimerger Law: Pyrrhic Victories*, 12 Journal of L. & Econ. 43 (1969). [3]

Page 75, line 13, following "best market price" add "⁹⁷," with text of footnote as follows:

⁹⁷ See *United States v. Kennecott Copper Corp.*, 249 F. supp. 154, 162 (S.D.N.Y.), *aff'd mem.*, 381 U.S. 414 (1965); cf. *Ford Motor Co. v. United States*, *supra*, 405 U.S. at 572.

Page 75, line 22, change "⁹⁷" to "⁹⁸," and renumber footnote accordingly.

Therefore, it is ordered, That the initial decision (as modified

Final Order

91 F.T.C.

above) and the order contained therein, shall become the decision and order of the Commission on the date of issuance of this order.

Interlocutory Order

IN THE MATTER OF

POWER'S SERVICE, INC., ET AL.

Docket C-2810. Interlocutory Order, Feb. 22, 1978

Denial of motion to reopen proceeding and modify order to cease and desist on grounds that such motion was premature given the Commission has still before it a similar case involving related issues.

ORDER DENYING PETITION TO REOPEN PROCEEDING AND
MODIFY ORDER TO CEASE AND DESIST

By letter filed on October 18, 1977, petitioners, who prepare and send debt collection forms on behalf of creditors, have requested the Commission to modify the consent order issued in the above-captioned matter on March 11, 1976. The modification sought is the deletion of the disclosure required by Paragraph 4 of the order. Petitioners' letter with supporting documents is being treated as a petition to reopen the proceeding and modify the order under Rule 3.72(b)(2) of the Commission's Rules of Practice. The Bureau of Consumer Protection opposes modification of the order as premature.

Paragraph 4 requires petitioners to disclose in each communication sent to alleged delinquent debtors the following statement: "This communication is only a reminder notice. Power's Service, Inc. cannot accept payment nor will it take legal action regarding this claim." Paragraph 4 also sets certain standards for the size and color of this required disclosure.

Petitioners' request for modification is based on their assertion that the disclosure required by paragraph 4 places them at a competitive disadvantage with various competitors who are not under any cease and desist order requiring such disclosure. Furthermore, petitioners allege that ever since they began to place the required disclosure in their debt collection communications, they have suffered a decline in sales, which they state is due to the use of the disclosure. Petitioners also cite the following two decisions rendered by Administrative Law Judges in two Commission proceedings in which order provisions similar to the one they wish modified have been rejected. *In the Matter of Trans World Accounts, Inc., et al.*, Dkt. 9059 (1977), and *In the Matter of Capax, Inc., et al.*, Dkt. 9058 (1977).

Rule 3.72(b) of the Commission's Rules of Practice provides for modification of an order upon a showing by petitioners that changed

conditions of fact or law require such modification or that the public interest so requires.

The Commission has issued a final order in *Trans World Accounts* [90 F.T.C. 350]. Complaint counsel did not appeal from the Administrative Law Judge's determination to reject a provision requiring an affirmative disclosure in respondents' collection notices. The Commission, therefore, did not consider its propriety in that case.

The appeal in *Capax* is currently pending before the Commission. Since it involves issues related to those raised by the instant petition, the Commission has determined that the petition is premature.

Accordingly, the Commission having carefully considered the petition and the answer thereto and being of the opinion that the petition is untimely:

It is ordered, That petitioners' petition be, and it hereby is, denied without prejudice.

IN THE MATTER OF
DAMON CORPORATION

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

Docket C-2916. Complaint, Feb. 23, 1978 — Decision, Feb. 23, 1978

This consent order, among other things, bars a Needham Heights, Mass. operator of a chain of medical laboratories from acquiring, for a period of ten years, any independent medical laboratory located in, or doing 25% or more of its business in given markets, without prior Commission approval. Further, the order requires the firm to cease furnishing any means of compensation to physicians or others for referring specimens for testing to Damon laboratories, rather than to those of its competitors.

Appearances

For the Commission: *Andrew G. Stone and Randolph B. Sim.*
For the respondent: *Shearman & Sterling, New York City.*

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named above, as hereinafter more particularly designated and described, has violated and is now violating the provisions of Section 7 of the Clayton Act (15 U.S.C. 18) and Section 5 of the Federal Trade Commission Act (15 U.S.C. 45), and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint pursuant to the provisions of Section 11 of the Clayton Act (15 U.S.C. 21) and Section 5 of the Federal Trade Commission Act (15 U.S.C. 45), stating its charges as follows:

DEFINITIONS

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

a. *Medical Laboratory Tests:* Tests or examinations performed on specimens drawn or otherwise taken from the human body, or on other organic material, for the purpose of assisting in the diagnosis of disease or assessment of medical condition or state of body condition; not including autopsies, x-ray and other radiographic examinations, and electrocardiographic and other electrographic examinations.

b. *Medical Laboratory Test Services:* The services performed by

businesses performing or arranging for the performance of Medical Laboratory Tests in connection with the performance of such Tests, which services may include but are not limited to: provision of such equipment and supplies as are necessary to obtain specimens; pickup of specimens; performing or arranging for the performance of Medical Laboratory Tests; communication of results to interested parties; and giving assistance to physicians in their interpretation of the meaning of the results of said Medical Laboratory Tests.

c. *Independent Medical Laboratory*: Any establishment performing Medical Laboratory Tests and Services except for the following: any laboratory or laboratories maintained and operated by Federal, state, county or municipal government; any laboratory or laboratories maintained and operated solely for research or teaching purposes; any laboratory operated by a physician or medical group practice, provided such laboratory is operated solely in connection with the diagnosis and treatment of his own or the group's own patients; any laboratory maintained in a hospital and operated by a hospital; and any laboratory maintained and operated by any industrial organization, for the sole purpose of testing of specimens from its own employees.

d. *Metropolitan Philadelphia Area*: Philadelphia, Bucks, Montgomery, Chester and Delaware counties in the Commonwealth of Pennsylvania; and Gloucester, Camden and Burlington counties in the State of New Jersey.

e. *Metropolitan Chicago Area*: Cook, Lake, McHenry, Kane, DuPage and Will counties in the State of Illinois.

THE RESPONDENT

2. Respondent, Damon Corporation (hereinafter "Damon"), is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 115 Fourth Ave., Needham Heights, Massachusetts.

3. Damon is a manufacturer of electronic products. It also produces and sells educational materials, medical equipment, and medical supplies.

4. In 1969, Damon entered into a program of acquiring Independent Medical Laboratories with the purpose of assembling a nationwide chain of laboratories. Since that time Damon has made more than 50 acquisitions of Independent Medical Laboratories located and serving the public in the following geographic areas, among others: Anderson, South Carolina; Birmingham, Alabama; Bradenton, Florida; Metropolitan Chicago Area; Columbus, Missis-

issippi; Detroit, Michigan; Ft. Lauderdale, Florida; Huntsville, Alabama; Los Angeles, California; New York, New York; Orlando, Florida; Parkersburg, West Virginia; Metropolitan Philadelphia Area; Phoenix, Arizona; Santa Barbara, California; Tampa, Florida; Topeka, Kansas; Ventura, California; Washington, D. C. By 1974, Damon's network of Independent Medical Laboratories had become one of the largest in the world.

5. Damon's total annual sales have risen from \$15,709,000 in fiscal 1968 to \$141,311,000 in fiscal 1974. Damon's sales of Medical Laboratory Tests and Services have grown from zero in fiscal 1968 to more than \$50 million in fiscal 1974, or 40 percent of total annual sales.

6. At all times relevant herein, Damon has been a corporation engaged in commerce within the meaning of the Clayton and Federal Trade Commission Acts.

COUNT I

7. The allegations of Paragraphs One through Six, inclusive, of this complaint are incorporated herein by reference.

LINE OF COMMERCE

8. For purposes of this Count, the relevant service market is the provision of Medical Laboratory Tests and Services by Independent Medical Laboratories. Such Laboratories fill a unique and critical role in the nation's health care delivery system by providing a wide variety of Medical Laboratory Tests and ancillary Services at competitive rates to physicians and other medical practitioners, to clinics, and to governmental, industrial, and other institutions which administer health care services. Independent Medical Laboratories also provide Medical Laboratory Tests and Services to hospitals and nursing homes which care for patients confined to such institutions. No other health care institution provides such a variety of Medical Laboratory Services for the benefit of the public at large.

9. The relevant geographic markets for purposes of this Count are the Metropolitan Philadelphia and Metropolitan Chicago Areas.

THE ACQUISITIONS

10. Damon has acquired the following Independent Medical Laboratories in the Metropolitan Philadelphia Area:

a. On April 10, 1969, Damon acquired substantially all of the assets and properties of Lawndale Laboratory Company (hereinafter "Lawndale"). Prior to and until April 10, 1969, Lawndale was a

corporation organized, existing and doing business under the laws of the Commonwealth of Pennsylvania with its principal place of business located in Philadelphia, Pennsylvania. At the time of its acquisition, Lawndale was the second largest Independent Medical Laboratory in the Metropolitan Philadelphia Area.

b. On April 17, 1969, Damon acquired all of the outstanding capital stock of Rhodes Laboratories, Inc., d/b/a Medical Arts Laboratories (hereinafter "Rhodes"). Prior to and until April 17, 1969, Rhodes was a corporation organized, existing and doing business under the laws of the Commonwealth of Pennsylvania with its principal place of business located in Willow Grove, Pennsylvania. At the time of its acquisition, Rhodes was the largest Independent Medical Laboratory in the Metropolitan Philadelphia Area.

c. On July 12, 1969, Damon acquired all of the outstanding capital stock of Rosoff Laboratories, Inc. (hereinafter "Rosoff"). Prior to and until July 12, 1969, Rosoff was a corporation organized, existing and doing business under the laws of the Commonwealth of Pennsylvania with its principal place of business located in Philadelphia, Pennsylvania.

d. On August 5, 1969, Damon acquired substantially all of the assets and properties of Elmcon, Inc., d/b/a Northeast Medical Center Laboratory (hereinafter "Elmcon"). Prior to and until August 5, 1969, Elmcon was a corporation organized, existing and doing business under the laws of the Commonwealth of Pennsylvania with its principal place of business located in Philadelphia, Pennsylvania.

e. On September 30, 1969, Damon acquired substantially all of the assets and properties of Claude P. Brown Associates, Inc. (hereinafter "Brown"). Prior to and until September 30, 1969, Brown was a corporation organized, existing and doing business under the laws of the State of Delaware with its principal place of business located in Philadelphia, Pennsylvania.

f. On July 1, 1970, Damon acquired substantially all of the assets and properties of E. Philip Halpern & William Ball, co-partners d/b/a Park Laboratories (hereinafter "Park"). Prior to and until July 1, 1970, Park was a partnership organized, existing and doing business under the laws of the Commonwealth of Pennsylvania with its principal place of business located in Philadelphia, Pennsylvania.

g. On May 19, 1972, Damon acquired substantially all of the assets and properties of Pathology Consultants, Inc. (hereinafter "Pathcon"), and its subsidiary, KNS Laboratories, Inc. (hereinafter

"KNS"). Prior to and until May 19, 1972, Pathcon was a corporation organized, existing and doing business under the laws of the Commonwealth of Pennsylvania, with its principal place of business located in Narberth, Pennsylvania. KNS was a corporation organized, existing and doing business under the laws of the State of New Jersey, with its principal place of business located in Woodbury, New Jersey.

h. On April 2, 1973, Damon acquired assets of Biomedical Resources Corporation (hereinafter "BMR"), including substantially all of BMR's assets in the Metropolitan Philadelphia Area. Prior to and until April 2, 1973, BMR was a corporation organized, existing and doing business under the laws of the State of New York, with its principal place of business located in New York, New York.

11. As a consequence of these acquisitions, by 1973, Damon had acquired approximately a 33 percent share of the Independent Medical Laboratory service market in the Metropolitan Philadelphia Area, and had become by far the largest Independent Medical Laboratory in that Area. The four largest Independent Medical Laboratories in the Area provided approximately 55 percent of such services in the Area in 1973.

12. Damon has acquired the following Independent Medical Laboratories in the Metropolitan Chicago Area:

a. On December 7, 1970, Damon acquired substantially all of the assets and properties of Mason-Barron Pathology Laboratories, S. C. (hereinafter "Mason-Barron"). Prior to and until December 7, 1970, Mason-Barron was a corporation organized, existing and doing business under the laws of the State of Illinois, with its principal place of business located in Chicago, Illinois. At the time of its acquisition, Mason-Barron was the largest Independent Medical Laboratory in the Metropolitan Chicago Area.

b. On December 10, 1970, Damon acquired all of the outstanding capital stock of Pasco Medical Laboratories, Inc. (hereinafter "Pasco"). Prior to and until December 10, 1970, Pasco was a corporation organized, existing and doing business under the laws of the State of Delaware, with its principal place of business located in Hinsdale, Illinois. At the time of its acquisition, Pasco was the second largest Independent Medical Laboratory in the Metropolitan Chicago Area.

c. On December 10, 1973, Damon acquired substantially all of the assets and properties of Aurora Clinical Laboratory, Inc. (hereinafter "Aurora"). Prior to and until December 10, 1973, Aurora was a corporation organized, existing and doing business under the laws of

the State of Illinois, with its principal place of business located in Aurora, Illinois.

d. On August 1, 1974, Damon acquired substantially all of the assets of Omega Medical Laboratories, Inc. (hereinafter "Omega"). Prior to and until August 1, 1974, Omega was a corporation organized, existing and doing business under the laws of the State of Illinois with its principal place of business located in Downers Grove, Illinois.

13. As a consequence of these acquisitions, by 1973, Damon had acquired approximately a 25 percent share of the Independent Medical Laboratory service market in the Metropolitan Chicago Area, and had become by far the largest Independent Medical Laboratory in that Area. The four largest Independent Medical Laboratories in the Area provided approximately 35 percent of such services in the Area in 1973.

COMMERCE

14. At all times relevant, Lawndale, Rhodes, Rosoff, Elmcon, Brown, Pathcon, BMR, Mason-Barron, Pasco, Aurora and Omega were corporations engaged in commerce, as that term is used in Section 7 of the Clayton Act, as amended, (15 U.S.C. 18), and in Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45). Park was a partnership, also engaged in commerce as that term is used in Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45). Each of these acquisitions affected commerce, as that term is used in Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45).

VIOLATIONS CHARGED

15. The effect of Damon's acquisitions of the stock and assets of Lawndale, Rhodes, Rosoff, Elmcon, Brown, Pathcon, and BMR in the Metropolitan Philadelphia Area, and of the stock and assets of Mason-Barron, Pasco, Aurora, and Omega in the Metropolitan Chicago Area, separately and cumulatively, may be substantially to lessen competition or to tend to create a monopoly in the Independent Medical Laboratory service market in the Metropolitan Philadelphia Area and in the Metropolitan Chicago Area in violation of Section 7 of the Clayton Act, as amended, (15 U.S.C. 18); and, the acquisitions by Damon of the stock and assets of the aforesaid corporations and Park, a partnership, separately and cumulatively, together with the subsequent use of such assets were and are to the prejudice and injury of the public and constitute unfair methods of

competition and unfair acts in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45); in the following ways, among others:

a. Actual competition and potential competition among and between the aforesaid corporations and partnership has been eliminated in the relevant markets.

b. Actual competition and potential competition between Damon and the aforesaid corporations and partnership has been eliminated in the relevant markets.

c. The trend toward concentration in the relevant markets has been accelerated.

d. The level of concentration in the relevant markets has been increased.

e. Damon has established itself as a dominant factor in the relevant markets by means of said acquisitions.

COUNT II

16. The allegations of Paragraphs One through Six, inclusive, of this complaint, are incorporated herein by reference.

RESPONDENT'S PRACTICES

17. In the course and conduct of its operation of Independent Medical Laboratories, Damon, through its subsidiaries and agents, has engaged in the practice, in various sections of the country, of making payments and/or granting other things of value, and/or causing intermediaries to make such payments and grants, to physicians and others ordering or arranging for Medical Laboratory Tests to be performed on behalf of patients by or through Damon or its subsidiaries. Said payments and grants, which were made during a period extending at least from 1971 until mid-1975, were intended by Damon and its subsidiaries to induce said persons to refer specimens, or to arrange for specimens to be referred, to Damon rather than its competitors, and to compensate said persons for so doing. More specifically, Damon has engaged in the following practices, among other things:

a. Damon has engaged in the practice of making payments, sometimes termed "handling fees" or "phlebotomy fees" and calculated either on the basis of a specific amount per test, or per specimen, or per patient, or as a specific amount per month, to physicians, and to nurses and other agents of physicians, to induce said persons and/or said physicians to arrange for submission of

Medical Laboratory Tests to Damon rather than to its competitors and to compensate said persons for so doing.

b. Damon has also engaged in the practice of causing intermediaries to make payments of the type described in sub-paragraph (a) above, to physicians, to induce said physicians to arrange for submission of Medical Laboratory Tests to Damon rather than to its competitors, and to compensate said persons for so doing.

c. Damon has also engaged in the practice of making payments equivalent to a percentage of amounts billed by or due to Damon for Medical Laboratory Tests submitted by physicians and medical clinics, to said physicians and to owners and managers of said medical clinics, and to their agents, to induce said persons to arrange for the submission of Medical Laboratory Tests to Damon rather than to its competitors, and to compensate said persons for so doing. In certain instances these payments have been termed "specimen collection fees," "handling fees," "rental fees," "maintenance fees" or "consultant fees."

d. Damon has also engaged in the practice of writing off charges and/or foregoing collection of all or part of amounts due from physicians for Medical Laboratory Tests to induce said physicians to refer Medical Laboratory Tests chargeable to patients and other parties to Damon rather than to its competitors, and to compensate said physicians for so doing.

e. Damon has also engaged in the practice of granting volume discounts to physicians with the intent that the benefit derived from said discounts would inure to said physicians, to induce said physicians to refer Medical Laboratory Tests to Damon rather than to its competitors, and to compensate said physicians for so doing.

VIOLATIONS CHARGED

18. The aforesaid acts and practices of Damon and its subsidiaries and agents have had the tendency unduly to restrict and restrain competition and have injured, hindered, suppressed, lessened or eliminated actual or potential competition, are to the prejudice and injury of the public, and constitute unfair methods of competition in or affecting commerce and unfair or deceptive acts and practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45), for the following reasons, among others:

a. Physicians have been induced to order Medical Laboratory Tests on the basis of payments or things of value offered or received rather than on the basis of patients' welfare.

Laboratory Tests on the basis of payments or things of value offered or received rather than on the basis of other factors, such as price, quality and/or service.

c. Laboratories making said payments have obtained unfair competitive advantage over their competitors.

d. The public has been deprived of accurate information concerning said acts and practices, and therefore has been rendered unable to evaluate the relative prices of Medical Laboratory Tests and other medical services on an informed basis.

e. As a consequence, certain Medical Laboratory Test prices have tended to be stabilized at higher levels, and overall costs to consumers have been increased.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of Section 7 of the Clayton Act and of Section 5 of the Federal Trade Commission Act; and

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

The Commission having considered the agreement and having provisionally accepted same and placed it on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of the Commission's Rules, now in further conformity with the procedure provided by Section 2.34 of its Rules hereby issues its decision in disposition of the proceeding against the above-named respondent, makes the following jurisdictional findings, and enters the following findings and order:

1. Respondent Damon Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its executive offices located at 115 Fourth Ave., Needham Heights, Massachusetts.

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

ORDER

I

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

1. *Respondent*: Damon Corporation, and those persons, partnerships, corporations, and other legal entities acting on its behalf, including but not limited to, its officers, directors, agents, representatives, employees, subsidiaries, affiliates, successors and assigns.

2. *Medical Laboratory Tests*: Tests or examinations performed on specimens drawn or otherwise taken from the human body, or on other organic material, for the purpose of assisting in the diagnosis of disease or assessment of medical condition or state of body condition; not including autopsies, x-ray and other radiographic examinations, and electrocardiographic and other electrographic examinations.

3. *Medical Laboratory Test Services*: The services performed by businesses performing or arranging for the performance of Medical Laboratory Tests in connection with the performance of such Tests, which services may include but are not limited to: provision of such equipment and supplies as are necessary to obtain specimens; pick-up of specimens; performing or arranging for the performance of Medical Laboratory Tests; communication of results of Medical Laboratory Tests to interested parties; and giving assistance to physicians in their interpretation of the meaning of the results of such Medical Laboratory Tests.

4. *Independent Laboratory*: any entity performing or arranging for the performance of Medical Laboratory Tests, other than a entity: (1) owned and operated by a hospital or hospitals; or (2) more than 90 percent of the Net Sales of Medical Laboratory Tests of which during its four most recent complete fiscal quarters were attributable to sales of Medical Laboratory Tests performed at said laboratory on specimens obtained from in-patients and out-patients of either: (i) a single hospital, or (ii) a group of hospitals that has jointly contracted to purchase Medical Laboratory Test Services from a single source or to have such Test Services performed by a single source.

II

A. *It is ordered*, That for a period of ten (10) years from the date of service of this order, respondent shall not acquire, directly or indirectly, without the prior approval of the Federal Trade Commission, the whole or any part of the stock, share capital, or any other indicia of ownership of, or any ownership interest in, any other Independent Laboratory: (1) which performs any Medical Laboratory Tests at any location within a Market; or (2) which during its four most recent fiscal quarters has derived more than twenty-five percent (25%) of its Net Sales of Medical Laboratory Tests from Tests performed upon specimens originating from within any one Market.

B. For purposes of this Part II, any arrangement between respondent and an Independent Laboratory pursuant to which such Independent Laboratory:

1. Transfers or otherwise makes available to respondent, for a consideration, any list of customers for Medical Laboratory Tests in a Market; or
2. Discontinues the solicitation of customers for, or the marketing of, Medical Laboratory Tests within a Market, pursuant to an understanding with respondent, and thereafter refers or sends customers for Medical Laboratory Tests in such Market to respondent;

shall constitute an acquisition by respondent of an ownership interest in such Independent Laboratory subject to the provisions of Paragraph A of this Part II.

C. For purposes of this Part II, the term "Market" shall mean each of the following geographic areas:

1. the Philadelphia, Pennsylvania area, being Bucks, Chester, Delaware, Montgomery and Philadelphia counties within the Commonwealth of Pennsylvania; and Burlington, Camden and Gloucester counties within the State of New Jersey;
2. the Chicago, Illinois area, being Cook, DuPage, Kane, Lake, McHenry and Will counties within the State of Illinois;
3. the Birmingham, Alabama area, being Jefferson, St. Clair, Shelby and Walker counties within the State of Alabama;
4. the Tampa, Florida area, being Hillsborough, Pasco and Pinellas counties within the State of Florida;
5. the Bradenton, Florida area, being Manatee County within the State of Florida;
6. the Phoenix, Arizona area, being Maricopa County within the State of Arizona;

7. the Orlando, Florida area, being Orange, Osceola and Seminole counties within the State of Florida;
8. the Huntsville, Alabama area, being Limestone, Madison and Marshall counties within the State of Alabama;
9. the Topeka, Kansas area, being Jefferson, Osage and Shawnee counties within the State of Kansas;
10. the Los Angeles, California area, being Los Angeles county within the State of California;
11. the Ventura, California area, being Ventura county within the State of California;
12. the Santa Barbara, California area, being Santa Barbara county within the State of California;

provided, that if respondent, in any of its fiscal years during the continuing existence of this Part II has less than five hundred thousand dollars (\$500,000) in Net Sales of Medical Laboratory Tests performed on specimens originating from within any geographic area listed above, said area or areas shall not constitute a Market for each of respondent's subsequent fiscal quarters during which respondent's Net Sales of Medical Laboratory Tests performed on specimens originating from within said area or areas, including such sales by any Independent Laboratory acquired by respondent, are below one hundred and twenty-five thousand dollars (\$125,000).

D. No acquisition made by respondent shall be deemed immune or exempt from the provisions of the antitrust laws by reason of anything contained in this order.

III

A. *It is further ordered*, That respondent shall not, directly or indirectly, make any payment of money, or grant or transfer any other thing of value, to or for the benefit of any person: (a) to induce such person either: (i) to contract with respondent for respondent to perform any Medical Laboratory Test Service; or (ii) to order or arrange for any Medical Laboratory Test Service to be performed by or through respondent; or (b) to compensate such person for so contracting, ordering, or arranging; whether or not said payment, grant or transfer is described or regarded as a rebate, credit, gift, commission, rental payment, participation in or share of profits, payment for any service in connection with the provision of any Medical Laboratory Test Service, or otherwise. This provision shall not, however, prohibit respondent:

(1) from providing Medical Laboratory Test Services to any person without charge, unless respondent knows or should know that --

person will receive anything of value for such Services from any other person or a hospital; or

(2) from granting such bona fide extensions of credit to persons charged for Medical Laboratory Test Services as are usual in the normal course of providing such Medical Laboratory Test Services; or

(3) from granting to persons charged for Medical Laboratory Test Services any discount or reduced price for any Medical Laboratory Test Services (free Medical Laboratory Test Services, however, being controlled solely by subparagraph (1) above and not by this subparagraph); *provided*, that subsequent to the date six (6) months after the date of service of this order upon respondent, (i) the resultant net price for each Medical Laboratory Test Service on which any discount or reduced price is granted is provided in writing to the person charged for the Medical Laboratory Test Services before or at the time said person is billed for such Services, and (ii) the method of calculation and the conditions of eligibility for such discount or reduced price are clearly stated in writing on all notices of charges therefor.

B. For the purposes of this Part III, the term "person" shall mean any individual, corporation, partnership, trust, unincorporated association or organization, or government or agency or political subdivision thereof, other than a hospital or respondent.

C. No act or practice carried out by respondent shall be deemed immune or exempt from the laws of any state or of the United States by reason of anything contained in this order.

IV

It is further ordered, That for a period of ten (10) years from the date of service of this order, respondent shall, within ten (10) days after signing an agreement in principle to acquire any Independent Laboratory, or after the acquisition of any Independent Laboratory, whichever event is first, submit the following information in writing to the Federal Trade Commission:

1. Name of such Independent Laboratory.
2. Location of each facility owned, operated, or managed by such Independent Laboratory at which Medical Laboratory Tests were performed within the twelve (12) month period preceding the date of notification and, with respect to each such facility:
 - a. Net Sales of Medical Laboratory Tests for each of the last twelve (12) complete fiscal quarters prior to the date of notification;
 - b. The principal geographic area(s) it served within the twelve (12) month period prior to the date of notification; and

c. Medical Laboratory Tests it was licensed to perform by any state or federal agency within the twelve (12) month period prior to the date of notification.

3. Price paid or to be paid for such Independent Laboratory.

4. Location of the facility owned, operated, or managed by respondent at which Medical Laboratory Tests were performed within the twelve (12) month period preceding the date of notification which was nearest to each facility of such Independent Laboratory identified pursuant to (2) above.

5. Net Sales of Medical Laboratory Tests attributable to each facility of respondent identified pursuant to (4) above for each of the last twelve (12) complete fiscal quarters of respondent prior to the date of notification.

6. Date of closing or contemplated date of closing.

V

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its operating divisions, its present corporate officers, its medical laboratory directors, and its sales personnel; and shall secure from each such officer, director, and employee, a signed statement acknowledging receipt of said order.

VI

It is further ordered, That respondent shall, within sixty (60) days after the date of service of this order, and thereafter on the first anniversary date of the date of service of this order and on each anniversary date thereafter to and including the tenth anniversary date, submit in writing to the Commission a report setting forth in detail the manner and form in which respondent intends to comply, is complying, and has complied with Parts II and III of this order. All compliance reports shall include such other information and documentation as may hereafter be required to show compliance with this order.

VII

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