

alloy has been affixed by an electrolytic process may be marked or described as gold electroplate or gold electroplated.

(6) Misrepresenting the carat fineness of the gold coating or surfacing of respondents' merchandise.

It is further ordered, That the amended initial decision, as herein modified, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That the respondents, Lifetime Cutlery Corp., Benjamin R. Berlin and Muriel Berlin, shall, within sixty (60) days after service upon them of this order file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist as modified.

Commissioner Mills not participating.

IN THE MATTER OF
PILLSBURY MILLS, INC.

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

Docket 6000. Complaint, June 16, 1952¹—Decision, Dec. 16, 1960

Order requiring the nation's second largest flour milling company to divest itself absolutely of two competitors it acquired: Ballard & Ballard, Louisville, Ky., purchased June 12, 1951, acquisition of which removed an important producer of family flour, flour-base home mix, and wheat flour milling products from the southeastern market and gave Pillsbury first place in that market in the sale of family flour; and Duff's Baking Mix Division of American Home Foods, Inc., Hamilton, O., selling its home mixes throughout the country, purchased in March of 1952.

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¹ Amended and Supplemental Complaint, June 30, 1954.

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Mr. L. E. Creel, Jr., Mr. J. Wallace Adair and Mr. Eugene Kaplan for the Commission.

Mr. Joseph J. Smith, Jr., and Mr. E. Barrett Prettyman, Jr., of Hogan & Hartson, of Washington, D.C., and Mr. Terrance Hanold, of Minneapolis, Minn., for respondent.

INITIAL DECISION BY EVERETT F. HAYCRAFT, HEARING EXAMINER

PRELIMINARY STATEMENT

The Commission on June 16, 1952, issued a complaint against Pillsbury Mills, Inc. (now The Pillsbury Company), sometimes hereinafter referred to as Pillsbury, charging it with violation of Section 7 of the Clayton Act as amended and approved December 29, 1950, through the acquisition on June 12, 1951, of the assets of Ballard and Ballard Company, sometimes hereinafter referred to as Ballard, operating a flour mill and feed mill located in Louisville, Kentucky, and on or about March 10, 1952, the assets of the Duff's Baking Mix Division of the American Home Foods, Inc., sometimes hereinafter referred to as American Home, a subsidiary of American Home Products Corporation, engaged in the manufacture of packaged food products, including flour-base home mixes, sometimes hereinafter referred to as mixes. It was alleged in the Commission's complaint and denied by respondent that both Pillsbury and American Home were, prior to March 10, 1952, leaders throughout the United States in the sale of mixes, and that both Pillsbury and Ballard prior to June 12, 1951, were leaders in the southeastern part of the United States in the sale of family flour, bakery flour and mixes. Finally it was alleged in the complaint and denied by respondent that the effect of the aforesaid acquisitions by Pillsbury of the assets of Ballard and Duff's Baking Mix Division of American Home

* * * may be substantially to lessen competition, or to tend to create a monopoly in the lines of commerce, as "commerce" is defined in the Clayton Act, in which the acquired companies were engaged throughout various sections of the United States.

The foregoing acts and practices were alleged to be in violation of Section 7 of the Clayton Act as amended in 1950.

The taking of testimony in support of the allegations of the complaint was completed in January 1953. In April 1953 after oral argument, the examiner, without expressing an opinion as to whether or not Section 7 of the Clayton Act had been violated, issued an initial decision in which he granted a motion to dismiss on the grounds that the allegations of the complaint had not been sup-

ported by "reliable, probative and substantial" evidence in the record as required by the Administrative Procedure Act, and dismissed the complaint without prejudice. Counsel in support of the complaint on June 1, 1953, filed their appeal from this decision with the Commission.

During the course of the trial respondent had been served with a subpoena duces tecum to produce certain production and sales figures of the relevant products for the period of time before and after the respective dates of acquisition of the assets, which respondent had then declined to produce. The record did contain, however, actual production and sales figures for the respondent for the fiscal year 1949-50, which counsel for the respondent had furnished the Commission during the course of a preliminary investigation. The record at that time did not contain accurate figures with respect to the volume of sales of comparable products manufactured and sold by respondent after it acquired the assets of Ballard and Duff's Division of American Home. Furthermore it did not contain any authentic or reliable production or sales figures with respect to family flour and bakery flour or of mixes or commercial feeds of competitors of the respondent in the southeastern territory of the United States, and no attempt was made by Commission counsel to get such authentic sales figures from such competitors, counsel in support of the complaint relying upon estimates by respondent's officials and others in the trade and surveys made by newspapers and other independent agencies in specific market areas in the Southeast.

The Commission in an opinion rendered in December 1953, after reviewing the record in some detail, remanded the case to the hearing examiner for further consideration, being of the opinion that the principal evidence of the case which the hearing examiner refused to accept as reliable should be taken as prima facie evidence of the facts disclosed therein. This evidence consisted of several letters, hereinafter referred to as the Mintener letters, addressed to the Commission in which respondent through its Vice President and General Counsel, Bradshaw Mintener, set forth (1) its sales of the relevant products in the Southeast and in the nation, (2) the acquired companies' sales of the relevant products in the Southeast and in the nation, and (3) respondent's best estimates of its major competitors' shares of the relevant markets. It was pointed out by the Commission in its opinion written by Chairman Howrey that respondent's counsel did not object to the introduction of these letters as not being competent evidence but contended that there were no accurate, absolute figures available in the flour industry showing competitors' sales or total sales. The Commission then stated:

* * * According to the testimony of respondent's market analyst, the best data available showing the market position and trend of sales of respondent and certain of its competitors in the flour industry are surveys prepared by the Market Research Corporation of America. This organization makes a random sample audit of retail stores which the witness described as the only random sample available which he considered projectionable. Respondent must have considered this information reliable enough [sic] for its own purposes inasmuch as it paid about \$50,000 per year for same.

* * * * *
The estimates were prepared by respondent and submitted to the Commission during the course of the preliminary investigation, and respondent asked the Commission to rely upon them in reviewing the case prior to the culmination of the acquisitions. Presumably respondent at that time, as an advocate, "put its best foot forward."

The Commission then in its opinion held that:

Under all the circumstances, it is believed that the "common sense" and "reasonable mind" tests have been met and the estimates are *prima facie* evidence of respondent's market position, the market position of the acquired companies and the market position of its major competitors.

The Commission then pointed out, however, that respondent when it puts in its case will have "full opportunity to rebut, explain or contradict".

The Commission in its order granting the appeal of counsel in support of the complaint in part and setting aside the hearing examiner's initial decision, also passed upon certain rulings of the hearing examiner wherein he had rejected certain surveys of newspapers and magazines. In one such ruling the examiner had excluded a Scripps-Howard newspaper survey which showed the brands of family flour and mixes on store shelves in a cross section of stores in twelve cities in 1950 and thirteen cities in 1951 as not having any bearing on sales. He also excluded a Good Housekeeping magazine survey consisting of the answers of 1,717 of its subscribers as to the brands of mixes they used, and also the survey of the New York World-Telegram showing the sales of mixes in 200 retail stores in the New York City area conducted in 1949 and 1950 as being too remote in time to be of any value in determining the effect of the acquisitions. The Commission was of the opinion that this evidence was erroneously excluded.

* * * Market information for 1949 and 1950 is of value in determining the issues in this proceeding. Such surveys, if properly conducted, while certainly not conclusive are indicators of market trends and the existence of competitive products in the market surveyed. Such indicators, along with other information, may be of value in assisting the Commission in determining the actual market conditions.

On June 30, 1954, the Commission issued its amended and supplemental complaint in this proceeding in which it included an

allegation that respondent on or about December 21, 1953, had sold and transferred certain of its assets which had been acquired on March 10, 1952, from American Home to Duff Baking Mix Corporation, a New Jersey corporation organized on December 11, 1953, with its principal office and place of business in Newark, New Jersey.

* * * Said assets sold, assigned and transferred by Pillsbury to Duff Corporation included the business of selling and distributing prepared baking mixes, such as waffle, hot muffin, corn muffin, hot roll, layer cake, devil food, spice cake and gingerbread mixes, under the trade name "Duff's," the going-concern value, goodwill, trade-marks, copyrights and patents incident to said business; and the formulae and manufacturing methods, processes and techniques used in connection therewith. Said sale by Pillsbury to Duff Corporation did not include, among other things, the physical property and equipment acquired by Pillsbury from American such as land, buildings and machinery.

It was alleged in this amended complaint that the sale by Pillsbury of a portion of the assets previously acquired by it from American Home, as set forth in the amended complaint, did not constitute such a disposition of said assets as to render moot the violations of Section 7 of the Clayton Act as charged in the original and amended complaints.

Following the mandate of the Commission the hearing examiner resumed the taking of testimony in this proceeding in July 1954, in Philadelphia, Pennsylvania, at which time counsel for the respondent began to offer testimony in opposition to the allegations of the complaint. The first witness was Mr. Wroe Alderson, a management consultant of the firm of Alderson and Sessions, consultants for business organizations and government organizations on problems of economics and marketing. He is recognized as a marketing expert. Mr. Alderson had made a study of the record in this case up to that time and was engaged by the respondent to give his views of the acquisition of Ballard and Duff from an economic standpoint. Since that time testimony, principally of representative flour millers and blenders, wholesalers, retailers, super-market and chain store operators relative to competitive conditions, has been taken in numerous cities in the Southeast and elsewhere. Alderson and Sessions also made a field study of the Birmingham and Louisville markets which was received in evidence. At the conclusion of the taking of such testimony counsel for respondent recalled Mr. Alderson for his opinion of the economic significance of the facts thus developed. Counsel for the respondent rested its case in June 1957. Thereupon rebuttal testimony was received until January 1958. A survey of the family flour market in the Southeast and of the mix market nationally and in the Southeast was made by the Economic Division of the Commission which was

received in evidence. Counsel in support of the complaint also called a prominent economist, Dr. Theodore J. Kreps, Professor of Economics at Stanford University, a recognized expert in the field of competition from the economic viewpoint, to testify as to the significance of the facts developed in the record. Proposed findings have been filed by counsel for the respondent consisting of 544 printed pages with lengthy appendices and a brief in support thereof. Counsel in support of the complaint have also filed proposed findings consisting of 340 pages and an appendix of nearly 100 pages.

Consideration has been given to the proposed findings and all the reliable, probative and substantial evidence in the record upon all material issues of fact, law or discretion. Each of those proposed findings which has been accepted has been, in substance, incorporated into this initial decision. All proposed findings not so incorporated are hereby rejected. Appropriate findings, conclusions and order are hereinafter set forth:

FINDINGS OF FACT

I. Description of the Industries and Acquisitions Involved

A. *Family Flour Market in the Southeast*

1. *Definition.* Family flour is one of the products involved in this case. It may be defined as flour with a relatively low protein content, made from either soft or hard wheat or a blend of the two, packaged for use in the home—usually in 2-, 5-, 10- and 25-pound packages or bags; sometimes in 50- and 100-pound bags for rural trade. The most popular size of package sold in the urban trade is the 5- and 10-pound bags, whereas the 25-pound bag is most popular in many rural areas.

2. *The Family Flour Market in the Southeast is a Declining Market.* The market for family flour in the Southeast, that area south of the Potomac and Ohio Rivers and east of the Mississippi River, where Ballard sold its family flour, is gradually declining both in per capita consumption and in the aggregate sale and shipment of family flour. To quote from the Vice President and Director of Sales of General Mills, respondent's principal competitor in the sale of family flour and flour-base mixes in the United States as well as in the Southeast:

* * * It is rather common knowledge that the production per capitawise is down for the past ten years, and the total tonnage is down for the past ten years. It is a shrinking market not only in the Southeast, but elsewhere in the family flour business. The decline, from our experience, has been slower in the Southeast than it has been on a national basis.²

² Tr. 28,263.

