FEDERAL TRADE COMMISSION DECISIONS

Findings, Opinions and Orders

IN THE MATTER OF

BEATRICE FOODS CO.

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

Docket 8864. Complaint, Oct. 1, 1971-Decision, July 1, 1975

Order requiring a multinational, multiproduct company, located in Chicago, Ill., among other things to divest itself of a competing manufacturer of paint rollers which it acquired in 1970, and to not make any acquisitions for 10 years, in the paint brush-and-roller industry, without prior Federal Trade Commission approval. Further, the order dismissed, for failure of proof, allegations in the complaint that the acquisition of Tip Top Brush Co., through which the respondent entered the industry, violated Sec. 7 of the Clayton Act.

Appearances

For the Commission: *Murray L. Lyon*, *William M. Sexton*, and *Randolph B. Sim.*

For the Respondent: *Edward L. Foote*, *John W. Stack*, and *Terry M. Grimm*, *Winston & Strawn*, Wash., D.C., *John P. Fox, Jr.*, General Counsel, Beatrice Foods Co.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondent Beatrice Foods Co., a corporation, has violated and is now violating the provisions of Section 7 of the Clayton Act, as amended (15 U.S.C. §18) through the acquisition of the stock and assets of various corporations, as hereinafter more particularly designated and described, and it appearing to the Commission that a proceeding by it with reference thereto would be in the public interest, hereby issues its complaint pursuant to the provisions of Section 11 of the aforesaid Clayton Act (15 U.S.C. §21) stating its charges as follows:

I. DEFINITIONS

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

(a) *Manually powered paint applicators:* Paint and varnish brushes; paint rollers including pans, covers, handles, and other accessories sold separately, or as part of a paint roller kit; and miscellaneous paint applicators other than spray equipment and aerosol cans.

(b) *Manually powered paint application industry:* Persons, partnerships, joint ventures, and corporations engaging in the manufacture and sale of manually powered paint applicators, as defined in (a), immediately above.

(c) *Paint rollers:* As used separately, includes, in addition to the complete paint roller, pans, covers, handles, and other accessories sold separately, or as part of a paint roller kit.

II. RESPONDENT

2. Respondent, Beatrice Foods Co., sometimes hereinafter referred to as "Beatrice," is, and has been, at all times relevant herein, a corporation organized, existing, and doing business under the laws of the State of Delaware, with its present executive office and principal place of business located at 120 S. LaSalle St., Chicago, Ill.

3. Beatrice is today a multinational, multiproduct company with its primary emphasis on foods and related services. Following extensive research by management and market specialists, Beatrice began diversifying six years ago into a limited number of non-food fields appraised as having exceptional potential for growth of sales and profits. These fields, grouped together as the Chemical & Manufactured Products Division, represented approximately 20 percent of Beatrice's dollar sales in fiscal year ended Feb. 28, 1970. Many of the products in the Chemical & Manufactured Products Division are similar in that these products are sold by Beatrice to common customers or are distributed to similar outlets, such as variety, hardware, grocery and mass merchandise stores. One field within this division is paint brushes and paint rollers. Many retailers and distributors of paint brushes and paint rollers are purchasers or potential purchasers of a variety of other products manufactured and distributed by Beatrice.

Beatrice, in the sale of its products, relies heavily on advertising, especially advertising designed to promote consumer brand identification. For fiscal year ended Feb. 29, 1968, Beatrice spent approximately $27 million for advertising of its products, utilizing all major media and means of reaching the consumer public. Respondent has continued to expand its advertising expenditure since that time.

In conjunction with its advertising, Beatrice has been successful in promoting its household products through new packages, display materials, coupons, and special promotions. Major promotional programs have centered on products within the Chemical & Manufactured Products Division, including Melnor sprinklers, Stiffel lamps, and Airstream trailers.

4. In the course and conduct of its business, Beatrice is, and has been, at all times relevant herein, engaged in selling its products to

purchasers located in various States of the United States, and caused such products, when sold, to be transported from its facilities in various States of the United States to such purchasers located in various States of the United States. In so doing, Beatrice is engaged in "commerce," as "commerce" is defined in the Clayton Act, as amended, and has been continuously so engaged at all times relevant herein.

5. Beatrice's development has been characterized through the years by continuous growth. During the past decade, sales increased by $1.1 billion, or 256 percent. For fiscal year ended Feb. 28, 1970, net sales were approximately $1,576,000,000, and total assets approximated $504 million. Acquisitions accounted for a significant portion of this growth.

III. ACQUIRED COMPANIES

Tip Top Brush Co., Inc. and Affiliated Companies

6. Prior to and until July 31, 1969, Tip Top Brush Co., Inc. and its affiliated companies Banner Brush Co., Inc.; Best-Set Brush Co., Inc.; United Brush Manufacturing Co., Inc.; First Synthetic Fibre & Brush Co., Inc.; West Side Leasing Corp.; Excello Roller Co., Inc.; and Star Brush Manufacturing Co., Inc., sometimes hereinafter referred to collectively as "Tip Top," were corporations organized, existing, and doing business under the laws of the State of New Jersey, with their offices and principal places of business located at 151 W. Side Ave., Jersey City, N.J., except with respect to Star Brush Manufacturing Co., Inc., which was organized, existing, and doing business under the laws of the State of New York, with its office and principal place of business located at 690 Harrison Ave., Boston, Mass.

7. All of the issued and outstanding capital stock of each of the corporations listed in Paragraph 6, above, were owned by Miklos Felkay and Madelaine Felkay. These corporations were closely held and operated so as to mutually benefit each other.

8. Tip Top was engaged in the manufacture, sale, and distribution of manually powered paint applicators. For fiscal year ended Sept. 30, 1968, the year preceding its acquisition by Beatrice, it had net sales of approximately $5,425,000, and it had total assets approximating $2,641,000. By fiscal year ended Sept. 30, 1969, these sales had increased to approximately $7,126,000.

9. In the course and conduct of its business prior to July 31, 1969, as aforesaid, Tip Top sold its products to purchasers located in various States of the United States and caused such products, when sold, to be transported from its facilities in various States of the United States to such purchasers located in various other States of the United States. In

so doing, Tip Top was engaged in "commerce," as "commerce" is defined in the Clayton Act, as amended.

10. Pursuant to an agreement adopted June 25, 1969, Beatrice, on July 31, 1969, acquired all of the issued and outstanding capital stock of Tip Top in exchange for up to 85,000 shares of Beatrice's common stock.

Essex Graham Company

11. Prior to and until July 1, 1970, Essex Graham Company, sometimes hereinafter referred to as "Essex," was a corporation organized, existing, and doing business under the laws of the State of Illinois, with its office and principal place of business located at 1700 W. Pershing Rd., Chicago, Ill.

12. Essex was engaged in the manufacture, sale, and distribution of manually powered paint applicators. In 1969, the year preceding its acquisition by Beatrice, Essex had net sales of approximately $2,216,000 and its total assets approximated $2,322,000.

13. In the course and conduct of its business prior to July 1, 1970, as aforesaid, Essex sold its products to purchasers located in various States of the United States and caused such products, when sold, to be transported from its facilities in Illinois to such purchasers located in various other States of the United States. In so doing, Essex was engaged in "commerce," as "commerce" is defined in the Clayton Act, as amended.

14. Pursuant to an agreement and plan of reorganization adopted July 1, 1970, Beatrice, on July 1, 1970, acquired substantially all of the assets of Essex in exchange for shares of Beatrice's common stock.

IV. NATURE OF TRADE AND COMMERCE

15. Manually powered paint applicators are a separate and distinct product which is distinguished from all other paint applicators and all other products in a number of ways, including, but not restricted to, method of use, cost of production, marketing, and consumer acceptance.

16. In the United States prior to World War II, paint was principally applied by brush. During World War II the paint roller was developed, offering a new method by which to apply paint. Initially paint rollers were produced principally by firms not engaged in the manufacture of paint brushes. During the past decade, however, substantial market pressure has resulted in a significant number of companies originally engaged in the manufacture of either paint brushes or paint rollers entering into the manufacture and sale of both. Currently, of the top twelve concerns in the manually powered paint application industry, ten manufacture and sell both paint brushes and

paint rollers. Of the remaining companies within this industry, most if not all, manufacture and/or distribute both paint brushes and paint rollers.

17. Approximately three years ago miscellaneous flat paint applicators other than brushes and rollers were introduced. In 1969, such miscellaneous flat paint applicators constituted an insignificant portion of the total sales of manually powered paint applicators.

18. The manufacture and sale of manually powered paint applicators is a significant industry in the United States. In 1969, value of shipments was approximately $99.3 million, up from 1967 value of shipments of $88.6 million. There has been a significant increase in the level of concentration in the manually powered paint application industry. In 1967, the top four and top eight manufacturers had approximately 34.6 percent and 51.3 percent of domestic plant shipments, respectively. By 1969, these shares had increased to approximately 40.4 percent and 58.6 percent, respectively. By attributing to the acquiring company the 1969 plant shipments of those companies acquired in 1970, the market shares of the top four and top eight in 1969 increase to 46.7 percent and 66.1 percent, respectively.

19. The aforesaid increase in concentration has been paralleled by a number of independent manually powered paint applicator concerns leaving the industry, either by virtue of merger or by voluntarily ceasing operations. Additionally, there has not been a significant new entrant into this industry within the past two decades.

20. In 1969, Tip Top was the third largest manufacturer of manually powered paint applicators, accounting for approximately 6.9 percent of plant shipments in the United States. In that year, Essex had approximately 2.3 percent of domestic plant shipments. The combined production of these acquired concerns would have made Beatrice the third largest domestic manufacturer of manually powered paint applicators in 1969.

21. Paint rollers constitute a significant segment of manually powered paint applicator sales, representing approximately $26.5 million in 1967, and increasing to approximately $31.2 million in 1969. Concentration in this segment is high. In 1969, the top four and top eight manufacturers had in excess of 59.2 percent and 76.7 percent of domestic plant shipments of paint rollers, respectively.

22. In 1969, Tip Top accounted for approximately 3.8 percent of paint roller plant shipments in the United States. In that year, Essex represented approximately 7.2 percent of domestic plant shipments. On the basis of the combined production of these acquired concerns, as aforesaid, Beatrice would become the third largest domestic manufacturer of paint rollers in 1969.

23. The largest segment of manually powered paint applicator sales is in paint and varnish brushes, representing approximately $62.1 million in 1967, and increasing to approximately $68.1 million in 1969. Concentration in this segment is significant. In 1969, the top four and top eight manufacturers accounted for approximately 40.1 percent and 61.7 percent of domestic plant shipments, respectively. In that year, Tip Top was the second largest manufacturer of paint and varnish brushes, with 8.3 percent of domestic plant shipments.

24. Manually powered paint applicators of all types are distributed to hardware, variety, paint and wallpaper, and mass merchandise stores, among others. Recently, these products have been sold in grocery stores, with this latter market expected to be of major significance in the future.

V. EFFECTS OF THE ACQUISITIONS

25. The effect, cumulatively and individually, of the aforesaid acquisition by Beatrice of the stock and assets of Tip Top and Essex may be substantially to lessen competition or to tend to create a monopoly in the manufacture and sale of manually powered paint applicators in the United States as a whole in the following ways, among others:

(a) Potential competition between Beatrice and each of the aforesaid corporations acquired by it and between Beatrice and all others has been eliminated;

(b) Actual competition between and among the aforesaid corporations acquired by Beatrice has been eliminated;

(c) Producers of manually powered paint applicators may be unable to compete, or will be at a competitive disadvantage in competing, with respondent due to any one, any combination of, or all of the following factors:

(1) Respondent's financial and economic strength;

(2) Respondent's advertising, merchandising, and promotional ability and experience;

(3) Respondent's ability to command acceptance of its products and of valuable store shelf space;

(4) Respondent's ability to offer preferential prices on manually powered paint applicators;

(5) Respondent's ability to offer preferential prices on other products it sells as a condition, implied or explicit, to the purchase of respondent's manually powered paint applicators;

(6) Respondent's ability to combine product distribution;

(d) The leading position of Beatrice has been enhanced and may be further enhanced;

(e) An industry trend toward concentration has been accelerated and further acquisitions may be induced;

(f) The degree of concentration has been increased and may be further increased; and

(g) The entry of new competitive entities has been and may continue to be made more difficult.

26. The effect, cumulatively and individually, of the aforesaid acquisition by Beatrice of the stock and assets of Tip Top and Essex may be substantially to lessen competition or to tend to create a monopoly in the manufacture and sale of paint rollers in the United States as a whole in the following ways, among others:

(a) Potential competition between Beatrice and each of the aforesaid corporations acquired by it and between Beatrice and all others has been eliminated;

(b) Actual competition between and among the aforesaid corporations acquired by Beatrice has been eliminated;

(c) Producers of paint rollers may be unable to compete, or will be at a competitive disadvantage in competing, with respondent due to any one, any combination of, or all of the following factors:

(1) Respondent's financial and economic strength;

(2) Respondent's advertising, merchandising, and promotional ability and experience;

(3) Respondent's ability to command acceptance of its products and of valuable store shelf space;

(4) Respondent's ability to offer preferential prices on paint rollers;

(5) Respondent's ability to offer preferential prices on other products it sells as a condition, implied or explicit, to the purchase of respondent's paint rollers;

(6) Respondent's ability to combine product distribution;

(d) The leading position of Beatrice has been enhanced and may be further enhanced;

(e) An industry trend toward concentration has been accelerated and further acquisitions may be induced;

(f) The degree of concentration has been increased and may be further increased; and

(g) The entry of new competitive entities has been and may continue to be made more difficult.

27. The effect, cumulatively and individually, of the aforesaid acquisition by Beatrice of the stock and assets of Tip Top and Essex may be substantially to lessen competition or to tend to create a monopoly in the manufacture and sale of paint and varnish brushes in the United States as a whole in the following ways, among others:

(a) Potential competition between Beatrice and each of the aforesaid corporations acquired by it and between Beatrice and all others has been eliminated;

(b) Potential competition between and among the aforesaid corporations acquired by Beatrice has been eliminated;

(c) Producers of paint and varnish brushes may be unable to compete, or will be at a competitive disadvantage in competing, with respondent due to any one, any combination of, or all of the following factors:

(1) Respondent's financial and economic strength;

(2) Respondent's advertising, merchandising, and promotional ability and experience;

(3) Respondent's ability to command acceptance of its products and of valuable store shelf space;

(4) Respondent's ability to offer preferential prices on paint and varnish brushes;

(5) Respondent's ability to offer preferential prices on other products it sells as a condition, implied or explicit, to the purchase of respondent's paint and varnish brushes;

(6) Respondent's ability to combine product distribution;

(d) The leading position of Beatrice has been enhanced and may be further enhanced;

(e) An industry trend toward concentration has been accelerated and further acquisitions may be induced;

(f) The degree of concentration has been increased and may be further increased; and

(g) The entry of new competitive entities has been and may continue to be made more difficult.

VI. NATURE OF THE VIOLATION

28. The acquisition by Beatrice of the stock and assets of the aforesaid corporations, individually, and/or together with the cumulative effect thereof, constitutes a violation of Section 7 of the Clayton Act (15 U.S.C. §18), as amended.

INITIAL DECISION BY WILLIAM K. JACKSON, ADMINISTRATIVE LAW JUDGE

OCTOBER 25, 1973

PRELIMINARY STATEMENT

The Federal Trade Commission, on Oct. 1, 1971, issued its complaint in this proceeding charging Beatrice Foods Co., a corporation, by its acquisitions of the stock and assets of Tip Top Brush Co., Inc. and Essex Graham Company, violated Section 7 of the Clayton Act, as amended (15 U.S.C. § 18). The complaint alleges that the effect, cumulatively and individually, of the acquisitions may be substantially to lessen competition or tend to create a monopoly in the manufacture and sale in the United States as a whole of (1) manually powered paint applicators, (2) paint rollers, and (3) paint and varnish brushes, in the following ways, among others:

(a) Potential competition between Beatrice and each of the aforesaid corporations acquired by it and between Beatrice and all others has been eliminated;

(b) Actual competition between and among the aforesaid corporations acquired by Beatrice has been eliminated;

(c) Producers of (1) manually powered paint applicators (paint rollers/paint and varnish brushes), may be unable to compete, or will be at a competitive disadvantage in competing, with respondent due to any one, any combination of, or all of the following factors:

(1) Respondent's financial and economic strength;

(2) Respondent's advertising, merchandising, and promotional ability and experience;

(3) Respondent's ability to command acceptance of its products and of valuable store shelf space;

(4) Respondent's ability to offer preferential prices on manually powered paint applicators (paint rollers/paint and varnish brushes);

(5) Respondent's ability to offer preferential prices on other products it sells as a condition, implied or explicit, to the purchase of respondent's manually powered paint applicators (paint rollers/paint and varnish brushes);

(6) Respondent's ability to combine product distribution;

(d) The leading position of Beatrice has been enhanced and may be further enhanced;

(e) An industry trend toward concentration has been accelerated and further acquisitions may be induced;

(f) The degree of concentration has been increased and may be further increased; and

(g) The entry of new competitive entities has been and may continue to be made more difficult.

After being served with the complaint, respondent appeared by counsel, and on Nov. 11, 1971, filed its answer to the complaint denying, in substance, that the mergers were illegal. Thereafter, on Jan. 13, 1972 and Feb. 25, 1972, prehearing conferences were held pursuant to pretrial orders of the undersigned for the purposes of simplification of the issues, obtaining admissions of fact and authentication of documents, discovery of relevant material, exchanging lists of exhibits and names of witnesses, together with a summary of their proposed testimony, to be used at the trial, and the preparation of a concise statement of the contested issues of law and fact. In accordance with the undersigned's pretrial order, both parties prepared and submitted a pretrial memorandum.

Hearings for the presentation of testimony and other evidence by complaint counsel began in Washington, D.C., on Dec. 6, 1972, and concluded on Dec. 18, 1972, with the exception of one witness, Mr. Brown W. Cannon, senior vice president of respondent, whose testimony was deferred until Apr. 24, 1973, in order to accommodate respondent until the commencement of respondent's defense. Pursuant to a request by respondent for further discovery, a 2-month adjournment[1] was granted prior to the presentation of respondent's defense. During this period, respondent presented to the undersigned approximately nine subpoenas duces tecum, all of which were issued. Respondent's defense commenced on Apr. 25, 1973, and was completed on May 21, 1973. Thereafter, on July 9, 1973, complaint counsel commenced rebuttal hearings which were concluded on July 16, 1973. On July 27, 1973, respondent had surrebuttal hearings and the record was closed on July 27, 1973.

The record in this matter consists of 3,553 pages and there were 35 days of hearing. Complaint counsel, for their case-in-chief, noticed 26 witnesses and 19 testified. Complaint counsel originally noticed 101 exhibits, of which 83 were received, one was withdrawn and 17 were omitted. Complaint counsel offered 12 additional exhibits, of which 10 were received. On rebuttal, complaint counsel called 20 witnesses and offered five exhibits, of which four were received and one was rejected.

Respondent's first pretrial submissions were submitted on Nov. 15, 1972, but were rejected as inadequate. Respondent resubmitted its lists of witnesses and documents on Nov. 29, 1972. On Jan. 10, 1973, respondent filed a third submission entitled "Second Revision of List of Witnesses and Documents." On Jan. 31, 1973, respondent filed a final list of documents, and on Apr. 5, 1973, filed a final schedule of witnesses.

Respondent, for its defense, originally noticed 232 exhibits, of which 69 were either offered or identified and 51 were received, 13 rejected, and five withdrawn. Respondent also identified or offered 20 additional exhibits that were not noticed, of which 15 were received, three were rejected, and two were identified but not offered. Approximately 163 of respondent's noticed exhibits were not identified or offered at the hearing. Respondent originally noticed approximately 90 witnesses, which on Apr. 5, 1973, was reduced to approximately 58 named individuals, together with numerous unnamed officials of respondent,

[1] Due to the illness of the undersigned during this adjournment, respondent's defense was further postponed.

of which 34 were actually called to testify in its defense. On surrebuttal, respondent called one witness and offered one exhibit which was rejected.

Pursuant to order of the undersigned, complaint counsel filed their proposed findings, conclusions of law, and brief in support thereof on Oct. 16, 1973. On Oct. 31, 1973, respondent filed its proposed findings and conclusions and brief in support thereof. Thereafter, on Sept. 10, 1973, complaint counsel filed their reply brief.

Any motions not heretofore or herein specifically ruled upon, either directly or by the necessary effect of the conclusions in this Initial Decision, are hereby denied.

This proceeding is before the undersigned upon the complaint, answer, testimony and other evidence, proposed findings of fact and conclusions and briefs filed by counsel supporting the complaint and by counsel for respondent. The proposed findings of fact, conclusions and briefs in support thereof submitted by the parties have been carefully considered by the undersigned, and those findings not adopted either in the form proposed or in substance are rejected as not supported by the evidence or as involving immaterial matter.

For the convenience of the Commission and the parties, the findings of fact include references to the principal supporting items in the record. Such references are intended to serve as convenient guides to the testimony and exhibits supporting the recommended findings of fact, but do not necessarily represent complete summaries of the evidence considered in arriving at such findings.

References to the record are made in parentheses, and certain abbreviations, as hereinafter set forth, are used:

CX - Commission's Exhibits
RX - Respondent's Exhibits
CPF - Complaint Counsel's Proposed Findings and Conclusions
RPF - Respondent's Proposed Findings and Conclusions
CB - Complaint Counsel's Brief
RB - Respondent's Brief
CRB - Complaint Counsel's Reply Brief

The transcript of the testimony is referred to with either the last name of the witness and the page number or numbers upon which the testimony appears or with the abbreviation Tr. and the page.

Having heard and observed the witnesses and after having carefully reviewed the entire record in this proceeding, together with the proposed findings, conclusions and briefs submitted by the parties, as well as replies, the administrative law judge makes the following:

FINDINGS OF FACT

I. IDENTITY AND BUSINESS OF RESPONDENT AND ACQUIRED COMPANIES

A. *Beatrice Foods Company (respondent)*

Introduction

1. Respondent Beatrice is and has been, at all times relevant herein, a corporation organized, existing, and doing business under the laws of the State of Delaware, with its executive office and principal place of business located at 120 S. LaSalle St., Chicago, Ill. (complaint and answer, Par. 2).

2. Beatrice is today a multinational, multiproduct company, with traditional emphasis on foods and related services (complaint and answer, Par. 3). In this regard, respondent has for many years been a leading producer of consumer food products, generally preselling consumers through intensive advertising, packaging, and promotional efforts (findings 5-15). Included within these products are fluid milk and cream, of which Beatrice is the third largest processor in the United States (CX 50 a); butter, yogurt, and other dairy products; grocery and confectionery items; and consumer convenience and specialty foods (CX 9-15). Some of the better known trade names of respondent's consumer food products are the following: Meadow Gold, Dannon, Louis Sherry, LaChoy, Aunt Nellie's, Ma Brown, Clark, and Holloway (CX 50 b).

It also engages in the agri-products business and has chemical, manufacturing, and international divisions which by 1970 accounted for over 30 percent of its sales. Nonfood products now sold by Beatrice range from house trailers to skis (*Beatrice Foods Co.*, F.T.C. Docket 8814, Sept. 28, 1972)[81 F.T.C. 481].

Growth Through Acquisition

3. Beatrice has become, through acquisition, a manufacturer of a number of consumer nonfood products, including lawn sprinklers, closet accessories, draperies, picture frames, housewares, paint brushes and rollers, travel trailers, and plumbing specialties (CX 2 a-h; CX 13, p. 15). Many of these acquired nonfood manufacturers are leading factors in their respective industries (CX 11, p. 9; CX 19 c).

4. Beatrice has made remarkable progress since its inception; its development has been characterized through the years by substantial and continuous growth. Between 1960 and 1970, all divisions reported record results. Total sales increased by $1.1 billion, or 256 percent; net earnings increased by $43 million, or 413 percent; working capital increased to $218 million from $52 million; and earnings per share of common stock increased 139 percent to $2.03 from 85 cents. By fiscal

year ended Feb. 28, 1970, net sales reached approximately \$1,576,000,000 and total assets approximated \$504,000,000 (complaint and answer, Par. 5; CX 13, pp. 2-3).

5. Acquisitions accounted for a significant portion of Beatrice's growth (complaint and answer, Par. 5). Of the approximate \$1.5 billion in sales for fiscal year 1970, slightly under \$750 million can be directly attributed to the sales of those companies acquired by respondent during its previous five fiscal periods (CX 9, p. 17).

Marketing and Advertising

6. The success of the Beatrice companies, by its own admission, is largely the result of marketing skill and knowhow (CX 15 1). This is manifested in its advertising, upon which Beatrice relies heavily to promote consumer brand identification in the sale of its products (findings 7-14). Beatrice has won awards for its advertising and promotion skill (CX 11, p. 16; CX 10, p. 18).

7. Beatrice utilizes all major media and means of reaching the consumer public (CX 5-z8) and advertises and promotes its products from coast to coast. Prime time is used on all three national television networks along with spot TV, radio, national magazines and large space newspaper ads. It has sponsored such famous TV shows as "The Girl from Uncle," the "Today" and "Tonight" shows, "Huntley-Brinkley," "Walt Disney's Wonderful World of Color," and the "Dean Martin" and "Carol Burnett" shows (CX 10, p. 19; CX 11, p. 17; CX 11, p. 19).

8. Other means of advertising used by Beatrice include transport ads, contests, recipe folders, trade magazine ads and outdoor signs (CX 10, p. 19; CX 11, p. 17; CX 12, p. 17).

9. Beatrice uses major league athletes and celebrities to endorse its products. Promotions have been conducted in conjunction with the Clyde Beatty-Cole Brothers Circus and through distributions of more than 100 million coupons. Millions of consumers are reached through Beatrice store displays and window signs (CX 10, p. 19).

10. For fiscal year ended Feb. 29, 1968, Beatrice spent approximately \$27,000,000 for advertising (CX 5 z). Advertising expenditures reached \$38,000,000 in 1971 (CX 15 o).

11. Beatrice has been among the leaders in innovative packaging of many of its products (CX 10, p. 12).

12. Beatrice has a continuing program of improving profit potential through imaginative marketing (CX 10, p. 17; CX 15 l; CX 16 f).

13. The company has successfully marketed its household products through new packages, display materials, coupons, and special promotions (CX 10, p. 19; CX 18 c-d).

14. Major promotional programs have centered on products within the Chemical & Manufactured Products Division, including Melnor

sprinklers, Stiffel lamps and Airstream trailers (CX 12, p. 9; CX 11, p. 17; CX 10, p. 19).

15. Some of Beatrice's more famous advertised brands are:

Meadow Gold (Dairy products)
La Choy (Chinese foods)
Holloway Milk Duds (Candy)
Clark (Candy Bars)
Dannon (Yogurt)
Stiffel (Lamps)
Melnor (Lawn sprinklers)
Miracle White (Laundry cleaning agent)
Rosarita (Mexican foods)
Airstream (Trailers)
Charmglow (Outdoor gas lamps and barbeques)
Hart (Skis)
Morgan (Yachts)

(CX 10, pp. 1-27; CX 11, pp. 1-26; CX 12, pp. 1-26).

Marketing and Distribution

16. Beatrice is highly skilled and efficient in marketing and distribution. Realizing that distribution is expensive, it has established distribution centers which increase effectiveness in marketing its broad line of Beatrice grocery products (CX 17, p. 10; CX 15 l; CX 13, p. 11). Distribution centers have been established in and around Los Angeles, Calif., Atlanta, Portland, Oreg., Denver, Dallas, Memphis, Camden, N.J., Fortoria, Ohio, and Boston. These nationwide distribution facilities enable the provision of faster customer service and reduction of costs by consolidating a variety of products into one shipment thereby improving the ready availability of products in major market areas. Other consolidations enabled by Beatrice's distribution center system are for such functions as sales, billing and inventory control (CX 13, p. 11). In 1970, Beatrice owned a nationwide network of 25 warehouses (CX 13, p. 12), and it also had additional warehouse facilities located in other States (Felkay 3514).

Interstate Commerce

17. Beatrice is, and has been, at all times relevant herein, engaged in selling its products to purchasers located in various States of the United States, and caused such products, when sold, to be transported from its facilities in various States of the United States to such purchasers located in various States of the United States. In so doing, Beatrice is engaged in "commerce," as "commerce" is defined in the Clayton Act, as amended, and has been continuously so engaged at all times relevant herein (complaint and answer, Par. 4; Stipulation CX 1 a).

B. *The First Acquired Company - Tip Top Brush Co., Inc. and Affiliated Companies*

Introduction

18. Prior to and until July 31, 1969, Tip Top Brush Co., Inc. and its affiliated companies, Banner Brush Co., Inc.; Best-Set Brush Co., Inc.; United Brush Manufacturing Co., Inc.; First Synthetic Fibre & Brush Co., Inc.; West Side Leasing Corp.; Excello Roller Co., Inc.; and Star Brush Manufacturing Co., Inc. (hereinafter referred to collectively as "Tip Top"), were corporations organized, existing, and doing business under the laws of the State of New Jersey, with their offices and principal places of business located at 151 W. Side Ave., Jersey City, N.J., except with respect to Star Brush Manufacturing Co., Inc., which was organized, existing, and doing business under the laws of the State of New York, with its office and principal place of business located at 690 Harrison Ave., Boston, Mass. (complaint and answer, Par. 6).

19. Prior to acquisition by Beatrice, all of the issued and outstanding capital stock of each of the corporations listed in paragraph 18 above, were owned by Miklos Felkay and Madelaine Felkay. Mr. Felkay had been in the brush business in Hungary. In 1948, his business was nationalized by the Communists and he and his family came to the United States (CX 22). Felkay entered the United States' paint brush business in 1948 and began making artist brushes and small consumer, throwaway brushes (CX 22, Felkay 1248). A 1950 balance sheet of Tip Top's shows total assets of $44,000 and a plant and equipment investment of $7,000 (RX 215). These corporations were closely held and operated so as to mutually benefit each other (complaint and answer, Par. 7).

20. On July 31, 1969, Beatrice acquired all of the issued and outstanding capital stock of Tip Top in exchange for up to 85,000 shares of Beatrice's common stock (complaint and answer, Par. 10).

21. At the time of its acquisition by Beatrice and continuously since, Tip Top has been engaged in the manufacture and sale of paint brushes, paint rollers, and paint roller accessories (CX 5 z10-11).

Phenomenal Growth of Tip Top

22. Since its inception, Tip Top has experienced what the company describes as "phenomenal growth" (CX 22). Tip Top began operations in 1949 in New York City, engaging at that time in the manufacture and sale of paint brushes. By 1955, the company had moved to a more spacious location of 20,000 square feet and had opened a west coast warehouse located in Los Angeles, Calif. By that year, Tip Top had 50 employees and its name had become well known throughout the nation. Continuing expansion necessitated the company's move to its current location in Jersey City, N.J., in July 1961, where it occupied a large factory totaling more than 110,000 square feet as of the time of the

acquisition and engaged in the manufacture of a complete line of paint brushes and paint rollers (CX 22).

Growth Through Acquisition

23. Prior to its acquisition by Beatrice, Tip Top had acquired several paint brush and roller manufacturers. In the late 1950's or early 1960's, Tip Top purchased the United Brush Manufacturing Company, a long established producer of paint brushes (Felkay 974). In 1967, Tip Top acquired Pitegoff Brothers, Inc., a manufacturer of paint brushes (CX 34-36, Felkay 1327). On July 1, 1969, Tip Top purchased substantially all of the assets of Star Brush Manufacturing Co., Inc., a well-known manufacturer of paint and varnish brushes and distributor of paint rollers (CX 37). During the period prior to its acquisition, Tip Top considered purchasing additional paint brush and roller companies (Felkay 983, 984-85).

For fiscal year ended Sept. 30, 1968, Tip Top had net sales of approximately $5,425,000 (CX 5 z-10). In that year, Tip Top was the fifth largest manufacturer of manually powered paint applicators in the United States (CX 108 b).

24. By 1969, due to its acquisitions and internal development, Tip Top had manufacturing facilities in Boston, Mass., and Jersey City, N.J., and warehouses in Los Angeles, Calif., and in Chicago, Ill. (CX 5 j; CX 22; CX 47 b, c.) Its initial employment of 10 had increased to in excess of 250 (Felkay 983). By the end of that year, Tip Top had become the third largest domestic manufacturer of manually powered paint applicators, with sales of approximately $7.4 million (CX 108 c).

25. In 1969, Tip Top had one of the most completely automated manufacturing facilities in the industry (CX 22).

26. In 1969, it was the expressed intention of Tip Top management to become the number one factor in its industry. It was estimated that this goal could be achieved by 1974-75 (Felkay 992-94, Schlytter 1000).

Products and Distribution

27. Tip Top is and has been in the business of making and selling brushes and rollers. In 1958, Tip Top's products were sold throughout the United States directly to drug chains, food chains, lumber yards, variety stores (Felkay 1250) and mass merchandisers (Felkay 1261). Prior to 1958, Tip Top was unable to place its brush line with jobbers since the jobber who sold to small dealers (Felkay 1251) carried only products of the then-established old line brush concerns, *i.e.*, Wooster, Baker, Rubberset and PPG (Felkay 1251). These products were professional paint brushes. Such brushes, in comparison with the Tip Top product, were thicker, heavier brushes with more and longer filaments and were made differently so as to carry more paint to a surface (Felkay 1254). In 1958, such brushes sold at retail from $5-$25,

whereas Tip Top's brushes sold from 99 cents to $2.49 (Felkay 1261). Since 1968, Tip Top has sold a full line of paint brushes (Felkay 1327-28).

Tip Top first saw rollers in the market in the mid-50's (Felkay 1258). Ace, EZ Paintr, Bestt and Thomas then sold rollers (Felkay 1258). In response to the advent of the roller, Tip Top introduced a lower priced 4 inch-brush (Felkay 1258). In comparison to earlier Tip Top brushes, this product was smaller and thinner, had a plastic (versus wood) handle and had lower quality filaments (Felkay 1259). The brush retailed for 99 cents (Felkay 1260).

In 1958, Tip Top began selling lower priced rollers (Felkay 1261). It purchased some of these products for resale from Ace Roller Co. (Felkay 1258, 1296). It also created in 1958 the Excello Roller Co. for its roller business (Felkay 976). Tip Top was an assembler of rollers. To 1969, the only part of the roller kit ever manufactured by Tip Top was the roller cover (Felkay 1296). Even as to these, the cores, fabrics and adhesives for covers were purchased elsewhere. These raw materials were not made by Tip Top (Felkay 1296, 1302). Tip Top never made any parts for roller frames (Felkay 1302).

In addition to making covers, Tip Top also purchased some complete covers elsewhere (Felkay 1325). Cheap, throwaway covers were purchased primarily for resale during 1965-70 from Jackson Roller (Felkay 1305), as well as Marshall Tubing Co. and Interstate Roller (Felkay 1304-06).

Tip Top's promotional roller kits (tray, cover and frame in one unit) retail from 59 cents to 99 cents (Felkay 1306).

The bulk of Tip Top's promotional roller kits are distributed on the east coast (Felkay 1315). Tip Top also sells some kits in the South (Atlanta to Florida) (Felkay 1318); as well as in the Western States (Felkay 1318) and in the Southwestern market (Texas and Louisiana) (Felkay 1323). In the Western States and in the Southwestern market, Tip Top's promotional kits are all jobbed (Felkay 1319, 1323).

28. Tip Top sells its products through salesmen and manufacturers' representatives. Prior to its acquisition by Beatrice, its principal outlets were hardware stores, lumber yards, food chains, paint stores, paint manufacturers, hardware wholesalers, drug stores and chains, discount stores, variety stores, variety wholesalers, general wholesalers, and rack jobbers (CX 5 s; Felkay 988, 1250; Edelson 2328). Recently, Tip Top has sold its merchandise to grocery supermarkets, such as Fred Meyers and Thrifty Acres (Zook 338, Edelson 2328).

Merchandising and Marketing

29. At the time of its acquisition, Tip Top was recognized as "the best merchandiser in the industry" (O'Conner 955). Prior to acquisition,

it had shown a record of continuous innovation in merchandising, as shown, by being:

(a) first to design a complete merchandising program for different types of outlets retailing brushes and rollers (CX 22);

(b) first to develop both the mass merchandiser and drug store as potential markets for paint applicators (Felkay 973-74);

(c) first to utilize mobile display showrooms (Felkay 976);

(d) first to offer premiums as an incentive to purchase paint applicator products (Felkay 987);

(e) first to display brushes and rollers in relation to the type of paint being used (Felkay 987); and

(f) first to offer color-coded brushes and rollers (CX 22).

Research and Development

30. By 1969, Tip Top possessed a reputation as a leader in research and development, and as a pioneer in the development of tapered nylon brushes designed particularly for the application of new, modern water- and rubber-based latex paints (CX 22).

Interstate Commerce

31. Prior to July 31, 1969, Tip Top sold its products to purchasers located throughout the United States and shipped its products to such purchasers from its facilities located in various States as described in findings 18 and 24. In so doing, Tip Top was engaged in "commerce," as defined in the Clayton Act, as amended (complaint and answer, Par. 9).

C. *The Second Acquired Company - Essex Graham Company*

Introduction

32. Prior to July 1, 1970, Essex Graham Company (hereinafter referred to as "Essex"), was a corporation organized, existing, and doing business under the laws of the State of Illinois, with its office and principal place of business located at 1700 W. Pershing Rd., Chicago, Ill. (complaint and answer, Par. 11).

33. On July 1, 1970, Beatrice acquired substantially all of the assets of Essex in exchange for shares of Beatrice common stock (complaint and answer, Par. 14).

Financial Growth

34. In 1969, the year preceding its acquisition by Beatrice, Essex had net sales of approximately $2,216,000 and its total assets approximated $2,322,000 (complaint and answer, Par. 12). In that year, it was the fifth largest manufacturer of paint rollers in the United States (CX 109 c).

35. In the 6-year period preceding its acquisition by Beatrice, Essex was an economically strong and viable concern. Based upon relatively stable sales during that period, operating income rose steadily each year, increasing from $80,483 in 1964 to $220,093 by 1969, while total

assets increased over 273 percent, rising from approximately $510,000 in 1964 to approximately $2,322,000 in 1969 (CX 39 a-c; CX 41 a-c; CX 42 f; CX 43 a-e).

Products and Distribution

36. Essex, at the date of its acquisition by Beatrice, was engaged solely in the manufacture, sale, and distribution of paint rollers and paint roller accessories (CX 5z11-12). Subsequent to the acquisition, it began to distribute paint brushes (CX 32 a, CX 32 l-p).

37. Prior to its acquisition by Beatrice, Essex sold its products through sales representatives and by competitive bids. These sales representatives do not sell exclusively to paint stores but sell to additional kinds of customers such as automotive stores (Greenberg 1459-60, Weiss 540, Zook 451A, Gartner 3207-08). At that time, the principal outlets for its products were paint stores and chains, hardware jobbers, paint and hardware distributors, variety stores and chains, mass merchandisers, department stores, the U.S. Government and other brush and roller manufacturers (CX 5 s-t; Felkay 1385-86; Freund 1415, 1429-30; Greenberg 1462). After its acquisition by Tip Top, Essex Graham supplied all of Tip Top's roller requirements (Strobel 3286). The bulk of these were in the lower priced category (Greenberg 1469).

38. Prior to July 1, 1970, Essex sold its products to purchasers located throughout the United States and shipped its products to such purchasers from its facilities in Illinois. In so doing, Essex was engaged in "commerce," as defined in the Clayton Act, as amended (complaint and answer, Par. 13).

II. Nature of the Trade and Commerce

Definitions

Manually Powered Paint Applicators

39. Manually powered paint applicators consist of paint and varnish brushes, paint rollers, including covers, handles and attachments included in a paint roller kit, and miscellaneous flat applicators, primarily pads (Zook 229-30).

40. A paint brush is used for the manual application of paint to a surface. It consists of a handle, a ferrule and the filament (Zook 262, 266-67; Weiss 466-67; Lieberman 680).

41. A paint roller is used for the manual application of paint to a surface. It consists of a paint roller sleeve or cover that applies the paint, the frame which holds the cover, the tray into which the paint is poured, extension handles and miscellaneous accessories such as trim rollers and bucket grids. Other products included in the category are painter's mitts and pad applicators (Zook 233, 262; Weiss 466; Felkay

1302). A pad applicator is a device where roller fabric is cut to size and bonded to an oblong frame (Zook 267-68). It is included in the accounting of rollers because it is made of the same material (Zook 233, Lieberman 681).

Artist Brushes

42. The manufacture and sale of artist brushes differs in many ways from that of paint brushes:

(a) The industry recognizes that the manufacture and sale of artist brushes is a separate industry from that of paint brushes (Zook 230-32, Weiss 465-66).

(b) The manufacture of artist brushes requires a different type of knowledge, equipment, bristles, handles and ferrules than the manufacture of paint brushes (Zook 230-32, Weiss 465-66, Shulman 658).

(c) Different manufacturers produce artist brushes than produce paint brushes (Zook 230-32, Weiss 456-66, Edelson 2293-94).

(d) Artist brushes are distributed differently than paint brushes (Zook 230-32). Artist brushes, when sold in the same store, are displayed in a different part of the store than other paint brushes (Weiss 572).

(e) An artist brush is made of much more expensive filament material than are paint brushes (Zook 230-32, Weiss 465-66, Shulman 658).

(f) An artist brush is designed for a specialized use: to paint pictures or to do hobby work and are not interchangeable with or included among manually powered paint applicators (Zook 230, Shulman 658).

Paint Brushes and Rollers are Part of the Same Overall Market

43. Paint brushes and rollers are interchangeable in use to a very great degree (Weiss 471). Paint brushes and rollers are distributed by the same salesmen to the same buyers, shipped together, and stocked, merchandised and promoted together (Zook 258-59, 291-92; Weiss 462-63; Touchett 581-85, 595-604; Lieberman 672-73).

44. Both customers and salespersonnel exert pressure on manufacturers of manually powered paint applicators to sell both paint brushes and rollers (CX 52, CX 53, CX 54, CX 55, CX 56, CX 57, CX 58, Weiss 463, Touchett 585-96, Lieberman 672-73). These manufacturers believe that they would lose sales and that their businesses would be adversely affected if they did not sell both paint brushes and rollers (Touchett 585; Shulman 635; Felkay 977, 980-81; Gartner 2251; Lieberman 672-73). One industry leader felt it would be a definite threat to his company's position, while another felt that the existence of his business would be threatened if brushes could not be delivered along with paint rollers (Touchett 585, Shulman 635).

45. The overwhelming majority of significant manufacturers of

manually powered paint applicators in 1969 each manufactured both brushes and rollers in that year (Findings 46, 47, 48).

46. The eight largest and 13 of the top 15 manufacturers of manually powered paint applicators manufactured both brushes and rollers in 1969. These 13 firms accounted for approximately 75 percent of manually powered paint applicator shipments. The largest firm in the manually powered paint applicator industry which did not manufacture both brushes and rollers ranked 12th with a 2.6 percent market share (CX 108 c, CX 109 c, CX 110 c).

47. In 1969, the largest eight manufacturers of paint brushes also manufactured rollers. These top eight accounted for 58.6 percent of all shipments of paint brushes in that year (CX 109 c, 110 c). Only one of the top 15 did not manufacture paint rollers (CX 109 c, CX 110 c).

48. Every one of the 13 largest manufacturers of paint rollers in 1969 except Essex Graham also manufactured brushes in 1969 (CX 109 c, CX 110 c). These 12 firms accounted for 76.5 percent of shipments of paint rollers in that year (CX 109 c).

49. Both paint brushes and rollers are sold by manufacturers to the same types of retail outlets such as hardware stores, lumber yards, paint stores, department stores, mail order houses, mass merchandisers, and drug and grocery chains (CX 27 d; CX 115 z7, z8; Felkay 973-74, 988; Zook 258-59, 412-17; Lieberman 681; Bready 818-21; Zurawin 843-47; Brumm 1536, 1543; Gartner 2244; Edelson 2328).

Beginning in the latter 1950's and continuing until the late 1960's, competitors in the manually powered paint applicator industry began selling to mass merchandisers. As the number of mass merchandiser outlets increased, a growing number of manually powered paint applicator manufacturers began selling to this retail outlet. As witness Weiss succinctly stated, "* * * the manufacturing and distributing patterns are following the retail pattern" (Weiss 532). By the latter 1960's, "* * * *everybody was in the market* * * *." (Felkay 1263). As respondent's proposed findings indicate, "virtually *all* companies identified of record have gotten into this * * * business." (RPF, p. 47). Since this type of retail outlet was growing, it was to be expected that companies in the industry would begin making sales efforts to these outlets. But *all* companies in the industry, as indicated above, sought this growing business; companies did not specialize in sales to this one type of retail outlet. To characterize selling a new customer as "entry", in an antitrust sense, is illusory. The manufacturers did not "enter" anything; they simply added a new outlet. Nor did manufacturers forego selling other types of retail outlets to specialize in selling to mass merchandisers; the record shows clearly that manufacturers continued to sell to all types of outlets (Zook 258; Weiss 478; Felkay

1388-89; Cannon 1166; Shulman 636; Zurawin 845; Gartner 2237, 2244; Edelson 2328; CX 115 z7).

The reason that companies in the industry sell to all types of customers is because of the wide variety of brushes and rollers carried by these customers. As testified to by respondent's witness Felkay, paint and hardware stores do *not* carry only the more expensive brushes and rollers; rather they carry both the inexpensive and more costly products (Felkay 1387-88; See also Zook 451; Weiss 529; Cannon 1201). Mass merchandisers such as Sears carry "good, better, and best" paint applicator products (Brumm 1543, Cannon 1137). Mass merchandisers generally carry both more expensive and throwaway brushes (Cannon 1200, Felkay 1387). As a result, distribution channels are intermingled; jobbers and distributors sell to department stores, food stores and variety chains as well as to paint stores and paint contractors (Weiss 529, 534; Cannon 1202). These distributors carry lower priced manually powered paint applicator products (Edelson 2472, Tyler 2103, Felkay 1387), as well as more expensive brushes and rollers (Cannon 1170, 1172). Some paint and hardware stores are sold direct (Weiss 529, 533), as are some variety stores and large retail outlets (Cannon 1202). Both jobbers and mass merchandisers may carry a "professional line" of paint brushes (Weiss 529).

The same salesmen and manufacturer's representatives sell to all types of paint brush and roller outlets (Weiss 540, Zook 451A, Gartner 3207-08).

Pricing

50. Many retail outlets, such as Sears, mass merchandisers, hardware stores, paint stores and drug chains carry both lower priced and higher priced brushes and rollers (CX 27 e, f; Greenberg 1433; Brumm 1540-43; Cannon 1200-01; Zook 450; Felkay 1387).

51. Manufacturers of paint brushes and rollers do not consider the prices of aerosol cans and power spray equipment in setting paint brush and roller prices (Zook 304-05, Weiss 475, Touchett 596-97).

52. Retail outlets do not purchase aerosols to replace paint brushes and rollers, nor do they increase their purchases of aerosols or paint brushes and rollers to the detriment of the remaining category (Weiss 473).

53. The average retail price of both brushes and rollers sold by several major manufacturers and retailers is $5.00 and under (Zook 302; Weiss 473-74; Edwards 711; Silverman 764-65; George 940).

54. In 1969, many leading paint brush and roller manufacturers made and sold both high and low priced brushes and rollers (Brumm 1540; Zook 302; Weiss 473; Shulman 637; Tyler 2125, 2129-30).

Recognition of the Industry

55. The paint brush and roller industry is generally recognized as a separate industry. Beatrice Foods made a study entitled "The Study of the Paint Brush and Paint Roller Market for Beatrice Foods Company" (Schlytter 999). The Bureau of Census categorizes brushes and rollers in the same five-digit SIC category, 39912. This category includes no other products (CX 74).

Other Paint Applicators

56. Other paint applicators consist of power spray equipment and aerosol cans. It has been stipulated in this action that "brushes and aerosols are interchangeable for certain uses" (Tr. 1874). The manufacture, distribution, sale and use of these products differ in many ways from that of paint brushes and rollers.

Aerosols

57. An aerosol paint spray (hereinafter "aerosols") consists of a metal container holding from 8 to 32 ounces of paint and propellant (Felkay 1272, DeGregory 1664). Aerosols apply paint directly to the surface, using the pressure of the propellant to force the paint through an orifice, which atomizes it (Weiss 468).

58. Aerosols are normally manufactured and sold by firms different from those which manufacture and sell manually powered paint applicators (Kerr 1905-06, CX 108 a-b, 109 a-c, 110 a-c).

59. Manufacturers of aerosols often package and sell many aerosol items other than aerosol spray paint (Mulliken 2101, Kerr 1900). Such other aerosol items can be produced on the same equipment used to produce aerosol spray paint (Mulliken 2101, Weiss 468-69, Kerr 1898). The same containers are used to package each type of aerosol product (Mulliken 2100-01, Weiss 468-69, Kerr 1898).

60. Aerosols are manufactured using different technology and machinery from that used to produce manually powered paint applicators (Weiss 468-69, Felkay 1304, Mulliken 2097).

61. Aerosol manufacturers recognize aerosols as a separate industry. There is a specialized trade organization for aerosol producers, the Chemical Specialties Manufacturers Association (Weiss 484; Mulliken 2030, 2033-34) and a specialized trade publication, "Aerosol Age" (Weiss 485). A seller of aerosols considers them to be in a market "completely different from the paint brush and paint roller market." (Weiss 472-73).

62. Aerosols are used for specialized painting applications for which the use of a paint brush or roller would be impractical (Chasen 2368). Aerosols are used for painting small, intricate objects, such as wrought iron chairs or radiators (Weiss 470-71, Touchett 595-602, Bready 821, Kerr 1872, Felkay 1272, Chasen 2368). Aerosols are not used for larger flat surfaces as their cost for such applications would far exceed the

cost of applying paint by paint brush or roller (Weiss 470-71, Touchett 595-602).

Spray Equipment

63. Sprayers consist of mechanical equipment for applying paint under force (Zook 262). There are three basic types of such sprayers, conventional, airless and electrostatic (Adams 772, Chasen 2369).

64. A conventional spray system is powered by compressed air generated by an air compressor (Adams 793). Conventional sprayers consist of a spray gun, made up of a container to hold the paint and a nozzle through which the paint is forced, and a compressor (Chasen 2369-70).

65. Airless sprayers use hydraulic pressure to force the paint through a small orifice (Adams 773, 792-93; Chasen 2369-70). The principal components of an airless sprayer are a high pressure pump, an airless spray gun, and the high pressure hoses which convey the paint from the pump to the gun (Adams 773).

66. Electrostatic sprayers apply paint to an object by placing an opposite electrical charge on the item to be coated from the electrical charge of the paint. The paint when released by such sprayers is thereby attracted solely to the object to be painted (Chasen 2369-70).

67. A cross section of witnesses directly involved in the making and/or selling of spray equipment testified on the prices of spray equipment. Their testimony shows that the range of prices of spray equipment is considerably higher than the range of prices for manually powered paint applicators (Findings 53, 68).

68. The least expensive complete spray unit sold by Sears had a list price of $37.95 (Panoessa 2001). A painting contractor testified that the least expensive spray equipment used in his business cost $50 and that some equipment used cost as much as $1500 (Chasen 2376-77). Wooster manufactures spray equipment ranging in price from $895 to $1095 (Zook 262). The entire range of Bink's spray equipment was $75 to $1500 (Adams 778-79). Respondent's witness Salovich testified as to two models of spray applicators sold by Spraytech with suggested retail prices of $50 and $119 (Salovich 1946-53).

69. The manufacture of sprayers is totally different from the manufacture of paint brushes and rollers (Zook 262-68, Weiss 466-67, Touchett 630, Shulman 645-47, Lieberman 675-81). Sprayers are primarily a precision machined metal product. Their manufacture uses processes common to a standard machine and metal working shop (Adams 777).

70. The raw materials used to manufacture sprayers are entirely different from those used to manufacture paint brushes and rollers. The manufacture of sprayers requires special forgings, stampings and

steel bar stock while the manufacture of brushes and rollers requires filament, handles, glue, ferrules, fabric, and cardboard tubes (Adams 777, Weiss 466-67, Zook 266-68).

71. With few exceptions, sprayers are manufactured and sold by firms different from those which manufacture and sell manually powered paint applicators (Adams 810; Zook 293-95; Lieberman 673-74; Bready 823; CX 80 d; CX 81 d; CX 86 d; CX 87 g; CX 88 f; CX 90 a; CX 91 d, k; CX 93 g; CX 96 d; CX 97 d; CX 98 d).

72. The government and paint brush and roller manufacturers recognize spray applicators as a separate industry. One paint brush and roller manufacturer stated: "* * * the spray business is a completely different type of business. It requires a much more degree of technical skill, a greater degree of having facilities, a bigger * * * investment, * * *. It takes a completely different selling organization. I don't know of any of our reps * * * that in themselves handle a paint spray line or paint gun line, because they call on different buyers. It is a different animal in business." (Touchett 630-31).

73. A manufacturer of sprayers did not consider any paint brush or roller firm to be a primary competitor (Adams 771-72).

74. Special training is required to achieve good results with a spray gun (CX 77, Adams 816-17). They are difficult to use. There are a multitude of things that can go wrong (Zook 265).

75. Sellers of sprayers must provide repair services and spare parts. Such services are not provided by paint brush and roller manufacturers (Zook 265-66; CX 112; Bready 822). Manufacturers of sprayers do not consider the costs of paint brushes and rollers in setting sprayer prices (Zook 305, Adams 790).

76. Sprayers are used to apply paint on small specialty jobs such as iron work and irregularly surfaced items (Zook 300-01), and by painting contractors for large, outdoor jobs (Chasen 2371, 2378). A painting contractor would not use a sprayer to paint an average sized room or one wall, since it would be more expensive than using a brush or roller (Adams 780-82, Chasen 2377). The large commercial sprayer manufactured by Wooster would be used for large commercial jobs such as factory ceilings and huge projects (Zook 300-01).

Paint Brush and Roller Submarkets

77. The raw materials used to manufacture paint brushes are completely different from the raw materials used to manufacture paint rollers (findings 40, 41).

78. The machinery used to manufacture paint brushes is completely different from the machinery used to manufacture paint rollers (Brumm 1522; Linzer 3355, 3361; Shulman 646; Lieberman 675; Cantonis 2146).

79. The technology required to manufacture paint brushes is completely different from the technology required to manufacture paint rollers (Benson 3427-28, 3432; Freund 1428-29).

80. Paint brushes and rollers have specialized characteristics and uses. Paint brushes are preferred to rollers for smaller flat surfaces and trim work while paint rollers are preferred to brushes for medium and larger flat surfaces (Bready 821, Weiss 471). Brushes are normally used for applying paint to furniture (Weiss 471, Touchett 613), and are preferred for outdoor walls of houses (Touchett 614).

81. Paint brush manufacturers are represented by their own trade association. Continual efforts to include roller manufacturers within the American Brush Manufacturer's Association have met with defeat (Weiss 482-84).

Conclusionary Findings Re Nature of the Trade and Commerce

82. The manufacture and sale of artist brushes, power spray equipment and aerosol cans are not included in the manually powered paint applicator line of commerce (findings 42, 56-79).

83. The relevant line of commerce in this proceeding consists of the manufacture and sale of manually powered paint applicators (findings 39-76).

84. A relevant submarket in this proceeding consists of the manufacture and sale of paint brushes (findings 77-81). An additional relevant submarket in this proceeding consists of the manufacture and sale of paint rollers and accessories (findings 77-81).

Size and Concentration of the Manually Powered Paint Applicator Industry

85. In 1967, total shipments of manually powered paint applicators were $88.6 million (CX 74, p. 39D-15).[2] Such shipments amounted to $96.4 million in 1968 and $98.2 million in 1969 (CX 75, p. 35).

86. The four largest manufacturers of manually powered paint applicators accounted for 36.6 percent of shipments in 1967, 38.1 percent in 1968 and 41.3 percent in 1969. The eight largest manufacturers of manually powered paint applicators accounted for 52.8 percent of shipments in 1967, 55.6 percent in 1968 and 62.5 percent in 1969 (CX 108 a-c).

87. Since 1967, concentration in the manufacture and sale of manually powered paint applicators has been increasing. Between 1967

[2] Respondent states that the use of "value of shipments" for SIC product category 39912, "paint and varnish brushes and paint rollers" (CX 74, p. 39D-15), is invalid (RPF 16-31). The Census data was used solely to corroborate other market share data (see findings 39-92), and the undersigned finds that the figures for the firms listed on CXs 108, 109, 110 represent the major known competitors in the industry. (See footnote to Finding 87, *infra*.) The Commission has repeatedly held that Census data may be used for the purpose of corroboration where there is independent evidence and identification of the major competitors in the market (*Papercraft Corp.*, Docket No. 8779, 3 CCH Trade Reg. Rep. ¶ 19,725, pp. 21,779-80 (F.T.C. 1971) [78 F.T.C. 1352]; *Avnet, Inc.*, Docket No. 8775, 3 CCH Trade Reg. Rep. ¶ 20,252, at p. 22,275 (1973) [82 F.T.C. 391].