

IN THE MATTER OF
FORD MOTOR COMPANY

Docket 9001. Interlocutory Order, Feb. 10, 1978

On motion to withdraw matter from adjudication, Commission directed that pleadings of complaint counsel be furnished to the Commission, but not placed on the public record, to enable it to determine the probability that a settlement will be achieved.

ORDER

By his order of January 19, 1978, the Administrative Law Judge certified to the Commission an amended motion by respondent to withdraw this matter from adjudication for consideration of a consent order.

Beyond those facts, the posture of the motion becomes somewhat murky. Respondent's original motion recites that "complaint counsel do not oppose this motion," but this recital is absent from the amended motion.¹ Complaint counsel have not, however, executed the proposed consent order, for reasons which the Administrative Law Judge describes as including both some disagreement with its terms and the view that it would vary the terms of our earlier order (Dkt. C-2582) against the respondent, a variance complaint counsel presumably felt they could not agree to since "[a]ny modification of an outstanding order is exclusively within the jurisdiction and discretion of the Commission."²

Evidently the respective positions of respondent and complaint counsel with regard to the proposed consent order are fully set out in respondent's memorandum of December 23, 1977, complaint counsel's answer of January 16, 1978, and respondent's reply of January 18. These pleadings have not been sent forward to us, however, because of the Administrative Law Judge's opinion that "it would not be appropriate for the Commission to consider the substance of that memorandum [of December 23, 1977] before it withdraws the instant matter from adjudication."

The reasons for this are not elaborated, nor are they self-evident. Obviously, no "*ex parte*" problem exists, and if respondent in its memorandum concedes matters it had placed in issue the damage has already been done by submitting the memorandum to the initial

¹ In his certification, however, the Administrative Law Judge characterizes the motion as "unopposed."

² While this statement is correct, its application in this context seems to reflect a misunderstanding of the significance of executing a proposed consent order. Complaint counsel's signature would indicate a recommendation that the Commission accept the order. Actual modification of the outstanding order would occur only if the Commission followed that recommendation. We make this observation only to obviate confusion in the future, since it appears here that complaint counsel could not unreservedly make such a recommendation.

trier of fact and law. Inasmuch as we are trying to determine, as the Administrative Law Judge did, the probability that a settlement will be achieved, respondent's memorandum and the additional pleadings could be of considerable assistance.

Accordingly, it is ordered, That the pleadings of December 23, 1977, and January 16 and 18, 1978, be expeditiously transmitted to the Commission. They should not, however, be placed on the public record at this time.

Interlocutory Order

IN THE MATTER OF

AIRCO, INC.

Docket 9098. Interlocutory Order, Feb. 15, 1978

Order establishing a protective order providing ten (10) days' notice before release of certain documents to be supplied in response to subpoena duces tecum.

ORDER

The Administrative Law Judge has certified to the Commission a paragraph undertaking to provide ten days' notice before release of certain documents to be supplied by Airco, Inc. in response to a subpoena *duces tecum*. If we so authorize, it is the Administrative Law Judge's intention to incorporate this paragraph in a protective order which he will grant to Airco. As our Rules now stand, a "ten-day notice" undertaking can only be made by the Commission itself.

The action requested by the Administrative Law Judge's certification is similar to that which the Commission took by order dated January 31, 1977, in *Exxon Corporation, et al.* The Commission has determined to authorize incorporation of paragraph 6 in the proposed protective order. The language set out in the Administrative Law Judge's certification will be modified, however, by deletion of the words "designated by Airco as confidential" and substitution therefor of the words "covered by this protective order." The coverage of such an order is of course for the Administrative Law Judge, not respondent, to determine.

So ordered.

Complaint

91 F.T.C.

IN THE MATTER OF

SECURITY PACIFIC MORTGAGE CORPORATION, AS
SUCCESSOR TO KASSLER & CO.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING
ACTS*Docket C-2917. Complaint, Feb. 17, 1978 — Decision, Feb. 17, 1978*

This consent order, among other things, requires a Denver, Colo. finance company to cease failing to provide consumers, in connection with the extension of credit, such material and disclosures as are required by Federal Reserve System regulations. Further, the company is required to make prescribed efforts to obtain information pertaining to third-party fees.

Appearances

For the Commission: *James T. Rohrer.*

For the respondent: *Gordon Greiner and Donald G. Palmer,
Holland & Hart, Denver, Colo.*

COMPLAINT

Pursuant to the provisions of the Truth in Lending Act and the implementing regulation promulgated thereunder, and the Federal Trade Commission Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that Security Pacific Mortgage Corporation, as successor in interest to Kassler & Co., a corporation, hereinafter referred to as respondent, has violated the provisions of said Acts and implementing regulation, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Kassler & Co. was a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its principal office and place of business located at Diamond Hill Office Park, 2460 West 26th Ave., Denver, Colorado.

PAR. 2. Security Pacific Mortgage Corporation is a "successor and assign" of Kassler & Co., having merged with Kassler in 1974, after the acts and practices alleged in the complaint. Security Pacific Mortgage Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 2460 West 26th Ave. Denver, Colorado.

PAR. 3. Respondent is now and for some time last past has been engaged in the business of arranging for and providing to the public, for a fee, mortgage loans secured by real property.

PAR. 4. In the ordinary course and conduct of its business as aforesaid, respondent regularly arranges for the extension of consumer credit, as "arrange for extension of credit" and "consumer credit" are defined in Section 226.2 of Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve Board.

PAR. 5. Subsequent to July 1, 1969, respondent, in connection with its arrangement for the extension of consumer credit, has provided customers with required cost disclosure statements which:

A. Fail to include in the finance charge a charge imposed directly or indirectly by the creditor payable directly or indirectly by the customer to a third party, such charge being incident to the extension of credit, as required by Section 226.4(a) of Regulation Z, when such charges were within the actual or constructive knowledge of the respondent and within the purview of its relationship with the customer as required by Section 226.6(d) of Regulation Z.

B. Fail to state the finance charge accurately as required by Section 226.8(d)(3) of Regulation Z.

C. Fail to disclose, in accordance with Section 226.8(d)(2) of Regulation Z, any finance charge paid directly or indirectly with the creditor's knowledge to another person as required by Section 226.8(e)(1).

D. Fail to state accurately the amount of credit by failing to exclude from such amount financed the items set forth in Section 226.8(e)(1) of Regulation Z as required by Section 226.8(d)(1) of Regulation Z.

E. Fail to disclose the annual percentage rate computed in accordance with the requirements of Section 226.5 of Regulation Z accurately to the nearest quarter of one percent, as required by Section 226.8(b)(2) of Regulation Z.

PAR. 6. Subsequent to July 1, 1969, in the ordinary course and conduct of its business as aforesaid, respondent arranged for the extension of credit in transactions in which a security interest is acquired in real property which is used as a principal residence of the customer. The customers thereby have the right to rescind the transaction, as provided by Section 226.9 of Regulation Z. As set out in Paragraph Five herein, respondent has failed and continues to fail to deliver to some of its customers the material disclosures required by Regulation Z. Therefore, some of the respondent's customers have not been afforded the three (3) day right of rescission from the date

of consummation of the transaction or date of delivery of material disclosures, whichever is later, as set out in Section 226.9(a) of Regulation Z. Respondent has not given notice of this right to rescind as required by Section 226.9(b) of Regulation Z, in the manner and form specified therein.

PAR. 7. Pursuant to Section 103(q) of the Truth in Lending Act, respondent's aforesaid failures to comply with the requirements of Regulation Z constitute a violation of that Act and, pursuant to Section 108(c) thereof, respondent thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Atlanta Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act, as amended; and

The respondent and its attorney and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the 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 thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Proposed respondent Kassler & Co. was, at the time of the acts alleged in the Commission's complaint, a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at Diamond Hill Office Park, 2460 West 26th Ave., Denver,

2. Security Pacific Mortgage Corporation is a successor and assign of Kassler & Co., having merged with Kassler in 1974, after the acts and practices alleged in the complaint. Security Pacific Mortgage Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 2460 West 26th Ave., Denver, Colorado. Security Pacific Mortgage Corporation is thus bound by this order.

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

ORDER

It is ordered, That respondent Security Pacific Mortgage Corporation, as successor in interest to Kassler & Co., a corporation, its successors and assigns, and its officers, and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the extension of "consumer credit" or arranging for "consumer credit", as defined in Regulation Z (12 C.F.R. 226) of the Truth in Lending Act [15 U.S.C. 1601-65 (1970), as amended, 15 U.S.C. 1601-65(a), (Supp. IV, 1974)], do forthwith cease and desist from:

1. Failing to include in the stated finance charge, as required by Section 226.4(a) of Regulation Z, any monies payable directly or indirectly by the customer to any third party who may have referred consumer loans to them or who may have assisted them in arranging for consumer credit, of which respondent is aware or should be aware through its reasonable effort.

2. Failing to disclose the amount of the finance charge accurately, as required by Section 226.8(d)(3) of Regulation Z.

3. Failing to disclose the amount of any "prepaid finance charge," as directed in Section 226.8(d)(2) of Regulation Z.

4. Failing to state accurately the amount of credit by failing to exclude from such amount the items set forth in Section 226.8(e)(1) of Regulation Z, as required by Section 226.8(d)(1) of Regulation Z.

5. Failing to disclose the annual percentage rate accurately to the nearest quarter of one percent, in accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

6. Failing to make reasonable efforts to obtain or to estimate information required for disclosures as is allowed by Section 226.6(f) of Regulation Z, and thus failing to accurately disclose the finance charge, as required by Section 226.8(d)(3) of Regulation Z.

7. Failing in any consumer credit transaction or advertising to

make all disclosures determined in accordance with Sections 226.4 and 226.5 of Regulation Z at the time and in the manner, form and amount required by Sections 226.6, 226.8 and 226.10 of Regulation Z.

It is further ordered, That the respondent henceforth obtain from each person receiving consumer credit from it a completed and signed statement relating to monies or obligations to pay monies which are payable, directly or indirectly, by the customer to any third party who may have referred the customer to respondent or who may have assisted the customer in arranging for consumer credit with respondent. A sample of such a form is attached hereto as Appendix A. In each instance in which respondent has obtained such a completed form and in which a customer has indicated thereon that he is not liable for and has not paid a fee to any other person in connection with the loan, respondent shall be deemed to have made sufficient reasonable efforts as required by subparagraph 1 of this order, unless respondent otherwise has actual knowledge of monies or fees payable by the customer to any third party.

It is further ordered, That respondent shall, within sixty (60) days after service of this order upon respondent, file with the Commission a report showing the manner and form in which it has complied and is complying with each and every specific provision of this order.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondent 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 emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

APPENDIX A

Customer Statement of Third Party Fees

1. Have you paid or are you liable for the payment of a fee to any person who has assisted you with or who has arranged for your application to Security Pacific Mortgage Corporation for this loan?

Yes

No

2. If your answer above was "Yes," please state the amount of the fee paid or to be paid to such person.

\$ _____

3. If your answer to question 1 was "Yes," please state the name and address of such person.

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Appendix

Address _____

I have read and understand this document, and affirm that the answers given are true to the best of my knowledge.

Date

Customer

Customer

Complaint

91 F.T.C.

IN THE MATTER OF

FRUEHAUF CORPORATION, INC.

ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT AND SECTION 7 OF THE
CLAYTON ACT*Docket 8972. Complaint, June 21, 1974 — Final Order, Feb. 22, 1978*

This order, among other things, requires a Detroit, Mich. truck trailer manufacturer to divest itself, within one year from the date of the order, of Kelsey-Hayes, a Romulus, Mich. manufacturer of automotive components, excluding those operations unique to Kelsey-Hayes' Aerospace Group and R-V Agriculture Group; and to refrain, for a ten-year period, from acquiring any concern engaged in manufacturing, distributing, or selling heavy duty wheels, antiskid braking devices, or truck trailers.

Appearances

For the Commission: *K. Keith Thurman, George J. Wright, Richard L. Williams and Tom D. Smith.*

For the respondent: *John R. Ferguson, William H. Wentz, Phillip A. Proger, Janine H. Coward, Alan S. Ward and Warren Daane, Baker, Hostetler, Frost & Towers, Washington, D.C.*

COMPLAINT

The Federal Trade Commission having reason to believe that Fruehauf Corporation, a corporation subject to the jurisdiction of the Commission, has acquired the stock of Kelsey-Hayes Company, a corporation, 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(a)(1)), and that a proceeding in respect thereof would be in the public interest, hereby issues this complaint, pursuant to 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(a)(6)(b)), stating its charges in that respect as follows:

I. DEFINITIONS

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

- (a) "Wheels" include wheels, rims, hubs and brake drums.
- (b) "Heavy duty" refers to components for application on on-highway vehicles such as trucks, truck tractors, buses, truck trailers and container chassis having a gross vehicle weight (GVW) of 14,000

(c) "Antiskid braking device" is three matched components consisting of a sensor, a computer and a valve designed to control braking during a potential skid situation. [2]

(d) "Truck Trailers" are all types of truck trailers (product class code 37150) reported by the U.S. Bureau of Census in its current industrial report of shipments of truck trailers for 1972.

(e) "Market" includes all shipments of the relevant products manufactured in the United States or imported into the United States.

II. FRUEHAUF CORPORATION

2. Respondent, Fruehauf Corporation (hereinafter "Fruehauf"), is now, and was at the time of the acquisition hereinafter set forth, a Michigan corporation with its principal office and place of business located at 10900 Harper Ave., Detroit, Michigan.

3. In 1972, Fruehauf had sales and rentals of \$550.4 million and assets of \$556.6 million. In that year it was the 245th largest publicly held industrial corporation in the nation in total sales and revenues and ranked 207th in assets.

4. Fruehauf, prior to and following the acquisition hereinafter set forth, was and is the nation's largest and most vertically integrated truck trailer manufacturer. Fruehauf presently produces truck trailers in twelve manufacturing locations in the United States. Ninety-six domestic branch operations owned by Fruehauf sell and service truck trailers in the United States and they constitute the most extensive service and distribution system in the nation's truck trailer industry. Fruehauf produces, sells and services several different types of truck trailers including all types of van trailers, platform, tank, bulk commodity and dry material, pole and logging, dump, low-bed heavy haulers, van size containers and container chassis.

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

III. KELSEY-HAYES COMPANY

6. Prior to its acquisition by Fruehauf as hereinafter set forth, Kelsey-Hayes Company (hereinafter "Kelsey-Hayes"), was a Delaware corporation with its principal office and place of business located at 38481 Huron River Drive, Romulus, Michigan. [3]

7. In the fiscal year ending August 31, 1973, Kelsey-Hayes had

sales of \$453.7 million and assets of \$243.0 million. In 1972, Kelsey-Hayes was the 281st largest publicly held industrial corporation in the nation in total sales and revenues and ranked 363rd in assets.

8. In 1972, approximately 72 percent of Kelsey-Hayes' sales were of products and components for automobiles, trucks, and truck trailers.

9. In 1972, Kelsey-Hayes was the nation's largest manufacturer of wheels for use in the manufacture of automobiles. Kelsey-Hayes was and is a significant supplier of heavy duty wheels including truck trailer wheels. In 1972, Kelsey-Hayes was a key supplier of heavy duty truck wheels to both original equipment manufacturers and replacement parts distributors and the major independent supplier of both drum brake assemblies and brake drums to the automotive industry. Kelsey-Hayes has developed and plans to manufacture and sell a heavy duty antiskid braking device of the type which will be standard equipment on all heavy duty trucks, truck tractors and truck trailers manufactured in the United States beginning September 1, 1974.

10. At all times relevant herein, Kelsey-Hayes sold and shipped its products throughout the United States and was engaged and is now engaged in commerce as "commerce" is defined in the Clayton Act and in the Federal Trade Commission Act.

IV. THE ACQUISITION

11. On or about October 31, 1973, Fruehauf Manufacturing Company (hereinafter "Fruehauf Manufacturing"), an inactive wholly-owned subsidiary of Fruehauf, was merged into Kelsey-Hayes, whereby Kelsey-Hayes survived as a wholly-owned subsidiary of Fruehauf. To consummate the merger, Fruehauf issued approximately 3,804,915 shares of Fruehauf common stock at an approximate value of \$99 million to Fruehauf Manufacturing and all Kelsey-Hayes common stock was then converted into Fruehauf common stock owned by Fruehauf Manufacturing in the ratio of five shares of Fruehauf common stock for four shares of Kelsey-Hayes common stock. Kelsey-Hayes has been operated as a Fruehauf subsidiary since the acquisition.

V. TRADE AND COMMERCE

12. The relevant geographic market is the United States as a whole. The relevant product markets are: [4]

- (a) Manufacture and sale of heavy duty wheels;
- (b) Manufacture and sale of truck trailer wheels.

- (c) Manufacture and sale of cast spoke truck trailer wheels, exclusive of rims;
- (d) Manufacture and sale of heavy duty antiskid braking devices; and
- (e) Manufacture and sale of truck trailers.

A. HEAVY DUTY WHEELS

13. The market for heavy duty wheels was \$263.6 million in 1972. Shipments in the truck trailer wheel market were \$72.7 million in that year. In 1972, shipments of cast spoke truck trailer wheels, exclusive of rims, were \$35.0 million.

14. Concentration in the manufacture and sale of heavy duty wheels is high with the top four firms accounting for 69 percent, and the top eight firms accounting for 94 percent of the market in 1972. Concentration is similarly high in the manufacture and sale of truck trailer wheels with the top four firms accounting for 63 percent, and the top eight firms accounting for 87 percent of the market in 1972. Concentration in the manufacture and sale of cast spoke truck trailer wheels, exclusive of rims, is very high, with the top four firms accounting for 91 percent, and the top eight firms accounting for 100 percent of the market in 1972.

a. *Vertical Relationships*

15. Entry into the manufacture and sale of heavy duty wheels is difficult. The manufacture and sale of such wheels requires large financial resources, sophisticated technological skills required of a foundry and an effective distribution system. Few firms possess such prerequisites for entry. [5]

16. In 1972, Kelsey-Hayes was the second largest domestic producer of heavy duty wheels, the eighth largest domestic producer of truck trailer wheels, and the fourth largest domestic producer of cast spoke truck trailer wheels, exclusive of rims. In 1972, Kelsey-Hayes' share of the market for heavy duty wheels was 15 percent, its share of the market for truck trailer wheels was 3.7 percent, and its share of the market for cast spoke truck trailer wheels, exclusive of rims, was 7.8 percent.

17. In 1972, Fruehauf accounted for 4.8 percent of all heavy duty wheel purchases. Fruehauf was the largest purchaser of truck trailer wheels and cast spoke truck trailer wheels, exclusive of rims, in that year, accounting, respectively, for 17.9 percent and 17.5 percent of such purchases. Fruehauf purchased 7 percent of its requirements

for truck trailer wheels in 1972 from Kelsey-Hayes and 93 percent from all other suppliers.

18. With the availability of Fruehauf's branches as outlets for selling and servicing of Kelsey-Hayes heavy duty wheels and the aid of the Fruehauf domestic sales force, Kelsey-Hayes' position in the heavy duty wheel market will be strengthened.

b. *Potential Competition*

19. Fruehauf was one of the few most likely competitors of Kelsey-Hayes in the heavy duty wheel market prior to the acquisition. Fruehauf had conducted several studies relating to fabricating its own truck trailer wheels and had done extensive development work with truck trailer wheel manufacturers prior to the acquisition of Kelsey-Hayes. Fruehauf, prior to the acquisition of Kelsey-Hayes, had already integrated into the manufacture of axles and was the only truck trailer manufacturer which fabricated truck trailer axles. Such axles were not only for its own use but also were sold to other truck trailer manufacturers. Similarly, Fruehauf had integrated into aluminum extrusion, a major truck trailer component, and was the only truck trailer manufacturer which produced its own aluminum extrusions. Such extrusions not only were used by Fruehauf but also sold to other truck trailer manufacturers. [6]

20. By virtue of its position as the most vertically integrated truck trailer manufacturer in the United States, its production of truck trailer axles and possession of attendant technological skill, its marketing ability, its financial resources and its demonstrated interest in entering the heavy duty wheel market, Fruehauf was, prior to October 31, 1973, one of the few most likely entrants into the manufacture and sale of heavy duty wheels.

B. HEAVY DUTY ANTISKID BRAKING DEVICES

21. Performance standards set forth in Department of Transportation Federal Motor Vehicle Safety Standard 121¹ will require heavy duty antiskid braking devices on all heavy duty trucks, truck tractors and truck trailers manufactured in the United States after September 1, 1974.

22. Entry into the manufacture and sale of heavy duty antiskid braking devices is difficult. The development, manufacture, and sale of heavy duty antiskid braking devices require large financial resources, sophisticated technological skill and an effective distribu-

tion and service system. Few firms possess such prerequisites for entry.

23. In the year following September 1, 1974, domestic sales of heavy duty antiskid braking devices will be approximately \$80 million. Heavy duty antiskid braking devices having application on truck trailers will comprise approximately 30 percent of the heavy duty antiskid braking device market in the year following September 1, 1974.

24. Concentration in the heavy duty antiskid braking device will be high. Fewer than ten firms will be able to manufacture production quantities of heavy duty antiskid braking devices by September 1, 1974.

25. Kelsey-Hayes is a leading producer and developer of heavy duty antiskid braking devices as well as a leading manufacturer of automobile antiskid braking devices.

26. Kelsey-Hayes' share of the heavy duty antiskid braking device market is projected to be approximately 30 percent in the year following September 1, 1974.

27. Purchases of heavy duty antiskid braking devices by Fruehauf will comprise approximately 8 percent of total heavy duty antiskid braking device purchases in the year following September 1, 1974. [7]

28. With the availability of Fruehauf's branches as outlets for selling and servicing of Kelsey-Hayes heavy duty antiskid braking devices and the aid of the Fruehauf domestic sales force, Kelsey-Hayes' position in the heavy duty antiskid braking device market will be strengthened.

C. TRUCK TRAILERS

29. In 1972, the total value of truck trailer shipments in the United States was \$886.2 million.

30. The truck trailer market is highly concentrated. In 1972, the top four firms accounted for 55.0 percent of total truck trailer shipments and the top eight firms accounted for 69.3 percent.

31. In 1972, Fruehauf's share of the truck trailer market was approximately 25 percent.

32. Entry into the manufacture and sale of truck trailers to significant users is difficult. A successful manufacturer and seller of truck trailers must possess ample financial resources, have manufacturing, assembling and marketing skill and have access to reliable sources of supply for component parts.

33. The prompt supply of truck trailer components is of major importance to truck trailer manufacturers due to short delivery

deadlines often set by truck trailer purchasers. Through the acquisition of Kelsey-Hayes, Fruehauf has captured a secure source of supply for truck trailer wheels as well as a source of heavy duty antiskid braking devices. This secure source of supply to Fruehauf of truck trailer wheels and heavy duty antiskid braking devices gives Fruehauf a significant advantage over its competitors, particularly in periods of scarce supply of either of these truck trailer components.

34. The advantage gained by Fruehauf over its competitors through its acquisition of a secure source of supply for component parts produced by Kelsey-Hayes is magnified by the probability that truck trailer customers who purchase truck trailers from Fruehauf during periods of components' scarcity will continue to purchase truck trailers from Fruehauf in the future. Truck trailer customers generally receive better trade-in terms for Fruehauf trailers at Fruehauf branches than they do from other manufacturers, giving these customers an incentive to continue purchasing from Fruehauf. Many truck trailer customers are trucking fleet operators who seek standardization in their fleets to minimize parts stocking problems and simplify maintenance and therefore are likely to continue [8] purchasing truck trailers from their present source. Fruehauf utilizes many component parts peculiar to Fruehauf trailers when the truck trailers are manufactured. Thus, double stocking of the same type of parts is necessary when a trucker mixes other makes of truck trailers with Fruehauf trailers in his fleet.

VI. EFFECTS OF THE ACQUISITION

35. The effects of the acquisition of Kelsey-Hayes by Fruehauf may be substantially to lessen competition or tend to create a monopoly in the manufacture and sale of heavy duty wheels, truck trailer wheels, cast spoke truck trailer wheels, exclusive of rims, heavy duty antiskid braking devices and truck trailers throughout the United States in violation of Section 7 of the Clayton Act, as amended, and the effects of the acquisition may be to unreasonably restrain trade and hinder competition unduly in the manufacture and sale of heavy duty wheels, truck trailer wheels, cast spoke truck trailer wheels, exclusive of rims, heavy duty antiskid braking devices and truck trailers, thereby constituting a restraint of trade and an unfair act and practice in commerce, in violation of Section 5 of the Federal Trade Commission Act, as amended, in the following ways among others:

Kelsey-Hayes have been and may be foreclosed from selling to a substantial purchaser of heavy duty wheels.

(b) Kelsey-Hayes' position in the heavy duty wheel market will be strengthened.

(c) Actual and potential producers of truck trailer wheels other than Kelsey-Hayes have been and may be foreclosed from selling to the leading purchaser of truck trailer wheels. [9]

(d) Kelsey-Hayes' position in the truck trailer wheel market will be strengthened.

(e) actual and potential producers of cast spoke truck trailer wheels, exclusive of rims, other than Kelsey-Hayes have been and may be foreclosed from selling to the leading purchaser of such wheels.

(f) Kelsey-Hayes' position in the market for cast spoke truck trailer wheels, exclusive of rims, will be strengthened.

(g) Substantial potential competition between Fruehauf and manufacturers of heavy duty wheels, including Kelsey-Hayes, has been eliminated.

(h) Potential competition in the heavy duty wheel market has been substantially lessened.

(i) Sales by Kelsey-Hayes of heavy duty antiskid braking devices may be increased through, and competitive suppliers of such products foreclosed from, the actual and potential purchases of Fruehauf.

(j) Kelsey-Hayes' position in the heavy duty antiskid braking device market will be strengthened at the expense of Kelsey-Hayes' actual and potential competitors.

(k) Truck trailer manufacturers who are competitors of Fruehauf have been or may be foreclosed from a source of supply for heavy duty wheels and heavy duty antiskid braking devices.

(l) Barriers to entry in each of the relevant markets have been raised.

(m) The dominant position of Fruehauf in the truck trailer market will be strengthened. [10]

VII. VIOLATIONS CHARGED

36. The acquisition of Kelsey-Hayes by Fruehauf constitutes a violation of Section 7 of the Clayton Act, as amended, (15 U.S.C. 18), and constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45).

Initial Decision

91 F.T.C.

INITIAL DECISION BY THOMAS F. HOWDER, ADMINISTRATIVE
LAW JUDGE

JULY 31, 1977

PRELIMINARY STATEMENT

This case concerns the effect on competition arising from the merger joining the Fruehauf Corporation ("Fruehauf") and the Kelsey-Hayes Company ("Kelsey") on October 31, 1973. The [2] Federal Trade Commission on June 21, 1974 issued a complaint challenging the merger as violative of Section 7 of the Clayton Act, as amended, (15 U.S.C. 18) and Section 5 of the Federal Trade Commission Act (15 U.S.C. 45).*

The Commission's complaint alleges that competition will be lessened in each of three basic markets, *viz.*, truck trailers, heavy duty antiskid braking devices, and heavy duty wheels — and also in two submarkets, truck trailer wheels (later abandoned by complaint counsel) and cast spoke truck trailer wheels, exclusive of rims. The anticompetitive effects alleged were vertical foreclosure of competing companies from access to markets and/or sources of supply and entrenchment of the merged firms in their respective markets. The complaint also alleges that Fruehauf has been removed as a potential competitor of Kelsey in the manufacture and sale of heavy duty wheels.

On August 19, 1974, respondent Fruehauf filed an answer to the complaint admitting the merger and certain corporate and jurisdictional facts, but denying the substantive allegations thereof.

Prehearing conferences were held in Washington, D.C. on September 10, 1974 and February 4, 1975. Discovery was actively pursued by both parties. Proposed exhibit lists with copies of proposed exhibits and witness lists with narrative summaries of expected testimony were exchanged by the parties prior to trial. Both parties submitted trial briefs in support of their respective positions in this matter. [3]

All hearings in the case were held in Washington, D.C. Presentation of the case-in-chief began on October 20, 1975 and concluded on December 5, 1975. Presentation of Fruehauf's defense began on March 22, 1976 and continued through May 4, 1976. Complaint counsel began its rebuttal case with hearings on June 1, 2 and 11, 1976. A rebuttal subpoena was issued to Fruehauf on May 20, 1976 with the return on September 13, 1976. Rebuttal hearings resumed

* Complaint counsel's "Reply to Respondent's Motion for More Definite Statement" (dated July 29, 1974) indicated that the only theories of liability which they would assert were those encompassed by Section 7 of the

on October 12, 1976 and concluded on November 8, 1976. Fruehauf presented its surrebuttal with hearings on November 29, 1976, December 1 and 2, 1976 and February 10, 1977.

The record (which includes a transcript of 7678 pages and 502 exhibits) was closed on March 29, 1977, following the resolution of various matters regarding exhibits, transcript corrections and *in camera* materials. Proposed findings were filed by the parties on May 1, 1977 and reply findings on June 7, 1977.

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 me upon the complaint, answer, testimony and other evidence, proposed findings of fact and conclusions of law filed by counsel supporting the complaint and by counsel for respondent. The proposed findings of fact, conclusions and arguments of the parties have been carefully considered, 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 issues not necessary for this decision.

Certain abbreviations, including the following are used in this decision:

CX - Commission's Exhibits.

RX - Respondent's Exhibits. [4]

CC's 1st RAF - Complaint Counsel's Initial Request for Admission of Facts.

CC's 1st RACF - Complaint Counsel's Initial Request for Admission of Confidential Facts.

R's 1st RAF - Respondent's Initial Request for Admission of Facts.

R's 1st RACF - Respondent's Initial Request for Admission of Confidential Facts.

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

Having heard and observed the witnesses and after having carefully reviewed the entire record in this proceeding, together with the proposed findings and conclusions submitted by the parties, I make the following findings:

FINDINGS OF FACT

I. IDENTITY AND BUSINESS OF RESPONDENT

1. Respondent Fruehauf is a publicly held corporation organized

and existing under the laws of the State of Michigan, with its principal office and place of business at 10900 Harper Ave., Detroit, Michigan. (Complaint and Answer, Para. 2.)

2. In 1972, Fruehauf had sales and rentals of \$550.4 million and assets of \$556.6 million. According to Fortune magazine, Fruehauf in 1972 was the nation's 245th largest publicly held industrial corporation in total sales and revenues and the 207th largest in total assets. (Complaint and Answer, Para. 3; CX 544A.) [5]

3. Fruehauf manufactures numerous types of truck trailers including van, platform, tank, bulk commodity and dry materials, pole and logging, dump, low-bed heavy haulers, van size containers, and container chassis. Fruehauf has established ninety-seven branches to provide sales, maintenance and service throughout the nation. (Complaint and Answer, Para. 4.) Both before and following the acquisition, Fruehauf has been the nation's largest truck trailer manufacturer. (CX 544A.)

4. At all times relevant herein, Fruehauf sold and shipped its products throughout the United States and was engaged in commerce as "commerce" is defined in the Clayton Act and in the Federal Trade Commission Act. (Complaint and Answer, Para. 5.)

II. THE ACQUISITION

5. On October 31, 1973 Fruehauf issued approximately 3,804,915 shares of Fruehauf common stock at an approximate value of \$99 million to Fruehauf Manufacturing Company, an inactive wholly-owned subsidiary of Fruehauf. Fruehauf Manufacturing Company then exchanged these shares of Fruehauf common stock for all the common stock of Kelsey-Hayes in the ratio of five shares of Fruehauf common stock for four shares of Kelsey-Hayes common stock. Fruehauf Manufacturing was thereby merged into Kelsey-Hayes and Kelsey-Hayes survived as a wholly-owned subsidiary of Fruehauf. Kelsey-Hayes has been operated as a Fruehauf subsidiary since the acquisition. (Complaint and Answer, Para. 11.) [6]

III. THE ACQUIRED COMPANY

6. Prior to October 31, 1973 Kelsey-Hayes was a Delaware corporation with its principal office and place of business at 38381 Huron River Drive, Romulus, Michigan. (Complaint and Answer, Para. 6.)

7. For the fiscal year ending August 31, 1972 Kelsey-Hayes had net sales of \$454.7 million and assets of \$243.0 million. According to

publicly held industrial corporation in the United States in total net sales and the 363rd largest in total assets. (Complaint and Answer, Para. 7; CX 544A.)

8. Kelsey-Hayes manufactures various component parts for the automotive industry, such as automobile wheels, brake drums and drum brake assemblies. It also manufactures heavy duty wheels for use on trucks and truck trailers. In addition, Kelsey-Hayes in 1975 was the leading supplier of heavy duty antiskid braking devices to heavy duty truck, truck tractor and truck trailer manufacturers. (Complaint and Answer, Para. 9; see proposed finding 46 of complaint counsel *in camera*.)

9. At all times relevant herein, Kelsey-Hayes sold and shipped its products throughout the United States and was engaged in commerce as "commerce" is defined in the Clayton Act and in the Federal Trade Commission Act. (Complaint and Answer, Para. 9, 10.)

IV. THE GEOGRAPHIC MARKET

10. There is no dispute and it is found that the relevant geographic market is the United States as a whole. (CX 544B.) [7]

V. HEAVY DUTY ANTISKID BRAKING DEVICE MARKET

11. The term "antiskid braking device" refers to certain safety equipment installed on the braking systems of an air-braked vehicle. This mechanism is designed to monitor and, if necessary, to override the driver's action during braking to prevent wheel lock-up and a possible skid. The device consists principally of three matched components: (1) a sensor which determines the speed at which a wheel is rotating; (2) a computer or logic module which calculates the speed at which the wheel should rotate in order to achieve maximum braking efficiency; and (3) a valve which regulates the air pressure so as to release the brakes momentarily in the event of an impending skid. (Campanini 379-80, 402, 407-09; Lindquist 531-32; Perry 662-63; Deibel 1012; DeClaire 1068-69; Denholm 1667; Henry 2438-39; Bell 2601, 2672-73; Robins 2903; Megginson 4198-99.)

12. In the main, development of the antiskid braking device was a direct result of Federal Motor Vehicle Safety Standard (FMVSS) 121 (49 C.F.R. 571.121 as amended), promulgated by the National Highway Traffic Safety Administration ("NHTSA") of the U.S. Department of Transportation. FMVSS 121 is a performance standard regulating stopping distances for heavy duty vehicles. Although this regulation does not specify the use of an antiskid braking device, the device is the only product presently available

which satisfies the standard. (Campanini 450; Perry 664; Deibel 1043.)

13. In promulgating FMVSS 121, the Department of Transportation set braking performance standards which had to be met on the majority of heavy duty air-braked truck trailers manufactured after January 1, 1975, and air-braked trucks and truck tractors manufactured after March 1, 1975. (CX 195; 550C; 555C; Campanini 408, 413, 450; Perry 664; Deibel 1005; Heller 4150-51; Polkow 4323.) [8]

14. Initially one antiskid device was required for each braked axle of an air-braked vehicle. However, a January 1976 modification of FMVSS 121 lengthened the required stopping distances and allowed heavy duty trucks and truck tractors to meet the standard without the necessity for an antiskid device on the front axle of those vehicles. The number of systems required on a truck trailer remains one per axle. (Heller 4184-85; tr. 4354-56 *in camera*.)

15. An antiskid braking device is a distinct product which is necessary, per government regulation, for the manufacture of a truck trailer; a product for which there presently is no substitute. For reasons set forth herein, I find that the antiskid braking device market is an economically meaningful market within which to analyze the competitive effects of the merger in issue.

A. Market Structure

16. Concentration in the manufacture and sale of antiskid devices is high. According to the record, only the following seven companies actively competed in the market in 1975 and 1976: Kelsey-Hayes, the leading seller, Eaton Corporation, Wagner Electric Company, B.F. Goodrich, A.C. (division of General Motors), Rockwell International, and Berg/Fiat. (Campanini 420; Perry 677; Deibel 1020; tr. 1129 *in camera*; Denholm 1672-73; Vause 2211; Henry 2439, 2455; tr. 2608-09 *in camera*; Robins 2903). The top two firms accounted for over 50 percent of the total 1975 unit sales of antiskid devices and the top four accounted for 74 percent. (Nelson 6531 *in camera*.)

17. Antiskid devices are sold in the United States to truck tractor and truck trailer manufacturers, original equipment manufacturers ("OEM"), who install the device on the axles of the vehicles. [9]

18. The major suppliers of antiskid devices each developed or obtained their own designs for their respective antiskid systems. They either manufacture one or more of the three major components themselves, or supervise their manufacture by subcontractors. (CX 190D, CX 191P-Q, CX 585B; Campanini 422-23; tr. 688 *in camera*.)

Deibel 1021-22; DeClaire 1071-72, 1075-76; Vause 2211; Megginson 4215, 4224, 4226, 4239; Schimpf 4305.)

19. The antiskid device has initially been marketed as a "system," the three major components being assembled by the seller and sold as a "package" or "kit" to the OEM. (Bachman 63; Allen 187; Stein 345). Some question was raised in the record as to whether the device will continue to be sold as a system or whether the three major components can be or will be sold separately to the OEM.

20. Antiskid can only exist as a components market to the extent that the separate components can be interchanged and assembled by the OEM's for installation on their vehicles. Standardization of the three major components would permit such an interchange; that is, although one supplier's component may not be physically identical to that of another, common performance characteristics would permit compatibility among the various sensors, valves, and logics. (Nelson 7181; Heller 4161; Campanini 509.)

21. At present, most components must be utilized with other components of the same supplier in order to function properly. (Campanini 409, 505; tr. 683-84 *in camera*; tr. 2677 *in camera*; Heller 4182.)

22. The record indicates that a certain amount of standardization of the wheelend hardware, or sensor, has occurred. As of late 1975, one OEM used an Eaton sensor in combination with Goodrich logics and valves. Two others used Eaton sensors [10] with Kelsey-Hayes logics and valves and one OEM combined Wagner sensors with Kelsey-Hayes logics and valves. (tr. 691 *in camera*; Deibel 1024; DeClaire 1079-80, 1110; Denholm 1684; tr. 2670-71 *in camera*; Megginson 4238; tr. 4365-65A *in camera*.)

23. Some witnesses expressed doubt that standardization of the sensor will ever be total due in part to the varying mountings required in different wheels. (Deibel 1024; Megginson 4250-51). Moreover, the signals fed from the sensor into the logic module generally differ among the various antiskid systems. (Campanini 409-10, 412; Megginson 4251.)

24. Complete standardization and separate sales of the logic modules and valves is even more unlikely for several reasons. Some manufacturers combine the valve and logic module into a single unit. (CX 190C; CX 191H, J; CX 194C; CX 196; CX 197; CX 198E-F; CX 199C; CX 204A; CX 550E; CX 556C; RX 149; tr. 692 *in camera*; Denholm 1712; Henry 2453; Bell 2672; Heller 4188; Polkow 4335-36.) In addition, manufacturers' valves perform different functions and have varying degrees of control incorporated within them. (CX 191K; CX 194B-C; CX 196; CX 197; CX 198H; CX 199C; CX 203B; CX 550D;

tr. 1710-11 *in camera*; Bell 2629; Megginson 4216-17, 4220-21, 4239-40, 4256-57; Deibel 1025.) On the other hand, the logics of certain manufacturers can be used with the valves of other manufacturers. (Dahl 4103; Denholm 1705.)

25. Some of the larger OEM's would prefer to buy standardized components. (Heller 4160-62.) For instance, International Harvester has been reviewing many competing valves for use with other manufacturer's sensors and logics. (Heller 4180-82.)

26. Witness Campanini, a representative of supplier Berg/Fiat testified that he expected standardization of the sensor, logic and valve, and that Berg/Fiat would eventually sell the logic and valve separately as well as together. (Campanini 523-24.) He felt that this standardization [11] would take place in 3-5 years for the sensor and another 3-4 more years for the valve. "I believe the standardization of components within the group of qualified manufacturers of components does provide an economy, and, as such, will be promoted by all concerned." (Campanini 523.)

27. However, a major factor reducing the possibility of a complete components market in antiskid is the desire by the vehicle manufacturers and ultimate users for single source responsibility should an antiskid device fail and liability ensue. (Lindquist 561-62; Deibel 1025-26; Bell 2629.)

28. The antiskid market, having been in existence only since 1975, was admittedly in a state of flux at the time of trial. (Perry 747; Henry 2455; Campanini 490; Reeve 891-92; Bachman 145-46.) Nevertheless, it developed as a systems market from the beginning and, at the time of trial still existed as a systems market. The standardization strived for by some OEM's had not yet been achieved. Basically, the seven manufacturers market the product as an integral device and the buyers purchase as such.

29. During 1975, sellers and buyers of antiskid devices participated in hearings held by NHTSA to determine whether FMVSS 121 should be suspended, revoked or modified. (Heller 4159-60; Campanini 488-489; McCuen 2070-71.) Throughout 1975, doubt existed as to whether FMVSS 121 would be administratively or judicially voided in whole or in part. (CX 585; McCuen 2070-71; Denholm 1701.) [12] Prior to becoming effective, it was repeatedly modified and delayed. (39 F.R. 20380; Deibel 1041-42). After it became effective, numerous modifications were proposed, commented on, and enacted. (39 F.R. 20380; 40 F.R. 1246; 40 F.R. 2989; 40 F.R. 38160; 40 F.R. 12797; 40 F.R. 8953; 40 F.R. 31771; 41 F.R. 1598; 41 F.R. 8784; 41 F.R. 29703; 41 F.R. 52055.)

manufacturers still had performance "bugs" which necessitated major recall campaigns during 1975. (Brown 1138; Campanini 491; CX 585.)

31. Notwithstanding the imperfections in the antiskid market, including its short, erratic past and uncertain future, it nonetheless constitutes a valid product market for Section 7 purposes, and as such merits further analysis. (Mann 5784.)

B. *Barriers to Entry or to Effective Competition*

1. Capital Costs

32. "Capital costs" measure the amount of money needed to build and equip a production facility of minimum efficient size, and includes the costs of inventory, working capital and, with respect to antiskid, research and development. (Mann 5684-85, 7563; Nelson 5819.) [13]

33. Various estimates of capital cost were given by supplier witnesses. This is because of variances on the part of suppliers in their methods of manufacture and/or assembly of the components. (Bell 2604; tr. 683 *in camera*; Denholm 1669, 1686-89; Deibel 1021; Campanini 373; DeClaire 1075-76; Vause 2211). Thus, the estimated capital costs ranged from several million dollars to \$14.6 million. One company spent \$14.6 million; another approximately \$13 million; another less than \$10 million; and one more estimate was several million dollars. (Deibel 1014-15; Brown 1123; McCuen 2074; Campanini 449, 457.)

34. Respondent's economic expert was of the opinion that capital costs fell into the moderate range. (Mann 5686, 7532). Complaint counsel's economic expert placed them on the borderline between moderate and large. (Nelson 6541.)

35. The record suggests that capital costs for entry might be lower today than they were for the present suppliers of antiskid. During the postponements and modifications of FMVSS, prospective suppliers faced continuing research and development costs to alter their designs and prototypes. (Brown 1146, 1177-78; Bell 2602-03.) An entrant today would not be charged with this added expense. Moreover, there is evidence in the record that development of a logic module is a less expensive task today than it previously was, since today's new entrant can use certain readily available parts. (Megginson 4241-45; Schimpf 4319.) [14]

36. Should the antiskid market ultimately develop into a components market, the capital costs for entrance into the production of a sensor, logic or valve would probably be lower than for

entrance as an antiskid "system" supplier. There was testimony that a logic module could be designed for \$1 million or less. (Schimpf 4310.)

2. Absolute Costs

37. The absolute cost barrier for entrance into the antiskid market is low. (Mann 7573.) An absolute cost barrier exists when firms in an industry possess some advantage such as patents imposing upon new entrants a cost penalty such that the entrant would have a higher unit cost at the same level of output of existing firms. (Mann 5683.) There are presently no blocking patents in the industry which could deter entry or require a royalty payment. (Lindquist 584; Perry 744.) There is apparently no scarcity of essential raw materials or components needed to assemble the sensors, logics and valves. (DeClaire 1074; Campanini 421-22; Megginson 4244.) Unquestionably the development, testing and manufacture of the antiskid device require application of sophisticated electronic technology, automotive braking technology, and vehicle dynamics theory, but the costs of obtaining the required knowhow is the same for all firms in the industry. (Campanini 435-36, 453-54; tr. 689-90 *in camera*; Deibel 1012-14, 1026-27; Denholm 1673-74; Schimpf 4306.) New firms possessing technical competence could bid along with those established in the industry for the expertise required. [15]

3. Economies of Scale

38. Economies of scale represent the level of output or market share which a prospective entrant would need to achieve so as not to be at a unit cost disadvantage compared to existing competitors. If, in order to operate at a minimum efficient level, a firm must secure 10 percent or more of a market, then that market is characterized by a high economy of scale barrier. (Mann 5676-77.)

39. Antiskid suppliers testified that they equipped themselves for production of well over 10 percent of their estimate of the market. For example, one supplier built a facility to produce 30 percent expected unit sales; another built a factory capable of supplying 50 percent; one felt it needed 30-35 percent of the antiskid market to insure a decent return on investment; one supplier estimated that a firm needed 15-16 percent of the antiskid market in order to remain a viable competitor. (See tr. 676 *in camera*; CC's 1st RACF - #71; CX 248B; see also CC's 1st RACF - #96; tr. 2606-07 *in camera*). Still other

in the market. (Brown 1144; see tr. 2450 *in camera*.) Another supplier testified that it needed 50 percent of the antiskid market in order to meet its profit goals. (Deibel 1017-18.) And two antiskid manufacturers testified that the antiskid market is very "volume sensitive." (Hess 5857, 5888; Brown 1153.)

40. While respondent contends such testimony is imprecise or non-determinative, it is clear that the presently competing antiskid systems suppliers believe that a market share of more than 10 percent is required. Consequently, this barrier to entry must be placed in the "high" category. [16]

4. Product Differentiation

41. A product differentiation barrier exists when an entrant must charge lower prices or spend extensively on sales promotion in order to attract away buyer loyalties from an established seller. Generally, in producers' goods markets this barrier is low, as knowledgeable purchasers make their decisions on a price/quality basis. (Mann 5678-79.)

42. The record indicates that antiskid suppliers believe it is helpful in marketing that a firm has a long established reputation for quality and performance in the automotive or heavy duty vehicle field. (Campanini 455-57; tr. 689-90 *in camera*, 713, 723-24 *in camera*; Deibel 1027; DeClaire 1082-83; Brown 1153-56.) During the developmental stage in particular, would-be antiskid suppliers felt that selection of their systems by a major OEM as "standard" would assist them in marketing to others and would enhance their credibility as a reliable source. (Perry 715; Vause 2220, 2236; tr. 2641-42 *in camera*.)

43. There is evidence in the record that antiskid suppliers believed it important in marketing the antiskid device to be able to provide an effective aftermarket distribution for parts and service. (CX 46, CX 68; CX 89D; CX 91A; CX 191-O; CX 200C; CX 244C-D; CX 550C; CX 546; CX 582A; CX 585G-H; Campanini 430, 457-58; Lindquist 566-67; Deibel 1011, 1057; DeClaire 1083; Brown 1153-55.)

44. The OEM's or buyers in the antiskid market are generally well informed, having participated actively in the testing and development of the antiskid system before implementation of FMVSS 121. (Mann 7567; Hulverson 4450-64, 4497-4510.) [17] When buyers are well informed about a product, they usually purchase on the basis of price and quality instead of product differentiation factors. (Mann 5792; Nelson 6546.) And there is testimony in the record that purchasers in fact did buy on the basis of price and

quality. (Dahl 4048; Allen 187; Campanini 487, 493; Bachman 145; Reeve 892.)

45. Thus, while the record indicates the presence of some product differentiation elements which must be taken into account to effect successful entry or to compete effectively, this barrier is not insurmountable.

C. Anticompetitive Effects

46. In 1975, Fruehauf's purchases of antiskid braking devices totaled \$1,938,614 or 4.7 percent of the dollar universe. (Nelson 6530-31 *in camera*; Mann 7531; tr. 2616 *in camera*; Robins 2907.) In 1975, Kelsey-Hayes sold 32.5 percent of all units sold and 28.6 percent of total dollar volume. (CX 612A-B *in camera*; Campanini 470-72 *in camera*; tr. 695-6 *in camera*; tr. 1126-27 *in camera*; tr. 1292-93 *in camera*; tr. 2615-17 *in camera*; tr. 2906-07 *in camera*; tr. 4341 *in camera*; Nelson 6528-29 *in camera*; Mann 7531 - see CX 585C.)

47. The modification of FMVSS 121 which resulted in the elimination of antiskid devices on the front axles of trucks and truck tractors operates to decrease the total universe both in terms of dollars and units. This will serve to increase respondent's percentage of the total market purchases as Fruehauf manufactures only trailers. [18]

48. In 1973, prior to the effective date of FMVSS 121, Fruehauf began contacting several prospective suppliers of antiskid devices. (Perry 708, 755-58; Hess 5859; tr. 5998, 6034 *in camera*; tr. 2634-44 *in camera*.) Fruehauf had decided that it wanted an in-axle sensor design and communicated this desire to its potential suppliers. (CX 89C; CX 91A-B; Perry 711; Vause 2216; Hulverson 4460-63; Hess 5905; see Deibel 1035-36; tr. 2666 *in camera*; Megginson 4202; see CX 246B.)

49. As of August 1973, competitors of Kelsey-Hayes did not consider it a likely candidate to become a standard supplier of antiskid devices to Fruehauf, primarily due to Kelsey-Hayes' lack of an in-axle sensor design. (CX 239L *in camera*; CX 693B *in camera*; CX 695 *in camera*; Perry 710-11, 713, 752; Deibel 1035; tr. 2644, 2667 *in camera*; Hess 5857, 5864, 5889-90, 5905; see Vause 2218; Hulverson 4478A.) In fact, as of August 1973, Kelsey-Hayes was not and knew it was not an approved antiskid supplier to Fruehauf because of its lack of a proven in-axle sensor. (CX 583A-D; Vause 2218-19; Hulverson 4478A.)

50. Because of Fruehauf's acquisition of Kelsey-Hayes in October 1973, Kelsey-Hayes competitors believed that it would get at least a

Fruehauf. (CX 239L *in camera*; Campanini 513; Deibel 1036-37; Brown 1147; Rowan 1935; Hess 5864, 5887; see Perry 713; Widell 2682; see CX 697B *in camera*.) A witness from Rockwell felt that all other antiskid suppliers would be effectively foreclosed from the Fruehauf business because of the acquisition. A B.F. Goodrich witness testified that Fruehauf's acquisition of Kelsey-Hayes "made it more difficult for the B.F. Goodrich Company to get a portion of that business." (Hess 5887; see tr. 6084 *in camera*.) A Wagner memorandum stated that "obviously our potential for selling [19] the skid control system to Fruehauf which we have been developing for such a long time is seriously impaired by the potentiality of a Kelsey-Hayes/Fruehauf merger." (CX 239L *in camera*.)

51. Buying "in-house" is a recognized corporate policy of Fruehauf. (Dahl 4110.) Although this policy has been questioned from time to time, it has been decided at the corporate management level that company-manufactured products are to be utilized despite the fact that it might sometimes be more economical to purchase from outside sources. (Dahl 4110-11; Reghanti 5463.)

52. Antiskid units purchased by Fruehauf from "standard" suppliers bear the Fruehauf brand name rather than the name or brand of the supplier. (Deibel 1035; Rowan 1907, 1917-18; Bell 2630). For example, the physical exhibit which was referred to by Kelsey-Hayes employees as a Kelsey-Hayes' in-axle sensor was branded "ProPar." (RX 222A-C.)

53. Fruehauf selected no antiskid supplier as "standard" until January 1974. (CX 240A-B; Rowan 1918, 1923.) The two suppliers selected were Kelsey-Hayes for dry freight vans (50 percent of production) and Wagner for other vehicles such as dumps, tankers, platform trailers and all Fruehauf "Hobbs" brand trailers (50 percent of production). (CX 240B; Perry 710; Rowan 1918; Bell 2631; Hess 5888; see Hulverson 4476.)

54. It should be noted that additional vertical foreclosure exists in the antiskid industry by virtue of General Motor's ownership interest in AC, one of the seven antiskid suppliers. (Brown 1137; tr. 1294 *in camera*; tr. 2619 *in camera*; tr. 2906-09, 2978, 2982-83 *in camera*.) [20]

55. As for potential entry into the antiskid market, Bendix has the ability to enter as a "system" or component supplier. (Perry 680; Deibel 1020; Denholm 1673; Bell 2610.) The large OEM's such as Ford and International Harvester also have that ability. (Campanini 515; Deibel 1049; DeClaire 1108-09; Heller 4163, 4183, 4186; Megginson 4242-43.)

56. There was testimony that Bendix may in fact attempt to

enter the antiskid market. (Perry 677-79; DeClaire 1082; Brown 1153; Bell 2610-11.) As of November 1975, Bendix was operating at the research and development prototype level with regard to producing the device. (Henry 2439.) On the other hand, Ford was considered qualified by industry members but unlikely to enter. (Deibel 1049; DeClaire 1108; Brown 1154-55.) International Harvester was viewed as unlikely to enter due to its limited in-house requirements and its lack of in-house electronics capability. (Deibel 1049; Brown 1154-55, 1165.)

57. Subcontractors who produce one or more components of an antiskid system are generally not perceived as competitors or potential competitors by present systems suppliers. (Campanini 517; tr. 688 *in camera*; 763; DeClaire 1118-19; Denholm 1704.)

58. Components subcontractors are not permitted to sell to other customers the products which they manufacture for the antiskid systems suppliers. This is because the components are of a proprietary design owned by the antiskid suppliers. The tooling used to manufacture such components is also owned by the suppliers. (CX 316I; CX 318F; CX 319E; CX 324V; CX 448D *in camera*; tr. 688, 738 *in camera*; Deibel 1021-22; MacDonnell 2043; Megginson 4242; Schimpf 4297, 4313.)

59. It would also require a significant amount of development and testing over an extended period of time in order for an antiskid subcontractor to be in a position to offer a component for sale directly to an OEM or ultimate user. (Perry 763; Schimpf 4306, 4309-10.) [21]

VI. TRUCK TRAILER MARKET

60. There is no dispute and it is found that truck trailers as a whole constitute an appropriate product market within which to judge the competitive effects of the merger. (See admission of respondent's counsel tr. 13; Mann 5749.) Indeed, the existence of this market has been recognized by the Commission in prior cases, most recently in *The Budd Co.*, 86 F.T.C. 518, 572 (1975). See also *Fruehauf Trailer Co.*, 67 F.T.C. 878, 904-05, 937 (1965).¹

61. Truck trailers are unique products for which there are no substitutes. A truck trailer is a nonpower vehicle designed to be pulled by a power vehicle, known as a tractor, for the purpose of transporting or hauling products over the highway. (Bachman 70-

¹ The respondent's horizontal acquisitions in the mid-1950's of two competing trailer manufacturers, Strick, the third largest in trailer sales, and Hobbs, the sixth largest, were found to be a violation of Section 7. The Commission ordered divestiture of both companies, but later modified its order allowing respondent to retain

71.) It consists of a chassis or frame on wheels and a body attached to the frame. (RX 265; Bachman 96-97.)

62. There are many types of trailers, including van, platform, tank, bulk commodity and dry materials, pole and logging, dump, low-bed heavy haulers, van size container and container chassis. (Complaint and Answer, Para. 4; CX 584G, H, I, L, N, O; CX 660J-M; RX 35D, T, U, X; Bachman 71-72, 96-97; Allen 172; Stein 328; Reeve 852; Fontaine 3548.)

63. The truck trailer industry is recognized as a separate economic entity. (Reghanti 5231-32.) There is a national organization, The Truck Trailer Manufacturers Association, to which many truck trailer manufacturers belong. (Allen 175; Stein 330-32; Fontaine 3558.) There are magazines which focus specifically upon the truck trailer industry. [22] (CX 561A-B; Fontaine 3548-49). The Bureau of the Census reports truck trailer shipments separately and the information is utilized by truck trailer manufacturers in the conduct of their business. (CX 254A-L; Bachman 44-45; Allen 174-75; Stein 330-32; 351-52.) R.L. Polk Company, a statistics gathering organization, reports information on overall registrations and on customers of truck trailers, which information is also used by the manufacturers of truck trailers. (Reghanti 5231-32.)

64. Truck trailers have peculiar characteristics and uses. (CX 584G, H, I, L, N, O; CX 660J-M; RX 35D, T, U, X; Bachman 71-72; 96-97; Allen 172; Fontaine 3548.) Their manufacture requires unique production facilities. (Complaint and Answer, Para. 4; Bachman 27; Allen 176-77, 189; Stein 337; Dahl 4056; Flagan 5052-53.) There are distinct customers for truck trailers. (Bachman 18-19, 100; Reeve 852.) Truck trailers have distinct prices. (Bachman 45-46; Reeve 870, 900; Bell 3308; Kortenhaus 3531.) They are sold through specialized vendors, *i.e.*, company based sales personnel, company-owned branch sales outlets or independent distributors of truck trailers. (Bachman 22-23; Allen 189; Reeve 856-57; Fontaine 3567.)

A. Market Structure

65. There are numerous manufacturers of truck trailers in the United States (Stein 351; RX 285M-R; CX 254A), and industry witnesses knew of no significant imports from other nations. (Bachman 20; Allen 173; Stein 336, Reeve 870.) There were, however, some exports. (Bachman 156-57.)

66. Total value of truck trailer shipments in the United States is in the area of \$1 billion per annum (CX 254A) and concentration in this market is high. According to 1972 Census data, the top [23] four

firms accounted for 55.0 percent of shipments and the top eight 69.3 percent.² The 1973 figure for the top four and top eight firms were 54.5 percent and 70.4 percent respectively. Many of the top twenty firms and all of the remaining firms have market shares of less than 2 percent or 1 percent. (See RX 266.) The concentration levels in the market have remained fairly constant over the last ten years. For the years 1968 to 1971, inclusive, the combined market shares of the top firms have been as follows:

	Top Four	Top Eight
1968	54.6%	68.4%
1969	58.0	70.8
1970	51.2	65.1
1971	48.6	63.8

67. Throughout this period Fruehauf has been the largest manufacturer in the industry with a 1973 market share of 25.2 percent. And for the period 1968-72, it had shares of 29.9 percent, 32 percent, 26.4 percent, 24.9 percent and 24.4 percent respectively.²

68. Respondent points out (using figures from unadjusted Polk registrations), top four and top eight firm concentration has declined over the 19-year period 1955-73 and the share of market held by the largest companies has shrunk. (Mann 5752; RX 266.) During this time, according to Polk data, Fruehauf's market share slipped 17.9 percent, from 41.1 percent to 23.2 percent. (RX 266.) Fruehauf's largest competitor, Trailmobile, also lost market share over this period. (Reghanti 5315; RX 266.) Fruehauf's President and Chief Executive Officer, Mr. Rowan, testified, but [24] presented no supporting data, that the company's market share has continued to decline; and that in September of 1975 its share was 19 percent. (Rowan 1974, 2002.) It should be noted that there has been little change in the identity and market position of the top eight firms in the industry since 1955. (RX 266, Reghanti 5317.)

69. The figures relied upon by respondent show that certain small and medium-sized companies have increased their market shares (RX 266), but only by small incremental amounts. Gains against Fruehauf have been made largely by top eight firms.

70. The truck trailer market has been growing at the rate of about 8 percent to 10 percent per year, (Bachman 80), and there has been some new entry into trailer manufacturing and sale. (Bachman 129-31.)³

² See chart at p. 75 of complaint counsel's proposed findings, *in camera*, for compilation of percentages referred to in this paragraph.

