

Complaint

107 F.T.C.

IN THE MATTER OF
THE ELECTRICAL BID REGISTRATION SERVICE OF
MEMPHIS, INC., ET AL.

FINAL ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF
THE FEDERAL TRADE COMMISSION ACT

Docket 9183. Complaint, Aug. 6, 1984—Final Order, Feb. 12, 1986

This final order requires a Memphis, Tenn. bid depository set up by electrical subcontractors, among other things, to cease taking disciplinary action against firms that negotiate prices after bidding is closed or that accept a contract at a price other than that filed with the registry. Additionally, respondents may not require firms using the registry to deal only with other registry participants and cannot restrict in any way negotiations between electrical subcontractors and general contractors. Further, respondents are required to reinstate any firm it suspended for violation of the illegal rules and remove the illegal provisions from its by-laws or other rules.

Appearances

For the Commission: *Truett M. Honeycutt, Douglas B. Brown and Harold E. Kirtz.*

For the respondents: *Carl H. Langschmidt, Jr., Boone, Wellford, Clark, Langschmidt & Apperton, Memphis, Tenn., for respondents The Electrical Bid Registration Service of Memphis, Inc., C.H. Dennis, Jr., James L. Overton, Wayne A. Allen and Jack Gross. James W. Watson and G. Patrick Arnoult, Watson, Arnoult & Quinn, Memphis, Tenn. for respondent The National Electrical Contractors Association, Memphis Chapter.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the Electrical Bid Registration Service of Memphis, Inc., a corporation, and C. H. Dennis, Jr., individually and as an officer and director of said corporation, and James L. Overton, Wayne A. Allen, and Jack Gross, individually and as directors of said corporation, and The National Electrical Contractors Association, Memphis Chapter, a corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, 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:

Definitions

(1) For the purposes of this complaint, the following definitions shall apply:

(a) The *greater Memphis area* consists of Memphis, Tennessee and some or all of the following twenty-three counties in Tennessee, Arkansas, and Mississippi: Shelby, Fayette, Lauderdale, and Tipton counties, Tennessee; Crittenden, Phillips, [2] St. Francis, Lee, Cross, and Mississippi counties, Arkansas; and DeSoto, Marshall, Benton, Tunica, Tate, Loachoma, Quitman, Panola, Lafayette, Tallahatchie, Yalobusha, Calhoun, and Granada counties, Mississippi; and

(b) The term *substantial* as applied to building construction contracts or projects means those contracts or projects for which the electrical subcontract is expected to be in excess of \$5,000.

Parties

(2) Respondent the National Electrical Contractors Association, Memphis Chapter (hereinafter referred to as the Memphis Chapter) is a nonprofit corporation organized and existing under the laws of the State of Tennessee, with its principal office and place of business located at 2600 Poplar Avenue, Suite 101, Memphis, Tennessee. The Memphis Chapter was organized and is operated in substantial part for the pecuniary benefit of its members, who are electrical subcontractors.

(3) Respondent the Electrical Bid Registration Service of Memphis, Inc, (hereinafter referred to as the Registry) is a nonprofit corporation organized and existing under the laws of the State of Tennessee, with its principal office and place of business located at 2600 Poplar Avenue, Suite 101, Memphis, Tennessee. As set forth below, the Registry was founded by the Memphis Chapter and its members, who (a) established the Registry as a corporation with a self-perpetuating board of directors, (b) appointed all of the members of the Registry's first board of directors, and (c) selected electrical subcontractors who were Memphis Chapter members to fill a majority of the seats on the Registry's board. A majority of the Registry's board has always consisted of electrical subcontractors who are Memphis Chapter members. The Registry was organized and is operated in substantial part for the benefit of the Memphis Chapter's members, who are de facto members of the Registry.

(4) Respondent C. H. Dennis, Jr. is an officer and director of the Registry, and respondents James L. Overton, Wayne A. Allen, and

Jack Gross are directors of the Registry. These individuals are sometimes referred to collectively as the individual respondents. They formulate, direct, and control the acts and practices of the Registry, including the acts and practices hereinafter set forth. Their address is the same as that of the Registry. Each individual respondent represents an electrical subcontractor that is a member of the Memphis Chapter.

Commerce

(5) Respondents maintain, and have maintained, substantial courses of business, including the acts and practices as [3] hereinafter set forth, which are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

Factual Allegations

(6) Firms and government entities often engage independent contractors to perform building construction work, and they often use competitive bidding to select a general contractor for construction of a project and enter into a prime contract with the general contractor for such work. When competitive bidding is used, the firm or government entity (commonly referred to as the awarding authority) frequently requests prime bids from general contractors based on plans and specifications depicting the work to be done and the materials to be furnished. The awarding authority also sets a date for submissions and opening of the prime bids made by the general contractors.

(7) In preparing a prime bid on a building construction project, a general contractor usually calculates the approximate cost of the work to be done by examining the specifications and estimating labor, materials, overhead, and profit. General contractors often do not perform specialty work, such as electrical work, and in order to prepare their prime bids general contractors generally obtain sub-bids from subcontractors relating to their particular specialties.

(8) Absent a bid depository or other mechanism that restricts the submission of bids by subcontractors to general contractors, the process of competitive bidding for building construction contracts can operate in the following manner. Each general contractor can obtain sub-bids from a variety of competing subcontractors in order to obtain what he considers the best proposal in terms of price and quality. Similarly, each subcontractor can submit sub-bids to a variety of competing general contractors. Until the deadline for the submission of prime bids to the awarding authority, general contractors and electrical subcontractors can engage in negotiations during which the subcontractors have an opportunity to revise their sub-bids. (Such negotiations are commonly referred to as pre-award bid shopping and

bid peddling.) After a general contractor has been awarded the prime contract, the winning general contractor and all interested subcontractors can engage in further negotiations, during which the general contractor may seek the most favorable price for the type and quality of the specialty work to be done, and subcontractors may attempt to win a subcontract by submitting lower acceptable bids. (Such further negotiations are commonly referred to as post-award bid shopping and bid peddling.)

(9) In the greater Memphis area, the process of competitive bidding for building construction contracts generally operates in the manner described in Paragraph Eight, except with respect to the submission of sub-bids by electrical subcontractors to general [4] contractors for substantial building construction contracts. The process by which electrical subcontractors submit bids and otherwise compete to be selected to work on substantial building construction projects in the greater Memphis area operates in a different manner because it is and has been governed by the rules of bid depositories established and maintained by electrical subcontractors, as set forth in Paragraphs Ten-Thirteen.

(10) Since approximately 1956, electrical subcontractors in the greater Memphis area have been engaged in a combination or conspiracy to restrict the manner in which they compete to be selected to work on substantial building construction contracts. The combination or conspiracy has been carried out by eliminating the open competitive process described in Paragraph Eight, which the electrical subcontractors believe puts unfair pressure on them to lower their bid prices, and instead establishing and operating bid depositories whose rules, policies, and practices place unreasonable restrictions on competition among electrical subcontractors. The Memphis Chapter and the Registry have participated in this combination or conspiracy, both as combinations of electrical subcontractors and as co-conspirators. Each of the individual respondents has participated in this conspiracy as a co-conspirator in his actions as an officer and/or director of the Registry.

(11) In furtherance of this combination or conspiracy, the Memphis Chapter has engaged in the following acts or practices, among others:

(a) In approximately 1956 the Memphis Chapter formed an in-house bid depository, and the Memphis Chapter operated this bid depository until 1976. The Memphis Chapter's depository established a deadline for electrical subcontractors' filing of bids and prohibited electrical subcontractors from offering a lower price or otherwise amending their bids after the deadline. In addition, Memphis Chapter members

were required to use the depository on all jobs handled by the depository;

(b) In 1976, the Memphis Chapter discontinued its in-house bid depository and formed a new bid depository, the Registry, which would be a separate corporation; and

(c) Since 1976, the Memphis Chapter and its members have supported and/or controlled the Registry.

(12) In furtherance of this combination or conspiracy, the Registry and the individual respondents have engaged in the following acts or practices, among others:

(a) The Registry has operated in accordance with the following rules, policies, and practices:

(i) The Registry has a deadline for electrical subcontractors' registering of bids and prohibits electrical [5] subcontractors from offering a lower price after the deadline. This prohibition on negotiations over price applies both before and after the award of the prime contract;

(ii) The Registry requires general contractors who accept the delivery of registered bids to agree that they will not award an electrical subcontract to any firm that did not have a bid registered with the Registry, and that all such awards must be at the price contained in the registered bid. This prohibition on negotiations over price applies both before and after the award of the prime contract;

(iii) An electrical subcontractor who uses the Registry on any particular job may not submit any bids for that job to any general contractor who is not using the Registry for that job; and

(iv) A general contractor who uses the Registry on any particular job may not accept a bid for that job from any electrical subcontractor who did not use the Registry on that same job unless the general contractor registers the non-participating electrical subcontractor's bid with the Registry before the Registry's deadline for registering bids.

(b) The Registry has implemented and enforced these rules, policies, and practices in the following manner:

(i) The Registry has imposed or threatened to impose sanctions, including suspension from the Registry and imposition of fines or liquidated damages; and

(ii) The Registry has notified all general and electrical contractors who regularly use the Registry of the identity of parties that have been sanctioned by the Registry.

(13) Most electrical subcontractors in the greater Memphis area are members of the Memphis Chapter. The Registry staff, which is also the staff of the Memphis Chapter, chooses what jobs will be on the

Registry, and most competitively bid substantial building construction jobs in the greater Memphis area are selected to be on the Registry. When a job is on the Registry, electrical subcontractors generally use the Registry if they desire to bid on the job. Because the Registry's rules prohibit electrical subcontractors using the Registry from dealing with general contractors who are not using the Registry, general contractors in the greater Memphis area are as a practical matter required to use the Registry, whether or not they would prefer to use the Registry or believe the Registry provides any benefits, if they want to receive bids from the electrical subcontractors who desire to bid on the job. [6]

Purposes and Effects

(14) The actual or probable purposes or effects of the combination or conspiracy alleged in Paragraph Ten and the acts and practices alleged in Paragraphs Eleven-Thirteen are or have been to restrict competition for electrical subcontracting for substantial building construction contracts in the greater Memphis area in the following ways, among others:

(a) General contractors have been restrained from seeking, negotiating for, and obtaining bids lower than those submitted by electrical subcontractors through the Registry;

(b) Electrical subcontractors have been restrained from offering lower prices or otherwise amending the bids that they have submitted through the Registry;

(c) Price negotiations and contractual relationships between willing general contractors and electrical subcontractors have been prevented by rules against dealing with firms not using the Registry;

(d) There is pressure on general contractors to use the Registry whether or not they would prefer to use the Registry or believe that the Registry provides any benefits;

(e) Firms that have been suspended from the Registry for engaging in price competition prohibited by the Registry's rules have been prevented from submitting bids to or obtaining bids from other firms using the Registry on particular jobs;

(f) There is an increased likelihood that electrical subcontractors may engage in bid rigging or otherwise agree not to compete on the basis of price; and

(g) The cost of electrical subcontracting services has been increased.

Violations

(15) Respondents' combination or conspiracy, and the acts or practices in furtherance thereof, have had or are having the purpose or

effect of restraining competition for electrical subcontracting for substantial building construction contracts in the greater Memphis area. These restraints on competition are unreasonable, because their anticompetitive effects are not outweighed by any procompetitive effects. Thus, respondents have violated Section 5 of the Federal Trade Commission Act by engaging in unfair methods of competition. Respondents' combination or conspiracy, or the effects thereof, are continuing and will continue in the absence of the relief herein requested. [7]

Commissioners Miller and Calvani voted in the negative.

INITIAL DECISION BY

MORTON NEEDELMAN, ADMINISTRATIVE LAW JUDGE

NOVEMBER 21, 1985

I

STATEMENT OF THE CASE

The complaint in this proceeding was issued on August 6, 1984. It charges that in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, the electrical subcontractors in the Memphis, Tennessee area have conspired or combined to restrain competition by means of a bid depository operated from 1956 until 1976 by the Memphis Chapter of the National Electrical Contractors Association ("Memphis Chapter"), and thereafter by the Electrical Bid Registration Service ("Registry"), which allegedly was organized by the Memphis Chapter for the purpose of continuing and refining the Memphis Chapter's earlier bid depository activities. According to the complaint, the Registry's rules relating to the bidding process between general contractors and electrical subcontractors has restrained price competition by:

Holding electrical subcontractors to their submitted bids, which means that they cannot be changed by negotiation either before or after the Registry's deadline for submitting electrical bids;

Requiring general contractors to agree that if they use the Registry on a particular job, they must use one of the registered bids;

Preventing electrical subcontractors who use the Registry on any particular job from submitting bids for that job to general contractors who are not using the Registry. [2]

The complaint alleges that these rules are enforced by imposing fines

and other sanctions, mainly suspension from the Registry's bidding system. The actual or probable effect of the alleged restraints is said to be that prices for electrical subcontractor services are raised without any countervailing efficiency justifications. The complaint further charges that the operation of the Registry is conducive to bid rigging or other forms of agreements not to compete on the basis of price.

While the Registry's answer denies most of the substantive allegations of the complaint, it admits that the Registry (1) establishes a deadline for submitting electrical subcontracting bids, (2) requires general contractors who accept registered bids to agree that they will not award a subcontract to any firm that did not have a bid filed with the registry, (3) prohibits an electrical subcontractor using the registry from submitting bids to any general contractor not using the registry, and (4) limits the discretion of a general contractor in using nonparticipating electrical subcontractors. The answer filed by the Memphis Chapter puts into issue the same points raised by the Registry, and also denies the complaint allegations respecting the role of the Memphis Chapter in forming or controlling the Registry.

In the prehearing stage both sides were allowed discovery including depositions or interviews with all prospective witnesses. Proposed exhibits were exchanged, and prior to the formal hearings, the parties were given an opportunity to file objections to all exhibits that were to be offered without supporting testimony. Complaint counsel's case-in-chief was heard between June 4 and June 18, 1985. The defense case was presented during the week of July 15. Rebuttal testimony was offered by complaint counsel on August 14, and the record was closed for the receipt of evidence on August 23. During the hearings, counsel for both sides were given full opportunity to be heard and to cross-examine the witnesses. The parties filed their main briefs and proposed findings on September 23. Reply briefs were filed on October 7. [3]

After reviewing all the evidence, as well as the proposed findings and briefs submitted by the parties, and based on the entire record, including my observation of the demeanor of witnesses, I make the following findings of fact:¹ [4]

¹ Proposed findings not adopted in the form or substance proposed are rejected, as either not supported by the entire record or as involving immaterial or irrelevant matters.

The following abbreviations are used throughout in citing to the record:

CX - (Complaint counsel's exhibits)
RX - (Respondents' exhibits)

Joint Exhibit 1A-Z is the Tennessee Contractors Licensing Act. Testimony is cited by the name of the witness, followed by transcript page, as in Birrell 1196. Complaint counsel's Exhibit 1 and respondents' Exhibit 4 are the indices required by § 3.46(b) of the Commission's Rules.

The appearances of the witnesses were as follows:

(footnote cont'd)

II

FINDINGS OF FACT

A. Introduction: Construction Job Bidding

1. Private firms and governmental units, commonly referred to in the construction industry as "awarding authorities", may use com-

<u>Name</u>	<u>Called By</u>	<u>Tr. Pages</u>
William K. Arnold (General Contractor)	Complaint counsel ("C.C.")	53-202
Frank Inman, Jr. (General Contractor)	C.C.	205-272
Cheryl Lynn Mann (Electrical Subcontractor)	C.C.	272-317
Roger James Peters (General Counsel of a General Contractor)	C.C.	327-415
Fred Talmoth Baker (Electrical Subcontractor)	C.C.	419-541
Robert E. Morrison (General Contractor)	C.C.	553-666
Cecil Raymond Boucher, Jr. (General Contractor)	C.C.	671-717
Joe Rayburn Hales (Senior Electrical Inspector, Shelby County)	C.C.	720-748
Irvin McGroom (General Contractor)	C.C.	759-805
Jesse M. Zellner (General Contractor)	C.C.	809-882
Roosevelt "Curley" Morgan (General Contractor)	C.C.	885-957
Russell H. Clark (Electrical Subcontractor)	C.C.	958-1048
Waylon R. Naylor (General Contractor)	C.C.	1051-1093
Frederick Ellsworth Wade (General Contractor)	C.C.	1100-1167
George S. Birrell (Associate Professor of Civil Engineering, Case Western Reserve University, Expert)	C.C.	1168-1300
John Frederick Stewart (Associate Professor of Economics, University of North Carolina, Expert)	C.C.	1307-1504, 2042-2099
Thomas Cooper Barnett (General Contractor and President of the Registry)	Respondents ("resp.")	1571-1622
David Bronson Martin (General Contractor)	resp.	1626-1702
Johnny Chester (Electrical Engineer, member of the board of directors of the Registry)	resp.	1703-1747
Gene Strong (Architect, member of the board of directors of the Registry)	resp.	1751-1845
Charles Dennis, Jr. (Electrical Subcontractor, Vice President and member of the board of directors of the Registry)	resp.	1845-1936
Earl Scurlock (Secretary-Manager of the Memphis Chapter and Manager of the Registry) [5]	resp.	1949-2028

petitive bidding to select a general or prime contractor for an institutional or industrial project. When competitive bidding is being used, the awarding authority requests that general contractors submit what is known as a "prime bid" for the overall project.² Since these general contractors normally do not perform specialty functions such as electrical work (installation of conduits, wiring, fixtures), they must obtain sub-bids from electrical and other subcontractors in order to prepare their prime bids.³ At issue here are the efforts of the Memphis Chapter and the Registry to establish a bid depository designed to control the electrical sub-bidding process, especially the elimination of "bid peddling",⁴ the practice whereby the general contractor discloses one electrical subcontractor's bid to another electrical subcontractor for the purpose of obtaining a lower bid.

B. Identity of Respondents

2. The National Electrical Contractors Association, Memphis Chapter ("Memphis Chapter"), is a nonprofit corporation organized and existing under the laws of [6] Tennessee, with its principal office and place of business located at 2600 Poplar Avenue, Suite 101, Memphis, Tennessee.⁵ The Memphis Chapter is engaged in various activities for the financial benefit of its 21 electrical subcontractor members, including counseling on price and profits, and the negotiation of a Memphis area labor contract.⁶

3. The Electrical Bid Registration Service of Memphis, Inc. ("Registry") is a nonprofit corporation organized and existing under the laws of Tennessee with its principal office and place of business located at 2600 Poplar Avenue, Suite 101, Memphis, Tennessee.⁷ The Registry operates a bid depository designed to serve the economic well-being of Memphis area electrical contractors by eliminating bid peddling.⁸

4. The individuals named as respondents, C. H. Dennis, Jr., James L. Overton, Wayne A. Allen, and Jack Gross, are either officers or owners of electrical subcontracting firms. All currently serve on the board of directors of the Registry; in addition, respondent Dennis is

² CX 2C, CX 3K, CX 4H; Birrell 1196.

³ Wade 1119, Birrell 1196.

⁴ During the course of the hearings, the witnesses generally drew no distinction between "bid peddling" and "bid shopping". But see Strong 1764 for a distinction based on whether the general contractor simply makes a survey of electrical prices (i.e., "shops") or actually uses (i.e., "peddles") the specific bid of one electrical subcontractor to drive down the price of another. For recognition by respondents of interchangeable use of the terms see CX 2D, CX 3K-L. Accordingly, throughout this initial decision I have used the terms interchangeably to refer to the negotiation for prices that are lower than those originally quoted in sub-bids submitted to a general contractor. A distinction is drawn, however, in several findings between pre-award and post-award bid peddling based on when the negotiations took place.

⁵ Memphis Chapter Answer, ¶ (2).

⁶ Memphis Chapter Answer, ¶ (2); Baker 500, Dennis 1895, Scurlock 1951-52.

⁷ Registry Answer, ¶¶ (2-3).

⁸ Barnett 1579-80, 1599; see also Finding 13.

vice president of the Registry.⁹

5. The record contains no evidence relating to the direct responsibility of the named individual respondents for the practices challenged in the complaint.¹⁰ But as complaint counsel would have it, an inference of control by them over the Registry's practices should be drawn from the fact that these four individuals, who are all identified [7] with electrical subcontracting firms, currently make up a majority of the Registry's board of seven, and included in the board's general power to manage the Registry's affairs, is the right to appoint the Registry's manager and to fill vacancies on the board itself.¹¹ There is no evidence, however, that the named individuals have collaborated to use this latent power in order to dictate to the three nonelectrical board members.¹² On the contrary, all that the record will allow on control of the Registry is that Earl Scurlock, acting on behalf of the Memphis Chapter, picked the members of the first board,¹³ that the first board picked the succeeding board and so on,¹⁴ and that Scurlock would probably designate their successors if the four named respondents were removed.¹⁵ And while the board also has the power to approve sanctions for violations of the Registry rules—this is the function of the board that is most relevant to this proceeding, see Findings 25, 45-54—the record shows that all disciplinary actions were imposed by a unanimous vote of all board members present, as required by Registry rules.¹⁶ As for the day-to-day business of the Registry—running a bid depository for electrical subcontracting jobs—this is carried out exclusively by Scurlock and his assistant (Juanita McClain), and there is no evidence that the named individual respondents in any way participate in this activity.¹⁷ [8]

C. Commerce

6. The Memphis Chapter and the Registry are engaged in "commerce," as "commerce" is defined in the Federal Trade Commission

⁹ Registry Answer, ¶ (4); Memphis Chapter Answer, ¶ (4); CX 2"O"-T, CX 3D, K; Dennis 1849-50.

¹⁰ While Dennis was named in the complaint in his capacity as a director and an officer, there was no evidence introduced respecting his duties as vice president except that he presides at board meetings when Barnett, the president of the Registry, is absent. Barnett, who also serves on the board of the Registry, was not named as an individual respondent in any capacity.

¹¹ See CX 3C, K, CX 4A-D.

¹² See Strong 1756, Dennis 1867. Since its formation, the Registry board has consisted of four electrical subcontractors, an architect, an electrical engineer, and a general contractor. The president of the Registry has always been Cooper Barnett, a general contractor. Registry Answer, ¶ (3); Barnett 1573.

¹³ CX 2F; Barnett 1572, Strong 1755, Scurlock 1953-54, 1999, 2009.

¹⁴ CX 4B.

¹⁵ See Scurlock 1952-54.

¹⁶ Registry Answer, ¶ (12)(b)(i); CX 3F, M, CX 4S. No Registry business, including the imposition of sanctions, can be transacted without a quorum of five directors. This means that a sanction cannot be approved without the vote of at least one nonelectrical board member. CX 4S; Barnett 1575, 1589, Dennis 1867.

¹⁷ See Findings 12, 14-15; see also Chester 1733, Scurlock 1955, 2000.

Act as amended.¹⁸

D. The Role Of The Memphis Chapter In The Evolution Of The Memphis Area Electrical Bid Depositories

7. The Memphis Chapter operated a bid depository from January 1956 until August 1976.¹⁹ While the bid depository operated by the Memphis Chapter was intended to bind all members of the chapter to rules eliminating bid peddling,²⁰ these rules were not rigorously enforced, and this earlier depository was widely regarded as ineffectual.²¹

8. In 1976, the board of the Memphis Chapter directed their manager, Earl Scurlock, to explore the feasibility of organizing a bid depository modeled after The Bid Registration Service of Memphis, Inc., a depository operated by the mechanical subcontractors in the Memphis area which had effectively eliminated bid peddling in the mechanical sub-trade.²² Scurlock contacted B.V. Stevens, manager of the mechanical [9] subcontractors' bid depository, and Carl Langschmidt, counsel for respondent Registry herein, and in 1976 counsel for the mechanical subcontractors' bid depository. Stevens and Langschmidt advised Scurlock about the technical and legal requirements for setting up a bid depository patterned on the mechanical subcontractors' model.²³

9. Stevens' and Langschmidt's advice was reported back to the Memphis Chapter by Scurlock, who was then authorized by Memphis Chapter to inform Langschmidt to draw up the necessary legal documents incorporating the Registry on September 7, 1976.²⁴

10. In October 1976, the board of directors of the Memphis Chapter approved a \$2,000 loan to the Registry, which was intended to enable the Registry to begin its operations.²⁵ This unsecured loan was paid

¹⁸ CX 2C, CX 3B, J, CX 4J. The Registry operates in the following 23 Memphis area counties in Tennessee, and neighboring Mississippi and Arkansas: Shelby, Fayette, Lauderdale, and Tipton Counties, Tennessee; DeSoto, Marshall, Benton, Tunica, Tate, Coachoma, Quitman, Panola, Lafayette, Tallahatchie, Yalobusha, Calhoun, and Grenada Counties, Mississippi; and in Crittenden, Phillips, St. Francis, Lee, Cross, and the southern half of Mississippi County, Arkansas. CX 3B, J, CX 4A. The geographic jurisdiction of the Memphis Chapter is essentially the same as the area served by the Registry. CX 2" T".

¹⁹ Memphis Chapter Answer, ¶¶ (11)(a-b); CX 2A, CX 6B.

²⁰ Scurlock 2012.

²¹ Dennis 1905-08. Essentially, the rules of the Memphis Chapter's bid depository provided that sealed bids had to be submitted by electrical subcontractors to designated branches of a commercial bank on all jobs valued in excess of \$3,000. These sealed bids, which had to be submitted four hours prior to the deadline for the general contractors, could not be changed. The Memphis Chapter bid depository obtained no agreements from general contractors to use the bids submitted through the depository and, in practice, there were many instances when electrical contractors orally changed bids after the deadline. CX 2A-C, CX 15A—CX 17B; Dennis 1908-10, Scurlock 1995-97, 2011-12.

²² CX 2E-F, CX 6B; Dennis 1907-08, Scurlock 1952-54, 2010.

²³ CX 2E-F, CX 6B; Scurlock 1952-54.

²⁴ CX 2F, CX 6B, CX 7A-D; Scurlock 1952-54.

²⁵ CX 2F, CX 6B, CX 8D-H; Scurlock 2014.

back within a few months,²⁶ and since 1976, the Registry has received no other loans from the Memphis Chapter.²⁷

11. Of the seven members of the first board of directors of the Registry picked by Scurlock, four were officers or owners of electrical subcontracting firms that were members of the Memphis Chapter.²⁸ Subsequent Registry boards during the period 1977-1983 included four representatives of electrical firms that were members of the Memphis Chapter.²⁹ In 1984, three of the directors of the Registry were similarly affiliated with members of the Memphis Chapter,³⁰ and in 1985, of the seven Registry [10] board members, two—C.H. Dennis and James Overton—were connected with firms belonging to the Memphis Chapter.³¹ Since the Registry's inception, at least one officer or director of the Memphis Chapter has been on the Registry's board.³²

12. Scurlock, the manager of the Memphis Chapter, is also the only manager the Registry has ever had.³³ Scurlock, who is paid a salary and bonuses by the Memphis Chapter but receives no separate compensation as manager of the Registry,³⁴ is responsible for the day-to-day operations of both the Memphis Chapter and the Registry.³⁵ Since its inception (and to this day) the Registry operates out of the office of the Memphis Chapter.³⁶

E. The Operation Of The Bid Depository By The Registry

13. Since its creation in 1976 by the Memphis Chapter, the Registry has established and enforced rules designed to eliminate bid peddling in the Memphis area electrical trade.³⁷

14. Scurlock and his assistant, Juanita McClain, gather information from trade publications ("Builders Exchange Weekly Bulletin" and "Associated General Contractors [11] Weekly Bulletin"), news sources, as well as from subcontractors and general contractors, about

²⁶ CX 2F, CX 8D-H, CX 9—CX 10; Scurlock 2014.

²⁷ CX 8E.

²⁸ Vernon G. Goldecke, one of the members of the Registry's first board, was a director of the Memphis Chapter in 1976. Others who served on the first Registry board and who were also members of the Memphis Chapter were Jack Gross, David Haines, and Frank Pitt. CX 2F-G, K, CX 3R.

²⁹ CX 2"O" T, CX 3R-W.

³⁰ CX 2S, CX 3V.

³¹ Dennis, vice president of the Registry and a current member of the Memphis Chapter, was president of Memphis Chapter in 1976 when the Registry was organized. Dennis was also governor of Memphis Chapter in 1978-1979, 1982-1985. Dennis' firm, Byrd Electric, has been a member of the Memphis Chapter from 1967 to the present. CX 2G-H, P-T, CX 3D, K, CX 11A-S; Dennis 1848. Overton is a current member of the Memphis Chapter. CX 2H.

³² CX 2" T".

³³ CX 2G.

³⁴ Scurlock 2009.

³⁵ Chester 1733, Strong 1796, Scurlock 1955.

³⁶ CX 2G. The Registry pays the Memphis Chapter a negotiated monthly fee for use of office space and secretarial services. CX 2G, CX 26C; Barnett 1591-92, Scurlock 2001-02.

³⁷ CX 3L-N, CX 160B-C; Arnold 122, Mann 287, Baker 498, Boucher 679, Barnett 1579-80, 1599, 1603-04, Chester 1712.

projects that might trigger the use of the Registry.³⁸

15. Having made a determination that a particular job is one on which there is to be competitive bidding and that the electrical work is likely to exceed \$5,000 in value,³⁹ Scurlock and McClain poll all the general contractors who might conceivably be interested in bidding on the job to determine whether they are willing to accept bids through the Registry.⁴⁰ Scurlock and McClain attempt to poll the general contractors several days in advance of the generals' bidding deadline; in actual practice, however, most of the generals are contacted on the day before the generals' deadline.⁴¹ Scurlock or McClain enter on a Registry work sheet the name of every general contacted, the general's telephone number, the name of the job, the bid date, the bid time, the name of the general's architect, the name of the general's engineer, and a notation as to whether the general has indicated a willingness to accept Registry bids.⁴²

16. The Registry requires general contractors, who have indicated a willingness to accept Registry bids, to agree that they will award the electrical subcontract to a firm that has a bid registered with the Registry and at the price filed with the Registry. [12] The winning general, however, need not select the low Registry bidder so long as it confines its selection to an electrical firm bidding through the Registry.⁴³

17. Since the Registry has no membership rolls, any licensed electrical subcontractor may submit a bid to a general who has previously indicated its willingness to accept Registry bids. The electrical subcontractors in the Memphis area apparently learn the identity of generals willing to accept Registry bids from either Scurlock or McClain who encourage electricals to bid through the Registry.⁴⁴

18. An electrical subcontractor using the Registry on any particular job may not submit bids for that job to a general contractor not using

³⁸ Scurlock 1956-57.

³⁹ CX 3B, J; Scurlock 1981-82. The \$5,000 limit is not an important restriction on the operation of the Registry since significant electrical jobs are valued in the area of \$50,000. *See, e.g.*, Zellner 824-26, Morgan 926. In addition to the monetary limitation, the Registry does not operate when subcontractors bid directly to awarding authorities for projects on which the bids are sealed and opened publicly. CX 4J.

⁴⁰ Inman 225, Zellner 826, Martin 1634-35, Scurlock 1956-57.

⁴¹ Arnold 99, Boucher 688-89, McGroom 766, Barnett 1578.

⁴² Scurlock 1956-59.

⁴³ The Registry's bid forms give the following notice to general contractors who have indicated a willingness to accept Registry bids: "He [General Contractor] agrees not to award the contract for the work covered by these bids on the said project to any party other than a subcontractor who has duly and timely deposited and registered his bid with the Electrical Bid Registration Service and at the price so bid by the subcontractor, it being acknowledged that as prime contractor he had the right to register with the Registry any outside subcontractor bids which he received that were not registered with the Registry and thereby be free to award the contract for such work to any such subcontractor submitting an outside bid." CX 4P. *See also* CX 3G, N; Zellner 838. In recent years the Registry has made an intensive effort to inform Memphis area general contractors about the Registry's rules, and to receive from these contractors an acknowledgement that they would abide by the rules when using the Registry. CX 3H, N, CX 12B-Z19. *See also* Dennis 1878-79.

⁴⁴ Barnett 1618-19, Scurlock 1987-88.

the Registry.⁴⁵

19. The Registry imposes on electrical subcontractors a strict deadline for submitting sub-bids. The deadline is three hours prior to the deadline for the general [13] contractors.⁴⁶ In the Memphis area, prime bids of general contractors are usually due at 2:00 p.m.,⁴⁷ which means that the Registry has an effective deadline of 11:00 a.m.

20. Bids of electrical subcontractors may be amended or withdrawn before the Registry's deadline by the subcontractors' compliance with the same procedures as would have applied had the amended or withdrawn bids been original bids.⁴⁸ [14]

21. After the Registry's bid submission deadline has tolled, those using the Registry cannot negotiate over price. The Registry requires that all awards made by general contractors must be at the price contained in the registered subcontractor bids. This prohibition against negotiation over price applies both before and after the award of the prime contract.⁴⁹

22. The Registry bids of electrical subcontractors must be submitted to the Registry on special forms provided by the Registry. The electrical subcontractor fills out a separate form for each general to whom

⁴⁵ Registry Answer, ¶ (12)(a)(iii). See also CX 3G, N. The Registry's rules provide:

When a subcontractor registers a bid or bids with the Registry, he shall not submit any non-registered bids to any prime contractor, or to the awarding authority in the case of direct bidding. CX 4M.

⁴⁶ The Registry's rules provide:

The deadline for delivery of the copies of bids to the depository for registration (said deadline being herein referred to as the "deadline for registration of bids" for ease of reference) shall be three hours prior to the deadline established for delivery of bids by prime contractors to the awarding authority. If the subcontractor bids are submitted directly to the awarding authority, the deadline for subcontractor bid registration shall be the same deadline as established for delivery of bids to the awarding authority.

When no deadline has been established for the delivery of the prime contractor bids to the awarding authority, or for the delivery of subcontractor bids to the awarding authority in the case of direct bidding, the Registry shall establish a deadline for the registration of subcontractors' bids and for the delivery of bids to the prime contractors or the awarding authority, as the case may be, after consultation with the prime contractors and/or awarding authority. CX 4M-N. See also Registry Answer, ¶ (12)(a)(i).

⁴⁷ Arnold 134-35.

⁴⁸ The Registry's rules provides:

Any bid registered with the Registry may be amended or withdrawn *before the deadline for registering of bids* by complying with the same procedure as if the amendment or withdrawal were an original bid: e.g., (1) the original amendment or withdrawal signed by an authorized representative of the subcontractor and the duplicate copy being placed in the appropriate sealed envelopes for each prime contractor, or the awarding authority if bid directly, (2) the envelopes containing same bearing on their face the specified information, except being captioned "AMENDMENT OF ORIGINAL BID" or "WITHDRAWAL OF ORIGINAL BID" and "COPY OF AMENDMENT OF BID FOR REGISTRATION" or "COPY OF WITHDRAWAL OF BID FOR REGISTRATION", respectively, (3) the envelopes being delivered by subcontractor (a) to the depository, time stamped and deposited in the locked container for original bids to be delivered and the locked container for copies of the bids to be registered, and (b) in the case of direct bidding, to the awarding authority. Upon opening the container of original bids, the amendment or withdrawal shall be placed with the original bid to the prime contractor in the large envelope and delivered to the addressee as provided for original bids. Upon opening the container of copies of bids for registration, the information as to amendment or withdrawal of a bid to the successful prime contractor, or the awarding authority in the case of direct bidding, will be tabulated with the information about the original bid as provided above.

This provision is not intended to foreclose, waive or otherwise limit any right a subcontractor may have to withdraw a bid after the deadline for deposit and registration of bids on the ground of mistake, what rights a subcontractor may have being determined by the applicable law of the jurisdiction. CX 4R-S.

⁴⁹ Registry Answer ¶ (12)(a)(i); Barnett 1582-87

it wishes to bid. The electricals may elect to bid different prices to different generals. The bid form for each general must be placed in a sealed envelope for transmission to the Registry.⁵⁰

23. When the sealed envelopes containing the electrical bids arrive at the Registry office, they are placed in large envelopes designated for each general who has [15] agreed to accept Registry bids. The large envelopes are delivered to these generals near 12 noon, approximately two hours before the generals' own deadline.⁵¹

24. While a general contractor is permitted under the Registry rules to register late bids it has received from electrical subcontractors who have not filed sealed envelopes directly with the Registry, time constraints faced by general contractors in receiving and compiling bids on bid day make it impractical to do so, since any bid, by the terms of the Registry's rules, can only be considered if physically filed with the Registry prior to the Registry's deadline.⁵² Should a general contractor use its office staff to register these late bids (and the record shows that most general contractors do not consider this a viable way to expand on the number of firms bidding through the Registry), it would have the effect of diverting the general's personnel at the crucial [16] point in time near the general's own bidding deadline when they could be negotiating over the terms of bids with trades that do not have bid depositories.⁵³

25. The Registry's rules are enforced by sanctions, mainly suspension from use of the Registry.⁵⁴ Suspension necessarily means that on future jobs, the general contractor will not have available Registry bids with the result that it will have fewer competitive prices to work with in making up its prime bid.⁵⁵ As for the electrical subs, suspension is detrimental to their businesses since it means that they cannot

⁵⁰ CX 4L-Q; Mann 285-86, Scurlock 1965-67.

⁵¹ Scurlock 1965-68. After the identity of the winning general has been determined, the Registry lists the bids to that general, and this tabulation is sent to all electricals who had bid on the job. Scurlock 1968-69.

⁵² The Registry's rules provide:

By Prime Contractor or Awarding Authority (Outside Bids): Each prime contractor, and the awarding authority in the case of direct bidding, shall have the right to register any outside bids he receives which have not been registered with the Registry by timely delivery of exact copies of all outside bids he desires to register, placed in a single, sealed envelope, furnished by the Registry, to an appropriate representative of the depository with the same information appearing on the face of the envelope as provided above for use by subcontractors in registering their own bids.

Upon receipt of the sealed envelope containing the copies of outside bids from the prime contractor, or awarding authority, the representative of the depository (not the prime contractor or awarding authority) shall time stamp and deposit the envelope in the locked container designated for the deposit of the copies of subcontractors' bids for registration.

The deadline for registration of outside bids by a prime contractor or awarding authority shall be the same as that provided below for registration by subcontractors of their bids. CX 4M. See also text of bid form, Note 43.

⁵³ Arnold 96, 101-02, 110, 170-71, Inman 218-19, Boucher 685-90, Zellner 816-17, Morgan 923, Naylor 1072-73, Birrell 1264-65, Stewart 1336-37, Barnett 1600-01, Martin 1679-80. See also Finding 36.

⁵⁴ Registry Answer, ¶ (12)(b)(i); CX 3F-H, M-N, CX 4S; Strong 1768-69. See Findings 45-54.

⁵⁵ Arnold 92-93, Peters 343-47, 358-64, Zellner 819-20, Martin 1675-76.

effectively bid to generals using the Registry.⁵⁶

26. Compliance with Registry rules is also secured by the Registry's policy of notifying all general contractors and electrical subcontractors who regularly use the Registry of the identity of suspended firms.⁵⁷ The Registry's notification policy, which ostensibly has the purpose of simply informing contractors and subs of the names of firms that will not be bidding through the Registry,⁵⁸ tends to make adherence to Registry rules more certain since suspension may harm the reputation of a firm and make it more difficult for it to get jobs in the future.⁵⁹

27. The Registry operates on the basis of a fee paid by the electrical subcontractor who has bid successfully on a particular job. The Registry's charge is 1-½ percent of the contract price, but in no event less than \$25 or more than \$2,000.⁶⁰ [17]

*F. The Market Setting Of The Bid Depository
Operated By The Registry*

28. In recent years there has been a drop in both the number and dollar value of jobs bid through the Registry. While complaint counsel do not dispute the fact that such a decline has occurred, it claims that precise market figures are simply unavailable, and it is sharply critical of respondents' attempt to fill in this lacuna by applying to total nonresidential construction figures (as provided by the authoritative F.W. Dodge survey) a factor of 10 percent, which is widely accepted as representing the portion of total construction fairly attributed to electrical work.⁶¹ Even if respondents' evidence is somewhat flawed,⁶² it is at least useful for showing that the general trend has been in the direction of the Registry handling an increasingly diminished percentage of total Memphis area electrical subcontracting jobs, as shown in Table 1, below:

⁵⁶ CX 92; Baker 425-26.

⁵⁷ Registry Answer, ¶ (12)(b)(ii); CX 3H, N, CX 8K-L.

⁵⁸ CX 8K-L, CX 158F-"T".

⁵⁹ Boucher 691-92.

⁶⁰ CX 4S-T.

⁶¹ Morgan 926.

⁶² Respondents' evidence is questioned because (a) it includes jobs under \$5,000 that are not eligible for Registry consideration, and (b) it includes negotiated work that has been entirely removed from the competitive bidding process. See Stewart 1405-20, 1432-33.

Table 1
Registry Jobs As A Percentage Of Total Memphis Area Electrical Subcontracting Jobs

Year	(1) Number of Electrical Jobs in the Memphis Area	(2) Number of Electrical Jobs Processed Through Registry	(3) Column 2 as % of Column 1	(4) Dollar Value of Elec- trical Jobs in the Memphis Area	(5) Dollar Value of Electrical Jobs Awarded Through Registry	(6) Column 5 as % of Column 4
1984	514	28	5.44	\$33,460,000	\$3,588,000	10.72
1983	559	48	8.58	24,460,000	4,245,000	17.35
1982	401	45	11.22	20,880,000	4,687,000	22.44
1981	489	69	14.11	20,510,000	6,132,345	29.89
1980	432	56	12.96	22,550,000	9,255,619	41.04
1979	452	76	16.81	30,045,800	7,506,749	24.98
1978	384	155	40.36	11,740,800	8,412,000	71.64
1977	472	123	26.05	13,590,200	6,878,000	50.60
1976	430	18	0.04	12,637,100	2,916,127	23.07

Sources: CX 14A-"T", CX 154; RX 1.

29. The record suggests several reasons for the decline shown in Table 1. There has been a marked trend in recent years away from bid work, and toward the use of prices negotiated between owner and an individual general contractor or owner and a [18] preselected group of general contractors.⁶³ Moreover, even on jobs on which there is competitive bidding for the prime contract, the winning general may bypass subcontractor bidding because it is accustomed to working with a previously selected team of specialty tradesmen.⁶⁴ It should also be noted that ordinarily the Registry will not be used unless the particular job is well-defined, complete, and assured of adequate financing.⁶⁵ Finally, the Registry does not operate at all if the general has been preselected even if the electrical work is open to competitive bidding.⁶⁶

30. Notwithstanding the decline in the total number of jobs going through the Registry, the Registry nevertheless affects an important segment of electrical subcontracting work done in the Memphis area. On most significant electrical jobs in which bidding is involved, the Registry operates.⁶⁷ Moreover, the volume of electrical subcontracting that passes through the Registry is cyclical, to the point that Scurlock testified that the machinery of the Registry must be preserved in anticipation of a shift from negotiated to bid work.⁶⁸

31. The claim was made by several witnesses that the Registry is simply an option open to general contractors who elect to use a sealed bid system.⁶⁹ The weight of the evidence is to the contrary. For while it is true that general contractors are [19] theoretically free to choose to go through the Registry or to bypass it,⁷⁰ as a practical matter when the Registry is in operation, contractors are under pressure to use it since they want all the bids that they can possibly get, including the bids that can only be had by going through the Registry. It is the perception of generals that without such a full array of electrical bids they cannot prepare truly competitive prime bids.⁷¹ Moreover, general contractors are especially interested in obtaining the bids of the dependable and financially stable electrical firms which regularly use the Registry, and generals believe that they would be at a competitive disadvantage if other generals had access to these well-established firms (by agreeing to take Registry bids) while they remained outside

⁶³ Arnold 58-59, Inman 208-09, Scurlock 1976-81.

⁶⁴ Strong 1829-32, Dennis 1852.

⁶⁵ Strong 1829-30, Dennis 1852; *see also* Martin 1674-75.

⁶⁶ Dennis 1899-1900.

⁶⁷ Baker 482, Zellner 826, Barnett 1620, Martin 1700-01.

⁶⁸ Scurlock 2003-04.

⁶⁹ Strong 1759-60, Scurlock 1959-60.

⁷⁰ Morgan 937, Naylor 1092, Wade 1144-45, Martin 1633-34.

⁷¹ Inman 213, Boucher 678, Zellner 832, 843, Naylor 1067-68, Wade 1139, Martin 1673-75.

of the Registry.⁷² It should also be noted that the Registry rule prohibiting subcontractors from bidding both inside and outside of the Registry is specifically designed to force generals to use the Registry.⁷³

32. There is no credible evidence that the use of the Registry on any job was instigated by general contractors.⁷⁴ To the contrary, notwithstanding the pressure to use it in order to obtain a complete array of bids, the record shows that general contractors perceive of no other significant advantage to them from the use of the Registry; indeed, they would prefer not to use it, and would rather rely on the last [20] minute give-and-take over the telephone that prevails in their dealings with other sub-trades.⁷⁵

33. According to complaint counsel, the market significance of the Registry is somehow enhanced by entry conditions in the Memphis area. While there is some evidence in the record that licensing,⁷⁶ bonding,⁷⁷ and other requirements⁷⁸ may operate to restrict the number of electrical subcontractors, there was no testimony that the existing electrical firms constitute an inordinately small pool of competitors, or that Memphis area general contractors are typically confronted with a meager selection of electrical subcontractors from whom to pick.⁷⁹ All that the record will allow on this [21] point is that the general contractors prefer to obtain the bids of all firms interested

⁷² CX 161E-F; Arnold 65, 73, 92-93, 112-14, 118, Inman 213, 224, 226-27, Zellner 832-34, 843, Morgan 924, 926-28, 945, Wade 1144, Barnett 1601, Martin 1670, 1675. Members of this class of subcontractors, which includes the membership of the Memphis Chapter, may not bid through the Registry on a particular job for one or more of the following reasons: general distaste for federal jobs because of record-keeping requirements, the size of the job, the kind of work involved, or commitment to other work. Zellner 830-31, Morgan 951-52, Clark 966, Martin 1639-40, Dennis 1895-96.

⁷³ CX 160F-G; Dennis 1930-33.

⁷⁴ See Inman 225, Peters 393, Boucher 695.

⁷⁵ Arnold 64-65, 120-22, Inman 224, Peters 363, Morrison 598, Boucher 695, Zellner 818, Morgan 923-24, Naylor 1065-67, Wade 1138-39.

⁷⁶ Under Tennessee law, all electrical work in excess of \$50,000 must be done by firms holding a state license. A key requirement for obtaining a state license is that the firm employ at least one master electrician. Only persons who have graduated with a degree in electrical engineering from a recognized university and who have two years of industry experience or, alternatively, persons with four years experience as journeyman electricians are eligible for the master electrician examination. The master electrician examination, which may be taken only once every six months, is administered by county or municipal authorities. In recent years, the administration of the licensing examination in Shelby County has operated to exclude persons who have been qualified as master electricians in other municipalities and counties in Tennessee and elsewhere. Approximately 25 applicants were examined by the Shelby County Electrical Licensing Board in February 1985. None of those persons passed the examination. The passing rate for prior examinations during the last several years has averaged less than 33 percent. Joint Exhibit 1A-Z; CX 116A-Z137, CX 117, CX 118; Mann 283-84, Hales 742, Dennis 1883. Note, however, that at least one experienced electrician took the exam although he acknowledged that he was not familiar with the code, and would have to "bluff" his way through. RX 3.

⁷⁷ Memphis and Shelby County law requires that all subcontractors be bonded and insured. Some firms are qualified and bonded to perform work on smaller jobs only, and therefore may not work on larger projects. CX 116A-Z137.

⁷⁸ There is some evidence that Memphis (or for that matter any other metropolitan area) is somewhat insulated from outside competition. Electrical subcontractors from outside of the Memphis area would have to assume transportation and subsistence costs that may make it difficult for them to compete against Memphis electrical subcontractors. See Clark 981, Wade 1110. Outside subcontractors also face the risk of having to deal with contractors whose ability is not known. Clark 981-85. In addition, local firms may have the advantage of established relationships with local labor unions and material suppliers. CX 161C-D; Wade 1117-18. Notwithstanding these difficulties, attractive Memphis area jobs attract outside subcontractors. See Clark 981.

⁷⁹ See, e.g., Morgan 953-54, Wade 1119.

in a project, including bids of electrical firms who use the Registry as well as those who are bidding outside of the Registry.⁸⁰

G. *The Effects Of The Registry*

34. The effects of the Registry were analyzed in depth by two academic experts called as witnesses by complaint counsel—George S. Birrell, a civil engineer,⁸¹ and John F. Stewart, an economist.⁸² The qualifications of these experts were not challenged by respondents, and no significant aspect of their testimony was disturbed by cross-examination. Moreover, their testimony was not only fully consistent with and supported by the testimony of respondents' own witnesses who testified that the Registry eliminates price cutting pressures, but it was also supported by the exhibits introduced into the record respecting the sanction incidents. *See* Findings 43–55. Accordingly, the contrast between the economic significance of bidding through the Registry and bidding without a bid registry that follows (Findings 35–42), draws heavily on this highly credible expert testimony.

35. By its terms, the Registry segments the bidding process by forcing general contractors to choose between taking bids from firms bidding inside or outside of the Registry, but not both.⁸³ If the Registry did not exist, a general contractor would be free to obtain sub-bids from any subcontractor who might be interested in bidding on a [22] particular job.⁸⁴ This segmentation of electrical subcontractors between those bidding inside and outside of the Registry, which is designed to prevent the bids received through the Registry from being undercut by outside bids,⁸⁵ is perceived by general contractors as depriving them of access to part of the universe of bidders that they need in order to make up a competitive prime bid.⁸⁶ The perception of these general contractors is fully consistent with the expert testimony, grounded on bidding theory, to the effect that because segmentation of a market reduces the total number of bids received by a general, it tends to increase prices.⁸⁷

36. In addition to segmenting the market, the Registry imposes an artificial time limit on price negotiation. When the Registry is not in

⁸⁰ Equally unimpressive is respondents' claim that the Registry facilitates entry of new firms by protecting them from the price-cutting pressures of bid peddling. *See, e.g.,* Dennis 1883–85. Protecting a new entrant from price competition is not a cognizable economic justification. Stewart 2072–73.

⁸¹ Birrell, an associate professor at Case Western University, is an expert in the management of construction projects including the contracting process, the formation of the construction team consisting of generals and subs, estimating costs, bidding, and planning construction work. CX 128A-S; Birrell 1168–90.

⁸² Stewart, an associate professor at the University of North Carolina, specializes in industrial organization. CX 129A-E; Stewart 1307–14.

⁸³ Findings 16, 18; CX 133, CX 155T-X; Stewart 1333–39.

⁸⁴ Naylor 1061–62.

⁸⁵ Strong 1806.

⁸⁶ Arnold 95–101, 123–27, 196–97, Inmann 227, 233, 241–44, Boucher 688, Zellner 832, 836–38, Morgan 923, 941–42, Wade 1139.

⁸⁷ CX 131B, CX 155T, V-X; Birrell 1271–75, Stewart 1327–39.

use, or where a particular trade has no bid depository to turn to, the bidding process is subject to increasingly vigorous price pressures as telephone negotiations intensify near the general contractors' prime bid deadline.⁸⁸ Such last-minute telephone negotiations may be initiated either by general contractors or by subcontractors. During the course of these telephone negotiations, generals or subcontractors may employ various bidding strategies and pressures.⁸⁹ To begin with, a general may simply shop by informing a subcontractor that its bid is too high without specifying the exact bid of any other subcontractor.⁹⁰ Another strategy that may be employed is outright bid peddling, whereby the general [23] uses the specific bid of one subcontractor to drive down the bid of another.⁹¹ Still another ploy, is for a subcontractor to volunteer a last-minute telephone change, perhaps citing a sudden concession from a supplier or the savings that arise when the subcontractor finds an acceptable alternative material under the specification provision allowing for the substitution of "or equals".⁹² Irrespective of the exact bidding strategy used, and who has initiated the last-minute telephone contact, the record evidence is that pre-award price concessions are almost universally incorporated into the general contractor's prime bid with the result that the awarding party receives a lower price.⁹³

37. The pre-award bargaining in the absence of a bid depository (again, usually in the form of last-minute telephone conversations) may touch on price indirectly as general contractors and electrical subcontractors negotiate over such matters as "or equals", work scope, and possible redundancies or overlaps.⁹⁴ See Findings 38-40.

38. Commonly used in the construction industry is the concept of "or equals", that is, the substitution of material called for by a specification with a material of equal quality.⁹⁵ It has been the experience of firms in the construction industry that some of the best price reductions for these "equals" come just before the generals' deadline as suppliers maneuver in an effort to have their customers—the subcontractors—submit winning sub-bids.⁹⁶ By cutting off the electrical subcontractors' bidding three hours before the generals' deadline, the Registry tends to inhibit the use of such late price [24] concessions from suppliers to electricals, which might, in turn, lower the prime

⁸⁸ Morrison 568-69, 593-96, 603, Boucher 676-77, Zellner 844-45, Naylor 1065-67, Wade 1113-15, 1122-26, 1138, Birrell 1211-14.

⁸⁹ See CX Physical Exhibit A.

⁹⁰ Arnold 183-84, Peters 365-67, Zellner 849, Wade 1127-29.

⁹¹ See Mann 287, Boucher 679.

⁹² Baker 490-91, Zellner 840, Wade 1135-37, Birrell 1238-40. See also Finding 38.

⁹³ CX 155P; Arnold 91-92, 194, Morrison 575, 593-94, Boucher 681, McGroom 784-85, Zellner 834-35, Birrell 1213-14, 1259-60, Dennis 1919.

⁹⁴ Birrell 1206-13.

⁹⁵ Birrell 1238-39.

⁹⁶ Morrison 604-06, Zellner 854, Wade 1122-23.

bids of the generals.⁹⁷

39. Work scope is the subcontractor's perception, derived from an examination of drawings and specifications, of the service to be provided on a project. On the basis of this examination, the subcontractor typically makes a "quantity take-off" of work units to be provided, and then based on his projection of costs and targeted margin, a bid price is worked up. Different subcontractors, however, have different perceptions of work scope on any given job, and one subcontractor may have included what another has omitted.⁹⁸ When such differences become apparent to the general contractor after a bid is filed, the usual procedure (in the absence of a bid depository) is for the general and subcontractors to engage in telephone negotiations clarifying and, if necessary, adjusting price to reflect any new understanding about work scope.⁹⁹ The Registry's rules do not allow for such post-filing price negotiation over work scope.¹⁰⁰

40. Still another area affected by Registry rules is negotiation over redundancies. Should the general contractor discover a redundancy or overlap, say, control wiring that may be done by mechanicals or electricals, or scaffolding which may be done by the general itself or by one of the sub-trademen, the procedure followed in the absence of a bid depository is for the general to contact the subsidiary trades bidding on the job, inquire about the possible redundancy, and negotiate a price adjustment.¹⁰¹ [25] While Registry rules do not prohibit the first step in this procedure—the inquiry about a possible redundancy¹⁰²—there is an absolute prohibition against the post-filing negotiation of a price concession, the most direct way of eliminating the redundancy.¹⁰³ Under the Registry rules all that a general confronted with a redundancy problem may do is wait until after the generals' bidding deadline has passed, and assuming it has been awarded the prime contract, it could then negotiate a "change order".¹⁰⁴ A post-award change order, however, is an option that is only available to the winning general; moreover, the post-bidding negotiation of change orders may slow down the construction process, cause the renegotia-

⁹⁷ Wade 1122-23. See also Wade 1163-64.

⁹⁸ Birrell 1206-08.

⁹⁹ Wade 1113-15, Birrell 1212-13, 1218-19.

¹⁰⁰ Zellner 844-45, Birrell 1227-28.

¹⁰¹ CX Physical Exhibit A; Arnold 121-23, 153, 172-74, Inman 214-15, 253-60, Zellner 854-55, Naylor 1066-69, Birrell 1209-13. As Birrell put it,

I perceive that relationship [between discussions and price changes] as intimate; that the purpose of the discussion is to establish if changes need to be made in price to enable the minimization of overlaps and omissions across competing bidders in one trade and across the bidders in all trades. For these people to discuss something about the project without it being related to the price of the project, you would have to think maybe pretty hard to find some topic to discuss, if it didn't have a relationship to price. Birrell 1232. See also Wade 1123-26.

¹⁰² Barnett 1585.

¹⁰³ Arnold 122, 162-65, 173, Inman 257, 267-68, Birrell 1227-28, Dennis 1910.

¹⁰⁴ Arnold 167-68, Inman 269-70, Chester 1721-22.

tion of related subcontracts, and are generally regarded as tending to increase costs.¹⁰⁵

41. If the Registry did not exist, even after a general contractor has been awarded the prime contract, the successful general and all interested subcontractors could engage in further negotiations. Thus in trades which do not have a registry, or when the Registry is not operating on an electrical job in the Memphis area, the winning general is likely to be courted in the post-award period by subcontractors who are now [26] prepared to lower their pre-award bid in recognition of the added leverage enjoyed by the successful general contractor.¹⁰⁶ In addition, there may be post-award negotiations about work scopes and the substitution of materials ("or equals") that could change the subcontractor's bid.¹⁰⁷ While lower subcontracting bids received in the post-award period may be passed on to the awarding authority, there is little incentive to do so, and most post-award reductions in price only result in improved margins for general contractors.¹⁰⁸

42. Complaint counsel's experts concluded that the Registry's rules limiting price negotiation and segmenting the market, as described in Findings 35-41, are likely to raise the cost of electrical subcontracting services.¹⁰⁹

43. Respondents argue that the Registry has no impact on price because subcontractors submit their lowest possible price to the Registry, confident that their sealed bids will not be subject to peddling.¹¹⁰ As a corollary of this "best price" argument, the claim is made that in the absence of the Registry, subcontractors may anticipate bid peddling by inflating their bids in order to leave room for negotiation. The notion of "best price" as one determined subjectively by businessmen was sharply criticized by complaint counsel's experts. Professors Stewart and Birrell testified that [27] all businessmen view their offers as the "best price". The function of the market is to test whether this so-called "best price" can be lowered still further.¹¹¹ Moreover, if in fact the Registry was the source of the "best price", or if in the absence of a bid depository experience showed that margins are inflated in anticipation of bid peddling, one would expect to see generals replicating the Registry in bid depositories for other trades. No such

¹⁰⁵ Arnold 169-70, Inman 253-61, 266-68, 272, Birrell 1235-38.

¹⁰⁶ Wade 1126-27, Birrell 1204, 1258-59. Post-award peddling may take place over an extensive period of time since some sub-trades are not required to be on the job site until other work is completed. Birrell 1259.

¹⁰⁷ Naylor 1073-74, Birrell 1257.

¹⁰⁸ Inman 248, Morrison 594, McGroom 784. A benefit does accrue to the owner, of course, if the general's bid had included an allowance for expected savings resulting from post-award bid peddling. CX 155P-Q; Wade 1156, Birrell 1240.

¹⁰⁹ CX 131A—CX 134, CX 155P-Q, S-X; Birrell 1213-14, 1261-63, 1271-74, 1291-93, Stewart 1319-21, 1333-47.

¹¹⁰ The "best price" argument was supported by several witnesses called by respondents (Barnett 1574, Martin 1630-31, Chester 1712, Dennis 1850-51, Scurlock 2004-06) as well as by the testimony of witnesses called by complaint counsel who said that the Registry was a source of good or low prices. See, e.g., Arnold 140, Inman 243-44, Peters 401-02, Boucher 707-08, Zellner 861, Morgan 937, Wade 1145-46, 1149.

¹¹¹ Birrell 1287-88, 1294-96, Stewart 1350-51.

trend exists, and the Registry itself is essentially a product of electrical subcontractor initiative rather than general contractor demand.¹¹² In addition, there is impressive direct proof that the Registry does not in fact produce the "best price". In the first place, as the sanction incidents (see Findings 45-54) demonstrate, the disciplinary machinery of the Registry itself is more often than not invoked for the very reason that the general was offered (and accepted) a better price outside of the Registry.¹¹³ Second, the whole notion of the Registry as the source of the "best price" was substantially demolished by the testimony of respondents' own witnesses to the effect that the purpose of the Registry is to reduce price-cutting pressures. Note, for example, the following testimony of Registry board member and president Barnett:

My particular interest in the Registry is that it promotes ethical bidding practices. It tends to discourage and if not—I can't say eliminate, but the aim would be to eliminate unethical practices such as bid shopping, bid peddling, price cutting, things of this nature that go on when there are not bids provided or recorded and open to public review, and this is—this is the primary reason for the establishment of the Registry, and this has been the aim of the Registry ever since it was established and went into operation.¹¹⁴ [28]

Barnett further testified:

Q: Why do you think the price cutting and bid peddling, why do you think that's a bad practice in the industry? What does it do when it's there?

A: Well, the only thing I can say is that it provides second opportunities for people to bid the job when we as general contractors are not provided that opportunity. It is—ever since I've been in the business, it's been considered as unethical practices. I was taught to believe this. I do believe it, and therefore, I don't subscribe to the theory of bid peddling or price cutting, and I personally try to discourage it anywhere I can, and I feel our Registry also does so.¹¹⁵

As for the prospect of inflated bids in the absence of a bid depository, Professor Birrell testified that the very purpose of the intensive telephone negotiations that characterize non-bid depository markets is to test for such inflation.¹¹⁶

44. The adverse impact on price attributed by complaint counsel's experts to the Registry's limitation on price negotiation and its segmentation of the market is confirmed by the sanction incidents. See Findings 45-54.

45. *Maler Construction Co.* Maler, a general contractor, was sus-

¹¹² See Findings 7-8, 31-32. See also CX 159G; Inman 225, Peters 393.

¹¹³ Stewart 1342.

¹¹⁴ Barnett 1579-80.

¹¹⁵ Barnett 1580. See also, CX 158B-C, CX 160B-C, CX 161"O"-Q; Barnett 1603-05, Martin 1691, 1699-1700, Chester 1712, 1726, Strong 1792-93, Dennis 1851.

¹¹⁶ Birrell 1275-77, 1286-90.

pendent from use of the Registry for the period July 27, 1977, to January 26, 1978. On the Lipsey's Seafood Restaurant job, Maler had agreed to accept Registry bids, but awarded the electrical work to a subcontractor who had not bid through the Registry. The unregistered electrical bid was some \$300 lower than the lowest Registry bid. Maler claimed that it had to go outside of the registry when the architect of the job redesigned the specifications in order to reduce costs, but Allen Electric, the low Registry bidder, refused to rework its bid. Allen later filed the complaint against Maler which eventually led to Maler's suspension. While Maler's claim respecting the change in specifications [29] was not well established on the record, there is no question that a lower bid was made outside of the registry.¹¹⁷

46. *Inland Construction Co.* Inland, a general contractor, was suspended from use of the Registry during the period September 18, 1980, to March 17, 1981. On the Hickory Ridge Mall job, Inland permitted Haines Electric Co., which had bid through the Registry, to modify its bid after the Registry's filing deadline had passed. The modification consisted of Haines lowering its original bid by changing the "alternates" appearing on its bid sheet from additions to deductions. Haines' base bid was \$749,120, and before the modification, its bid for Alternate 1 was \$756,970 (\$749,120 base bid + \$7,850), \$777,636 for Alternate 4 (\$749,120 base bid + \$28,516), and \$778,320 for Alternate 5 (\$749,120 base bid + \$29,200). By changing each of these alternates from an addition to a deduction, Haines lowered its bid to \$741,270 for Alternate 1, to \$720,604 for Alternate 4, and to \$719,920 for Alternate 5. The Registry charged Inland with violating its rules by accepting these price reductions from Haines.¹¹⁸ In commenting on this incident, the Registry said—

The Registry Office received several verbal complaints stating they believed Haines Electric Company violated the rules and regulations in that they changed their alternates from an add to a deduct. The rules and regulations of the Registry Service would not permit a firm to change a price or an alternate period. After an electrical contractor registers his bid he then has two options: (a) that it is to remain in the registry as bid or (b) to withdraw.¹¹⁹ [30]

For its part in the Hickory Ridge Mall incident, Haines was suspended from use of the Registry between September 18, 1980, and March 17, 1981.¹²⁰

¹¹⁷ CX 18A—CX 24, CX 137, CX 147A.

¹¹⁸ CX 25A—CX 30, CX 138, CX 147B.

¹¹⁹ CX 25B-C.

¹²⁰ CX 28B. In addition to being suspended for the Hickory Ridge Mall job, Haines was suspended from the Registry between May 28, 1982, and May 28, 1983, (subsequently changed to February 15, 1983, after an appeal) because of its actions on the V.A. Hospital-Ambulatory Care Addition job. This suspension came about after the Registry received a complaint letter from Anderson Electrical alleging that Haines had submitted Registry bids and then bid outside the Registry to a general contractor who was not using the Registry. Haines was suspended

(footnote cont'd)

47. *Dick Corporation*. Dick, a general contractor, was suspended from use of the Registry indefinitely beginning on September 11, 1980. The suspension was imposed because Dick agreed to accept electrical bids through the Registry on the City of Memphis' Volunteer Park Phase III job, but awarded the electrical subcontract to an electrical subcontractor (Wallace Electric) who had not bid through the Registry. The lowest base bid that Dick received through the Registry was \$2,397,000 from Shelby Electric. Dick awarded the job to Wallace at a bid price of \$2,180,000 for a slightly different scope of work after city officials determined at the last-minute that Dick's winning prime bid was above the amount budgeted by the city for the job. Confronted with this change, Dick attempted to negotiate a reduction from Shelby, either in the form of a new bid or an informal reduction of its existing bid. When this effort failed, Dick went outside of the Registry to Wallace.¹²¹

48. *APAC Tennessee Construction Co.* APAC Tennessee, a general contractor, was suspended from use of the Registry for six months beginning on January 5, 1982. On the Federal Express Headquarters Site Work job, APAC accepted Registry bids, but awarded the job to a bidder outside the Registry. The outside bid was some \$4,000 lower than any bid received through the Registry, taking into account an adjustment made for a modified scope of work.¹²² [31]

49. *Engineering Management Co.* Engineering Management, a general contractor, was suspended from use of the Registry for one month beginning on August 25, 1982. This suspension originated with the River Place job on which Engineering Management permitted Mann Electric to change its price after the Registry's deadline had tolled. Mann's original base bid through the Registry was \$129,830. Allen Electric filed with the Registry a base bid of \$104,500 plus additional charges for office space work. When Arnold, president of Engineering Management, spoke to Mann about the scope of the work in Mann's bid, he learned that Mann's bid actually was some \$9,000 lower than Allen's bid since Mann had intended that its base bid include a substantial amount of office space work. At the disciplinary hearing before the Registry Board, Arnold tried to explain that the bids were ambiguous, and needed clarification before they could be fairly compared, but the Registry suspended his firm anyway.¹²³ For its part in the River Place violation, Mann Electric was suspended from the Registry for one month beginning on August 25, 1982.¹²⁴

even though it had submitted identical bids both inside and outside the Registry, and its Registry bid was the lowest bid among the Registry bidders. CX 86B—CX 97; Dennis 1928-30.

¹²¹ CX 32A—CX 39, CX 139A, CX 148A, CX 152A-E; Peters 348-57, 410.

¹²² CX 41A—CX 46B, CX 123, CX 139B, CX 148B, CX 153; Morrison 575-92.

¹²³ CX 47D—CX 51B, CX 127, CX 140, CX 149A; Arnold 80-92, Mann 288-90.

¹²⁴ CX 51B. In addition to being suspended for its role in the River Place job, Mann was suspended from the Registry from June 3, 1983, through December 2, 1983, in connection with the Kroger Southaven Store job. This

50. *Ben J. Malone Co.* Malone, a general contractor, was suspended from use of the Registry for six months beginning on August 25, 1982. This sanction was imposed when Malone accepted Registry bids on the Federal Express Power Roof Exhauster and Ventilators job, but awarded the contract to an electrical subcontractor bidding outside the Registry. Malone had received six bids through the Registry, ranging from Anderson [32] Electric's \$185,220 to Chisca Electric's \$433,356. Malone also received a bid for \$166,000 outside of the Registry from American Electric. Although American's bid was for a slightly different scope of work. Malone considered American's bid more favorable than any Registry bid in terms of both price and scope of work. Moreover, since Malone had used American previously, and was familiar with the quality of its work, this low outside bid was especially attractive. The disciplinary action against Malone was initiated by Anderson Electric.¹²⁵

51. *Martin Construction Co.* Martin Construction, a general contractor, was suspended from use of the Registry for six months beginning on September 14, 1982. On the Memphis Area Transit Authority, Office Modifications job, Martin agreed to accept Registry bids, but awarded the subcontract to an electrical subcontractor bidding outside the Registry whose bid had not been registered. Martin had gone outside of the Registry because "Curley" Morgan, Martin's estimator, was disappointed when he received only three bids through the Registry. These bids were for \$28,860 (Mid City Electric), \$31,384 (Chisca Electric), and \$39,502 (Comm. & Ind. Electric). The low Registry bidder (Mid City Electric) called Morgan after the bids were delivered by the Registry to declare its withdrawal, claiming mistake. As a result of the Mid City withdrawal, Morgan was left with only two Registry bids. Morgan testified that he was surprised that Mid City Electric had withdrawn its bid on the basis of an alleged mistake since the bid was only 10 percent lower than the next lowest bid in the Registry. In Morgan's experience, bids containing mistakes are usually 25 to 30 percent lower than the next lowest bid. Because of the sudden withdrawal of Mid City, Morgan sought to obtain bids outside the Registry before placing his own bid for the prime contract. Morgan called several electricals, and eventually received a bid from A.C. Electric which was \$4,000 lower than the bid withdrawn by Mid City Electric. Using this lower outside electrical bid, Morgan became [33] the suc-

suspension came about after the Registry received a complaint letter from Carson Electric alleging that Mann had bid both inside and outside the Registry on the Kroger job. Mann explained to the Registry that the successful general contractor, R. Naylor & Co., who had not indicated a willingness to accept Registry bids, had telephoned Mann after Naylor won the prime contract to determine if Mann Electric wanted the electrical job. Mann quoted Naylor the same price for the electrical work that Mann had bid through the Registry. Despite this explanation, the Registry suspended Mann. Mann's quotation was \$15,950 lower than any other bid received by Naylor outside of the Registry. CX 105A—CX 110; Mann 291-92, Naylor 1053-65.

¹²⁵ CX 52B—CX 59, CX 141, CX 149B; McGroom 779-94.

cessful low bidder on the prime contract. Morgan testified that if he had used the lowest bid remaining in the Registry after Mid City withdrew, his firm would not have won the prime contract. The hearing which resulted in the disciplinary sanction was scheduled after the Registry received a complaint from Chisca Electric (the low Registry bidder after Mid City withdrew), requesting that the Registry investigate Martin's award of the electrical subcontract outside of the Registry.¹²⁶

52. *C.R. Boucher Construction Co.* Boucher, a general contractor, was suspended from use of the Registry during the period January 24, 1984, through July 24, 1984, because it had agreed to accept Registry bids on the Honey's Auto Parts Store job but awarded the electrical subcontract to a firm that had not bid through the Registry. Boucher accepted the outside bid because it was approximately \$1,000 below any Registry bid. As it happens, Boucher only won the prime contract by being less than \$1,000 lower than any other general, and probably would not have obtained the prime contract but for the lower outside electrical bid.¹²⁷ The Registry's disciplinary action against Boucher was initiated following the receipt of a complaint from Allen Electric, the low bidder in the Registry.

53. *Crown Electric Co.* Crown, an electrical subcontractor, was suspended from use of the Registry from March 8, 1978, until April 7, 1978, when it violated the Registry's rules requiring that all bids must be made in exact compliance with the plans and specifications. Crown's Registry bid of \$55,000 for the electrical work on the Federal Express Town and Country Shopping Center was substantially lower than the next lowest Registry bid of \$89,500. When the Registry office contracted Crown to ask about this discrepancy, Crown explained that its bid excluded a generator which would have raised the bid by some \$26,000 to \$81,000, or still \$8,500 lower than the next lowest [34] Registry bid. In suspending Crown, the Registry Board noted that "the bid price was significantly lower than the next lowest price but not qualified to indicate a variance from the plans and specifications of the project."¹²⁸ In effect, the Registry suspended Crown for trying to use the Registry while keeping open the option of negotiating with the winning general about doing the work in a different way (namely, that the general shop independently for a generator), and at a substantially lower price than that offered by the other Registry bidders.¹²⁹

54. *A-1 Electric Co.* A-1, an electrical subcontractor, was suspended from use of the Registry from November 30, 1979, through May 30,

¹²⁶ CX 60A—CX 63B, CX 142, CX 150A; Morgan 890-901.

¹²⁷ CX 64A—CX 69, CX 143, CX 150B; Boucher 686-91.

¹²⁸ CX 72B.

¹²⁹ CX 70—CX 75B, CX 144, CX 151A.

1980, because it submitted a bid through the Registry on the Dobbs House project, and then submitted a lower bid directly to the awarding authority. A-1's original bid through the Registry was \$87,345. Later, when a mistake was uncovered, it changed its bid to \$79,111 in bidding directly to the awarding authority.¹³⁰

55. Stewart examined the ten sanction incidents described in Findings 45-54 for added costs fairly attributable to the Registry: that is, what the effect on the winning electrical bid would have been if the Registry rules had operated effectively to eliminate [35] the violation, usually in the form of acceptance of lower outside bids. Stewart's analysis is shown in Table 2, below:

Table 2
Effect Of Registry Rules In Inflating Winning Electrical Bids

(1) Sanction Incident	(2) Winning Electrical Bid	(3) Maximum * Inflation If Registry Rules Had Operated	(4) Col. 3 as % of Col. 2
Maier	\$8,865.00	\$300.00	3.38
Inland	720,604.00	56,979.00	7.90
Dick	2,180,000.00	217,000.00	9.95
APAC	225,400.00	4,000.00	1.77
Engineering Mgt.	98,480.00	6,020.00	6.11
Malone	166,000.00	19,220.00	11.57
Martin	27,515.00	3,869.00	14.06
C.R. Boucher	12,480.00	680.00	5.44
Crown	81,000.00	8,500.00	10.49
A-1	79,111.00	389.00	.04
TOTALS	\$3,599,455.00	\$316,957.00	8.8% or 10 incident average of 7.1%

Sources: CX 146; see also Stewart 1357-86; CX 136A-CX 145, CX 147A-CX 151B.

* Stewart also calculated minimum price inflations based upon record evidence that certain jobs involved alternatives requiring adjustments in columns 2 and 3. See Stewart 1385-86 and CX 146.

56. Stewart argued that in addition to the impact on price resulting from the limitations on negotiations and segmentation of the market,

¹³⁰ CX 80-CX 85, CX 145, CX 151B. Other incidents of suspension of electricals involved Binghampton Electric Co. and Chisca Electric Co. Binghampton was suspended from the Registry from March 21, 1978, through September 20, 1978, in connection with the 980 South Third Street job because it allegedly submitted a bid to a general contractor that was different from the bid filed with the Registry for the same general. Binghampton attempted to explain to the Registry board that its "outside" bid was merely an attempt to clarify its illegible Registry form, but Binghampton was suspended anyway. CX 75C-CX 79. Chisca was suspended from using the Registry from November 19, 1982, through January 19, 1983, in connection with the Tennessee Air National Guard, Jet Fuel Storage job because it altered its bid to the successful general contractor after the bid registration deadline set by the Registry. CX 99A-B, CX 103. In still another incident, Chisca was absolved by the Registry's board of the charge of improperly changing its bid on the IRS-SCRS Computer Room Expansion job. RX 2A-R.

the Registry increases the likelihood that electrical subcontractors may engage in bid rigging or other forms of price-fixing by providing a forum for the conspirators, as well as a mechanism for immediately detecting violations of any price-fixing agreement.¹³¹ I have given little weight to this speculation since there is no evidence whatever that the Registry has been used as a front for a price-fixing agreement or to allocate contracts, and no convincing reasons were advanced by Stewart for speculating about the possibility of conspiracy in a [36] construction industry in which actual conspiracy is rampant without the aid of bid depositories.¹³²

H. Respondents' Proffered Justifications

57. Respondents not only claim that the Registry produces the lowest possible prices (see Finding 43), but also that the rules of the Registry are justified because of their contribution to improve efficiency in the bidding process, as well as for their elimination of evils associated with bid peddling.¹³³ See Findings 58-62.

58. The three-hour bidding deadline imposed by the Registry was defended as simply a modest extension of prevailing custom in the Memphis area where it is the practice of some generals to require subcontractors to submit their bids by noon so that the generals may prepare their bids by the customary 2:00 p.m. prime bidding deadline.¹³⁴ This deadline is not incorporated in any formal rule, and the evidence indicates that there is far from universal compliance with the custom.¹³⁵ Moreover, this informal deadline does not preclude, as the Registry's rules do, a general contractor from engaging in price negotiation after a subcontractor's bid has been submitted.¹³⁶

59. It was contended by several witnesses that the time limitations imposed by the Registry were designed to eliminate chaos in the bidding process and to establish a more orderly procedure.¹³⁷ There is no evidence, however, that without a registry the bidding process is beyond the capability of general contractors who, in fact, seem to function quite efficiently in dealing over the telephone with firms in other trades which [37] freely make price changes up to the last minute before the general's prime bid is due.¹³⁸ Besides, to the extent

¹³¹ CX 155X-Y; Stewart 1386-89.

¹³² See e.g., Stewart 1466-67.

¹³³ See, however, admission of Registry president Barnett that the Registry does not increase competition and "its not the intent to increase competition". Barnett 1607.

¹³⁴ Zellner 861-63, Barnett 1583-85, Martin 1628-29.

¹³⁵ Zellner 862-64, Barnett 1584, Martin 1663-65.

¹³⁶ Zellner 868-69, Stewart 1399-1400, Martin 1663-65.

¹³⁷ Strong 1766; see also Martin 1633.

¹³⁸ See Findings 36-40, Arnold 63, 198-99, Inman 211-12, 224, Peters 410-11, Baker 490-91, Morrison 567-69, 593-96, Boucher 676-77, 695, Zellner 814-15, 817-18, 834-35, 843, Morgan 923-24, Naylor 1066-67, 1072, Wade 1120-27, Barnett 1604-05. One of respondents' witnesses, Dennis, an electrical subcontractor and member of the Registry board, even suggested that the Registry itself may be a source of disorder if, for example, a general did not decide until the last minute to take Registry bids necessitating a frantic effort to inform electricals that they

that the Registry does provide a service (written bids, presented in standardized form, and delivered according to a fixed time schedule) which some general contractors may desire, this hardly justifies the Registry's absolute restrictions on all alternative forms of bidding, including last-minute bidding by telephone before the deadline (all bids must be physically filed with the Registry, see Finding 24), or the Registry's restrictions on negotiating with those subcontractors who have filed within the deadline.¹³⁹ As it happens, the significance of the claimed efficiency must be vastly overstated since there is no evidence that general contractors have sought to replicate the Registry in other trades, or that the impetus for the Registry comes from anyone except the electrical subcontractors. Moreover, even assuming that for some reason (unrevealed in this record), closed, written electrical bids, which are delivered at a fixed time, are needed by a particular general, this could be accomplished without the restrictive superstructure of the Registry by the simple expedient of a statement by the general that it wants its bids in that fashion as a condition for doing business with it.¹⁴⁰

60. The opinion was expressed by some witnesses that bid peddling is unethical because the subcontractor who is forced by last-minute pressures to lower a previously submitted bid may do so by cutting corners on quality to the point that safety hazards [38] may be created.¹⁴¹ No witness, however, could identify a single job on which quality or safety were put in jeopardy as a result of bid peddling.¹⁴² Moreover, since the construction industry routinely uses several levels of inspection—by architect, engineer, general contractor, and government inspectors¹⁴³—to determine compliance with specifications and to assure that quality and safety requirements are met, it would take a deliberate decision to engage in subterfuge for the subcontractor even to attempt to avoid these standards. On this record there is no evidence that such malfeasance is any more or less prevalent among “shopped” or “peddled” subcontractors than it is among par-

should submit bids through the Registry for that particular general. Dennis 1854. See also Stewart 2074-75 for a discussion of the additional informational burden created by the Registry since generals and subs must determine who is bidding inside and outside of the Registry.

¹³⁹ Stewart 2047-49, 2052-55.

¹⁴⁰ Stewart 2048-49.

¹⁴¹ Barnett 1579-83, Martin 1632-33, 1635-37, Chester 1706-07, 1710-13, Dennis 1850-51, 1856-63, Scurlock 2012. The more general claim that the Registry seeks to eliminate bid peddling because it is “unethical” (see, e.g., CX 161J); Barnett 1579, Dennis 1911) does not state a cognizable economic efficiency. Birrell 1292-93. By the same token, the Registry cannot properly be justified by referring to closed bidding systems operated by buyers like the federal government. The public policy considerations behind such systems, namely, the paramount importance assigned to the appearance of fairness, is not properly invoked to defend a system designed essentially to avoid price cutting. See Stewart 1396-1400.

¹⁴² See, e.g., Morrison 570, Barnett 1598-99, Chester 1724, 1735-38, Strong 1798-99, Dennis 1902-04. As it happens, respondents introduced no evidence relating to the prevalence of bid peddling either before or after the creation of the Registry.

¹⁴³ Morrison 643-44, Martin 1636-37, 1645-46, Chester 1727-29, Strong 1771-79.

ticipants in the Registry.¹⁴⁴ What the record does show is that generals, a group of expert buyers, routinely make their own estimates of what the work of a sub-trade should cost, and that they then review sub-bids to determine if they are suspiciously low.¹⁴⁵ A bid from a financially suspect or managerially inept subcontractor, who might be tempted to skimp on quality, is likely to be rejected no matter how attractive it may seem.¹⁴⁶ Again, it is also significant that there is no record proof that the Registry operates at the request of contractors who, it may be fairly assumed, would be vigorous [39] supporters of such an institution if it were identified as a guarantor of quality.¹⁴⁷ A more plausible scenario than the sacrifice of quality predicted by respondents, is that a subcontractor will react to downward pressures on price by pressuring their established suppliers for a concession, or by bending every effort to determine if there are alternative and lower-priced sources available for materials and labor, but sources that do not compromise quality.¹⁴⁸ Another avenue that might be pursued by the pressured subcontractor is to review margins for the purpose of determining whether the job is worth doing at a reduced profit.¹⁴⁹ These ways of reducing price are more likely to be followed than a sacrifice of quality since such a compromise must not only survive the various levels of inspection described above, but even if it were not detected in the building stage and was only uncovered later by the owner, this could lead to a blemish on the reputation of a subcontractor which could translate into no future contracts at any price.¹⁵⁰

61. The argument was made that the low bid resulting from bid peddling is conducive to procrastination. This could occur, it is alleged, when a subcontractor yields to bid peddling pressure knowing that at the low bid price it cannot properly perform the work, but takes on the project anyway in anticipation that somewhere down the line a more attractive project may materialize, and then both jobs can be completed profitably. While it is claimed that this kind of bid strategy can lead to costly delays, no proof was adduced as to its actual occurrence.¹⁵¹ [40]

62. Finally, there was testimony that the Registry is designed to protect the subcontractor's investment in working up a bid. The argument was made that a sealed bid system of the kind operated by the

¹⁴⁴ CX 155Z1; Strong 1799-1800, Dennis 1887-92.

¹⁴⁵ Wade 1127-28, Birrell 1200-04.

¹⁴⁶ Birrell 1197, 1200-01, 1208-09, Martin 1632, 1667-68.

¹⁴⁷ See Finding 32.

¹⁴⁸ Morrison 604-05, Wade 1122-23, 1136-37, 1146-47, Birrell 1242-43.

¹⁴⁹ See, e.g., Mann 316, Morrison 599-600. Included in a subcontractor's bid is a profit component that is hardly inflexible: it is an estimate derived from expectations respecting future workload, the likelihood that more lucrative of projects may emerge, and the competitive state of the market. Birrell 1199-1200.

¹⁵⁰ See Martin 1643-44, Chester 1723-24, Strong 1803-04, Dennis 1890-91.

¹⁵¹ See Strong 1757-58, 1762-66.

Registry is necessary in order that a subcontractor's bid, which can cost thousands of dollars to compile, is fairly considered on its merits, and is not used simply as bait for the purpose of obtaining a still lower bid.¹⁵² There is no evidence, however, that there exists a group of subcontractors who are willing to take a "free ride", in the sense that they do not compose their own bids and simply sit back, waiting to be shopped in the expectation that they will simply undercut whatever their competitors may bid.¹⁵³ Besides, the record evidence showing that electricals have varying costs suggests that blind reliance on a competitor's figures would involve the considerable risk of a costly miscalculation.¹⁵⁴ [41]

III

DISCUSSION

In bidding for the prime contract on construction jobs, general contractors assemble subsidiary bids from the electrical and other specialty trades. The Electrical Bid Registration Service of Memphis, Inc. ("Registry") was formed by the National Electrical Contractors Association, Memphis Chapter ("Memphis Chapter"), for the purpose of placing various restrictions on the process by which Memphis area electrical subcontractors submit such sub-bids to general contractors. These restrictions take the form of Registry rules requiring electrical subcontractors who use the Registry to submit their sealed bids, which may not be changed, no later than three hours before the deadline for the opening of the general contractors' prime bids. This temporal limitation, designed to eliminate bid peddling (the practice of disclosing one subcontractor's bid to another subcontractor in an attempt by a general contractor to get a still lower sub-bid), effectively cuts off all price negotiation during the crucial three hour period prior to the generals' customary bidding deadline. The Registry also impacts on the bidding process by segregating firms bidding in the Registry from possible price cutters bidding outside of the Registry. This segmentation of competition is accomplished by a Registry rule prohibiting electrical subcontractors from bidding both inside and outside of the Registry, and complimentary rules that (1) forbid general contractors from accepting bids both inside and outside of the Registry, and (2) require the generals who agree to accept Registry bids to award the job to an electrical subcontractor (but not necessarily the low bidder) who has bid through the Registry. The record reveals that

¹⁵² Strong 1756, 1768-69, Dennis 1864-67.

¹⁵³ See, e.g., CX 155Z1; Martin 1647-49, 1677-78, Stewart 2055-59.

¹⁵⁴ Stewart 2055-59.

these Registry rules are enforced, and that disciplinary proceedings and accompanying sanctions—mostly suspensions of various lengths—are usually invoked when a general contractor, [42] learning of a better bid outside of the Registry, decides to ignore the Registry bids in favor of the lower outside bid.

Complaint counsel maintain that even if the practices described above are not governed by the per se rule against a price fixing conspiracy, the Registry and the Memphis Chapter are engaged in a restraint designed to impact on price negotiations, which should be treated under the modified rule of reason analysis applied in *NCAA v. Board of Regents*, 104 S.Ct. 2948 (1984). There, the NCAA had entered into contracts with television networks limiting the number of times any one college could have its football games televised, and, in effect, establishing the price that each college could receive from the networks for televising its games. These collective agreements with the networks were complemented by NCAA rules prohibiting its members from negotiating independently for the broadcast of individual games based on the popularity or caliber of the teams involved or viewer interest in a particular contest. Violations of the NCAA rules subjected members to sanctions, including possible expulsion from the organization or a suspension of television appearances. While the restraints in NCAA obviously involved tampering with price competition, the Supreme Court declined to follow a per se approach since collegiate athletics by its terms must involve some forms of collective agreement—for example, joint decisions respecting eligibility of students to participate in athletics—and therefore the plausibility of any procompetitive justification (such as injection of new forms of competition, the facilitation of entry, and the broadening of consumer choice) should be weighed against proven harm. In its approach to facially suspect but perhaps justifiable conduct, NCAA was a logical extension of *Broadcast Music, Inc. v. CBS*, 441 U.S. 11 (1979) where the per se rule was not invoked when the practice in question—blanket licensing of the rights to broadcast copyrighted musical compositions—was defended as the only practical way of achieving cost-effective distribution (and of solving the concomitant problems of monitoring use and receiving payment of royalties) in a market characterized by thousands of copyright [43] owners and millions of compositions. The Court's remand decision in *Broadcast Music* indicates that this apparently acceptable efficiency justification was to be weighed against the fact that the questioned practice obviously tends to reduce any incentive toward price competition among composers with whom the networks may have preferred to deal on a basis other than a blanket license arrangement.

As it happens, application of NCAA and *Broadcast Music* to this

case would represent a departure from earlier bid depository decisions—*Christiansen v. Mechanical Contractors Bid Depository*, 230 F.Supp. 186 (D. Utah 1964), *aff'd*, 352 F.2d 817 (10th Cir.), *cert. denied*, 384 U.S. 918 (1966), and two cases decided under the California anti-trust law, *People v. Inland Bid Depository*, 233 Cal. App. 2d 851, 44 Cal. Repr. 206 (Dist. Ct. App. 1965), and *Oakland-Alameda County Builders' Exchange v. F.P. Lathrop Construction Co.*, 4 Cal. 3d 354, 93 Cal. Repr. 602, 482 P.2d 226 (1971)—in which the approach taken by the courts was one of virtual per se condemnation of the practice as either a price-fixing conspiracy or a group boycott (that is, a boycott of nonparticipating or suspended general contractors or subcontractors) with little attention to actual harm or possible justifications.¹⁵⁵ It is clear, however, from the plain language of the complaint that this case is grounded on the theory that the mere fact that prices are tampered with in the sense that price negotiation is limited, does not resolve the question of legality, and consistent with *NCAA* and *Broadcast Music*, complaint counsel must show actual or probable anticompetitive effects from the challenged practice while respondents are to be given an opportunity to demonstrate procompetitive benefits. [44]

In *NCAA* itself, the two-part, modified rule of reason analysis proceeded from the assumption that the television plan was essentially a horizontal output restriction, which potentially could raise prices or minimally establish a price structure that was both unresponsive to viewer demand and unrelated to the prices that might prevail in a competitive market. The Supreme Court then said that these presumed effects shifted a "heavy burden" (*NCAA*, 104 S.Ct. at 2967) to the *NCAA* which had to show that the restraint on price negotiation was justified because it resulted in procompetitive efficiencies. In concluding that this burden was not met, the Court disposed of the notion that a rule of reason analysis is synonymous with examination of a wide gamut of possible justifications. The Court held that once it is demonstrated that a questioned practice operates as a restriction on price or output, only convincing proof that competition has been enhanced is to be considered. Thus, the Court specifically rejected the argument that the television restriction was necessary to promote live gate attendance since acceptance of this approach would be tantamount to saying that if a product was sufficiently unattractive to consumers then it may qualify as a candidate for removal from competition itself. *Id.* at 2969.

¹⁵⁵ Support for the application of the per se rule to bid depositories can be found in *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150 (1940), where the Supreme Court condemned without consideration of possible justifications "[a]ny combination which tampers with price structures." *Id.* at 221. The Court applied the per se rule not only to agreements among sellers to set uniform prices directly, but also to any agreement whose purpose is effectively to control the price of a product or service (*Id.* at 222-23), the acknowledged objective of the Registry. See, e.g., Findings 13, 21, 43.

Applying NCAA to the instant case, complaint counsel has the burden of proving, as in fact the complaint alleges, that the Registry produces anticompetitive effects, the most significant being that the Registry causes or probably causes an increase in the cost of electrical subcontracting services in the Memphis area. As indicated in the Findings, complaint counsel has met this burden through expert testimony corroborated by the actual experience of general contractors and electrical subcontractors as well as the record evidence respecting the so-called "sanction" incidents. Also, consistent with NCAA, once complaint counsel had shown that the Registry rules cutting off negotiation and segmenting bidding tend to create price-enhancing influences on jobs bid through the Registry, a detailed analysis of market power, including definition of market and market shares, becomes superfluous. NCAA, 104 S.Ct. 2965-67. Moreover, it should be noted [45] that as a practical matter the Registry's rules must embrace an economically significant segment of Memphis construction work for how else could one account for the perception of general contractors that they are pressured to use the Registry whenever it is in operation in order to obtain a full complement of competitive bids. Besides, respondents themselves must be convinced of the economic importance of eliminating price cutting on jobs going through the Registry for otherwise there would be no point in their imposition of the Registry's highly restrictive bidding rules. See, e.g., *Washington Crab Assn., et al.*, 66 F.T.C. 45, 119 (1964).

Since complaint counsel has met its burden under NCAA, I next turn to the question of whether respondents have shown countervailing procompetitive justifications. As respondents would have it, not only does the Registry produce the ultimate procompetitive effects contemplated by NCAA in the form of the lowest possible prices, but it is also said to facilitate the orderly preparation of bids while eliminating unethical practices which if left uncontrolled could produce quality or even safety problems. This particular array of proffered justifications was obviously intended to bring the Registry within the four corners of *Cullum Electric & Mechanical, Inc. v. Mechanical Contractors Association of South Carolina*, 436 F.Supp. 418, *aff'd* 569 F.2d 821 (4th Cir.), *cert. denied*, 439 U.S. 910 (1978). There the mechanical subcontractors in South Carolina had entered into contracts with most of the general contractors in the area requiring the generals to reject the bids of mechanical subs that had been submitted less than five hours before the generals' bidding deadline. Cullum, a mechanical subcontractor, had its low bid rejected because it had been submitted after the prescribed deadline. In assessing the impact of the bid depository under Sherman 1, the District Court said that the arrangement was not intended to fix prices, but was designed instead

to eliminate what it characterized as chaotic bidding and bid peddling. The court then concluded that the registry's elimination of last-minute bidding and bid peddling did not have an impact on price because the members of the registry testified that these [46] prohibitions encouraged them to make their registry bids at the lowest price possible. Clearly it was this evidence that led the lower court in *Cullum* to conclude—

The record before the court in this case is devoid of any indication that the five-hour bid procedure was devised by the [mechanical subcontractors] with any intention whatsoever of fixing prices. More significantly, however, the record also fails to reflect that the five-hour bid procedure has had any effect whatsoever upon prices, whether to raise, lower or stabilize them. Plaintiff has simply failed to establish that general contractors are paying the same amount, or a greater or less amount for mechanical work than they would pay under a system not regulated to eliminate such practices as bid peddling. 436 F.Supp. at 427.

In sharp contrast to *Cullum*, here there is an impressive record proof that the Registry rules do in fact impact adversely on price. For notwithstanding the claim that subcontractors are encouraged to give their best price to the Registry since they know there will be no peddling under the Registry's rules, both the expert testimony and other evidence in this record show that a businessman's self-serving statement that he has given his best price amounts to little more than hyperbole which must be tested in the marketplace. As Professor Stewart observed, every businessman believes that his price is the best price and that his profit margins are fair. The function of the market is to test this "best price" hypothesis and to make certain that margins do not reflect what businessmen want rather than what competition will allow. That the Registry serves to insulate margins from such competitive pressures is shown in part by the fact that in most instances Registry sanctions were imposed because some subcontractor outside of the Registry had offered a price that was lower than the lowest price offered through the Registry. Equally impressive is the testimony of respondents' own witnesses who said that the purpose of the Registry is to eliminate price cutting, which must of necessity mean that to the extent that the Registry carries out this acknowledged purpose, it produces prices that could have been lower. It is also significant that the impetus for the Registry comes from the electricals, and not from the generals who presumably would [47] sponsor a bid depository of their own, or replicate it on an individual job basis, if they were convinced that this kind of limitation on negotiation actually produces the best possible price.

As for the conclusion in *Cullum* that in the absence of a bid registry the result would be a chaotic inefficiency, most of the credible evi-

dence in this record is to the contrary. The record shows that Memphis general contractors operate quite efficiently in other specialty trades without a bid depository. In point of fact, what the *Cullum* court described as a "chaotic situation" (436 F.Supp. at 420), on this record amounts to nothing more than the usual give-and-take of price negotiation that may result in lower prices as the deadline approaches for the generals' prime bid.

Finally, the *Cullum* decision reflects a view about the ethical propriety of bid peddling that is not only contrary to NCAA's admonition that only procompetitive efficiency justifications are to be considered, but it is also at odds with the Supreme Court's opinion in *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978). There, too, a group of businessmen attempted to surround a restrictive practice (an association rule prohibiting price bidding and only allowing a discussion about price after an engineer had been selected) with an ethical aura by claiming that competitive bidding would so tempt engineers to ignore safety factors, that a total exemption from the antitrust laws was required. The Supreme Court rejected out of hand this kind of frontal assault on the basic premise of the antitrust laws, to wit, that competition is to determine price and quality, and the Court held that except for extraordinary circumstances, competition is not to be eliminated in the name of the ethical norms of private groups.¹⁵⁶ Certainly no such extraordinary circumstances were shown on this record. On the contrary, the record shows that built into the construction [48] industry is an elaborate system of specifications and inspections to make certain that quality standards are maintained. In a word, if there is a problem of inferior quality in the construction industry, it exists with or without bid peddling, and with or without bid depositories.

In contrast to the substantial evidence showing that the Memphis area electrical bid depository is an unreasonable restraint of trade because of its unjustified impact on price competition, there was a failure of proof respecting the complaint charge that the Registry contributes to collusive agreements. On this issue, I see no reason for following an economist's speculative rumination over how a bid depository may make collusive agreements more readily enforceable when the track record of the construction industry shows that collusion is endemic without the aid of such "enforcement".

As for the complaint allegations respecting the role of the Memphis Chapter, the record shows that it was the guiding light behind the creation of the Registry in the first place, and that its influence on the

¹⁵⁶ Earlier, in *Fashion Originators Guild of America (FOGA) v. FTC*, 312 U.S. 457 (1941) the Supreme Court said that even if design piracy were a tort under state law, it would not justify the severe restraint of a collective refusal by clothing designers to deal with distributors of unauthorized copies of their designs.

Registry persists to this day: the electrical subcontractors on the first Registry board came from the membership rolls of Memphis Chapter, the first Registry board selected the next board and so on, and the only manager the Registry has ever had is Scurlock, manager of the Memphis Chapter. It is inconceivable that Scurlock, who is only compensated by the Memphis Chapter, would operate the Registry in a way that was inconsistent with the interests of the Memphis Chapter. In short, the Registry is nothing more than an alter ego or disguised continuation of the old bid depository operated by the Memphis Chapter, and it would be turning precedent on its head to say that the successor (the Registry) may be named in an order, but not the originator (Memphis Chapter). See, *P.F. Collier & Son Corp. v. FTC*, 427 F.2d 261 (5th Cir.), cert. denied, 400 U.S. 926 (1970).

While the responsibility of Memphis Chapter for the policies and acts of the Registry is manifest, there is no basis on this record for issuing an order that is binding on the individually named respondents. Under complaint counsel's theory of individual [49] responsibility, any four electrical subcontractors serving on the Registry's board are liable if for no other reason than that they constitute a majority. This liability, according to complaint counsel, attaches irrespective of the lack of evidence that the four imposed their will on the other board members, or the total failure of proof respecting the named individuals' participation in the day-to-day affairs of the Registry. This is a flimsy basis for naming individuals, and is not supported by the cases holding that individuals are properly named only when they control or actively manage an enterprise, and an order could be evaded if they were not named. *FTC v. Standard Education Society*, 302 U.S. 112 (1937); *Doyle v. FTC*, 356 F.2d 381 (5th Cir. 1966). In contrast, even if such an order were justified here on the basis of actual control or management of the Registry by the individual respondents (and, again, no such record was made), it would be an exercise in futility since any named four could be replaced immediately by a fresh foursome who had not been named. [50]

IV

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over the respondents.
2. The acts and practices charged in the complaint took place in or affected commerce within the meaning of the Federal Trade Commission Act.
3. Respondent, the Memphis Chapter, was instrumental in creating

the Registry, and the Memphis Chapter has perpetuated its influence over the Registry by designating electrical subcontractors as a majority of the Registry's board, and by installing the manager of the Memphis Chapter as manager of the Registry.

4. By its terms, the Registry's rules cut off price negotiation after the Registry's deadline, prohibit subcontractors from bidding both inside and outside of the Registry, and require general contractors who agree to accept Registry bids from awarding the job to a subcontractor bidding outside of the Registry.

5. The operation of the Registry as described in Paragraph 4 above, actually or probably increases the price for electrical services by arbitrarily cutting off price negotiation and by segmenting the bidding market into two distinct sets of electrical bidders—those in the Registry and those outside.

6. The adverse effects of the Registry are not offset by any procompetitive justification, and no convincing showing has been made that the Registry is necessary for quality, safety, or for any other reason.

7. The Registry and the Memphis Chapter have engaged in an unreasonable restraint of trade. [51]

8. There was a failure of proof as to responsibility of the named individual respondents for the acts of the Registry or for the need to name the individual respondents in order to obtain effective relief.

Accordingly, the following order should be issued:

ORDER

I.

It is ordered, That respondents The Electrical Bid Registration Service of Memphis, Inc. ("Registry"), a corporation, its successors and assigns, and the National Electrical Contractors Association, Memphis Chapter ("Memphis Chapter"), a corporation, its successors and assigns, and respondents' agents, representatives, and employees, directly or indirectly, or through any corporate or other device, in connection with the awarding of building construction contracts or subcontracts in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, shall forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any course of action, agreement, combination, or conspiracy with each other, or with electrical subcontractors or general contractors in the greater Memphis area:

(1) That requires or provides that electrical subcontractors using the services of a bid registration service are prohibited from or are

subject to any disciplinary action or threat of disciplinary action for (a) negotiating, after the deadline for the filing or deposit of bids with the bid registration service, with general contractors using the services of the bid registration service; (b) submitting further bids to such general contractors after the deadline for the filing or deposit of bids with the bid registration service; or (c) [52] accepting a contract at a price other than the price submitted by such electrical subcontractors through the bid registration service prior to the deadline for the registering of bids;

(2) That requires or provides that general contractors using the services of a bid registration service are prohibited from or are subject to any disciplinary action or threat of disciplinary action for (a) negotiating, after the deadline for the registering of bids with the bid registration service, with electrical subcontractors using the services of the bid registration service; (b) attempting to obtain or obtaining further offers to perform jobs for which bids were taken through the bid registration service; or (c) awarding contracts to electrical subcontractors at prices other than those submitted through the bid registration service prior to the deadline for the registering of bids;

(3) That requires or provides that any person or firm that uses a bid registration service with respect to any specific job must (a) receive or solicit bids from, or submit bids to, only those persons or firms that are using the services of the bid registration service with respect to that job; or (b) register with the bid registry a copy of any bid that it has received or solicited from, or has submitted to, any person or firm that is not using the services of the bid registration service with respect to that job; [53]

(4) That requires or provides that any person or firm that in any fashion uses a bid registration service must receive or solicit bids from, or submit bids to, only those companies, firms, or individuals that are also members of, signatories to, or participants in said bid registration service;

(5) That in any manner prohibits, restricts, or discourages price negotiation between an electrical subcontractor and a general contractor or awarding authority, including, but not limited to, (a) declaring such price negotiation to be unethical or improper; (b) taking or threatening to take punitive or disciplinary action against a person or firm for engaging or attempting to engage in such price negotiation; or (c) urging, inducing, or encouraging electrical subcontractors or general contractors to refrain from such price negotiation; or

(6) That has the purpose or effect of unreasonably restraining price competition for electrical subcontracting services.

Provided that, nothing in this order shall prohibit the Registry from charging a reasonable fee (a) to a general contractor who uses the

services of the Registry for a particular job and awards the subcontract for that job to a nonparticipating subcontractor; or (b) to a subcontractor who uses the Registry on a particular job and is awarded the subcontract for that job by a nonparticipating general contractor.

Provided further that, nothing in this order shall prohibit the respondents from (a) complying with the unilateral request of an awarding authority that a job be listed on a [54] sealed-bid basis without further price negotiation; or (b) seeking or petitioning for legislation concerning bidding procedures in the construction business.

II.

It is further ordered, That the Registry shall immediately reinstate any firm suspended from participation in its bid registration service, which suspension resulted from conduct engaged in by respondents, which hereafter would amount to a violation of this order.

III.

It is further ordered, That the Registry and the Memphis Chapter, within ninety (90) days after the date of service of this order, remove from their respective constitutions, by-laws, codes or standards of conduct, rules, regulations, existing policy statements, or guidelines, any provision, interpretation, or policy statement that is inconsistent with the provisions of Part I of this order.

IV.

It is further ordered, That:

A. The Registry shall within fifteen (15) days of the date of service of this order distribute a copy of this order to all persons who are employees, officers, or directors as of the date of service of this order and to all persons or firms that have participated in the Registry at any time prior to service of this order. Furthermore, within fifteen (15) days of the date that any person becomes an employee, officer, or director of the Registry, its successors or assigns, or any person or firm becomes [55] affiliated with or commences participation in the Registry, its successors, or assigns, the Registry shall distribute a copy of this order to any such person or firm; and

B. The Memphis Chapter shall within fifteen (15) days of the date of service of this order distribute a copy of this order to all persons who are employees, officers, directors, or members as of the date of service

of this order. Furthermore, within fifteen (15) days of the date that any person becomes an employee, officer, or director of the Memphis Chapter, its successors, or assigns, or any person or firm becomes a member of the Memphis Chapter, its successors, or assigns, the Memphis Chapter shall distribute a copy of this order to any such person or firm.

V.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in their corporate existences such as dissolution or the creation of successor corporations or any other change in the corporations that may affect compliance obligations arising out of the order, or at least thirty (30) days prior to the formation by or with the participation of any respondent of any other corporation or organization that conducts the business of a bid registration service.

VI.

It is further ordered, That respondents shall:

A. Within sixty (60) days after the date of service of this order, submit a written report to the Federal Trade Commission setting forth in detail the manner and form in which they have complied with this order;

B. For a period of five (5) years after the date of service of this order, maintain and make available to the Federal Trade Commission staff for inspection and [56] copying, upon reasonable notice, records pertaining to any action taken in connection with any activity covered by Parts I, II, and III of this order, including written communications, and summaries of oral communications, to and from the respondents; and

C. In addition to the report required by Section VI(A) of this order, within one year after the date of service of this order, and annually for a period of five (5) years on or before the anniversary of the date of service of this order, and at such other times as the Commission may by written notice to the respondents require, file a written report with the Federal Trade Commission setting forth in detail the manner and form in which the respondents have complied and are complying with this order.

Final Order

107 F.T.C.

FINAL ORDER

The Administrative Law Judge filed his Initial Decision in this matter on November 21, 1985, finding the corporate respondents Electrical Bid Registration Service of Memphis, Inc., and National Electrical Contractors Association, Memphis Chapter, Inc. to have violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by engaging in acts and practices as alleged in the complaint.

On December 11, 1985, the Respondents filed a notice of their intention to appeal the Initial Decision. That notice was withdrawn on January 10, 1986. Counsel Supporting the Complaint filed a notice of intention to appeal the Initial Decision on December 13, 1985, but withdrew their notice on January 8, 1986. [2]

The Commission has determined that the case should be placed on its own docket for review and that the Initial Decision, with the exception of Finding 56 and the associated discussion, should become effective as the decision of the Commission. Accordingly,

It is ordered, That the Initial Decision, except as noted above, and the order contained therein shall become effective on February 12, 1986.

Acting Chairman Calvani would not have placed this matter on the Commission's docket for review and would have allowed the Initial Decision in its entirety to become effective as provided in Section 3.51(a) of the Commission's Rules. The Commission having determined to take this procedural step, he concurs in the issuance of the order contained in the Initial Decision.

IN THE MATTER OF
HEALTH CARE MANAGEMENT CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF
THE FEDERAL TRADE COMMISSION ACT

Docket C-3182, Complaint, Feb. 20, 1986—Decision, Feb. 20, 1986

This consent order requires the Columbus, Ga. owner and operator of North Mobile Community Hospital near Mobile, Ala., and the hospital's medical staff, among other things, to cease imposing unlawful restrictions relating to the practice of podiatry at the hospital. The hospital and its staff are prohibited from imposing such restrictions by not enacting any bylaw or policy that would have the effect of: (1) coercing or intimidating any staff member not to co-admit podiatrists' patients; (2) requiring an amount of residency training for podiatrists that is not reasonably related to legitimate quality-of-care grounds; or (3) prohibiting podiatrists with hospital privileges from attending medical staff meetings.

Appearances

For the Commission: *Douglas B. Brown.*

For the respondents: *David W. Mernitz, Stark, Doninger, Mernitz & Smith, Indianapolis, Ind.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the named respondents have violated the provisions of Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows:

PARAGRAPH 1: Respondent Health Care Management Corporation is a for-profit corporation existing under the laws of the State of Georgia. North Mobile Community Hospital ("the Hospital") is a division of Health Care Management Corporation, operating a general acute care hospital in the Mobile, Alabama, metropolitan area. The principal physical facilities of the Hospital are located at Hartley and Baker Roads, Satsuma, Alabama. Health Care Management Corporation is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44, and is subject to the Commission's jurisdiction.

PAR. 2. Respondent Medical Staff of North Mobile Community Hospital ("the Medical Staff") is an unincorporated association, organized and existing under the laws of the State of Alabama, and is located at the Hospital. It is composed of the physicians and other practitioners who have been granted privileges to attend patients at the Hospital.

PAR. 3: Most, if not all, of the members of the Medical Staff are engaged in the business of providing medical services for a fee. Except to the extent that competition has been restrained as herein alleged, most, if not all, of the Medical Staff's members have been and are now in competition among themselves and with other health care providers in the Mobile metropolitan area.

PAR. 4: Membership on the Medical Staff provides important economic benefits to the individual members, and it allows a practitioner to admit and treat patients at the Hospital and provides the opportunity for other professional benefits to its members. The Medical Staff is organized for the profit of its members, is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44, and is subject to the Commission's jurisdiction.

PAR. 5: Physicians in the Mobile, Alabama, metropolitan area charge fees and collect payments for their services that, in substantial part, are paid directly or indirectly with Federal funds or funds received interstate from insurance companies and from other payers. The flow of said funds is affected by competition among physicians in the Mobile metropolitan area and by the acts and practices of the Medical Staff and its members as hereinafter alleged. Moreover, medical practitioners in the Mobile metropolitan area treat out-of-state patients, and the ability of a medical practitioner to obtain hospital privileges may influence his or her decision to move to and practice in the Mobile metropolitan area. These acts and practices are in commerce or affect commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR. 6: On January 14, 1981, a podiatrist applied to the Hospital for certain surgical privileges within the scope of his Alabama podiatry license. The Hospital encouraged the Medical Staff to grant privileges to the podiatrist because the Hospital desired to increase its occupancy rate and the utilization of its facilities.

PAR. 7: On September 2, 1981, the Hospital granted that podiatrist certain podiatric surgical privileges on the condition that he co-admit his patients with a medical doctor, in conformance with the standards of the Joint Commission on the Accreditation of Hospitals then in effect. Soon after that date, the podiatrist began to co-admit patients with at least two members of the Medical Staff.

PAR. 8: In July, 1982, some members of the Medical Staff, who were

in competition with podiatrists, began a drive to prevent podiatrists from performing surgery at the Hospital. Thereafter, beginning at least as early as October, 1982, some members of the Medical Staff, the Medical Staff acting as a combination of its members, and the Hospital joined in a combination and conspiracy to pressure individual physicians not to co-admit patients with any podiatrist and to impose on the practice of podiatry within the Hospital unreasonable restrictions that are not reasonably related to legitimate quality of care grounds.

PAR. 9: In furtherance of the aforesaid combination and conspiracy to impose on the practice of podiatry within the Hospital unreasonable restrictions that are not reasonably related to legitimate quality of care grounds, the Medical Staff, some members of the Medical Staff, and the Hospital engaged in the following acts and practices, among others:

A. Some members of the Medical Staff pressured individual physicians not to co-admit patients with any podiatrist;

B. The Medical Staff imposed restrictions unreasonably limiting the practice of podiatry within the Hospital:

1. The Medical Staff imposed severe restrictions regarding the supervision of podiatrists by members of the Medical Staff. Those restrictions were not reasonably related to quality of care and had the effect of raising costs and limiting the practical ability of the podiatrists to use the Hospital's surgical facilities;

2. The Medical Staff required all podiatrists who sought surgical privileges to have completed a three-year approved residency. However, the Medical Staff had no knowledge concerning the relevancy of the training received in the second and third years of podiatric residency training to the specific procedures for which privileges were requested, and it had no objective basis to believe that the three-year residency requirement was reasonably necessary to ensure quality of care for the specific procedures that the podiatrists sought privileges to perform. The effect of a three-year residency requirement would be to exclude virtually every podiatrist in the United States from obtaining surgical privileges; and

3. The Medical Staff prohibited podiatrists from attending Medical Staff meetings; and

C. The Hospital approved or enforced these restrictions and thereby joined in the aforesaid combination and conspiracy.

PAR. 10: As a result of the aforesaid combination, conspiracy, and conduct, the only podiatrist who retained privileges could not admit and treat surgical patients at the Hospital because no member of the Medical Staff would co-admit patients with him. Other podiatrists

were denied privileges there because of the aforesaid combination, conspiracy, and conduct.

PAR. 11: The purposes or effects and the tendency and capacity of the combination, conspiracy, conduct, and practices described in Paragraphs Eight, Nine, and Ten are and have been to restrain trade unreasonably and hinder competition between medical doctors and podiatrists for the care of the foot in the Mobile metropolitan area, and to deprive consumers of the benefits of competition in the following ways, among others:

A. Patients have been limited in their ability to choose among a variety of alternative types of health care providers competing on the basis of price, service, and quality;

B. Other hospitals may be deterred from granting reasonable surgical privileges to podiatrists; and

C. Podiatrists may be deterred from entering into practice in the Mobile area because of the lack of reasonable surgical privileges.

PAR. 12: The combination, conspiracy, and conduct described above constitute an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. Such combination, conspiracy, and conduct are continuing and will continue absent the entry against respondents of appropriate relief.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents 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 respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents 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 respondents 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 respondents have violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the execut-

ed 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 by interested persons pursuant to Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Health Care Management Corporation is a for-profit corporation existing under the laws of the State of Georgia. North Mobile Community Hospital is a division of Health Care Management Corporation, operating a general acute care hospital in the Mobile, Alabama, metropolitan area. The principal physical facilities of the Hospital are located at Hartley and Baker Roads, Satsuma, Alabama.

2. Respondent Medical Staff of North Mobile Community Hospital is an unincorporated association, organized and existing under the laws of the State of Alabama, and is located at North Mobile Community Hospital. It is composed of the physicians and other practitioners who have been granted privileges to attend patients at the Hospital.

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

ORDER

I

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

A. *Health Care Management Corporation* means the respondent, Health Care Management Corporation, a Georgia corporation, its officers, committees, representatives, directors, agents, employees, successors, and assigns.

B. *The Hospital* means North Mobile Community Hospital, a division of Health Care Management Corporation, its officers, committees, representatives, agents, employees, successors, and assigns. The Hospital is a general acute care hospital at Satsuma, Alabama. It does not include other hospitals owned or operated by Health Care Management Corporation that are not successors or assigns of North Mobile Community Hospital.

C. *The Medical Staff* means the respondent Medical Staff of North Mobile Community Hospital, its officers, committees, representatives, delegates, agents, employees, successors, and assigns. The Medical Staff is an unincorporated association of physicians and other practitioners who have been granted privileges by the Hospital to admit and attend patients at the Hospital.

D. *Corrective action* means action taken pursuant to and in conformance with the Medical Staff's bylaws against any person with clinical privileges at the Hospital who fails to provide evidence of malpractice insurance coverage or whose professional conduct or activities are detrimental to patient safety or to the delivery of quality patient care or are unreasonably disruptive to the operation of the Hospital.

II

It is ordered, That Health Care Management Corporation, in connection with the ownership and operation of the Hospital, shall cease and desist from, directly or indirectly or through any device, entering into, continuing, maintaining, adhering to, acquiescing in, or aiding and abetting any agreement, combination, or conspiracy to unreasonably restrict the practice of podiatry permitted under Alabama law, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to any agreement, combination, or conspiracy to:

A. Coerce or encourage any staff member not to co-admit a podiatrist's patient or otherwise associate professionally in the treatment of that patient with a podiatrist who is lawfully licensed in the State of Alabama and has been granted surgical privileges by the Hospital for the procedures for which the patient is admitted;

B. Enact, impose, or approve any bylaw, rule, regulation, policy, or practice that requires an amount of residency training for podiatrists that is not reasonably related to legitimate quality of care grounds with regard to the specific surgical procedures for which privileges are requested;

C. Enact, impose, or approve any bylaw, rule, regulation, policy, or practice relating to the practice of podiatry that is not reasonably related to legitimate quality of care grounds and that unreasonably restricts the practice of podiatry at the Hospital or unreasonably discriminates against podiatrists; or

D. Enact, impose, or approve any bylaw, rule, regulation, policy, or practice that restricts any podiatrist who has been granted privileges by the Hospital from attending Medical Staff meetings.

III

It is further ordered, That the Medical Staff shall cease and desist from, directly or indirectly or through any device, in or affecting

commerce, as "commerce" is defined in the Federal Trade Commission Act, the following:

A. Coercing or encouraging any staff member not to co-admit a podiatrist's patient or otherwise associate professionally in the treatment of that patient with a podiatrist who is lawfully licensed in the State of Alabama and has surgical privileges at the Hospital for the procedures for which the patient is admitted;

B. Enacting, imposing, participating in, recommending, or suggesting any restriction, bylaw, rule, regulation, policy, or practice that requires an amount of residency training for podiatrists that is not reasonably related to legitimate quality of care grounds with regard to the specific surgical procedures requested;

C. Enacting, imposing, participating in, recommending, or suggesting any restriction, bylaw, rule, regulation, policy, or practice relating to the practice of podiatry that is not reasonably related to legitimate quality of care grounds and that unreasonably restricts the practice of podiatry or unreasonably discriminates against podiatrists; or

D. Enacting, imposing, participating in, recommending, or suggesting any restriction, bylaw, rule, regulation, policy, or practice that restricts any podiatrist who has been granted privileges by the Hospital from attending Medical Staff meetings.

IV

It is provided, That this order shall not be construed to prohibit the Hospital or the Medical Staff or its members from engaging in credentialing, corrective action, utilization review, quality assurance, peer review, or hospital policy-making activities at the Hospital, where such conduct by the Hospital or the Medical Staff neither constitutes nor is part of any agreement, combination, or conspiracy whose purpose, effect, or likely effect is to impede unreasonably the practice of podiatry at the Hospital as permitted under Alabama law.

V

It is further provided, That nothing in this order shall require the Medical Staff or the Hospital to violate any Federal or State law.

VI

It is further ordered, That:

A. Within thirty (30) days after the date of service of this order, Health Care Management Corporation, in connection with its owner-

ship and operation of the Hospital, shall provide a copy of this order and of the complaint in this proceeding to each current officer and director of the Hospital, and, for a period of five (5) years after that date, provide a copy of such order and complaint to each new officer or director of the Hospital within thirty (30) days after each new officer or director is appointed or elected;

B. Within thirty (30) days after the date of service of this order, the Medical Staff shall provide a copy of this order and of the complaint in this proceeding to each officer of the Medical Staff and to each member of the Medical Staff who was an officer or a member, respectively, on the date of service of this order and, for a period of five (5) years after that date, provide a copy of such order and complaint to each person who becomes a member of the Medical Staff at the time that the person is notified of his or her acceptance to the Medical Staff;

C. Within ninety (90) days after the date of service of this order, each respondent shall file or cause to be filed with the Commission a written report setting forth in detail the manner and form in which it has complied with this order; and

D. In addition to the report required by Section VI(C), each respondent shall file, one (1) year after the date of service of this order and at such other times as the Commission or its staff may by written notice require, a written report setting forth in detail the manner and form in which it has complied and is complying with this order.

VII

It is further ordered, That within sixty (60) days after the date of service of this order, the Medical Staff and Health Care Management Corporation shall revise or change the respective restrictions, bylaws, rules, regulations, policies, and practices of the Medical Staff and the Hospital to conform with the provisions of this order and shall eliminate, modify, and change any restrictions, bylaws, rules, regulations, policies, or practices that unreasonably restrict the practice of podiatry at the Hospital. A copy of all such changes shall be included in the report required under Section VI (C) of this order.

VIII

It is further ordered, That each respondent notify the Commission of any proposed change in its organization that may affect compliance obligations arising out of this order at least thirty (30) days prior to such proposed change.

IN THE MATTER OF
RHODE ISLAND BOARD OF ACCOUNTANCY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF
THE FEDERAL TRADE COMMISSION ACT

Docket 9181. Complaint, July 10, 1984—Decision, Feb. 25, 1986

This consent order requires the Rhode Island Board of Accountancy, the sole licensing authority for CPAs and PAs in the state, among other things, to cease prohibiting accountants in the state from seeking business by truthful advertisements or other non-deceptive forms of solicitation. Respondent may continue to impose restrictions authorized by the state legislature against dishonest or fraudulent practices and against persons who falsely identify themselves as accountants.

Appearances

For the Commission: *Rendell A. Davis, Jr.*

For the respondent: *Linda Buffardi*, Providence, R.I. and *Christopher H. Little* and *Steven E. Snow*, *Tillinghast, Collins & Graham*, Providence, R.I.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the Rhode Island Board of Accountancy has violated Section 5 of the Federal Trade Commission Act, and that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

I. DEFINITIONS

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

- (a) *Board* means the respondent named above, the Rhode Island Board of Accountancy;
- (b) *Rhode Island* means the State of Rhode Island and Providence Plantations;
- (c) *CPA* means certified public accountant;
- (d) *PA* means public accountant; and
- (e) *encroachment* means the endeavor of a CPA or PA to provide

services to persons or entities that are the clients of other CPAs or PAs.

II. RESPONDENT

2. The Board is organized, exists, and transacts business under the laws of Rhode Island (R.I. Gen. Laws § 5-3) with its principal office at 100 North Main Street, Providence, Rhode Island. The Board is subject to the Commission's jurisdiction under the Federal Trade Commission Act.

3. Three of the five members of the Board are required by R.I. Gen. Laws § 5-3-4 to be in "active practice" in Rhode Island as CPAs and one member of the Board is required to be in "active practice" as a PA.

4. Compensation for serving on the Board for each Board member is limited to no more than thirty dollars (\$30) per meeting of the Board and such compensation cannot exceed seven hundred fifty dollars (\$750) per year for any one Board member.

5. The Board members are appointed by the Governor of Rhode Island.

6. The Board is the sole licensing authority of CPAs in Rhode Island. It administers written examinations and otherwise supervises the qualification, certification, and licensing of CPAs for practice within Rhode Island.

7. Upon payment of fees, the Board issues annual permits to practice to properly qualified CPAs and PAs.

8. It is unlawful for individuals to practice as CPAs or PAs in Rhode Island unless they hold permits to practice issued by the Board.

9. Pursuant to R.I. Gen. Laws § 5-3-4(f)(2), the Board may prescribe rules and regulations concerning professional conduct for CPAs and PAs in Rhode Island. The Board is authorized by R.I. Gen. Laws § 5-3-12(d) to take disciplinary action against any CPAs or PAs in Rhode Island who violate any of the Board's regulations concerning professional conduct.

III. STATE REGULATION OF ADVERTISING, SOLICITATION, AND ENCROACHMENT BY ACCOUNTANTS

10. Rhode Island has no articulated or expressed state policy of restricting truthful advertising or prohibiting solicitation or encroachment by CPAs and PAs. The laws of Rhode Island are silent as to the form of, or content of, the Board's rules and regulations concerning professional conduct, except for instructions that the Board may issue "[r]ules and regulations of professional conduct for establishing and maintaining high standards of competence and integrity in the profession of public accounting."

IV. BOARD CONDUCT

11. The Board has restrained competition among CPAs and PAs in Rhode Island by combining or conspiring with its members or others, or by acting as a combination of its members or others,

(a) to prohibit advertising and solicitation by CPAs and PAs in Rhode Island and

(b) to prevent Rhode Island CPAs and PAs from endeavoring to provide any services to persons or entities that are the clients of other CPAs or PAs, unless such clients request such services or unless the auditing of a subsidiary, branch, or other component of such clients is necessary to express an opinion on the combined or consolidated financial statements of the clients.

12. In furtherance of this combination or conspiracy, the Board has promulgated Regulations 4.1 and 5.2 of its Regulations Concerning Professional Conduct of Holders of a Certificate to Practice as a Certified Public Accountant or of an Authority to Practice as a Public Accountant. Appendix A, attached to this complaint, sets forth the text of those regulations.

V. TRADE AND COMMERCE

13. Except to the extent that competition has been restrained as alleged below, and depending on their specialties and geographic location, CPAs and PAs in Rhode Island compete with each other and with the accountants serving on the Board.

14. Millions of dollars are spent each year on the services of the hundreds of CPAs and PAs practicing in Rhode Island.

15. The services provided by Rhode Island CPAs and PAs involve and affect individuals, corporations, and other business entities throughout the United States. Those services facilitate, direct, and shape the conduct of interstate business and contribute to the flow of persons, money, goods, and services into and out of Rhode Island. In the course of rendering services, many CPAs and PAs located in Rhode Island travel to states other than Rhode Island and make substantial use of interstate mail and telephone services in the transport of funds, financial statements, and other communications. Some Rhode Island CPAs are in partnership with CPAs practicing in states other than Rhode Island. The acts and practices described below are in interstate commerce, or affect the interstate activities of CPAs and PAs in Rhode Island and of persons who pay for their services, and are in or affecting commerce within the meaning of Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1).

Complaint

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VI. EFFECTS

16. The effects of the combination or conspiracy described above are and have been to restrain competition and injure consumers in the following ways, among others:

(a) competition in the sale of the services of CPAs and PAs has been unreasonably restricted;

(b) consumers of the services of CPAs and PAs have been deprived of information as to such services and of the benefits of free and open competition in the sale of such services; and

(c) CPAs and PAs have been unreasonably restrained in their ability to make their services readily and fully known and available to consumers requiring such services.

VII. VIOLATION

17. The combination or conspiracy and the acts and practices described above constitute unfair methods of competition or unfair or deceptive acts or practices that violate Section 5 of the Federal Trade Commission Act. This combination or conspiracy, or the effects thereof, are continuing and will continue or reoccur unless the Commission enters appropriate relief against the Board.

APPENDIX A

Excerpts from the "Regulations Concerning Professional Conduct of Holders of a Certificate to Practice as a Certified Public Accountant or of an Authority to Practice As a Public Accountant" promulgated by the Board:

4.1 Encroachment: A Certified Public Accountant or Public Accountant shall not endeavor to provide a person or entity with a professional service which is currently provided by another Certified Public Accountant or Public Accountant except:

1. He may respond to a request for a proposal to render services and may furnish service to those who request it. However, if an audit client of another Certified Public Accountant or Public Accountant requests a different Certified Public Accountant or Public Accountant to provide professional advice on accounting or auditing matters in connection with an expression of opinion on financial statements, the accountant to whom the request has been made must first consult with the accountant currently engaged to ascertain that the accountant is aware of all the available relevant facts.

2. Where a Certified Public Accountant or Public Accountant is required to express an opinion on combined or consolidated financial statements which include a subsidiary, branch or other component audited by another independent Public Accountant, he may insist on auditing any such component which in his judgment is necessary to warrant the expression of his opinion.

A Certified Public Accountant or Public Accountant who receives an engagement for services by referral from another Certified Public Accountant or Public Accountant shall not accept the client's request to extend his service beyond the specific engagement without first notifying the referring accountant, nor shall he seek to obtain any additional engagement from the client.

* * * * *

5.2 Solicitation and Advertising: A Certified Public Accountant or Public Accountant shall not seek to obtain clients by solicitation. Advertising is a form of solicitation and is prohibited.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondent having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of jurisdictional facts, 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 Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Rhode Island Board of Accountancy is organized, exists, and does business under and by virtue of the laws of the State of Rhode Island and Providence Plantations, with its office and principal place of business located at 100 North Main Street, Providence, Rhode Island.

2. 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

I.

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

A. *Board* means the Rhode Island Board of Accountancy, its mem-

bers, committees, representatives, agents, employees, successors, and assigns.

B. *Person* means any natural person, corporation, partnership, governmental entity, association, organization, or other entity.

C. *Encroachment* means the endeavor of a person to provide services to the client of another person.

D. *Reasonably believes* refers only to that which a reasonable person would believe after having considered all relevant facts and legal precedent.

E. *Accountancy License* means any certificate, authority, registration, permit, or license issued by the Board, including, but not limited to,

1. a certificate of certified public accountant,
2. the authority to practice as a public accountant,
3. registration as an accountant licensed by a foreign country,
4. a permit to practice as a certified public accountant or public accountant, and
5. a limited permit to engage in the practice of accounting.

II.

It is ordered, That the Board, in or in connection with its activities in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, shall cease and desist from, directly or indirectly, or through any device:

A. Prohibiting, restricting, impeding, or discouraging any advertising, solicitation, or encroachment by any person. Such conduct includes, but is not limited to:

1. Adopting or maintaining any rule, regulation, policy, or course of conduct that prohibits, restricts, impedes, or discourages any advertising, solicitation, or encroachment;
2. Taking or threatening to take disciplinary action against any person for advertising, soliciting, or encroaching; and
3. Declaring any practice of advertising, solicitation, or encroachment to be illegal, unethical, unprofessional, or otherwise improper.

B. Inducing, urging, assisting, or encouraging any person to take any action prohibited by this Part.

Provided, that nothing in this order shall prevent the Board from taking any action authorized by Chapter 5-3 of the General Laws of Rhode Island against those advertising, solicitation, or encroachment practices that respondent reasonably believes are dishonest or fraudulent within the meaning of Section 5-3-12(b) of those Laws, or

that respondent reasonably believes are unlawful under Section 5-3-16 of those Laws, as those statutes are limited by the First and Fourteenth Amendments to the United States Constitution.

III.

It is further ordered, That this order shall not be construed to prevent the Board from petitioning for or seeking legislation concerning the profession of accountancy.

IV.

It is further ordered, That the Board shall:

A. Distribute by first-class mail an announcement in the form shown in Appendix A, and a copy of this order:

1. Within thirty (30) days after this order becomes final, to each person who, at the time this order becomes final, has an Accountancy License;

2. Within thirty (30) days after this order becomes final, to each person who, at the time this order becomes final, has an application for, or a request for reinstatement of, an Accountancy License pending before the Board; and

3. For a period of five (5) years after this order becomes final, to each person who applies for an Accountancy License, within thirty (30) days after he or she applies for such a license;

B. Within ninety (90) days after this order becomes final, submit a written report to the Federal Trade Commission setting forth in detail the manner and form in which the Board has complied and is complying with this order;

C. For a period of five (5) years after this order becomes final, maintain and make available to the Federal Trade Commission staff for inspection and copying, upon reasonable notice, records adequate to describe in detail any action taken in connection with any activity covered by Part II of this order, including any written communications and any summaries of oral communications, and any records of rulemaking and enforcement proceedings, regarding advertising, solicitation, or encroachment;

D. In addition to the report required by Section IV.B. of this order, annually for a period of five (5) years on or before the anniversary of the date on which this order becomes final, and at such other times as the Commission may by written notice to the Board require, file a written report with the Federal Trade Commission setting forth in

detail the manner and form in which the Board has complied and is complying with this order; and

E. Notify the Federal Trade Commission at least thirty (30) days in advance if possible, or otherwise as soon as possible, of any change in the Board's authority to regulate the profession of accountancy that may affect compliance obligations arising out of this order.

APPENDIX A

[Date]

ANNOUNCEMENT

As you may be aware, the Rhode Island Board of Accountancy has entered into a consent agreement with the Federal Trade Commission that became final on [date]. The order issued pursuant to the consent agreement provides that the Board may not prohibit, restrict, impede, or discourage any

- (1) advertising,
- (2) solicitation, or
- (3) endeavor of a person to provide services to the client of another person, a practice also known as "encroachment."

However, the order does not prevent the Board from prohibiting those advertising, solicitation, or encroachment practices that violate statutory prohibitions against dishonesty and fraud.

In particular, this means that as long as you do not engage in dishonesty or fraud, neither the Board nor any member of the Board can prevent or discourage you from engaging in the following practices: (a) in-person solicitation, (b) self-laudatory advertising, (c) comparative advertising, (d) endorsement or testimonial advertising, and (e) advertising that would have violated previously-imposed standards or rules, such as rules requiring that accountant advertising be "dignified" or "professional."

For more specific information, you should refer to the FTC order itself. A copy of the order is enclosed.

Chairman
Rhode Island Board of Accountancy

IN THE MATTER OF

UNITED STATES STEEL CORPORATION, ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT

Docket 760. Order, July 21, 1924—Modifying Order, March 10, 1986

The Federal Trade Commission has modified a 1924 order (8 F.T.C. 1) issued against respondent by deleting a requirement that the company include specific price and transportation information on its contracts and invoices.

ORDER REOPENING AND MODIFYING ORDER ISSUED ON JULY 21, 1924

On November 7, 1985, respondent United States Steel Corporation ("USS") filed its "Request to Reopen and Set Aside in Part and Modify in Part the Order" ("Request"), pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice. The Request asked the Commission to reopen the proceeding in Docket No. 760 and to modify the order issued by the Commission in this case on July 21, 1924, by deleting Paragraph 3, which requires USS to state clearly on its contracts and invoices how much is charged for the steel f.o.b. the producing or shipping point and how much, if any, is charged for the actual transportation. USS also asks that the order be modified to specify that, "Quotations and sales may be made on a net delivered price basis so long as there is no concerted refusal to quote or sell rolled steel products f.o.b. the plant where the products are manufactured or from which they are shipped." USS' request was placed on the public record for thirty days; no comments were received.

After reviewing USS' request and other available information, the Commission has concluded that the public interest warrants reopening and modification of the order to eliminate Paragraph 3. The requirement that price and transportation information be included on USS' contracts and invoices for rolled steel products was adopted principally as a fencing-in restraint ancillary to the order's prohibitions against the use of the "Pittsburgh Plus" or other basing point pricing system and against price discrimination. USS has shown that since the deregulation of railroad freight rates by the Staggers Rail Act of 1980, 49 U.S.C. 10701 *et seq.*, enacted by Congress to promote competition by allowing carriers to negotiate confidential contract rates with their customers, many carriers have insisted that USS not disclose their negotiated rates. This change in the legal framework within which carriers and USS now operate, and the carriers' insist-

ence upon confidentiality within that new framework, represents a changed condition of fact warranting elimination of the order's requirement that the actual freight charge appear on contracts and invoices between USS and its customers. Disclosure of USS' rates in its invoices allows USS' competitors to discover any favorable terms which it has negotiated with carriers and would reduce the incentive of a rail carrier to offer USS a favorable rate. Elimination of Paragraph 3 is therefore in the public interest because it will enable USS to compete effectively for contract rates.

The disclosure requirements of Paragraph 3 appear to have served their remedial purpose. There is no indication that USS has used the "Pittsburgh Plus" or other basing point system of pricing or engaged in price discrimination of the type contemplated by the order since July 21, 1924. Nothing in the record suggests that the requirements of Paragraph 3 are now needed to ensure that basing point pricing or price discrimination are not reinstated by USS.

With respect to the remainder of the Request, which asks that the order be modified to specify that, "Quotations and sales may be made on a net delivered price basis so long as there is no concerted refusal to quote or sell rolled steel products f.o.b. the plant where the products are manufactured or from which they are shipped," such modification is not necessary. Once Paragraph 3 is deleted, the remaining provisions of the order do not restrict USS' ability to quote or sell on a net delivered price basis. Rather, these provisions only ban quoting or selling of rolled steel products at "Pittsburgh Plus" prices, which the order defines as adding to the price of products shipped from points outside Pittsburgh amounts equal to the freight if the products had been shipped from Pittsburgh, or upon any other basing point. Net delivered pricing would not, therefore, be precluded so long as there was no charge for fictitious freight.

Accordingly, *it is ordered* that this matter be, and it hereby is, reopened and that Paragraph 3 of the order be, and it hereby is, deleted.

Complaint

IN THE MATTER OF

BASS BROTHERS ENTERPRISES, INC., ET AL.

CONSENT ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket 9178. Complaint, May 8, 1984—Decision, March 12, 1986

This consent order requires, among other things, that Ashland Oil Co., the nation's third-largest producer of carbon black, cancel the proposed sale of its carbon black assets to Bass Brothers Enterprises, Inc. Ashland is also required to obtain Commission approval before selling any of its domestic carbon black plants to a major competitor.

Appearances

For the Commission: *Steven B. Feirman* and *Edward F. Glynn, Jr.*

For the respondents: *Kathleen E. McDermott* and *Thomas L. Feazell*, in-house counsel, Russell, Ky., for respondent Ashland Oil Co.

COMPLAINT

The Federal Trade Commission, having reason to believe that Bass Brothers Enterprises, Inc. ("Bass Brothers") and Sid Richardson Carbon & Gasoline Co. ("Sid Richardson") intend to acquire the assets located in the United States of the Carbon Black Division of Ashland Chemical Company, a division of Ashland Oil, Inc. (collectively "Ashland"), in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45); and it appearing that a proceeding by the Commission in respect thereof would be in the public interest, the Commission hereby issues its complaint, pursuant to Section 11 of the Clayton Act (15 U.S.C. 21) and Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)), stating its charges as follows:

I. BASS BROTHERS ENTERPRISES, INC. AND SID RICHARDSON
CARBON & GASOLINE CO.

1. Respondent Bass Brothers Enterprises, Inc. is a corporation organized and existing under the laws of the State of Texas with its corporate headquarters at 2700 First City Bank Tower, 201 Main Street, Fort Worth, Texas.

2. Respondent Sid Richardson Carbon & Gasoline Co. is a corporation organized and existing under the laws of the State of Texas with

its corporate headquarters at 2700 First City Bank Tower, 201 Main Street, Fort Worth, Texas.

II. ASHLAND OIL, INC.

3. Respondent Ashland Oil, Inc. is a corporation organized and existing under the laws of the state of Kentucky with its corporate headquarters at 1000 Ashland Drive, Russell, Kentucky.

III. JURISDICTION

4. At all times relevant herein, each of the companies named in this complaint has been engaged in activities that are in or affecting commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended (15 U.S.C. 12), and Section 4 of the Federal Trade Commission Act, as amended (15 U.S.C. 44).

IV. THE PROPOSED ACQUISITION

5. On November 15, 1983, Bass Brothers entered into an agreement to acquire substantially all of the material operating assets in the United States of Ashland's Carbon Black Division. Bass Brothers is also acquiring a one-year option to purchase an irrevocable exclusive license to use Ashland's new energy-efficient reactor technology for manufacturing carbon black in the United States. After the proposed acquisition, the Ashland carbon black operations will be integrated with those of Sid Richardson.

V. TRADE AND COMMERCE

6. The relevant product market in which to assess the competitive effects of the acquisition is the market for carbon black.

7. The relevant geographic market in which to assess the competitive effects of the acquisition is the United States.

8. The relevant market is highly concentrated.

9. Barriers to entry into the production and distribution of the relevant product are substantial.

10. Both Sid Richardson and Ashland are substantial competitors in the relevant product and geographic markets.

VI. EFFECTS OF THE PROPOSED ACQUISITION

11. The effect of the proposed acquisition, if consummated, may be to substantially lessen competition or tend to create a monopoly in the relevant markets 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), inasmuch as it will, among other things, result in the following:

- (a) Eliminate substantial actual competition between Sid Richardson and Ashland in the relevant market;
- (b) Eliminate Ashland as a substantial competitor in the relevant market;
- (c) Substantially increase concentration in an already highly concentrated market, therefore increasing the likelihood of collusion;
- (d) Encourage additional mergers or acquisitions in the relevant market, thereby further increasing the likelihood of collusion;
- (e) Tend to reduce the degree of price competition in the relevant market;
- (f) Tend to reduce the volume of production of carbon black below competitive levels; and
- (g) Tend to reduce actual competition among other companies engaged in the production and distribution of the relevant product.

VII. VIOLATIONS CHARGED

12. The proposed acquisition constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), and, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18).

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent named in the caption hereof with violation of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended, and the respondent having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondent, 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 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 Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of

its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Ashland Oil, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Kentucky, with its corporate headquarters at 1000 Ashland Drive, Russell, Kentucky.

2. 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

Definitions

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

Carbon black means furnace-process and thermal-process carbon black, whether used for rubber or other applications.

Ashland means Ashland Oil, Inc., as well as its officers, employees, representatives, agents, parents, divisions, subsidiaries, successors, and assigns.

Bass Brothers means Bass Brothers Enterprises, Inc., as well as its officers, employees, representatives, agents, parents, divisions, subsidiaries, successors, and assigns.

SRCG means Sid Richardson Carbon & Gasoline Co., as well as its officers, employees, representatives, agents, parents, divisions, subsidiaries, successors, and assigns.

Production capacity means the practical annual productive capacity of all units, including units currently in operation and units that could be put into operation with or without time delay or additional investment.

I.

It is ordered, That, unless Ashland has already done so, it will, not later than fourteen (14) days after this order becomes final, terminate any agreement that provides for or contemplates the acquisition of Ashland's carbon black business by Bass Brothers or Sid Richardson, including but not limited to the letter of intent signed on or about November 15, 1983, return or destroy all documents containing or recording confidential information provided to Ashland by Bass Brothers or SRCG, and recover from Bass Brothers and SRCG all documents containing or recording confidential information provided to Bass Brothers and SRCG by Ashland, in connection with acqui-

tion negotiations or agreements. Nothing herein contained shall relieve Ashland from any obligation of confidentiality imposed by agreement among Bass Brothers, SRCG and Ashland.

II.

It is further ordered, That for a period of four (4) years from the date on which the Agreement consenting to the issuance of this order is signed, Ashland shall not sell, transfer, or divest, either directly or indirectly, any carbon black manufacturing plant in the United States to any person engaged in the production of carbon black in the United States, unless Ashland has filed the notification set out in Section III of this order and the waiting period set out in Section III of this order has expired. *Provided, however,* That such sale, transfer, or divestiture shall not be subject to this Section II: (1) if the sale, transfer, or divestiture is of a single plant, and the acquiring firm's share of carbon black production capacity in the United States in the most recent calendar year preceding the transaction is no greater than fifteen percent; or (2) if notification of the transaction is required to be made, and in fact is made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

III.

It is further ordered, That the notification required of Ashland by Section II of this order shall be made to the Director of the Bureau of Competition of the Federal Trade Commission, shall refer to this order, and shall include such information and be in such form as is required of the acquired person for notification of an acquisition made pursuant to Section 7A of the Clayton Act and any rules promulgated thereunder. After filing such notification, Ashland shall observe the provisions and requirements of Paragraphs (a), (b), and (e) of Section 7A of the Clayton Act, 15 U.S.C. 18a, and any rules promulgated thereunder, that relate to prohibition of an acquisition prior to expiration of the waiting period, granting of requests for early termination, extension of waiting period, submission of additional information or documentary material, and other governmental action or information requests, that are in effect at the time the notification is filed, which provisions and requirements are incorporated herein by reference. *Provided,* That no party other than Ashland must file notification under this Section III, and the duration of the waiting period shall not be affected by the failure of any party other than Ashland to submit documents or information if requested.

IV.

It is further ordered, That notification and other documents required to be filed by Ashland with the Director of the Bureau of Competition by Sections II and III of this order shall not be deemed "compliance reports" within the meaning of Rule 4.9 of the Commission's Rules of Practice, 16 C.F.R. 4.9.

V.

It is further ordered, That Ashland shall notify the Commission at least thirty (30) days prior to any proposed corporate change 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 that may affect compliance obligations arising out of this order.

VI.

It is further ordered, That if, prior to the expiration of this order, the Commission dismisses the complaint against Bass Brothers and SRCG without an order, this order shall be terminated by the Commission upon application by Ashland.

VII.

It is further ordered, That Ashland shall, within thirty (30) days after making any sale, transfer, or divestiture of any carbon black manufacturing plant in the United States that is not subject to notification under Section II of this order, file with the Commission a written report describing such transaction.

VIII.

It is further ordered, That Ashland shall, within sixty (60) days after service upon it of this order, file with the Commission a written report setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF
MASSACHUSETTS FURNITURE AND PIANO MOVERS
ASSOCIATION, INC.

DISMISSAL ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT

Docket 9137. Final Order, Sept. 28, 1983—Dismissal Order, March 19, 1986

ORDER OF DISMISSAL

The Commission has determined that the continued prosecution of this case is no longer in the public interest. Accordingly, *It is ordered,* That the complaint be and hereby is dismissed. Commissioner Strenio did not participate.

IN THE MATTER OF

AMERICAN MEDICAL INTERNATIONAL, INC., ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND CLAYTON ACTS

Docket 9158. Final Order, July 2, 1984—Modifying Order, March 21, 1986

The Federal Trade Commission has modified, for the second time, a 1984 divestiture order with American Medical International, Inc. (104 F.T.C. 1). After first modifying the original order specifying the divestiture required (104 F.T.C. 617 (1984)), the Commission has further modified the order to allow respondent to divest French Hospital in San Luis Obispo, Calif., to Summit Health Ltd. The current modified order allows respondent to retain a security interest in French Hospital until Summit finishes payment, and retain the stock of French Hospital Corp.

ORDER MODIFYING MODIFIED ORDER TO CEASE AND DESIST

On November 9, 1984, the Commission issued its modified order in this matter requiring, *inter alia*, that respondent American Medical International, Inc. ("AMI") "divest, absolutely and in good faith, all stock, assets, properties, licenses, leases, and other rights and privileges, tangible and intangible, that AMI acquired from Central Coast Hospital Company, French Hospital Corporation and French Medical Clinic, Inc., together with any subsequent improvements." Pursuant to the terms of Paragraph II of the order, AMI submitted an application requesting prior Commission approval of AMI's divestiture of French Hospital Corporation to Summit Health Ltd. ("Summit"). The application was placed on the public record for thirty days in accordance with Section 2.41 of the Commission's Rules of Practice, and no public comments were received.

Although the proposed divestiture appeared consistent with the order's express objective of "establish[ing] French Hospital as a viable competitor in San Luis Obispo County", the agreement entered into between AMI and Summit varied from the provisions of Paragraph II of the order in certain respects. Specifically, the agreement granted AMI a security interest in the assets to be divested and an accompanying right to repossess the assets. In addition, the agreement did not provide for the transfer of the stock of French Hospital Corporation or of the data processing equipment installed by AMI at the hospital. Because it appeared that the public interest would be served by modifying the order to allow the proposed divestiture to go forward, on March 6, 1986, the Commission issued its Order To Show Cause Why Order Requiring Divestiture Should Not Be Modified ("order to show

cause”) pursuant to Section 3.72 of the Commission’s Rules of Practice. The order to show cause proposed modification of Paragraph II of the order to allow AMI to retain a security interest in the assets to be divested, to require redivestiture of any assets AMI reacquires by operation of such a security interest, to delete the requirement that AMI divest the stock of French Hospital Corporation and to exclude from the assets to be divested the data processing equipment installed by AMI at French Hospital. On March 11, 1986, the order to show cause was served on AMI, and AMI answered on March 12, 1986, stating that it consents to the modifications.

After reviewing AMI’s answer and the materials submitted in connection with AMI’s divestiture application, the Commission has concluded that the public interest warrants modifying the order as proposed in the order to show cause. As the Commission observed in the order to show cause, the proposed divestiture appears likely to advance the remedial objectives of the order.

Accordingly,

It is hereby ordered, That pursuant to 15 U.S.C. 45(b), and Section 3.72 of the Commission’s Rules of Practice, 16 C.F.R. 3.72, Paragraph II of the order in this matter be modified to read as follows:

It is ordered, That within twelve (12) months from the date this order becomes final, AMI shall divest, absolutely and in good faith, all assets, properties, licenses, leases, and other rights and privileges, tangible and intangible, that AMI acquired from Central Coast Hospital Company, French Hospital Corporation and French Medical Clinic, Inc., together with any subsequent improvements except for the stock of French Hospital Corporation and the data processing equipment installed by AMI at French Hospital. The purpose of the divestiture is to reestablish French Hospital as a viable competitor in San Luis Obispo County. The divestiture shall be subject to the prior approval of the Federal Trade Commission.

Pending divestiture, AMI shall take all measures necessary to maintain French Hospital in its present condition and to prevent any deterioration, except for normal wear and tear, of any of the assets to be divested so as not to impair French Hospital’s present operating abilities or market value.

Nothing in this order shall be deemed to prohibit an eligible person from giving and AMI from accepting and enforcing a bona fide lien, mortgage, deed of trust or other form of security interest on all or any portion of the assets to be divested under the provisions of this order. If AMI accepts a security interest, in no event should such security interest be interpreted to mean that AMI has a right to participate in the operation or management of such assets. In the event that AMI,

as a result of the enforcement or settlement of any bona fide lien, mortgage, deed of trust or other form of security interest, reacquires any of the aforementioned assets, then AMI shall promptly notify the Commission in writing and shall divest the reacquired assets in accordance with the terms of this order within twelve (12) months of the reacquisition.

Commissioner Strenio did not participate.