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

IN THE MATTER OF

NATIONAL PORTLAND CEMENT COMPANY

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

Docket 8654. Complaint, Jan. 22, 1965—Decision, Mar. 31, 1967

Order dismissing complaint, vacating initial decision and terminating a divestiture proceeding against a Philadelphia manufacturer of portland cement, because the respondent no longer owns any of the assets or stock of the Ryan Ready Mixed Concrete Corporation whose acquisition by the respondent was the basis for this proceeding.

COMPLAINT

The Federal Trade Commission has reason to believe that National Portland Cement Company has acquired the stock and assets of Ryan Ready Mixed Concrete Corporation and its affiliate N. Ryan Company, Incorporated in violation of Section 7 of the Clayton Act (U.S.C., Title 15, Section 18) as amended, and therefore, pursuant to Section 11 of said Act, it issues this complaint, stating its charges in that respect as follows:

I

DEFINITIONS

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

a. "Portland cement" includes Types I through V of portland cement as specified by the American Society for Testing Materials. Neither masonry nor white cement is included.

b. "Ready-mixed concrete" includes all portland cement concrete which is manufactured and delivered to a purchaser in a plastic and unhardened state. Ready-mixed concrete includes central-mixed concrete, shrink-mixed concrete and transit-mixed concrete.

c. "The New York City metropolitan area" consists of the five boroughs of the City of New York and the New York counties of Nassau, Suffolk and Westchester.

II

NATIONAL PORTLAND CEMENT COMPANY

2. National Portland Cement Company (National), respondent herein, is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania with its principal office located at 1842 Fidelity-Philadelphia Trust Building, Philadelphia, Pennsylvania.

3. Respondent is principally engaged in the manufacture and sale of portland cement from its plant at Brodhead, Pennsylvania. In 1963, National had sales of $4,407,058, assets of $5,338,371, and net income of $332,290.

4. The New York City metropolitan area is one of the principal markets for portland cement manufactured in National's plant. In 1962, the total shipments of portland cement from this plant amounted to 1,370,600 barrels, of which approximately 17% was shipped to customers located in the New York City metropolitan area.

5. At all times relevant herein, National was a corporation engaged in commerce, as "commerce" is defined in the Clayton Act.

III

RYAN READY MIXED CONCRETE CORPORATION AND N. RYAN COMPANY

6. Prior to September 23, 1963, Ryan Ready Mixed Concrete Corporation (Ryan) and its affiiliate N. Ryan Company, Incorporated (N. Ryan), were corporations organized and existing under the laws of the State of New York, with principal offices located at 491 Smith Street, Brooklyn, New York.

7. At the time of the acquisition Ryan was, and for many years had been, engaged in the production and sale of ready-mixed concrete in the New York City metropolitan area. For the fiscal year ending February 28, 1963, Ryan had sales of $10,937,593, assests of $3,280,567 and net profits of $268,041.

8. Ryan operated five ready-mixed concrete plants in the New York City metropolitan area. Ryan is one of the four largest producers of ready-mixed concrete, and one of the four largest consumers of portland cement, in the New York City metropolitan area. During 1962, Ryan consumed 958,305 barrels of portland

cement and sold approximately 697,000 cubic yards of ready-mixed concrete.

9. At the time of the acquisition, N. Ryan was, and for many years had been, operated as the associated purchasing company for Ryan. For the fiscal year ending April 30, 1963, N. Ryan had sales of $6,531,032, assets of $1,708,050, and net profits of $187,345.

10. At all times relevant herein, Ryan and N. Ryan were corporations engaged in commerce, as "commerce" is defined in the Clayton Act.

IV

ACQUISITION

11. On or about September 23, 1963, National acquired all the outstanding capital stock of Ryan and N. Ryan by exchanging therefor 57,000 shares of National common stock and 7,000 shares of National Class B Preferred Stock.

V

THE NATURE OF TRADE AND COMMERCE

12. Portland cement is a material which in the presence of water binds aggregates, such as sand and gravel, into concrete. Portland cement is the essential ingredient in the manufacture of ready-mixed concrete. There is no practicable substitute for portland cement in the manufacture of concrete.

13. The portland cement industry in the United States is substantial. In 1963, there were about 51 cement companies in the United States operating approximately 182 plants. Total shipments of portland cement in that year amounted to 349,321,000 barrels having a value of $1,116,555,000.

14. On a national basis, approximately 57% of all portland cement is shipped to companies engaged in the production of ready-mixed concrete. In the heavily populated metropolitan areas, the percentage of portland cement consumed by ready-mixed concrete companies is generally higher. Ready-mixed concrete producers are the only businesses engaged in the sale of concrete as a commodity.

15. Due to such factors as transportation costs and the necessity of supplying competitive delivery service to consumers, the effective market area of portland cement production and distribution facilities is limited. Similar considerations limit the market area for ready-mix companies.

16. Cement producers sell their portland cement to consumers, such as ready-mixed concrete companies, manufacturers of concrete products, contractors and building materials dealers. In the past such consumers, in general, have not been integrated or affiliated with portland cement producers.

17. In recent years there has been a trend of mergers and acquisitions by which ready-mixed concrete companies in major metropolitan areas in various portions of the United States have become integrated with portland cement companies. As ready-mix companies have been acquired by producers of cement, competing cement producers have sought to acquire other cement consumers in order to protect their markets against the actual or expected foreclosure caused by these acquisitions, and to prevent additional foreclosure of their markets as a result of future such acquisitions by their competitors. Thus each acquisition by a cement producer of a substantial consumer of portland cement forms an integral part of a chain reaction of acquisitions—contributing both to the share of the market already foreclosed by acquisitions, and to the impetus for further such acquisitions.

18. Three of the five largest ready-mixed concrete producers in the New York City metropolitan area have, since 1960, become integrated, through acquisition, with portland cement companies.

VI

VIOLATION OF SECTION 7

19. The effect of the acquisition of Ryan Ready Mixed Concrete Corporation and N. Ryan Company, Incorporated by National Portland Cement Company, both in itself and by aggravating the trend towards vertical integration between suppliers and consumers of portland cement, may be substantially to lessen competition or to tend to create a monopoly in the production and sale of portland cement and ready-mixed concrete in the New York City metropolitan area, in adjoining markets, or in the United States as a whole, in the following ways, among others:

(a) Competitors of respondent may have been or may be foreclosed from a substantial share of the market for portland cement.

(b) The entry of new sellers of portland cement and ready-mixed concrete may be inhibited or prevented.

(c) The ability of nonintegrated competitors of respondent effectively to compete in the sale of portland cement may be substantially impaired.

(d) As an integrated manufacturer and seller of portland cement and ready-mixed concrete respondent has achieved or may achieve a decisive competitive advantage over its competitors which are engaged only in the manufacture and sale of portland cement, or ready-mixed concrete.

(e) The production of ready-mixed concrete, now a decentralized, locally controlled, small business industry, may become concentrated in the hands of a relatively few producers of portland cement.

Now, therefore, the acquisition of Ryan and N. Ryan by National Portland Cement Company, as above alleged, constitutes a violation of Section 7 of the Clayton Act (U.S.C., Title 15, Section 18), as amended.

Mr. Robert L. Heggen, Mr. Joel Davidow and *Mr. Alan C. Schneeberger* supporting the complaint.

Cadwalader, Wickersham & Taft, by *Mr. George D. Reycraft, Mr. P. Jay Flocken,* and *Mr. Charles B. Degnan,* of New York, N.Y., for respondent National Portland Cement Company.

White & Case, by *Mr. Edgar E. Barton, Mr. Scott E. Bohon,* and *Mr. Thomas J. Maroney,* of New York, N.Y., for respondent United States Steel Corporation.

Initial Decision by John Lewis, Hearing Examiner

In the Matter of

NATIONAL PORTLAND CEMENT COMPANY

Docket No. 8654

and

In the Matter of

UNITED STATES STEEL CORPORATION

*Docket No. 8655**

MAY 20, 1966

INDEX

* Final order of Dec. 2, 1968, reported in 74 F.T.C. 1270, 1319.

FINDINGS OF FACT—Continued

STATEMENT OF PROCEEDINGS

These are two separate proceedings, instituted by the issuance of separate complaints, charging each of the above-named respondents with having violated Section 7 of the Clayton Act, as amended, by acquiring the stock or assets of a ready-mixed concrete producer in the New York City metropolitan area. After the filing of their respective answers by respondents, separate prehearing conferences were held in each proceeding, *viz*, on May 5 and August 3, 1965, in Docket No. 8654, and on May 20 and August 4, 1965, in Docket No. 8655. Prehearing Orders embodying the results of said conferences were issued by the undersigned hearing examiner on June 4 and August 30, 1965, in Docket No. 8654, and on June 15 and August 30, 1965, in Docket No. 8655. An application by respondent National Portland Cement Company to take the deposition of a prospective industry witness, and for the issuance of a subpoena duces tecum in connection therewith, was granted by order of the undersigned dated May 28, 1965. On motion of the proposed deponent, the undersigned, by order dated August 25, 1965, quashed the aforesaid subpoena duces tecum except as to a portion of one specification. A further application by said respondent to take the depositions of a number of additional industry witnesses, and for the issuance of subpoenas duces tecum in connection therewith, was denied by order of the undersigned dated August 27, 1965, without prejudice to the right of said respondent to renew such application at a subsequent stage of the proceeding, upon a proper showing. No further application for the taking of the depositions of said witnesses was made by respondent.[1] An application by counsel supporting the complaint to take the deposition of a proposed witness in the United States Steel Corporation proceeding was granted by order of the undersigned dated September 23,

[1] Respondent National Portland Cement Company originally requested leave to take the depositions of 38 witnesses. At the close of the evidence in support of the complaint, said respondent indicated that it intended to renew its application to take some of said depositions. However, it subsequently advised the examiner by letter dated November 5, 1965, that it had decided not to proceed with the taking of any further depositions (Tr. 898, 1145, Doc. No. 8654).

1965. Said deposition was read into the record of that proceeding at the request of respondent, without objection from counsel supporting the complaint.

On motion of counsel supporting the complaint, the undersigned issued an order, dated June 17, 1965, directing the holding of partial joint hearings in the above-entitled proceedings for the purpose of receiving testimony from certain industry witnesses, whose testimony complaint counsel claimed would be substantially identical in each proceeding. The request of respondent National Portland Cement Company for permission to file an interlocutory appeal from said order was denied by order of the Commission issued July 2, 1965. Upon the filing of a certificate of necessity by the undersigned, based on the application of counsel supporting the complaint, the Commission, by order issued August 19, 1965, authorized the suspension of hearings in the National Portland Cement Company proceeding, at the conclusion of complaint counsel's case-in-chief, until the completion of the separate hearings in the United States Steel Corporation proceeding, and authorized the holding of hearings in more than one place.

Hearings for the reception of evidence in support of, and in opposition to, the complaint in Docket No. 8655, were thereafter held in Washington, D.C., and New York, New York, between October 11, 1965, and November 22, 1965. Hearings for the reception of evidence in support of the complaint in Docket No. 8654 were held in Washington, D.C., and New York, New York, between October 11, 1965, and November 3, 1965, and hearings for the reception of evidence in opposition to the complaint in said proceeding were held in Washington, D.C., between November 22, 1965, and December 17, 1965.[2] Except for those portions of the hearings at which testimony was received from officials of the acquired and acquiring companies, and the testimony of three ready-mix producers, the hearings in these proceedings were held jointly in accordance with the undersigned's order of June 17, 1965.[3]

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[2] Defense hearings in Docket No. 8654 were substantially completed on November 23, 1965. However, a brief hearing was held on December 17, 1965, for the reception of certain documentary evidence which was not theretofore available. The date for the filing of proposed findings was fixed at the close of the hearing on November 23, 1965.

[3] In view of its opposition to the holding of joint hearings with respondent United States Steel Corporation, respondent National Portland Cement Company was given an opportunity for separate cross-examination of joint witnesses and to exclude from its record the cross-examination of such witnesses by counsel for United States Steel Corporation. While engaging in separate cross-examination of such witnesses, counsel for National Portland Cement Company elected to have the cross-examination by counsel for United States Steel Corporation included in its record (Tr. 329, Docket No. 8654).

All testimony taken in these proceedings was duly recorded, and such testimony and all other evidence received into the record have been filed in the office of the Commission. All parties were represented by counsel, participated in the hearings, and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues. At the close of all the evidence, and pursuant to leave granted by the undersigned, proposed findings of fact, conclusions of law and an order, together with supporting briefs, were filed by the parties on January 26, 1966, and replies thereto were filed on February 7, 1966.

Although the parties have filed separate proposed findings in these proceedings, the undersigned has concluded that it would be appropriate to issue a single, combined initial decision in the two proceedings in view of the substantial identity of the records,[4] the similarity of market conditions, and the interrelationship of the two acquisitions (both *inter sese* and with other companies in the market). To the extent any findings are based on evidence which does not appear in both records, appropriate reference thereto will be made.

After having carefully reviewed the evidence in these proceedings, and the proposed findings and conclusions submitted (including the replies thereto and supporting briefs),[5] and based on his observation of the witnesses, the undersigned makes the following:

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[4] As heretofore noted, most of the hearings in these proceedings were joint. The evidence at such hearings consisted of testimony and documentary evidence from officials of cement and ready-mixed concrete companies purporting to be in competition with respondents or the companies acquired by them, in the New York City metropolitan area. The separate hearings were devoted principally to receiving evidence from officials of the acquired and acquiring companies regarding the facts and circumstances incident to each of the acquisitions. The differences in the records based on the testimony received at the separate hearings have been narrowed somewhat since the testimony of the president of the acquired company in the United States Steel Corporation proceeding was incorporated into the record of the National Portland Cement Company proceeding on motion of the latter respondent (Tr. 976–977, Doc. No. 8654). Although certain industry statistical exhibits were also received at separate hearings, these exhibits are, for the most part, identical in each record.

[5] Proposed findings not herein adopted, either in the form proposed or in substance, are rejected as not supported by the evidence or as involving immaterial matters. References to the proposed findings are made with the abbreviations: "CPF" (for complaint counsel); "NPF" (for respondent National Portland Cement Company); and "UPF" (for respondent United States Steel Corporation). References to supporting briefs are made with the abbreviations: "CB" (for complaint counsel); "NB" (for respondent National Portland); and "UB" (for respondent U.S. Steel). References to replies or answers to opposing counsel's findings or briefs are made with the abbreviations: "CR" (for complaint counsel); "NR" (for respondent National Portland); and "UR" (for respondent U.S. Steel).

FINDINGS OF FACT [6]

I. *Identity and Business of Respondents and Acquired Companies*

A. National Portland Cement Company

1. Respondent, National Portland Cement Company (hereinafter sometimes referred to as "National") is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, with its principal office located at 1842 Fidelity-Trust Building, Philadelphia, Pennsylvania. The company was incorporated on November 4, 1931, under the laws of the Commonwealth of Pennsylvania (Admitted, Ans., par. 3; NCX 37 A). The major stockholders of National are, (a) Tunnel Portland Cement Company, Ltd., of London, England, owning about 54% of the stock, (b) F. L. Schmidt, of New York City, owning about 22% of the stock, and (c) members of the Ryan family, of New York City, owning most of the balance of the stock (N Tr. 883–885, 911–913).

2. National is principally engaged in the manufacture and sale of portland cement. It operates a plant for the manufacture of portland cement at Brodhead, Pennsylvania. Such plant has an annual rated capacity of two million barrels of cement (Admitted, Ans., par. 4; N Tr. 865). It ships and sells cement from such plant to customers located principally in the Middle Atlantic States, including eastern Pennsylvania, New Jersey, southern New York, eastern Connecticut, northeastern Maryland, Delaware, and the District of Columbia. In addition to its plant at Brodhead, it maintains a distribution terminal at Bridgeport, Connecticut (N Tr. 865; NRX 39 G, I).

3. National's net sales and income for the fiscal years ending March 31, 1962, and March 31, 1963, prior to its acquisition of the Ryan companies, and its net consolidated sales and income for the fiscal years 1964 and 1965, after the acquisition, were as follows (NCX 18, 20, 46):

[6] References are hereinafter made to certain portions of the record in support of particular findings. Such references are to the principal portions of the record relied upon by the examiner, but are not intended as an exhaustive compendium of the portions of the record reviewed and relied upon by him. In the interest of expedition, reference will be made to the U.S. Steel record, except where the evidence appears only in the National Portland record (that being the method utilized by respondent National Portland in its proposed findings). References to the record will be made with the following abbreviations: "Tr." (for the transcript of testimony); "CX" (for complaint counsel's exhibits); and "RX" (for respondent's exhibits). Where the examiner relies on evidence which appears only in the National Portland record, the letter "N" will be used in juxtaposition to the above-mentioned abbreviations.

	Net sales	Net income
1962	$ 4,542,296	$422,938
1963	4,407,058	332,290
1964	[7] 11,736,293	356,915
1965	[7] 8,224,817	(119,533)

B. The Ryan Companies

4. Prior to their acquisition by National, on or about September 23, 1963, Ryan Ready Mixed Concrete Corporation (hereinafter sometimes referred to as "Ryan") and N. Ryan Company, Inc. (hereinafter sometimes referred to as "N. Ryan"), were corporations organized and existing under the laws of the State of New York, with their principal offices located at 491 Smith Street, Brooklyn, New York. Ryan and N. Ryan were incorporated in New York State on March 26, 1930, and April 27, 1928, respectively. Ryan and N. Ryan were owned and controlled by substantially the same interests (Admitted, Ans., par. 3; NCX 38 A–B and 40 E; Prehearing Order, par. 8; N Tr. 68).

5. At the time of its acquisition, and for many years prior thereto, Ryan was engaged in the production of ready-mixed concrete and the sale thereof to construction contractors in the New York City metropolitan area (hereinafter referred to as the NYMA). At all of said times N. Ryan was a dealer in raw materials, including portland cement, and sand and gravel, and resold most of said materials to Ryan, for which it acted as exclusive purchasing agent (Admitted, Ans., par. 3 and 6; Prehearing Order, par. 10, 11; N Tr. 934–936; NCX 38 D and 40 E).

6. At the time of its acquisition by National, Ryan operated five ready-mixed concrete plants in the NYMA. Three of said plants were located in New York City, two being in Brooklyn and one in the Bronx. The remaining two plants were located in Nassau County, one being at Hicksville, and the other at Great Neck. From such plants Ryan served New York City (except for Staten Island) and portions of the adjacent Long Island counties of Nassau and Suffolk (Admitted, Ans., par. 6; NCX 38 B–C).

7. At the time of its acquisition by National, Ryan purchased substantial quantities of portland cement for use in the production of ready-mixed concrete. It was the fourth largest consumer

[7] The sales figures for 1964 and 1965, while consolidated with Ryan's, do not include sales by National to Ryan, which amounted to $1,129,856 in 1965 and $646,752 in 1964 (NCX 20 F).

of cement among ready-mix companies in the NYMA. Its purchases of portland cement for the years 1958 through 1964 were as follows (NCX 38 C, 39, 40 C, and 47 A):

	Purchases (barrels)
1958	529,650
1959	652,220
1960	529,797
1961	604,394
1962	958,305
1963	[8] 790,245
1964	524,352

8. Prior to its acquisition by National, Ryan purchased a portion of its cement requirements from National. Following its acquisition, Ryan's purchases from National increased substantially. Set forth below is a table reflecting Ryan's purchases of cement from National, both before and after its acquisition in September 1963, and the percentage which such purchases represented of its total purchases (NCX 37 D, 38 C, 39, 40 C):

	Ryan's cement purchases from National (bbls.)	Percentage of total cement purchases
1958	70,920	13.4
1959	82,397	12.5
1960	62,593	11.7
1961	67,749	11.1
1962	23,574	2.4
1963	129,164	16.3
1964	406,397	77.5

9. Ryan's net sales and its net income, after taxes, for the fiscal years 1962 and 1963 (ending February 28), for the eight-month period ending October 31, 1963, and for the fiscal years 1964 and 1965 (ending March 31) were as follows (NCX 25–27, 31 E; NRX 66):

[8] These figures include purchases for the period after September 23, 1963, when Ryan became a subsidiary of National.

	Net sales	Net income
1962	$ 7,181,006	$(235,004)
1963	10,937,593	268,041
1963 (8 mos.)	6,823,253	432,854
1964 (11 mos.)	[9]	[9](10,824)
1965	4,914,598	[10](402,518)

10. N. Ryan's net sales and its net income, after taxes, for the fiscal years 1962 and 1963 (ending April 30), and for the six-month period ending October 31, 1963, were as follows (NCX 28–30):

	Net sales	Net income
1962	$4,815,076	$(48,670)
1963	6,531,032	187,344
1963 (6 mos.)	356,437	59,568

11. Prior to its acquisition by National, Ryan, through its wholly owned and controlled subsidiary, N. Ryan, made substantial purchases of portland cement from sources located outside the State of New York, such purchases being shipped to it in interstate commerce. All of the cement was manufactured into ready-mixed concrete by Ryan within the State of New York and was sold by Ryan within the State of New York (Prehearing Order, par. 11; N Tr. 68–69; NCX 38 C and 40 C).

C. U.S. Steel Corporation

12. Respondent, United States Steel Corporation (hereinafter sometimes referred to as "U.S. Steel"), is a corporation organized and existing under the laws of the State of New Jersey, with a general office located at 71 Broadway, New York, New York (Admitted, Ans., par. 2; Prehearing Order, par. 2; Tr. 7–8).

13. U.S. Steel is, and for many years has been, the largest steel producer in the United States, and a major integrated producer of raw materials for the production of iron and steel

[9] The record does not contain information as to Ryan's sales in 1964. The figure of its losses is for the 11-month period ending March 31, 1964 (NRX 66).

[10] Includes figures for N. Ryan operation, which was merged into Ryan on March 1, 1964 (NCX 40 F).

products (Admitted, Ans., par. 3). In the years 1962 to 1964 its sales, net income and assets were as follows (CX 18–20):

	Sales ($000)	Net income ($000)	Assets ($000)
1962	$3,500,955	$163,679	$4,982,949
1963	3,637,173	203,549	5,033,528
1964	4,129,352	236,785	5,206,119

14. U.S. Steel, through its Universal Atlas Cement Division (hereinafter sometimes referred to as "UAC"), is, and for some time last past has been, a manufacturer of portland cement. UAC is one of the four largest portland cement manufacturers in the United States. It operates 11 cement plants, having an annual capacity of over 30 million barrels and serves 37 States. During the years 1962 to 1964 its net profit, after taxes, was in excess of $3 million annually (Admitted, Ans., par. 3; Tr. 900; CX 99).

15. UAC serves the NYMA from its plants located at Hudson, New York, and Northampton, Pennsylvania, such plants having an annual capacity of 4 million barrels and 2.9 million barrels, respectively. UAC also operates a distribution terminal at Glen Cove, New York, from which it serves the NYMA. In the year 1963 the total shipments of portland cement by UAC's Hudson and Northampton plants amounted to 4,770,339 barrels, of which 967,549 barrels were shipped to consumers located in the New York City metropolitan area (Admitted, Ans., par. 5; Prehearing Order, par. 5; CX 41 A and 42).

D. Certified Industries, Inc.

16. Prior to the acquisition of its assets by a subsidiary of U.S. Steel on or about April 30, 1964, Certified Industries, Inc. (hereinafter sometimes referred to as "Certified"), was a corporation organized and existing under the laws of the State of Delaware, with its principal office located at 201 Park Avenue, Hicksville, New York (Admitted, Ans., par. 7). It was organized under the laws of the State of Delaware on March 9, 1959 (CX 35, p. 5).

17. At the time of its acquisition Certified was, and for a number of years prior thereto had been, engaged in the production and sale of ready-mixed concrete and mineral aggregates (sand and

gravel) in the NYMA (Admitted, Ans., par. 8). At the time of the acquisition Certified owned nine stationary ready-mixed concrete plants (of which seven were in operation), six of such plants being located in Nassau and Suffolk Counties, and one each in Manhattan, Queens, and Brooklyn. It also owned several pits for the extraction of sand and gravel, and a quarry for the extraction of lightweight aggregates (CX 38 and 47).

18. Certified entered the ready-mixed concrete business under the name Certified Transit Mix Corporation in 1953, when its president, E. L. Litwin, and three other individuals (all of whom had previously been in the building supplies business) acquired the assets of a small, one-plant, four-truck ready-mixed concrete company located at Copiague on the south shore of Long Island in Suffolk County. During 1953 and 1954 Certified bought additional trucks, a property with sand and gravel materials and opened an additional ready-mix plant at Commack in central Suffolk County. In 1956 or 1957 Certified acquired the business of Central Rock Ready-Mix Company, a small, six-eight truck operation at Island Park on the south shore of Long Island in Nassau County. By 1957, Certified was operating approximately 30 trucks and had three permanent batch plants for the production of ready-mixed concrete, and one portable plant. During this period it began to supply ready-mixed concrete on out-of-State construction projects, using portable batch plants. On June 15, 1961, Certified acquired most of the assets of Preferred Transmix Concrete, Inc., of Hicksville, New York. Preferred was actually a larger company than Certified, but was having financial difficulty. It operated approximately 65 trucks, and had six batch plants in Nassau and Suffolk Counties, and one plant in Queens. On August 18, 1961, Certified acquired the stock of Northern Lightweight Aggregate, Inc., of Cohoes, New York, a producer of expanded shale lightweight aggregates used in the production of lightweight concrete. With its acquisition of Preferred's Queens plant in 1961 and the opening of additional plants in Manhattan and Brooklyn in 1961 and 1962, Certified expanded its basic sales area for ready-mixed concrete from Nassau and Suffolk Counties to New York City proper (Tr. 787–796; CX 22–24, and 35, pp. 5, 11–17).

19. At the time of its acquisition by U.S. Steel in April 1964, Certified was one of the four largest producers of ready-mixed concrete in the NYMA (Admitted, Ans., par. 9). Its sales of ready-mix for the years 1961 through 1963 were as follows (CX 37):

	Ready-mix sales (cu. yds.)
1961	330,000
1962	763,002
1963	772,241

20. At the time of its acquisition, Certified was the second largest consumer of portland cement among ready-mixed concrete producers in the NYMA. Certified's purchases of portland cement for the years 1961 through 1964 were as follows (CX 36, 38, and 93):

	Purchases, portland cement (barrels)
1961	451,898
1962	823,352
1963	1,054,072
1964	793,479

21. Certified purchased a portion of its cement requirements from UAC prior to its acquisition. The amount of such purchases increased very significantly in 1963 when U.S. Steel assisted Certified in obtaining a long-term loan, and the trend continued in 1964 when it was acquired by U.S. Steel. Set forth below is a table reflecting the amount and proportion of Certified's cement purchases from UAC between 1961 and 1964:

	Certified's cement purchases from UAC (bbl.)	Proportion of total cement purchases (%)
1961	36,675	8.4
1962	123,731	14.9
1963	567,470	53.8
1964	701,151	88.4

22. Certified's net sales, income, retained earnings and total assets for the fiscal years 1960 through 1963 (ending June 30), for the six-month period ending December 31, 1963, and for the four-month period ending April 30, 1964 (prior to it acquisition), and the eight-month period ending December 31, 1964 (after its acquisition), were as follows (CX 21–24, 30, 32 A–B, 33 B):

	Net sales	Net income	Retained earnings	Total assets
1960	$ 4,707,433	$ 81,317	$ 84,299	$ 2,303,206
1961	4,338,768	291,866	395,958	4,826,103
1962	9,753,178	321,910	717,865	9,322,225
1963	14,325,991	(655,850)	62,015	11,147,419
1963 (6 mos.)	6,099,721	(928,444)	(866,429)	8,965,865
1964 (4 mos.)	2,081,838	(871,518)	N.A.	N.A.
1964 (8 mos.)	6,983,555	(1,204,210)	(1,202,594)	9,633,392

23. Prior to its acquisition, Certified made substantial purchases of portland cement from sources located outside the State of New York, and such purchases were shipped to it in interstate commerce. After blending the cement into ready-mixed concrete, Certified sold such concrete exclusively in the State of New York (Prehearing Order, par. 8; Tr. 16). However, during 1963 Certified's subsidiary, Northern Lightweight Aggregate, Inc., made shipments of 34,499 tons of expanded shale to destinations outside the State of New York, valued at $205,757 (CX 40).

Certified's Financial Condition

24. As the above figures indicate, Certified began losing money in the fiscal year ending June 30, 1963, and this trend continued during the balance of 1963 and the first four months of 1964 until it was acquired by U.S. Steel. The latter has asserted, as a defense to this proceeding, the fact that prior to and at the time of its acquisition Certified was a "failing company," and that therefore the acquisition does not violate Section 7 of the Clayton Act. Since Certified's financial condition is a critical issue in this proceeding, detailed findings pertaining thereto are hereinafter made.

25. Certified was for some years prior to its acquisition a thinly capitalized company, with a relatively heavy debt structure in relation to net worth, and with a modest working capital in relation to the scope of its operations (Tr. 802, 936). For example, in the fiscal year ending June 30, 1960, its current assets were $1,594,000, and its current liabilities were $1,347,000, leaving a working capital of only $247,000 to support annual sales of $4,707,000 (CX 21, pp. 3–4). In the fiscal year ending June 30, 1961, its current assets were $2,746,000 and current liabilities were $2,357,000, leaving a working capital of $389,000 to support annual sales of $4,339,000. During that year its noncurrent liabilities increased sharply, from $88,000 in 1960 to $1,289,000 (CX 22, pp. 6–8).

26. Certified's thin financial structure was aggravated by some of the acquisitions which it made in 1961. Thus, in order to finance the acquisition of Preferred Transmix, a company which was in financial difficulty, Certified issued $250,000 in 5% convertible subordinated notes due December 31, 1963 (CX 22, pp. 4–5, 10). Certified's acquisition of Northern Lightweight Aggregate, Inc., which had not operated at a profit for most of the period it was in business, was financed in part through the issuance of a 10-year convertible note in the amount of $446,000 (CX 22, pp. 3, 10; CX 35, p. 9; Tr. 796).

27. Certified made a number of efforts during 1961 and 1962 to raise additional capital in order to improve its financial situation. Thus, in the fall of 1961 it sought to market $1.25 million in convertible debentures. The underwriting firm which it proposed to use was of the opinion that it could not market more than $750,000 of Certified's debentures, and was willing to assume a firm commitment to underwrite only $400,000, the balance to be sold on a "best efforts" basis. When the debentures were finally offered in the spring of 1962, only $557,000 were sold, of which the net proceeds to Certified were $466,000 (CX 23, note 12; CX 35, pp. 1, 11; Tr. 936–937). During 1962 Certified also negotiated a $300,000 mortgage loan with the National Commercial Bank of Albany (CX 23, note 10; Tr. 937–938). Efforts to finance the purchase of additional trucks in the spring of 1962, through Bankers Trust Company of New York, were unsuccessful when the bank ascertained that Certified was in arrears on obligations to suppliers amounting to $346,000 (RX 5; Tr. 939–940; 1071–1072).

28. Certified's acquisition of Preferred more than doubled the size of its operations and was accompanied by a substantial increase in its trade accounts receivable and payable, with resultant strain on its working capital. Thus, its trade accounts receivable rose from $796,000 on June 30, 1960, to $1,207,000 on June 30, 1961, and $2,145,000 on June 30, 1962. Its trade accounts payable rose during the same period from $621,000 to $813,000 and to $1,648,000. Its net working capital, which had increased from approximately $247,000 in 1960 to $388,000 in 1961, declined to $220,500 in 1962 (CX 21, p. 3; CX 22, pp. 6–7; CX 23, pp. 8–9; Tr. 802).

29. A substantial portion of Certified's accounts payable involved obligations to cement suppliers. Since such arrearages were interfering with its entitlement to the 20-cents a barrel discount for "cash" (which required payment by the tenth of the month following delivery), Certified negotiated extended credit arrange-

ments with a number of its cement suppliers. In the fall of 1961 it entered into extended credit arrangements, totalling $350,000, with four of its cement suppliers (Alpha, Coplay, Keystone, and North American). These were noninterest bearing and were to be paid off when Certified was in a position to do so. Under these arrangements it was permitted to purchase additional quantities of cement from the suppliers and to receive the customary cash discount on current purchases. In addition, during January 1962 Certified issued a 12-month note for $150,000, bearing interest at 4½% to UAC, to which it was indebted on purchases of cement (Tr. 804–808, 1176, 1184).

30. While Certified experienced a substantial increase in sales during 1962 and part of 1963, its rate of profit did not increase in proportion, due to a softening in ready-mix prices. This was accompanied by a buildup in accounts receivable due to the slowness of customers in making payment. These factors resulted in a deterioration in its capital position. Thus, between June 30, 1962, and September 30, 1962, it earned a net profit of $183,000 on sales of $4,036,000, but its trade accounts receivable rose by $286,000, while its cash balance declined from $683,000 to $229,000 (CX 23, p. 8; CX 25 B, D). By October 31, 1962, Certified owed $1,500,000 to its suppliers, of which $426,000 was over 90 days old from the invoice date (CX 53 E). For the six months ending December 31, 1962, its rate of profit on sales declined to .008% ($57,500 on sales of $7,140,000), compared to 3.3% ($321,910 on sales of $9,753,000) for the year ending June 30, 1962 (CX 23 and 30).

31. In the fall of 1962, Certified sought to increase the amount of its loan from Franklin National Bank of Long Island, from which it had been borrowing money on an unsecured, conventional basis. However, the bank was unwilling to advance any further funds on this basis. Therefore, on October 15, 1962, Certified converted its $900,000 "open end" loan account with the bank to an "assigned accounts receivable loan" agreement for revolving credit. Under this arrangement Certified was permitted to borrow 80% of accounts receivable, with a maximum line of credit of $1 million. The new arrangement provided Certified with only about $100,000 of additional working capital (CX 25 B, F note 2, H note 12; Tr. 938).

32. In early December 1962, Certified notified respondent that it would have difficulty in paying the $150,000 note, which it had given respondent to secure its obligation for cement purchases. Respondent agreed to extend the term of the note from February 15 to April 30, 1963. During the discussions, an official of respond-

ent recommended that Certified give consideration to trying to arrange some long-term financing which would permit it to consolidate its debts and relieve the pressure of meeting payments on short-term obligations which were becoming due. Since Certified had exhausted its efforts to obtain additional financing, respondent arranged a meeting between Certified and Bankers Trust Company of New York, where respondent was a depositor (Tr. 1144, 1146; RX 15; CX 53 B).

33. After reviewing Certified's financial statements and its projections of future operations, Bankers Trust concluded that Certified was "in need of approximately $3 MM [million] on a long term basis to refinance existing debt, provide for new equipment and furnish much needed working capital" (CX 53 B; Tr. 1074). While the bank was optimistic about Certified's prospects, it concluded that on the basis of Certified's actual financial statements, the necessary long-term loan would not be "bankable" by it without some sort of guarantee by U.S. Steel (Tr. 1075).[11] On January 25, 1963, respondent entered into a "Notes Purchase Agreement" with the bank, under which it agreed to purchase any notes given to the bank by Certified, up to a maximum of $3.5 million in the event such notes were not paid when due (CX 54 A). Negotiations between Certified and the bank were carried on between January and March 1963, and were concluded with an agreement dated March 15, 1963, under which the bank loaned Certified $3.3 million for a period of ten years, at a rate of interest of 7/8% above the bank's prime commercial loan rate, with the first installment of interest to become due July 1, 1964. The loan was secured by mortgages on the property of Certified and its subsidiaries (CX 69; RX 18). Because of Certified's need to meet various obligations during the period the loan was being negotiated, the bank (with respondent's guarantee) made three temporary advances during January and February 1963, totaling approximately $1.5 million, which were later "rolled into" the long-term loan (RX 10, 13, 14 and 18).

34. Under the terms of the loan agreement, Certified agreed that it would not permit its net current assets to be less than $600,000 for a period of three years from June 30, 1963, and not less than certain stated sums in excess of that figure for the period thereafter. The agreement also set a limit of $1.6 million on the

[11] As previously noted (par. 27, *supra*), the bank had been unwilling to finance the purchase of additional trucks by Certified in the spring of 1962.

amount of Certified's accounts receivable loans (CX 69, p. 25, Sec. 6.1, and p. 27, Sec. 6.4).

35. U.S. Steel's interest in assisting Certified was, obviously, not motivated by purely charitable considerations. It regarded Certified as a "substantial user of cement, the third largest in the metropolitan New York area" (CX 51 A). Despite what it considered to be Certified's "precarious financial position" and the fact that the latter's "collateral [for the loan] is thin," it was willing to guarantee the loan because of the "importance of this account to Universal Atlas Cement Division and the opportunities of increased sales and profits" (*ibid*). After approval of the loan it submitted to Certified a proposed agreement under which the latter would undertake to buy 65% of its cement requirements from UAC for a period of 10 years (CX 44; Tr. 844). While Certified did not sign the agreement, it did increase its cement purchases from UAC sharply, from approximately 15% in 1962 to 54% in 1963 (CX 36).

36. Despite the infusion of additional capital as a result of the Bankers Trust loan, Certified continued to experience financial difficulties. During the spring of 1963 Certified experienced a build-up in its accounts receivable loans in excess of the $1.6 million limitation set forth in the loan agreement with the bank (RX 19, 20). It also fell $120,000 short of the net current assets requirement of $600,000 under the loan agreement (RX 24, 26). The figures for the year ending June 30, 1963, revealed that Certified had suffered a loss of $655,850, and had a working capital deficit of approximately $200,000 below that required under the agreement (CX 24). These difficulties were due to a number of factors, including losses on two large construction projects as a result of having to make deliveries during one of the most severe winters in a decade, unanticipated expenses incurred in connection with the opening of its two plants in New York City, a decline in ready-mix prices, and serious collection problems which plagued the entire construction industry (RX 19, 20, 24, 26). Upon being advised of Certified's difficulties, the bank, with the concurrence of respondent, agreed to waive the various violations of the loan agreement. The $1.6 limitation on outside borrowing was temporarily increased to $2.1 until September 30, 1963, this amount later being increased to $2.5 and the term of the increase extended for two years (Tr. 1084; RX 20, 22, 30, 33, 34).

37. Certified undertook various measures in an effort to economize and to reduce capital expenditures. The four principal officers took a waiver of salary at the collective rate of $45,000 a year.

Plants were closed down in all areas where construction activity had slackened. The Northern Lightweight Aggregate plant was not operated after mid-November 1963. Payments to suppliers were postponed as long as possible and the company deferred all but the most necessary purchases of equipment (Tr. 888; RX 31, 39). In an effort to reduce its interest payments on accounts receivable financing, it transferred such financing from Franklin National Bank to Commercial Credit Corporation, under an agreement which permitted it to borrow 85%, instead of 80%, of accounts receivable, and to save 1.5% in interest (RX 30, 34–36).

38. Despite these efforts, Certified continued to suffer from a capital and cash deficiency. Among other things, it was unable to generate the cash necessary to meet payment on a $60,000 mortgage note due October 1, 1963, or to meet payment of $250,000 on subordinated convertible notes due December 31, 1963 or to pay amounts due to basic suppliers, totaling approximately $675,-000, including $118,000 owing to Gulf Oil Company and $155,000 owing to respondent. It was also in arrears on taxes amounting to $40,000 (CX 63, 64 A, E, I; RX 38, 39, 42). As will be later noted, it was able to meet pressing obligations only because of further advances by Bankers Trust, which were made with U.S. Steel approval after the start of acquisition negotiations.

39. Certified's declining financial condition in the latter part of 1963 is reflected in its financial statement of December 31, 1963. This reveals that it lost $928,444 for the last six months of the year, or approximately $155,000 a month (CX 30). These figures may be compared with those for the three months ending September 30, 1963, when it lost $151,409, or $50,500 a month (CX 29). At the end of December it had a deficit of over $70,000 in net working capital or net current assets, compared to net current assets of approximately $375,000 at the end of September. Its financial statement for the seven months ending January 31, 1964, indicates that its rate of loss was accelerating in the latter months of 1963. It lost $1,141,146 for the seven-month period, which is a loss rate of $163,000 a month, or a loss of $212,000 for the month of January. By the end of January 1964, it had a deficit in net working capital of $279,000 (CX 31). For the four months ending April 30, 1964 (when it was acquired by respondent), Certified sustained a loss of $871,518, or a loss rate of $218,000 a month (CX 32 A).

40. Certified approached U.S. Steel in November 1963 to suggest that the latter acquire an interest in it. Negotiations between

the two companies were continued until March 1964, when a firm agreement was reached, subject to approval of Certified's stockholders. The details of such discussions and the other circumstances surrounding the acquisition will be hereinafter discussed in greater detail.

II. *The Acquisitions*

A. National-Ryan

41. Prior to its acquisition of the Ryan companies in September 1963, respondent National was involved in possible merger negotiations with another company and Certified Industries. In 1962, the now president of National, but then connected with another cement company, arranged a meeting between a broker representing Bangor & Aroostock Company (a diversified company) and representatives of respondent and Certified Industries, to explore the possibility of Bangor & Aroostock's acquiring both companies and operating them on an integrated basis. The interests then controlling National were receptive to the Bangor & Aroostock proposal. However, the proposed acquisition and merger was ultimately rejected by Certified in January 1963 when it secured the $3.3 million loan commitment from Bankers Trust Company, guaranteed by respondent U.S. Steel (N Tr. 866–872; CX 84 E–G).

42. After respondent National's president assumed that office in May 1963, he entered into discussions with members of the Ryan family, looking toward respondent's acquisition of Ryan and its affiliate, N. Ryan (N Tr. 873). Although Ryan had operated at a profit in the fiscal year ending February 28, 1963, it had sustained a loss of $235,000 in the previous year and its president felt that with the declining demand for concrete in the New York market and the increasing difficulty in competing with vertically integrated companies, it would be to the long-range advantage of his companies to join forces with a cement company (N Tr. 935, 939; NCX 25–26). Negotiations were successfully completed on or about September 23, 1963, when respondent National acquired all the stock of Ryan and N. Ryan by exchanging therefor 57,000 shares of National's common stock and 7,000 shares of National's Class B preferred stock, for a total cost of $1.6 million (Admitted, Ans., par. 3; NCX 18, note 1). On March 1, 1964, N. Ryan was merged into Ryan. Since its acquisition Ryan has been operated as a wholly owned subsidiary of National (CX 38 A, 40 E–F).

B. U.S. Steel-Certified

43. Prior to Certified's acquisition by a subsidiary of respondent U.S. Steel in April 1964, Certified had had discussions and negotiations with a number of other companies during 1962 and 1963, looking toward Certified's merging with or being acquired by another company. Initially, such discussions were undertaken with the thought of broadening Certified's horizons or of achieving a profit to the individuals who operated and controlled the company. However, in the latter stages, when Certified's financial condition began to deteriorate, its officers felt it was mandatory to sell out to another company (Tr. 820).

44. In early 1962 Certified entered into negotiations with representatives of Colonial Sand & Stone Company, a large, vertically integrated ready-mixed concrete and cement company. Certified proposed to merge into Colonial on the basis of an exchange of stock, with Certified's stockholders to receive one share of Colonial's stock in exchange for 2½ shares of Certified's stock, which was then being quoted at $6.50 a share. Negotiations were terminated in the summer of 1963 because of Colonial's concern about Federal Trade Commission reaction to the merger, and because Certified's deteriorating financial condition had then become known to it (CX 84 A–B).

45. During 1962 and 1963 a series of intermittent meetings were held by representatives of Certified with representatives of Triangle Lumber Corporation of Great Neck, New York, whose subsidiary Triangle Cement Corporation was an importer and distributor of cement. Various proposals were discussed, including one under which Triangle would acquire an interest in Certified by purchasing a substantial block of the latter's stock at $5.00 a share, and another under which Certified would exchange its stock for Triangle's on a two for one basis. The proposed arrangement contemplated that Triangle would arrange for increased financing for Certified. The negotiations were finally terminated by Triangle in the middle of 1963 (CX 84 B–C).

46. In the summer of 1962, Certified entered into discussions with Perry Andreas (then president of North American Cement Company, and later president of respondent National), looking toward the possible acquisition of Certified's subsidiary, Northern Lightweight Aggregate, Inc., by Andreas and members of his family. These negotiations were unsuccessful since agreement could not be reached on a price to be paid for Northern Lightweight. However, through Andreas' good offices, a further series

of negotiations were arranged, beginning in September 1962, with a representative of Bangor & Aroostock Corporation, looking toward the acquisition of the stock of both National and Certified by Bangor & Aroostock. The latter offered to pay $3.50 a share to Certified's stockholders and to furnish financial support to Certified, on the basis of $500,000 in long-term financing and $1 million on a six-months' basis. Negotiations were terminated in January 1963, after Certified had received the loan commitment from Bankers Trust Company, guaranteed by U.S. Steel. Certified's officials felt that the loan arrangement was a more advantageous proposition for their company since it would permit its continued independent existence and because they considered the financial support and cash payment by Bangor & Aroostock inadequate (CX 84 E–G; Tr. 832–833).

47. During 1962 and 1963 Certified discussed with American Cement Corporation a possible merger between Certified and M. F. Hickey Company, Inc., a ready-mix concrete company which American Cement had acquired in 1960. Under a tentative agreement reached in June 1963, Certified was to acquire Hickey's assets from American, in return for 287,000 shares of Certified's stock. Since Certified did not have sufficient capital to finance the purchase and was itself in need of financial assistance, American was to arrange for adequate financing for the new, expanded Certified, including a plan to prepay the $3.3 million loan to Bankers Trust Company. A tentative arrangement was subsequently made with several banks to provide Certified with a $4 million loan. However, Certified's officials did not consider this adequate since the amount remaining after paying off the $3.3 million loan from Bankers Trust would be insufficient to provide the working capital required for the Certified-Hickey operation, both of which companies were then losing money. Negotiations were finally terminated in September 1963 by American Cement, which advised Certified that the Federal Trade Commission's reaction to the proposed merger was not as favorable as they had anticipated (CX 84 G–I).

48. During 1962 and 1963 Certified held a series of meetings with Alpha Portland Cement Company of Easton, Pennsylvania. Initially these meetings were concerned with Alpha's attempting to arrange for financial assistance to Certified. Efforts by Alpha during 1962 to arrange for financing of Certified through various financial institutions were unsuccessful. In the fall of 1963 a further series of meetings took place at which there was discussed a possible acquisition of Certified by Alpha, and Alpha's assump-

tion of the guarantee of the Bankers Trust loan. However, these meetings were terminated when Alpha informed Certified that its board of directors had voted against the acquisition (CX 84 J–K).

49. In the latter part of 1962 Certified's president, E. L. Litwin, sought to interest Seagrave Corporation, a company with diversified manufacturing interests, in buying into his company. Litwin proposed that Seagrave make an initial payment of $3.00 a share for Certified's stock, plus a future payout based on earnings, and obtain needed working capital for the company. After examining Certified's financial statement, Seagrave lost all interest in Certified unless the company could be acquired for a relatively nominal consideration. Negotiations were terminated by Seagrave in early 1963 (CX 84 K–I; Tr. 1194).

50. Certified's initial effort toward being acquired by respondent U.S. Steel took place in early November 1963 (Tr. 871, 874). Certified advised U.S. Steel that it felt its survival was dependent on its ability to "tie up with a cement company," in view of its financial losses, and its difficulties in competing with the other major ready-mix companies which were either vertically integrated, or enjoyed a favored price relationship, with a cement company. Certified's president, E. L. Litwin, proposed that U.S. Steel, (a) acquire an interest in Certified by purchasing, at $5.00 a share, approximately 50% of the 435,300 shares of Class "B" common stock held by Certified's officers, (b) advance to Certified $1,250,000 to be used to liquidate an existing debt of $1,853,000, of which a substantial portion had become, or was about to become, due, and (c) arrange additional financing of $1,750,000, to supplement its working capital, provide funds for modernization and for three new plant locations (CX 61). This would have required an investment of over $4 million by U.S. Steel, in addition to its commitment on the $3.3 million loan by Bankers Trust.

51. Respondent U.S. Steel had mixed feelings about Certified's proposal. It tried to balance Certified's value to it as the major consumer of UAC cement in the New York area,[12] with the undesirability of any further investment in a company which was in Certified's state of financial debility. U.S. Steel's evaluation of Certified's financial condition and its doubts as to whether any further investment in the company was justified is reflected in the following excerpts from a memorandum, dated November 26, 1963, sent to U.S. Steel's administrative vice president in

[12] In 1963 UAC sold 968,000 barrels of cement in the NYMA, of which Certified purchased 567,500 barrels (CX 42, 30).

charge of fabrication by its fiscal vice president and treasurer (CX 62):

1. The company [Certified] suffered a substantial loss for the year ending June 30, 1963. As a result, its cash position is thin—it will have difficulty meeting a debt maturity at the end of December—and it needs additional capital, if it is to continue. *Thus, we must say to you that there is no financial basis for lending additional funds at this time.* * * * There is no additional collateral available to secure any further advances of substance. The company's financial needs appear to be in the neighborhood of an additional $4,000,000.

2. From the viewpoint of a businessman and in the light of the financial position summarized above, we *cannot consider this a good business risk.* Being caught in an excess capacity of cement, and a severe competitive situation as between ready-mix operators, we know that the past profit opportunities gradually have dried up and it is difficult to see anything on the horizon which would improve those profit opportunities. * * * Thus, *the lack of profit, from a business viewpoint, makes this an unattractive investment. In fact, one wonders why any company would acquire such an operation when the chance for loss so greatly exceeds the chance for profit.*

3. *The remaining consideration of significance would be in the area of how valuable this distribution is to us.* In other words, is the profit to the plant in excess of the losses which will continue to be sustained by this outlet?

* * * It is our surmise that once any additional significant step is taken in the way of financial advances, we should have some means of protecting our investment. Since adequate collateral is not available, this means that we must have a position of obtaining control. It also means possibly that we have to be willing to be a direct participant in the ready-mix business (emphasis supplied).

52. The doubts of U.S. Steel officials were resolved in favor of proceeding with negotiations to acquire an interest in Certified because of Certified's importance as an outlet for UAC cement and because it was felt to be necessary to protect U.S. Steel's already heavy investment in Certified. As stated in a memorandum prepared for a meeting of the board of directors in January 1964, by the executive vice president in charge of production (CX 74 B):

If Certified ceases operations, Universal Atlas Cement would suffer an irreplaceable loss in its present market for its Hudson product and be seriously embarrassed commercially in one of its major markets during the last sixty years.

* * * * * * *

Certified's financial position probably will cause bankruptcy unless it can find a purchaser willing to invest additional funds in the business. Its efforts in this regard, we understand, have not been fruitful. In order to protect the substantial financial interest Universal Atlas Cement now has in Certified's business, it is necessary that action be taken at once.

53. U.S. Steel officials did not consider Certified's initial proposal acceptable since it would not be assured of control of the company, despite additional financial assistance of $3 million ($1.25 million for debt liquidation and $1.75 million for additional working capital, plant modernization and expansion) and payment of approximately $1.3 million for 50% of the stock of the principal officers. It also considered excessive, Certified's proposal that it pay $5.00 a share for the stock. Various alternative proposals were considered within the U.S. Steel organization, under which U.S. Steel would obtain a controlling interest in Certified by paying between $3.25 and $4.50 a share for Certified's stock (CX 61 C–D).

54. In the meantime, Certified's financial condition continued to worsen. As previously mentioned, its losses for the six months ending December 31, 1963, were $928,400 (CX 30). In order to meet pressing financial obligations, Certified sought an increase in the guaranteed loan from Bankers Trust Company. During December 1963 U.S. Steel agreed to an increase in the loan by $200,000, on the condition that Certified would give it an option to purchase, at a satisfactory price, a majority of its voting stock (CX 74 A). In subsequent discussions with Certified's president, the latter agreed that he and three other officers, who together controlled approximately 65% of its stock, would sell 51% of Certified's stock to U.S. Steel at $2.40 a share (compared to $5.00 a share which Certified sought in its original proposal, and $3.25 to $4.50 a share which U.S. Steel officials were initially considering offering). Based on this undertaking, U.S. Steel consented to a further $200,000 advance to Certified by Bankers Trust, guaranteed by U.S. Steel (CX 73 A, 74 A, 63; RX 38).

55. Negotiations between Certified and U.S. Steel continued from January to the latter part of March 1964, before agreement was finally reached. As the negotiations proceeded, Certified's financial condition worsened. Certified's financial statement for the seven-month period ending January 31, 1964, indicated that it had sustained an operating loss of $1,141,000 and that its rate of loss was increasing (CX 31). Despite the additional advance of $200,000 by Bankers Trust Company, Certified was unable to meet a number of its financial obligations, including payments due for taxes, gasoline, oil and tires (RX 47, 48; CX 64 A, 74 A). Commercial Credit Corporation, with which Certified had been discounting its accounts receivable on a relatively favorable basis, notified Certified that it would restrict its borrowing to quality accounts (CX 64 A). Because of its concern that Certified might

be thrown into bankruptcy during the pendency of the negotiations, U.S. Steel agreed to increase its loan commitment under the Bankers Trust Agreement by $500,000, of which $300,000 was advanced to Certified in early February and two $100,000 payments were made in the latter part of February and early March (RX 41, 43–49).

56. Although U.S. Steel had initially indicated a willingness to purchase a 51% interest in Certified, as Certified's condition worsened and its own financial involvement increased, U.S. Steel modified its approach toward the acquisition. It concluded that (CX 73 B):

> * * * the best way of continuing this company in business, without going through the problems of a bankruptcy, is by voluntary liquidation. Through this means, if acceptable to the stockholders, we would propose to acquire the assets. The price at which the assets would be acquired would be a reflection of two things:
>
> 1. An amount sufficient to liquidate indebtedness.
> 2. An amount to give something to the stockholders. This latter figure would be a minimum one, but would have to be enough to induce the stockholders to liquidate their company.

Since Certified had earlier indicated a willingness to accept $2.40 a share for 51% of its stock, or a total of $1.5 million (in addition to approximately $4 million in additional financial assistance), U.S. Steel considered offering it $1.5 million for its assets, in addition to assuming Certified's liabilities (*Ibid*).

57. Final agreement on a plan for U.S Steel's acquisition of Certified was reached in the latter part of March 1964. Under the agreement, all of Certified's assets were to be sold to New Providence Corporation, a U.S. Steel subsidiary. New Providence agreed to, (a) assume and pay Certified's obligations and liabilities (with certain limited exceptions), and (b) pay to Certified's stockholders the sum of $1,026,000 for its assets (RX 58; CX 75). After payment by Certified of certain obligations which New Providence had not assumed, there was expected to remain for distribution to stockholders the sum of $1 million, or $1.65 a share (RX 58 C).

58. The agreement was approved by Certified's board of directors on March 30, 1964, and by its stockholders on April 14, 1964. New Providence took over the assets and business formerly operated by Certified on April 30, 1964. Since the acquisition of its assets, Certified's business has been operated as an autonomous division of U.S. Steel, known as Certified Industries Division of United States Steel Corporation. E. L. Litwin, the former presi-

dent of Certified, became vice president and general manager of the division, and Robert A. Raggio, treasurer of UAC, became president of the division (Tr. 786, 893, 1175). During the four-month period ending April 30, 1964, Certified sustained a loss of $871,500 (CX 32 A). In the eight-month period ending December 31, 1964 (after its acquisition), Certified lost $1,204,200 (CX 32 B). In the calendar year 1963 UAC sustained a loss of $12,000 on sales of $2,130,000 to Certified. However, such sales contributed approximately $534,000 toward the absorption of fixed expenses by UAC (Tr. 1207–1208). In the 12 months ending June 30, 1965, UAC lost $215,000 on sales to Certified, but such sales contributed $623,000 toward the absorption of fixed expenses (CX 99).

III. *Market Conditions*

A. The Product Market

1. *Portland Cement*

59. "Portland cement" is a material which in the presence of water binds aggregates, such as sand and gravel into concrete. For purposes of these proceedings, it includes Types I through V of "portland cement," as specified by the American Society for Testing Materials. It does not include masonry or white cement. Portland cement is the essential ingredient in the manufacture of ready-mixed concrete. There is no practical substitute for portland cement in the manufacture of concrete (Admitted, N Ans., par. 2 and 3; Admitted, US Ans., par. 12; Prehearing Orders, par. 1).

2. *Ready-mixed Concrete*

60. "Ready-mixed concrete" is a material which is processed from portland cement and aggregates, and is delivered to purchasers in a plastic and unhardened state. It includes central-mixed concrete, shrink-mixed concrete, and transit-mixed concrete (Admitted, N Ans., par. 2; US Prehearing Order, par. 1; CX 9 A).

B. The Industry

1. *Portland Cement*

Customers

61. Portland cement is sold to (a) producers of ready-mixed concrete, (b) manufacturers of concrete products, (c) building material dealers, and (d) construction contractors. Cement com-

panies, as a rule, depend on a large number of such customers as outlets for the production of their manufacturing plants (Tr. 237–238, 295, 330, 331, 361–363, 433, 473, 474, 975–976, 1025–1026).

62. Firms engaged in the production of ready-mixed concrete are the principal customers for portland cement. In 1964 ready-mixed concrete producers consumed over 215 million barrels of portland cement, and accounted for approximately 59% of total industry shipments. In the northeastern part of the United States (which includes plants in the area from New York State to Maine) shipments to ready-mixed concrete customers accounted for over 65% of the total shipments from that area (CX 1, p. 10).

Structure

63. The portland cement industry in the United States consists of 51 companies operating 181 manufacturing plants. In 1964, total shipments of portland cement by such plants amounted to 366,304,000 barrels having a value of approximately $1.2 billion (CX 1, 2, and 3). In that year imports of foreign cement into the United States amounted to 3,633,000 barrels (CX 1, p. 6).

64. In recent years the cement industry has operated with substantial excess capacity. In 1963 and 1964 the per cent of capacity utilized by cement companies in the United States was 73.8% and 76.9%, respectively (CX 1 and 6).

65. There is a relatively high degree of concentration in the cement industry in the United States. In 1958 (the latest year for which there are figures available), the four largest companies accounted for 32% of total industry shipments; the eight largest companies accounted for 50%; and the 20 largest companies accounted for 78%. In recent years, there have been a substantial number of mergers or acquisitions in the industry. During the period from 1956 to 1963 there were 22 mergers involving cement companies, while only 10 new companies entered the industry. In 1963 there were 51 cement manufacturing companies, as compared to 62 companies in 1958 (CX 2, 3, 11 A–B, 12, 13 A).

66. Prior to 1959 there were relatively few cement companies which were affiliated with the consumers of portland cement. In recent years there has been a significant trend of mergers and acquisitions by which ready-mixed concrete companies (the principal consumers of portland cement) have become acquired by portland cement companies (CX 45; Tr. 215, 242–243, 300–303, 335–336, 371–372, 470, 479, 978, 1023–1029, 1123).

67. There were only four acquisitions of ready-mixed concrete

firms by cement companies in the United States prior to 1959. During the period from 1959 to 1965, there were over 30 acquisitions by cement companies of ready-mixed concrete firms in the United States (CX 45).

Market Characteristics

68. The effective marketing area of a cement manufacturer is generally limited to a regional area around its cement plant or distribution terminal. This is dictated by such factors as the homogeneous nature of the product, transportation costs, and necessity of providing prompt delivery service (Tr. 214, 288, 322–324, 355, 427–429, 452–454, 965–966, 1021, 1119).

69. Portland cement is a fairly standardized product, for which consumers will not generally pay a higher price than the lowest price prevailing at a given destination. Although varying prices are sometimes quoted by cement companies, based on a mill price plus freight charges to the destination, most companies reserve the right to meet the lowest delivered price of any cement supplier, and delivered prices in a given area tend to be uniform. This frequently requires a manufacturer to absorb all or part of transportation costs (Tr. 222, 224, 291, 294, 323–327, 356–358, 457, 460–462, 967, 1022–1023, 1120).

70. Where price and quality are equal, consumers of portland cement tend to favor suppliers which provide the most prompt delivery service. This has resulted in the increased use of truck delivery for cement shipments. Shipments by truck accounted for 65.9% of cement shipments in 1964, as compared to 47.1% in 1960 (Tr. 214, 216, 288–289, 323, 355–356, 428–429, 454–455, 534, 673, 749, 965, 1021; CX 1 and 4).

71. The growth of truck delivery has been accompanied by an increase in the use of distribution terminals to serve heavily populated local areas and enable cement suppliers to provide the required rapid delivery. The number of distribution terminals has increased from approximately 175 in 1963 to approximately 235 in 1965 (Tr. 213, 429, 455, 534–535, 966, 1021–1022, 1119; CX 2 and 3).

2. *Ready-mixed Concrete*

Customers

72. Ready-mixed concrete is sold principally to construction contractors and subcontractors for use in the construction of commercial buildings, schools, residential structures, foundations,

sidewalks, sewers, bridges and roads (Tr. 540, 583, 613, 637, 638, 674, 712, 753, 1003–1004).

Structure

73. In 1963 the ready-mixed concrete industry in the United States consisted of approximately 4,600 establishments. Most of these were small establishments with less than 20 employees. There were 1,020 ready-mixed concrete establishments with 20 or more employees in 1963, as compared to 944 such establishments in 1958 (CX 9 A).

74. As the above figures suggest, the ready-mixed concrete industry in the United States is highly fragmented. In 1958, the four largest firms accounted for only 2% of total industry shipments, while the 20 largest firms accounted for only 6% and the 50 largest accounted for 11% (CX 17). However, in certain large metropolitan areas a high degree of concentration existed in 1958, with the four largest firms accounting for between 34% to 88% of total shipments in the various areas for which data are available in the record (CX 43 B).

Market Characteristics

75. The marketing area of ready-mixed concrete is limited to an area within a relatively narrow radius of the ready-mixed batching plant, due to the nature of the product. Ready-mixed concrete will set or harden within a relatively short time, and it is relatively expensive to transport it for any considerable distance (Tr. 491, 561–562, 575, 606–607, 633, 667, 776–777, 1000).

76. Ready-mixed concrete is generally priced on an individual quotation basis. Among the principal factors determining the price are the size of the job, the strength of the concrete required, and the distance of the job from the batching plant. A small differential on a large job may cause a purchaser to favor one ready-mixed concrete supplier over another (Tr. 503, 508, 540–542, 567, 583–584, 615, 679–682, 713, 756, 767).

C. The Relevant Geographic Markets

1. *Portland Cement*

a. Northeastern Market

Structure

77. The New York City metropolitan area is served principally by cement companies with manufacturing plants located in the Hudson River Valley of New York, and the Lehigh Valley of

Pennsylvania. There are 18 cement companies serving the New York City metropolitan area, from plants located in either the Hudson River Valley or the Lehigh Valley, or in both areas. Six of these companies also maintain distribution terminals within the New York City metropolitan area. In addition to these cement manufacturing companies, there are several distributors of imported cement who sell or have sold in the New York City metropolitan area from terminals located in the area (CX 2, 3, and 42).

78. Plants located in the Lehigh Valley distribute their cement principally in southeastern New York, eastern Pennsylvania, New Jersey, lower Connecticut, Delaware, and part of Maryland (Tr. 288–290, 322, 354, 452). Plants located in the Hudson River Valley distribute their cement principally in eastern New York, eastern Pennsylvania, northern New Jersey, and lower New England, including Connecticut, Rhode Island, Massachusetts, southern New Hampshire, and Vermont (Tr. 214, 452, 964, 1020, 1119). Distributors of imported cement supplying the New York City metropolitan area sell such cement principally in the New York City metropolitan area and adjacent areas in lower Connecticut (Tr. 427, 1052).

79. Total shipments of portland cement by all cement plants serving the New York City metropolitan area and by the principal distributors of imported cement serving the area were as follows, for the years 1960 through 1964 (CX 41):

	Barrels (000)
1960	39,298
1961	39,342
1962	44,020
1963	48,116
1964	47,253

80. Market share and concentration data in the record are based principally on data obtained by the Commission from the 18 cement companies and the two main importers distributing cement in the New York City metropolitan area. Complaint counsel contend that the northeastern area of the country served by these companies is an appropriate geographic market. Respondents contend that, to the extent the northeastern section of the country may be considered an appropriate geographic market, it should include all of New York (and not merely the eastern

portion thereof, as proposed by complaint counsel), and should also include the District of Columbia and Virginia. These contentions will be later considered in greater detail. However, it may be noted at this point that in 1963 the total market, as suggested by respondents, involved shipments of 65 million barrels of cement by domestic producers and approximately 1.5 million barrels by importers (CX 6, p. 12; NRX 2), compared to shipments of 48.1 million barrels by producers and importers in the geographic area proposed by complaint counsel (CX 41).

81. In terms of the broader area and the larger universe figure of 66.5 million barrels suggested by respondents, the four largest companies shipping cement into the New York City metropolitan area accounted for 25% of cement shipments into the area in 1963 (CX 6, p. 12; CX 41). In terms of the narrower geographic area proposed by complaint counsel and the smaller universe figure suggested by them, the four largest companies shipping cement into the New York City metropolitan area accounted for 34.5% of cement shipments into the area (CX 41). In 1963 UAC ranked first among the top four cement companies in the northeastern section of the country. It accounted for 9.8% of cement shipments into the area in 1963, based on the universe proposed by complaint counsel, and 7.4% based on the universe suggested by respondents. Respondent National ranked sixteenth among companies serving such area. It accounted for 2.8% of cement shipments in 1963, based on the universe proposed by complaint counsel, and 2% based on the universe suggested by respondents.

b. New York City Metropolitan Area

Structure

82. For purposes of these proceedings, the New York City metropolitan area (herein referred to as the NYMA) includes the five counties comprising New York City (New York, Bronx, Queens, Kings, and Richmond), plus the Long Island counties of Nassau and Suffolk to the east of New York City, and Westchester County to the north. At least eight of the cement companies supplying this area maintain or have maintained separate distribution terminals within this geographic area (CX 2, 3). A number of the cement suppliers who testified in these proceedings considered the NYMA, or the principal portion thereof, to be a distinct market or submarket for their product (Tr. 235, 292–293, 360, 433).

83. Between 1960 and 1964 cement shipments into the NYMA

by the companies serving the area represented between 25% and 31% of the total shipments of their plants serving the area (CX 41, 42). In 1963 these companies shipped 12,777,000 barrels of cement into the NYMA, which represented almost 20% of the total consumption of portland cement in the 11-State northeastern area suggested by respondents as the minimum appropriate geographic market (CX 6, 42).

84. Prices within the NYMA are fairly uniform, despite the differing production and transportation costs of the cement companies supplying the area. There have been a number of price reductions in the area since 1962. Within a relatively short period a price reduction initiated by one company has been matched by other companies serving the area. Prices in the NYMA are generally lower than those charged by cement companies in other areas of the northeast, despite the fact that transportation costs to the NYMA are higher than to certain other portions of the northeast. While price changes in the NYMA have sometimes been accompanied by proportionate reductions elsewhere in the northeast, this has frequently not been the case (Tr. 223–224, 292–294, 310, 325–327, 358–360, 429–431, 460, 471, 967–969, 1022–1025, 1120–1121).

85. The NYMA is presently served by approximately 19 suppliers of portland cement from 24 cement plants and seven distribution terminals. This area is served by more cement companies than any other metropolitan area in the United States (Tr. 235, 471; CX 2, 3, 41, 42).[13]

86. The NYMA has a relatively high degree of concentration at the cement supply level. In 1962 the four largest suppliers to the area accounted for 44.5% of total cement shipments into the area by the 20 suppliers then principally serving the area. In 1963 the percentage accounted for by the top four companies increased to 48.5% and in 1964 to 53.4% (CX 42).

87. In 1962 respondent U.S. Steel's UAC Division was the sixth largest cement supplier in the NYMA, accounting for 5.2% of the shipments into the area by the 20 principal suppliers. This represented a decline from its 1960 share of 7.6% and its ranking as the third largest supplier in the area. In 1963 UAC's share of cement shipments into the NYMA increased to 7.6%, and it became the fourth ranking supplier. In 1964, the year in

[13] CX 41 discloses that Alpha Portland Cement has a plant in Pennsylvania. However, this plant is no longer in existence (Tr. 965). The same exhibit discloses that Lehigh Portland Cement has two plants in Pennsylvania. However, neither plant serves New York (Tr. 1020). Triangle Cement is no longer serving New York, its terminal having been taken over by Atlantic Cement (Tr. 1061).

which U.S. Steel acquired Certified, UAC's share increased to 11.4%, and it became the second largest supplier of cement in the area (CX 42).

88. In 1962 respondent National accounted for 1.8% of the total shipments of cement into the NYMA by the 20 principal suppliers and was the seventeenth ranking company. This represented a decline from its 1960 share of 4.1% and its rank of twelfth. In 1963, the year in which it acquired Ryan, National's share increased to 2.4%, and it was the sixteenth ranking company. In 1964 its share increased to 4.8% and it became the sixth ranking company in the NYMA (CX 42).

89. The top ranking company in the sale of cement in the NYMA from 1960 to 1964 was Colonial Sand & Stone Co., Inc., a vertically integrated ready-mixed concrete and cement company. Between 1960 and 1963 Colonial accounted for from 21% to 22% of cement shipments into the area. In 1964 Colonial's share of the NYMA cement market increased to 31% (CX 42).

90. Prior to 1959 there were no cement companies in the NYMA which were affiliated with a ready-mixed concrete company or other consumer of cement (CX 45). The first instance of a cement-ready-mixed concrete, vertically integrated operation in the NYMA occurred in November 1958, when Colonial Sand & Stone Co. erected its own cement producing facilities at Kingston, New York, in the Hudson River Valley (Tr. 996; RX 61, p. 2). Colonial was, and is, the largest ready-mixed concrete company and the largest consumer of cement in the NYMA. As a result of prior acquisitions, it then enjoyed partial vertical integration, having its own aggregate producing and towing facilities. With the erection of its own cement plant under the name Hudson Cement Company, it became a fully integrated company, although it continued to purchase substantial quantities of cement from other cement producers for several years (Tr. 997, 275, 309, 517; N Tr. 936–938).

91. The next instance of cement-ready-mixed concrete, vertical integration to occur in the NYMA, and the first to come about through acquisition, took place in January 1960, when American Cement Corporation acquired M. F. Hickey Company, Inc., of Brooklyn, New York. The Federal Trade Commission thereafter issued a complaint against American Cement charging it with having violated Section 7 of the Clayton Act by virtue of the M. F. Hickey acquisition (Docket No. C–681). Based on a consent agreement entered into with American Cement, the Commission issued its decision and order on January 20, 1964, under

which American Cement was ordered to divest itself of Hickey. Hickey's plant and assets were sold on June 30, 1964, to Ajax Block Corporation, which continued the Hickey operation under the same name (CX 93 B; Tr. 574). The present Hickey company is purchasing 75% to 80% of its cement requirements from the Hercules Cement Division of American Cement, to which it is indebted under a purchase money mortgage of $3.2 million (Tr. 582, 595).

92. The next cement company to become vertically integrated with a ready-mixed concrete company was respondent National which, as previously mentioned, acquired the Ryan companies in September 1963. The U.S. Steel(UAC)-Certified combination was the next instance of vertical integration. As previously found, this took place in April 1964.

93. The latest instance of vertical integration in the NYMA as to which there is evidence in the record, took place in June 1964, when Marquette Cement Manufacturing Company, which served the NYMA from a plant in the Hudson River Valley, established a ready-mixed company under the name Lawrence Concrete Company. In November 1964, Lawrence acquired the business and assets of Cooney Brothers, a large ready-mixed concrete company in the New York City area (Tr. 1124).[14]

Recent Market Trends

94. As previously found, the cement industry nationally has operated with substantial excess capacity. This condition has been particularly pronounced in the NYMA. In the late 1950's and early 1960's the cement companies supplying the NYMA experienced substantial competition from distributors importing foreign cement (Tr. 406–407). Despite foreign competition, an increase in the demand for cement in the NYMA during the early 1960's made it possible for cement companies to maintain prices at a level sufficient to enable them to operate profitably. However, beginning around the latter part of 1962 the demand for cement, particularly from ready-mixed concrete companies, began to slacken, and this condition has continued to the present (Tr. 325, 344, 380; N Tr. 919). Thus, shipments of cement into the NYMA declined from a peak of 13.6 million barrels in 1962 to 11.6 million barrels in 1964, and consumption of cement by ready-mix firms declined from 9.4 million barrels to 7.7 million barrels during

[14] In 1963 Cooney was the sixth ranking ready-mix company in the NYMA, in terms of cement consumption. In 1964 it was the seventh ranking company (CX 93 A).

the same period (CX 42, 93). This decline in cement consumption was aggravated by the fact that Colonial Sand & Stone, which consumed over 50% of the cement in the area and was an important outlet for the cement of a number of cement producers, had become vertically integrated and, by 1964, was producing over three-fourths of its cement needs (CX 42, 93; Tr. 339, 379, 480–481, 984, 1057, 1130; N Tr. 930).[15] Also affecting the situation was the entry into the market of a new and aggressive cement company, Atlantic Cement Company which, within two years after entering the market, became the largest cement supplier in the northeastern market and an important supplier in the NYMA (CX 41, 42).[16]

95. The decline in the demand for cement resulted in considerable pressure on cement prices, as cement companies began to compete aggressively for the available business. This resulted in the decline of prices in the New York City area from approximately \$3.85–\$4.00 a barrel in 1961–1962, to around \$3.09 in 1965 (Tr. 224, 230, 236, 291–292, 325, 359, 380, 457–462, 472, 498, 967–969, 1120). Price competition among cement companies resulted in prices in the NYMA which were the lowest in the northeast, despite the fact that transportation costs to the area were higher than to certain other areas served by these cement companies (Tr. 294, 327, 358, 460). As a result, the profits of some of the cement companies began to decline around 1962, and at least one of the smaller ones began to operate at a loss (Tr. 306, 352, 417).

96. Accompanying the increase in price competition was an increase in the extension of credit by cement companies to ready-mixed concrete companies. Normally, customers were expected to pay for their cement purchases within 30 days and, if they desired to avail themselves of the 20-cents per barrel "cash" discount, they had to do so by the tenth of the month following delivery. However, beginning around 1962 cement companies began extending long-term credits to their ready-mix customers and permitted them to avail themselves of the cash discount on current purchases. This practice was more prevalent in the NYMA than in other areas of the northeast (Tr. 240–241, 299, 329, 369–371, 432–433, 1122).

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[15] In 1964 Colonial consumed 4,107,000 barrels of cement and produced 3,645,000 barrels, of which it consumed all but 210,000 barrels in its own operations.

[16] For the first two years after entering the market, Atlantic sold in the NYMA through a distributor, Triangle Cement Corporation (Tr. 219; RX 11).

2. *Ready-mixed Concrete-NYMA*

Structure

97. The NYMA is served by over 50 ready-mixed concrete producers. The great bulk of these are small producers, who operate a single batch plant and serve a relatively narrow geographic area of 15 to 20 miles from their plant. However, there are six or seven larger companies with multiple plants, which serve all or large portions of the NYMA. In addition to the regular ready-mixed concrete producers, there are a number of small distributors of ready-mixed concrete referred to in the industry as "gypsies," who purchase their ready-mixed concrete from other producers. They generally operate a single truck and serve the smaller construction projects. There are a considerable number of these operators serving the Long Island counties (CX 43, 92, 93; NCX 44; Tr. 490, 507, 530, 548, 561, 570, 578, 587, 606, 633, 655, 666, 709, 745).

98. In 1958, the four largest ready-mixed concrete producers in the New York Standard Metropolitan Statistical Area, as defined by the Bureau of Census (which includes the eight counties in the NYMA, plus Rockland County), accounted for 52% of the value of shipments by ready-mixed concrete establishments in that area (CX 43 B).[17] The record contains no current data concerning shipments by ready-mixed concrete establishments in the area. However, it does contain data on cement consumption by ready-mix firms accounting for the bulk of the cement purchased by ready-mix firms in the NYMA. Since all of the cement purchased by such firms is used in the production of ready-mixed concrete, the cement-consumption data in the record provide a reasonably reliable indicator of current concentration ratios in the ready-mix market and of the relative market position of the principal ready-mix firms. According to these figures, the four largest ready-mix firms accounted for the following percentages of cement consumption in the years 1962 to 1964: 56.9%, 56.6%, and 51.4% (CX 42, 93).

99. Since the above percentages are based on a comparison of cement consumption by the four largest ready-mixers with shipments to all cement users (including concrete products manufacturers and dealers), it is evident that they understate the extent of concentration existing among ready-mix firms in the NYMA. While the record does not contain precise data on the

[17] Official notice is herein taken of the definition of this area, as appearing at page 28 of "Standard Metropolitan Statistical Areas" issued in 1964 by the Bureau of the Budget.

amount of cement sold to, or consumed by, ready-mix companies as a group, it is possible to estimate this amount from other data and testimony in the record, which indicate that ready-mix companies accounted for at least 70% of all cement sold in the NYMA.[18] Based on the assumption that 70% of the cement sold in the NYMA was sold to ready-mix firms, it may be estimated that the four largest ready-mix firms accounted for the following percentages of cement consumption by all ready-mix firms in the NYMA in the years 1962 to 1964: 81.3%, 80.9%, and 73.6% (CX 42, 93).

100. Based on the assumption that the estimated figures of cement consumption by ready-mix firms provide a reasonably accurate universe of total cement consumption by such firms in the NYMA,[19] and that these figures, together with the actual figures of cement consumption by the principal ready-mix firms in the area, provide an appropriate basis for computing the market position of such concerns, the market shares of the principal ready-mix firms in the NYMA may be estimated as follows (CX 42, 93):

Market Shares of Principal Ready-Mix Firms in NYMA

	1962	1963	1964
Colonial Sand & Stone	49.9%	49.8%	50.1%
Certified Industries	8.6	11.7	9.8
Transit Mix Concrete Corp.	12.7	10.4	7.2
Ryan Ready-Mixed Concrete	10.0	8.8	6.4
M. F. Hickey	5.1	4.8	3.4
Cooney Brothers	2.4	2.3	2.5
Century Transit Mix	1.9	1.5	3.1

101. To the extent there may be any question as to the accuracy of the estimated figures of cement consumption by all ready-mix firms in the NYMA, the relative market position of the various

[18] As heretofore noted, ready-mix producers are the principal consumers of cement (par. 62, *supra*). Because of the high concentration of ready-mix producers in the NYMA, the proportion of cement consumed by them is even higher in that area than elsewhere in the country or in the northeast. Cement company officials who testified in these proceedings estimated that between 70% and 85% of their sales were to ready-mix producers (Tr. 237, 295, 330, 433, 474, 1026). Actual figures of cement purchases by the principal ready-mix firms in the NYMA accounted for between 66.4% and 69% of cement shipments into the NYMA between 1962 and 1964 (CX 42, 93).

[19] The estimated figures of cement consumption by ready-mix firms in the NYMA are: 9,545,000 barrels in 1962; 8,945,000 barrels in 1963; and 8,187,000 barrels in 1964. These figures were computed by applying the percentage, 70, to the figures of total cement shipments into the NYMA in the years indicated (CX 42).

firms may be determined by comparing actual figures of cement consumed by them with the actual figures of cement shipments to all customers by the principal cement companies serving the NYMA (CX 42, 93). In terms of total cement consumption, the shares of the principal ready-mix firms were as follows:

Percentage of Cement Consumed by Principal Ready-Mix Firms in NYMA

	1962	1963	1964
Colonial	34.2%	34.8%	35.1%
Certified	6.0	8.2	6.7
Transit Mix	8.8	7.3	5.0
Ryan	7.0	6.2	4.5
Hickey	3.5	3.4	2.4
Cooney	1.7	1.6	1.8
Century	1.3	1.1	2.1

Recent Market Trends

102. Like cement companies, for which they are the principal customers, ready-mix firms have suffered from a declining demand for their product beginning around the end of 1962 or early 1963 and continuing down to the present time. Prior to that period there was a fairly brisk demand for concrete due to, (a) an increase in building construction and modification activity within New York City in anticipation of certain changes in the New York City building code, (b) the demands of the World's Fair, and (c) construction activity on Long Island. However, construction activity in the NYMA began to decline around the end of 1962, with a resultant decline in the demand for ready-mixed concrete and cement (Tr. 325, 344, 360). While the record does not contain any overall figures of ready-mixed concrete sales during this period, the figures of cement consumption by the principal ready-mix companies provide a reliable indicator of the extent of the decline in the demand for concrete during this period. Thus, cement purchases by the principal ready-mix companies declined by about 18% between 1962 and 1964, from 9.4 million barrels to 7.7 million barrels (CX 93).

103. The declining demand for concrete and the resultant increase in competition among ready-mix companies for the available business, brought about a substantial drop in the prices of ready-mixed concrete. Illustrative of this decline is the price charged for concrete of 3,000 p.s.i. quality (*i.e.*, concrete with a

strength sufficient to withstand a pressure of 3,000 pounds per square inch). The price on such concrete declined from about $16.00 per cubic yard in 1962 to $14.50 in 1963 and then to $13.00 in 1964–65. The price charged for the lowest quality concrete used in construction, 2,000 p.s.i., declined from about $14.00 in 1962, to a general range of $10.00 to $12.75 in 1964, with some concrete being sold as low as $9.50 a cubic yard (Tr. 503–505, 540–542, 568, 584, 616, 641–644, 674–675, 755). While cement prices also declined during this period, the drop was not sufficient to offset the decline in the prices of ready-mixed concrete (Tr. 545–547, 569, 685, 895).

104. The decline in construction activity in the NYMA was accompanied by an increasing slowness on the part of building contractors and subcontractors in meeting their payments to suppliers, including those owing to suppliers of ready-mixed concrete. Whereas it had been customary for customers to make payment for concrete by the tenth of the month following delivery, competitive conditions forced a gradual liberalization in credit terms, with the time for payment being gradually extended to 30 days, then to 45–60 days, and in some instances to 90 days or longer (Tr. 509, 588, 593, 621, 650, 686; N Tr. 944–946; RX 19 B, 20).

105. The decline in ready-mixed concrete prices and the problems in collection of accounts receivable have subjected ready-mix firms to a cost-price squeeze and adversely affected the profits of many ready-mixed concrete firms in the NYMA. A number of ready-mix firms in the NYMA have been operating at a loss for the past few years (Tr. 894–895, 518, 545–547, 586, 617–619, 641–644, 675–676, 755–757).

106. Unfavorable economic conditions in the construction industry in the NYMA during the past few years have been responsible for a number of ready-mix firms going out of business. While there have been some new entrants into the market, a number of these firms merely took over the facilities of departing operators. For the most part, the new entrants were small, fringe operators. Many of the new entrants were so-called "gypsies," *i.e.*, one man, nonunion organizations, operating one or two trucks (Tr. 623–627, 651–653, 655, 688–691, 696, 770–771, 779–781, 783). A number of the ready-mix operators still in business have cut down substantially on the number of trucks operated by them, in an effort to retrench (Tr. 531, 562–563, 608, 633–634).

107. Some of the ready-mix companies have sought to improve their ability to compete and to survive by affiliating with a cement

company (Tr. 536, 650, 769). Several of the cement companies, facing similar problems at their level, have sought to affiliate with a ready-mix company in order to insure themselves of a regular outlet for their cement. As previously noted, the early 1960's saw the following cement-ready-mix combinations come into being in the NYMA: American-Hickey, National-Ryan, U.S. Steel(UAC)-Certified, and Marquette-Lawrence (Cooney). Other cement companies have given consideration to becoming affiliated with a ready-mix firm (Tr. 304, 978, 982).

108. Preceeding these combinations, was that previously alluded to, Colonial-Hudson, which was established by internal expansion around the end of 1958. Colonial is one of the few ready-mix operators in the NYMA which has been able to consistently operate at a profit. Its sales increased from $42 million in 1958 to approximately $52 million in 1964, and its net income increased from $1.4 million to $3.8 million in the same period (NRX 3; RX 62). Colonial is far and away the largest ready-mix firm in the NYMA, maintaining a fleet of over 450 transit-mix trucks, compared to approximately 90 trucks operated by Certified, 80 trucks by Transit Mix, and Ryan, respectively, and 75 trucks by Hickey. Substantially all other ready-mix firms operate less than 25 trucks (NCX 44, 38 E; NRX 3, p. 3; CX 35, p. 15; RX 61, p. 3; Tr. 575).

109. Prior to the erection of its own cement plant, Colonial was an important customer for a number of the cement companies supplying the NYMA (Tr. 308, 314, 339–340, 379, 400, 480, 984, 1130; N Tr. 931). Its purchases from outside sources declined significantly beginning around 1960 and, by 1964, they reached a small fraction of their former volume. Its plant at Kingston was initially insufficient in size to supply all of Colonial's cement needs, but by 1964 the capacity of its plant was doubled and Colonial sharply reduced its outside purchases of cement. Thus, its purchases of cement declined from approximately 2.1 million barrels in 1960 to 660,000 barrels in 1964. Colonial's own consumption of cement in 1964 was 4.1 million barrels (CX 93 A, 42; RX 61; NRX 3, p. 2; Tr. 997, 1001, 400).

IV. Alleged Competitive Impact

110. The complaints herein allege, and complaint counsel contend, that vertical integration of a cement company and a ready-mixed concrete producer may have an adverse competitive impact, both at the cement level of commerce and at the ready-mixed concrete producer level. At the cement company level, it is con-

tended that the acquisition of a ready-mixed concrete producer results in a substantial foreclosure of markets to other cement companies, confers certain cost advantages, and raises barriers to the entry of other cement producers into the market. At the ready-mixed concrete level, it is contended that a ready-mix firm owned by a cement producer obtains certain decisive competitive advantages, including price and financial assistance, and is better able to withstand the competitive struggle (CPF 84–98). These contentions are hereinafter considered.

A. Impact on Cement Company Level

1. Foreclosure

111. Certified was the fourth largest consumer of cement in the NYMA in the year 1962, and in the years 1963 and 1964 it was the second largest consumer of cement in the area. In the years 1962 to 1964 its purchases of cement accounted for the following percentages of cement shipped into the NYMA: 6%, 8.2%, and 6.7%. In terms of cement purchases by ready-mix producers, Certified's purchases of cement represented the following percentages of cement sold to ready-mix producers in the NYMA in those three years: 8.6%, 11.7%, and 9.8% (CX 36, 38, 42, 93). In the broader northeastern geographic area served by the cement companies which supply the NYMA, Certified's purchases accounted for the following percentages of cement shipments in the years 1962 to 1964: 1.8%, 2.1%, and 1.7% (CX 36, 38, 41, 93).

112. In 1961, respondent U.S. Steel supplied 8% of the cement purchased by Certified from all cement suppliers. As previously found, in January 1962 U.S. Steel extended Certified a credit in the amount of $150,000 toward the purchase of cement and permitted it to obtain the usual 20-cent-a-barrel cash discount on additional purchases, without repayment of the $150,000 credit. In 1962, Certified's purchases from U.S. Steel increased to approximately 15% of its total purchases. As previously found, U.S. Steel guaranteed a loan to Certified in January 1963 in the amount of $3.3 million. During 1963 Certified's purchases from U.S. Steel increased to approximately 54% of its total cement purchases (CX 36). In 1964, the year in which U.S. Steel acquired Certified's business and assets, Certified's purchases of cement from U. S. Steel increased to 88% of its total cement purchases (CX 38).

113. Ryan was the third largest consumer of cement in the NYMA in the year 1962, and in the years 1963 and 1964 it was

the fourth largest consumer of cement in the area. In the years 1962 to 1964 its purchases of cement accounted for the following percentages of cement shipped into the NYMA: 7%, 6.2%, and 4.5% (CX 42, 93). In terms of cement purchased by ready-mix producers, Ryan's purchasers of cement accounted for the following percentages of such purchases in the NYMA in those three years: 10.0%, 8.8%, and 6.4%.[20] In the broader northeastern geographic area served by cement companies supplying the NYMA, Ryan's purchases accounted for the following percentages of the cement shipments of the plants of such companies serving the northeastern area, in the years 1962 to 1964: 2.2%, 1.6%, and 1.1% (CX 41, 93).

114. In the years 1961 and 1962, prior to its acquisition by National, Ryan's purchases of cement from National amounted to 67,749 barrels and 23,574 barrels, which represented 11.1% and 2.4%, respectively, of its total cement purchases. In the year 1963 (Ryan having been acquired by National in September 1963), Ryan's purchases of cement from National increased to 129,164 barrels, which represented 16.3% of its total cement purchases. In 1964, Ryan's total cement purchases from National increased to 406,397 barrels, representing 77.5% of its total cement purchases (NCX 37 D, 38 C, 39, and 40 C).

115. Certified and Ryan were both substantial customers for cement, in comparison with other cement consumers in the northeastern area. In the three years 1962 through 1964, Ryan's cement purchases averaged over 750,000 barrels annually, and Certified's purchases averaged almost 900,000 barrels annually (CX 93 A). There are only about ten customers in the entire northeastern area that consume over 750,000 barrels annually (Tr. 348–349, 930, 1026). Few of the other cement companies whose officials testified in these proceedings, including such top-ranking companies as Lone Star Cement and Lehigh Portland Cement, sell more than 250,000 barrels to any one customer.[21] In fact, customers purchasing around 50,000 barrels annually would rank among the top ten customers for most of these suppliers, which generally serve 200 to 300 customers in the northeast (Tr. 239–240, 295–296, 331–332, 364–367, 433 A, 475–476, 975–976, 1027).

116. At the present time, four out of the top seven ranking

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[20] The above percentages are based on the assumption previously made that 70% of the cement shipped into the NYMA was sold to ready-mix producers.

[21] Atlantic Cement sells over 250,000 barrels to at least one customer in the northeast, and Hudson Cement sells in excess of this amount to its affiliate, Colonial (Tr. 240; CX 93 B).

ready-mix companies in the NYMA are vertically integrated with a cement producer. This includes the top ranking company, Colonial, the second ranking company, Certified, the fourth ranking company, Ryan, and the seventh ranking company, Cooney (which is now Lawrence Concrete). As previously found (par. 91, *supra*), the fifth ranking company, Hickey, although divested from its former owner, American Cement, is financially related to American by virtue of a $3.2 million purchase money mortgage, and purchases over 75% of its cement requirements from American. Excluding Hickey, the four vertically integrated ready-mix firms in the NYMA accounted for approximately 68% of the cement consumed by ready-mix firms in the NYMA in 1964, and approximately 48% of the cement sold to all consumers in the NYMA in 1964 (CX 42, 93).

117. As reflected by the record of cement purchases by Ryan and Certified, a vertically-integrated ready-mix firm tends to buy the bulk of its cement requirements from the cement company with which it is affiliated. To the extent it makes a small proportion of its purchases from other cement companies, it does so principally because a particular contractor-customer has specified another company's cement or because its affiliated company does not make a particular type of cement used by the ready-mix firm for a portion of its production (Tr. 340, 495, 527). While ready-mix firms enjoy relatively long-term customer relationships with some of their cement suppliers, the proportion of their purchases from any one supplier rarely approaches the proportion to total purchases which exists between vertically integrated companies (Tr. 494, 532, 563, 609, 669, 748; CX 36; NCX 38 C). Moreover, the nonaffiliated cement company must eternally satisfy its customers as to price, quality and service if it hopes to continue the relationship. This is obviously not true where a "captive" relationship exists.

118. While vertical integration affords a cement company a captive market which is not subject to challenge by competing cement companies on the basis of the usual competitive inducements of price, quality, and service, such a relationship is not without its disadvantages. For example, there are a number of ready-mix firms in the NYMA which will not purchase cement from a vertically integrated cement company because they "don't consider it good business to buy from a competitor" (Tr. 493, 598, 525, 668, 254–255). On the other hand, there are some ready-mix firms in the area who have no such prejudice, and who purchase cement from vertically integrated companies (Tr. 609,

748). On balance, the advantage to a cement company of having an assured volume through a captive, affiliated ready-mix operation is more than enough to offset any disadvantage stemming from the loss of accounts which are reluctant to deal with a competitor.[22]

2. Cost Advantages

119. As in the case of many manufacturing industries, cement companies have certain fixed expenses in plant operation irrespective of whether the plant is operating at full or partial capacity. As plant utilization is increased, these expenses are reduced proportionately, per unit produced (Tr. 323). A cement company which has its own ready-mix outlet has an opportunity to increase its plant utilization and reduce per unit production costs. It is able to do this without any additional sales effort or expense, such as that required in selling to nonaffiliated companies. It is also able to integrate its storage and delivery facilities with the needs of its ready-mix outlet (Tr. 1045–1048).

3. Barriers to Entry

120. The only new cement company to enter the NYMA in recent years has been Atlantic Cement Company. Atlantic's plant was constructed in the Hudson River Valley between 1960 and 1962. At the time it undertook to construct its plant the only vertically integrated cement companies were Colonial and American, Colonial's cement plant having started production in 1959 and American having acquired Hickey in January 1960. While Atlantic, which had conducted feasibility studies prior to proceeding with erection of its plant, was somewhat concerned with the growth of vertical integration, it nevertheless decided to proceed with its plans to enter the NYMA. In order to facilitate its entry into the market, it entered into a contract in the fall of 1962 with Triangle Cement Company, an established distributor of imported cement, whereby the latter became Atlantic's exclusive distributor in the NYMA (Tr. 215–219; RX 65 A–Z 14).

121. In 1962 Triangle was the second largest shipper of cement into the NYMA, accounting for 1.08 million barrels, compared to

[22] Despite a decline in Certified's total cement purchases between 1963 and 1964, its purchases from UAC increased by approximately 135,000 barrels and UAC's overall sales in the NYMA increased by over 350,000 barrels (CX 36, 38, 42, 93). While Ryan's total cement purchases declined during this period, its purchases from National increased by over 250,000 barrels and National's sales in the area increased by 155,000 barrels (NCX 39, 40 B, 42).

2.96 million barrels by Colonial, the largest shipper, and 1.03 million barrels by Lone Star Cement, the third largest shipper. In 1963, the first full year in which it operated under the contract with Atlantic, Triangle's shipments into the NYMA amounted to 1.5 million barrels, making it the second largest shipper after Colonial, which accounted for 2.7 million. In 1964, during which the Atlantic-Triangle contract was terminated in June, Triangle's cement shipments into the NYMA were 291,000 barrels and Atlantic's own shipments were 354,000. Their combined shipments of 645,000 barrels made them the third largest shipper, after Colonial with 3.6 million barrels and UAC with 1.3 million barrels (CX 42).

122. Several cement companies have undertaken modernization and expansion of existing plants serving the NYMA. Marquette Cement Company, which acquired North American Cement Company in late 1961, began a construction program in 1965 to increase the capacity of the former North American plant in the Hudson River Valley from 1.6 million barrels to 3.3 million barrels (Tr. 1118). As previously noted, Marquette became vertically integrated with a ready-mix company in June 1964 (Tr. 1125). Whitehall Cement Company undertook a modernization program for its Lehigh Valley plant in 1964 in an effort to lower its production costs and put itself in a better position to compete in a declining market (Tr. 383).

123. Several of the companies distributing cement in the NYMA have curtailed their operations or ceased selling in the area. Thus, in October 1964, Alpha Portland Cement Company closed its terminal at Port Washington, Long Island, from which it had previously distributed, in portions of the NYMA, cement manufactured at its plant in the Hudson River Valley. This terminal was closed because the decline in Alpha's volume in the NYMA, resulting from the loss of one of its largest customers in the area, Certified, no longer justified the expense of maintaining a terminal (Tr. 966, 970–973).[23] Triangle Cement Corporation which, as previously noted, had been a substantial distributor of cement (both imported and Atlantic's) closed its terminal at Brooklyn, New York, when its contract with Atlantic was terminated in June 1964. It leased the terminal to Atlantic and ceased to distribute cement in the NYMA (Tr. 220, 1061). Triangle was

[23] Alpha's sales to Certified declined from a peak of 322,000 barrels in 1962 to 2,800 barrels in 1964 (Tr. 973). Alpha's overall volume in the NYMA declined from a peak of 982,000 barrels in 1962 to 401,000 barrels in 1964 (CX 42).

Certified's third largest supplier in 1963, but sold it no cement in 1964.[24]

124. In order to accommodate themselves to the declining market available to them in the NYMA as a result of the growth of vertically integrated cement companies, some of the cement companies have expanded their sales territory to, or concentrated their sales effort in, areas where competition is less keen or where there is less vertical integration (Tr. 246, 337).

125. A number of the cement companies whose officials testified in these proceedings are opposed to vertical integration. However, several indicated that they might have to acquire a ready-mix company in order to protect their market (Tr. 217, 246, 304, 337, 438, 978–9, 990, 992). One of the companies, Marquette, as previously noted, became vertically integrated with a ready-mix company in June 1964, in response to its foreclosure from substantial ready-mix accounts it had previously served, including Colonial and Certified (Tr. 1125).[25] National's acquisition of Ryan was motivated in large part by its inability to sell to Colonial, after the latter became vertically integrated (N Tr. 930–931). U.S. Steel's acquisition of Certified was motivated to a large extent by the fact that a substantial part of the market had become vertically integrated (CX 61 B).

B. Impact on Ready-Mix Level

126. Complaint counsel contend that the integration of Certified and Ryan has had, and will continue to have, an adverse effect on the ability of nonintegrated ready-mix companies to compete and to survive as independent entities. Counsel contend that, by virtue of the economic leverage arising from their cement company affiliation, integrated ready-mix companies are able to offer special prices and terms of payment, which independent companies cannot afford to meet, to the competitive disadvantage of the latter (CPF 93–98). Complaint counsel also contend that not only have these integrated companies the power to control prices and credit terms, but that they have actually done so in the NYMA (CPF 75–77).

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[24] Triangle supplied Certified with 95,000 barrels of cement in 1963, out of total purchases by Certified of over 1 million barrels. Triangle's total sales in that year were 1.5 million barrels (CX 36, 38, 42).

[25] Marquette's sales to Colonial, which had been its largest customer, declined from 404,000 barrels in 1962, to 88,000 barrels in 1964 (Tr. 1130). Marquette's sales to Certified through its North American Cement Division declined from 142,000 barrels in 1962, to 5,000 barrels in 1964 (CX 36, 38). Ryan was among Marquette's smaller customers. Its sales to Ryan declined from a peak of 43,000 barrels in 1963 to 15,728 barrels in 1964 (Tr. 1138).

127. It is a matter of elementary economic logic that a large, multi-product company does have certain inherent advantages not possessed by smaller, single-product competitors. This is particularly true where the multi-product company is vertically integrated with a customer. As previously found, the increased or assured plant utilization resulting from vertical integration helps a cement company to reduce its per unit production costs. Presumably it may be able to pass on any benefits resulting therefrom to its affiliated ready-mix company in the form of a lower price or otherwise. However, the record in these proceedings does not demonstrate that the Certified or Ryan acquisitions have, in fact, conferred on their acquiring cement companies the benefits which might be expected to result therefrom. The record is likewise lacking in substantial evidence that Certified or Ryan have, in fact, been the leaders in market practices purportedly engaged in by them.

128. As previously found, both Ryan and National were operating at a profit in the year prior to National's acquisition of Ryan. In the year 1964, following the acquisition, Ryan lost $10,824. National continued to operate at a profit in 1964. However, in 1965 Ryan's loss increased to $402,518 and National's net profit declined by approximately $75,000, leaving a net consolidated loss on both operations of $119,533. It seems evident that the anticipated benefit from so-called "incremental sales" which were expected to accrue to National as a result of the Ryan acquisition have not materialized (N Tr. 877). Based on actual operations for the first five months of the present fiscal year, it may be estimated that the National-Ryan combined operation will have a cash deficiency of $250,000 at the end of the present fiscal year (NRX 5 B; N Tr. 909). According to the uncontradicted and credited testimony of National's president, if prices and volume continue at present levels, both companies may have to liquidate by March 31, 1967, unless outside capital, not now available, were to enable them to continue (Tr. 911–914).

129. As previously found, Certified lost $655,000 in the fiscal year ending June 30, 1963. In the six months ending December 31, 1963, its losses increased to $928,000. During the first four months of 1964, while negotiations for its acquisition were pending, Certified lost $871,500. In the eight months after it was acquired by U.S. Steel, Certified lost $1.2 million. While U.S. Steel's UAC Division did increase its 1964 profit over the previous year by approximately $130,000, out of net profits of approximately $4 million, it sustained a loss on its sales to Certified.

However, its sales to Certified did contribute $623,000 toward absorption of fixed expenses of UAC.

130. As heretofore found, the decline in cement and ready-mix sales in the NYMA beginning in late 1962 or early 1963 was accompanied by a softening of cement and ready-mix prices, and by a liberalization of credit terms in the sale of both commodities. There is no evidence, however, that either UAC or National were leaders in the lowering of cement prices or the liberalization of credit. As far as prices are concerned, the record establishes that the nonintegrated companies were the leaders in the lowering of cement prices in the NYMA (Tr. 227, 310, 346, 410, 414, 967). With respect to the liberalization of credit terms offered to ready-mix companies, there is little or no evidence of National's participation in the practice of granting long-term credits to customers. In the case of UAC, the evidence discloses that in early 1962 it granted a $150,000 credit to Certified (secured by a note bearing interest). However, prior to that time four other suppliers to Certified, all nonintegrated, had granted credits in similar amounts (unsecured by a note and bearing no interest). Eventually, the extension of credit by UAC to Certified led to its guarantee of a $3.3 million loan, a practice as to which the record fails to establish there was similar participation by other companies in the NYMA.

131. At the ready-mix level, several of the witnesses claimed to have experienced difficulty in competing with integrated ready-mix companies. It was suggested that the interests of the ready-mix end of the business tend to be subordinated to the cement portion, where profit margins are higher, and that the integrated companies are able to buy their cement more cheaply, and to sell their concrete at lower prices and on more favorable credit terms, than the nonintegrated companies (Tr. 520, 537, 588, 607, 679). The record fails to establish that there has been any subordination of the ready-mix business to the cement business among vertically integrated companies. So far as appears from the record, volume and profits in both ends of the business have been declining in the NYMA. The trend toward integration has been motivated, in part at least, by a desire to assure more complete utilization of cement plants, but there is no evidence of any deliberate lowering of prices on concrete in order to assure such utilization. Nor does the record establish that vertically integrated ready-mix companies in the NYMA purchase their cement at lower prices or on more favorable credit terms than nonintegrated companies. As far as price is concerned, the evidence indi-

cates that all ready-mix companies in a given area, integrated and nonintegrated, pay the same price (Tr. 538–539, 669, 860). With respect to credit terms, the evidence discloses that "almost any cement company" will, and does, offer ready-mix customers extended credit terms (Tr. 752).

132. While several of the ready-mix witnesses sought to ascribe responsibility for the lowering of concrete prices and the liberalization of credit terms in the sale of concrete to the integrated companies (Tr. 519–520, 522, 588, 607, 679), the evidence as a whole fails to sustain these claims. The evidence does disclose a general decline in market prices of concrete since the end of 1962, but it does not establish that the integrated companies, as such, have been the leaders in this movement. The testimony of a number of the ready-mix witnesses indicates that all of the major companies, integrated and nonintegrated, were equally aggressive in price competition.[26] Insofar as the integrated companies were involved in price competition, the record fails to establish any necessary connection between their alleged aggressive action and their being integrated. For example, there was almost no reference to Ryan as being among the price leaders, either before or after its integration. While Certified was referred to by a number of the witnesses as being among the price leaders, the testimony indicates that it had been an aggressive company for a number of years and that there was no significant change in its competitive behavior after it became vertically integrated (Tr. 649).

133. Aside from whether the lowering of prices and liberalization of credit terms in the NYMA can be attributed to the integrated companies, as such, there is considerable confusion in the record as to which of the integrated companies, and whether respondents in particular, were responsible for these practices. There was a tendency on the part of the complaining witnesses to visit the sins of the market on those companies with which they happened to be in more active competition. Thus, in the New York City area, Colonial was characterized as the company that "has endeavored to promote sales by aggressive action. That has been met by other companies" (Tr. 522). In the Long Island area, some of the ready-mix witnesses assigned the villain's role to

[26] One of the ready-mix witnesses testified that price leadership could not be ascribed to any particular company, and that price competition involved all of his larger competitors, integrated and nonintegrated (Tr. 506–507). Another ready-mix witness, who at first attributed price leadership in his area to Certified (Tr. 543), later indicated that all of his larger competitors, including a nonintegrated company, were equally aggressive (Tr. 552). Another witness included the same nonintegrated firm as being among his aggressive competitors (Tr. 757).

Certified, while speaking with approbation of Colonial's gentlemanly competitive behavior. By coincidence, several of the latter witnesses purchased their cement from Colonial's affiliate, Hudson, and indicated that in the Long Island area Colonial concentrated on public works projects, for which these companies did not bid, whereas Certified actively competed with them in private construction work (Tr. 611, 719, 748, 758–759). In contrast with the attitude of its competitors, the record (consisting of memoranda written ante litem motam) discloses that Certified felt it too was the victim of a cost-price squeeze for which its competitors were responsible, and indicates that it lost certain jobs because of its inability to compete pricewise (CX 56 A; RX 26 A).

134. Complaint counsel sought to bolster the blanket assertions of some of their ready-mix witnesses, concerning the price and credit leadership of their integrated competitors, by testimony concerning the loss of specific accounts to Certified and Ryan. For the most part, this testimony was unreliable hearsay (based on information received by the witnesses from third persons concerning Certified's and Ryan's putative prices and credit terms) and, in a number of instances, it was contradicted by other evidence in the record. Of approximately eight instances cited by the witnesses, only two involved Ryan. One of these involved the alleged extension of credit by Ryan and the other, a better price (Tr. 593, 618). In neither instance is there any reliable evidence as to whether Ryan did extend credit or as to the price it was charging.[27] In the remaining instances, relating to Certified, all but one involved the alleged granting of a better price. Not only is there no reliable evidence of Certified's price to the contractors in question, but in several instances there is affirmative evidence that the hearsay information purportedly received by the witnesses was erroneous.[28] In the single instance involving the alleged ex-

[27] The witness who claimed he had been unable to sell to a contractor because of the granting of credit by Ryan conceded that he did not know whether Ryan had actually extended any credit (Tr. 598). The other witness claimed he could not make a profit at the "going price" of $10.75, whereas the price at which Ryan purportedly got the job was $11.00 (Tr. 617–618). It is interesting to note that the contractor involved on the latter job was one which another ready-mix witness claimed he could not sell to because Certified was offering the account credit terms (Tr. 589).

[28] One ready-mix witness claimed that he had lost a job to Certified on the basis of a price of $9.50 a yard for 2,000 pound concrete, compared to a price of $11.25 which he had been charging the builder (Tr. 681–682). Certified's invoices to the builder reveal that it was actually charging $11.25 and $11.75 (RX 6; Tr. 960–963). Another witness claimed that Certified had taken jobs from him below his cost, citing one job on which Certified was aided by the fact that the contractor was using steel supplied by U.S. Steel (Tr. 591). The record establishes that U.S. Steel did not supply any steel on the project (Tr. 664–5), and that the complaining witness' price was actually 25¢ a yard below that which Certified purportedly charged on the job (Tr. 592).

tension of credit by Certified, there is no reliable evidence that Certified did, in fact, extend credit to the contractor.[29]

135. The examiner does not doubt but that, in the normal course of events, Certified and Ryan underbid their competitors on particular projects. In the economic climate that prevailed in the NYMA after late 1962, there was continuing pressure on concrete prices. Considering the substantial drop in prices that occurred, it seems evident that the various ready-mix companies were actively vying with one another for the available business. However, there is no substantial and reliable evidence that Certified or Ryan was engaging in predatory pricing or was offering prices that were substantially out of line with those being offered by their competition generally. The mere fact that they may have taken accounts from particular competitors does not necessarily establish that they were engaged in practices beyond the pale of normal competition. Assuming even that the prices which they may have bid were at or below the costs of some of their smaller competitors (a fact which is not established by the record), this does not necessarily establish that such prices were below their own costs. The record discloses that in the normal course of competition they, like their competitors, lost accounts as well as gained them.[30]

136. With respect to the matter of credit, the record discloses that, in the depressed state of the market, there was a general slowness in the payment of accounts at both levels of the industry, *i.e.*, by construction contractors to ready-mix producers and by the latter to cement suppliers. It was not uncommon to allow contractors 60 days or more to pay for concrete (Tr. 588, 686). However, the record is lacking in reliable, probative and substantial evidence that either Ryan or Certified was the leader in any practice of extending long-term credit to customers or that either of them used credit as an inducement in the acquisition of accounts. In the case of Ryan there is almost no evidence with respect to its extension of any long-term credit. While the evidence does disclose a substantial increase in Certified's accounts receivable during the period at issue, the record fails to establish that such increase was out of line with its overall volume of

[29] It may be noted that the account alleged to have been acquired by Certified because of the extension of credit was one which another ready-mix witness claimed it could not sell to because Ryan had offered it a better price (Tr. 617).

[30] For example, Certified was able to obtain the contract for supplying concrete on a very large construction project in Long Island, on the basis of bids of $9.75 and $10.25. When it later found it necessary to raise its bid on the same project to $11.00, it lost out to a competitor (Tr. 867). Certified also lost other projects because of lower prices offered by its competition (RX 26 A).

business or that its practices differed materially from those of its competitors generally. The record establishes that Certified, like many of its competitors, was carrying certain accounts not because it wished to extend them credit, but because they were slow in payment and because to insist on payment might have resulted in loss of the accounts. Correspondence in the record written ante litem motam reveals that Certified felt itself the victim of a serious industrywide collection problem, and that it made serious efforts to curtail the extension of credit to customers.[31]

CONCLUSIONS

I. *Engagement in Commerce by Acquiring Companies*

1. The complaints herein allege, the respective respondents admit, and it is concluded and found, that at all times relevant in these proceedings, each of the acquiring companies, United States Steel Corporation and National Portland Cement Company, was a corporation engaged in commerce, as "commerce" is defined in the Clayton Act.

II. *Engagement in Commerce by Acquired Companies*

2. The respective respondents deny that the companies whose stock or assets they acquired were engaged in commerce at the time of such acquisitions, within the meaning of the Clayton Act (UPF, p. 89; NPF, p. 46). The basis of the contentions that such companies were not engaged in commerce is the fact that the ready-mixed concrete produced by them was manufactured and sold wholly within the State of New York (NB, p. 14; UPF, p. 7). However, as heretofore found, both of the acquired companies made substantial out-of-State purchases of portland cement which were shipped to them in interstate commerce. It is, accordingly, concluded and found that each of the acquired companies, Ryan Ready Mixed Concrete Corporation and N. Ryan Company, Inc., and Certified Industries, Inc., was a corporation engaged in commerce, within the meaning of the Clayton Act at the time it was acquired by the respective respondents herein. *Foremost*

[31] In May 1963 Certified notified Bankers Trust Company that its top officials "have devoted our full effort to a serious collection problem which presently is plaguing the entire construction industry" (RX 19 B). It also informed the bank during this period that "competition is forcing liberalization of credit terms" (RX 20). In September 1963, Certified notified its customers that to earn a cash discount their accounts must be paid in full within 10 days from the date of invoice, that invoices not discounted would be due within 30 days, that the credit of customers whose accounts remained unpaid after 30 days would be subject to review, and that after 60 days no further credit would be extended and interest at 6% would be charged on all monies due (RX 29).

Dairies, Inc., Docket No. 6495, April 30, 1962; *Beatrice Foods Company*, Docket No. 6653, April 26, 1965. In the case of Certified Industries, Inc., the record discloses that at the time its business and assets were acquired, its substantially wholly owned subsidiary, Northern Lightweight Aggregate, Inc., made substantial shipments of aggregates to destinations outside the State of New York. Such fact constitutes an additional basis for concluding that Certified Industries, Inc., was engaged in commerce, within the meaning of the Clayton Act.

III. *The Product Markets*

3. Complaint counsel contend, each of the respondents concede, and it is concluded and found, that "ready-mixed concrete" and "portland cement," as heretofore defined, are appropriate product markets for purposes of these proceedings, and are relevant lines of commerce within the meaning of Section 7 of the Clayton Act, as amended (CPF, p. 35; UPF, p. 4; NPF, p. 5).

IV. *The Geographic Markets*

A. Portland Cement

4. Complaint counsel contend that the northeastern area of the United States served by the cement companies supplying the NYMA, and the NYMA itself, are each an appropriate geographic market and section of the country for the sale of portland cement, within the meaning of Section 7 of the Clayton Act, as amended (CPF, p. 35; CB, pp. 6–11). Respondents contend that complaint counsel have failed to establish that either the northeastern States or the NYMA is an appropriate geographic market or section of the country for purposes of assessing the probable competitive impact of the acquisitions here involved, insofar as the portland cement product line is concerned (UPF, pp. 39–43; UB, pp. 6–9; NPF, pp. 6–10; NB, pp. 15–16).

5. The northeastern section of the country, as contended for by complaint counsel, includes eastern New York, eastern Pennsylvania, New Jersey, Connecticut, Massachusetts, Rhode Island, Vermont, New Hampshire, Delaware, and part of Maryland (CPF No. 50). This, substantially, is the area served by the cement producers which supply the NYMA. Respondent U.S. Steel suggests that because producers with plants in Maryland, western New York and western Pennsylvania sell into portions of the above area, the geographic market should be extended to include the territory of the plants competing with the northeastern pro-

ducers which serve the NYMA (UPF No. 109). While respondent National does not propose any specific area as being the appropriate market for portland cement, it notes that the cement plants serving the NYMA make some shipments into at least 23 States and the District of Columbia. It suggests that the area proposed by complaint counsel should be enlarged to at least include, (a) the District of Columbia and Virginia, into which several of the Lehigh Valley plants make some cement shipments, (b) western New York, in which several of the Lehigh and Hudson Valley producers have plants, and (c) other Customs Districts in the northeast, which receive foreign cement (NPF, pp. 7-8; NR, p. 11).

6. A determination of the scope of the relevant geographic market "depends upon the geographic structure of the supplier-customer relations" and not merely on "where the parties to the merger do business." *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 357 (1963). This is particularly true in a case of vertical integration, in which foreclosure of markets is a major element of the offense. In the *Philadelphia National Bank* case, the Court held to be applicable to a Section 7 proceeding the principle of market definition which it had earlier applied in *Tampa Electric Co.* v. *Nashville Coal Co.,* 365 U.S. 320, 327, involving a charge of foreclosure under Section 3 of the Clayton Act, *viz,* that:

> "* * * the area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates *and to which the purchaser can practically turn for supplies*" (emphasis supplied).

7. In the instant proceedings, the "supplier-customer" or "seller-purchaser" relationships most directly affected by the acquisitions were those between cement companies serving the NYMA and their ready-mix customers. It seems evident, therefore, that the appropriate geographic market should, in no event, be deemed to extend beyond the area served by cement plants serving customers in the NYMA. This, essentially, is the northeastern area served by the Lehigh Valley-Hudson River Valley producers, as proposed by complaint counsel. The fact that such producers may compete in the outer portions of their territory with producers from adjacent areas is irrelevant. The fact that several of the Lehigh Valley plants make some shipments into the District of Columbia and Virginia, and possibly into other areas, does not justify an extension of the market to include such

areas since such shipments are occasional, involve a relatively small volume, and generally do not involve direct shipments from the producing plant. Shipments into the northeastern area, as proposed by complaint counsel, account for over 90% of all shipments by Lehigh Valley-Hudson River Valley producers (Tr. 214, 322, 350–351, 355, 452, 965, 1119; NRX 15–50, 58, 59, 62).

8. It is very rare that the relevant geographic market is "susceptible to a [precise] 'metes and bounds' definition." *Tampa Electric* v. *Nashville Coal,* 365 U.S. at 331. Some "fuzziness would seem inherent in any attempt to delineate the relevant geographic markets." *United States* v. *Philadelphia National Bank,* 374 U.S. at 360, n. 37. It may be that the northeastern market could be drawn somewhat more broadly to include areas adjacent to Maryland and Delaware. Conversely, a more precise definition of the market might result in narrowing it so as to exclude Maryland and Delaware, which are not served by most Hudson River Valley producers. However, based on the record as a whole, it is the finding and conclusion of the examiner that the northeastern area, as proposed by complaint counsel, constitutes a reasonably appropriate geographic market and section of the country for the sale of portland cement, within the meaning of Section 7 of the Clayton Act, as amended.

9. As previously noted, complaint counsel contend that the NYMA is also an appropriate geographic market and section of the country for the sale of portland cement. U.S. Steel, while arguing that complaint counsel have failed to establish that the northeastern section of the country is an appropriate relevant market for portland cement (UPF No. 110), contends that "at the very least the multi-state Northeastern section of the country" is the appropriate market and that "no serious contention can be made that the so-called 8-county New York City Metropolitan area constitutes the relevant area of effective competition in selling portland cement" (UB, p. 9). Respondent National likewise contends that the NYMA is not an appropriate market for portland cement, and that the area of effective competition involves "at least" the 11 northeastern States and the District of Columbia (NB, pp. 15–16).

10. As previously found, (a) there is a considerable degree of uniformity of prices for portland cement within the NYMA, and the prices charged within the area differ from those in adjacent areas of the northeast, (b) shipments entering the NYMA constitute a sizeable portion of the total shipments of cement producers serving the area, such shipments ranging from 25% to

31% of total shipments by northeastern producers between 1960 and 1964, and (c) a number of the northeastern producers consider the NYMA to be a distinct or separable market or submarket within the over-all territory served by them. In the light of the Supreme Court's guideline in the *Philadelphia National Bank* case, that the "proper question to be asked [in a determination of the appropriate section of the country] is not [merely] where the parties do business * * *, but where * * * the effect of the merger on competition will be most direct and immediate," it seems evident that the NYMA is the area where the effect of the acquisitions here involved will be most directly and immediately felt, if at all. The Court in *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325, has also provided the further guidance that "well-defined sub-markets [may] constitute [geographic] markets for antitrust purposes." There is no question that, by every conceivable standard, the NYMA is a well-defined submarket for portland cement, within the broader northeastern section of the country. It is, accordingly, concluded and found that the New York City metropolitan area is an appropriate geographic market and section of the country within the meaning of Section 7 of the Clayton Act, as amended.

B. Ready-Mixed Concrete

11. Complaint counsel contend that the New York City metropolitan area is an appropriate geographic market and section of the country for the sale of ready-mixed concrete (CPF, p. 35; CB, p. 11). Respondent U.S. Steel contends that the eight-county area referred to by complaint counsel as the "New York City metropolitan area" is not an appropriate relevant market for ready-mixed concrete in view of certain differences in market factors within the area, including the fact that only a few of the producers serve more than two counties within the area, and the differences in the sizes of trucks and areas served (UPF, pp. 64–69). Respondent National, on the other hand, concedes that "[f]or purposes of the ready-mixed concrete line of commerce, [it] accepts the 'New York City metropolitan area,' as defined in the complaint, as an appropriate relevant geographic market or section of the country" (NB, pp. 14–15).

12. The record establishes that despite certain differences in the areas served by the various producers, the New York City metropolitan area, as proposed by complaint counsel, is a fairly homogeneous area. Price, market, and competitive conditions are

fairly uniform throughout the area and tend to differ in some respects from those in other areas of the northeast. While it might at one time have been appropriate to subdivide the area between the New York City counties and those in Long Island, such a division is now unrealistic in view of the fact that some New York City-based companies presently serve large portions of Long Island, and some producers in the latter area serve substantial portions of New York City proper, with market conditions being similar throughout the area. It is, accordingly, concluded and found that the eight-county area referred to in the complaint as the New York City metropolitan area is an appropriate geographic market and section of the country for the sale of ready-mixed concrete, within the meaning of Section 7 of the Clayton Act, as amended.

V. *Competitive Effect*

A. General Considerations

13. There is no question that foreclosure of access to a substantial customer by a substantial supplier has anti-competitive implications which makes it suspect under the Clayton Act. Such foreclosure by contract has long been recognized to be inimical to competition under Section 3 of the Clayton Act. *Standard Oil Co.* v. *United States*, 337 U.S. 293; *Federal Trade Commission* v. *Motion Picture Adv. Serv. Co.*, 344 U.S. 392. Although the broad scope of the earlier decisions has been considered, by some, to have been narrowed somewhat by the Supreme Court's later decision on the point in *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320,[32] the basic anticompetitive tendencies inherent in such arrangements are, nevertheless, still recognized. Where such foreclosure is accomplished by acquisition, rather than by contract, its anticompetitive implications are even more apparent since, "integration by merger is more suspect than integration by contract, because of the greater permanence of the former." *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 366.

14. The possibilities for competitive injury are particularly pronounced in the case of vertical acquisitions since "[t]he primary vice of a vertical merger or other arrangement tying a customer to a supplier is that, by foreclosing the competitors of either party from a segment of the market otherwise open to them, the arrangement may act as a 'clog on competition,' *Stand-*

[32] See, for example, Handler, *Recent Antitrust Developments*, 71 Yale L.J. 81 (1961).

ard Oil Co. of California v. *United States,* 337 U.S. 293, 314, which 'deprive[s] * * * rivals of a fair opportunity to compete.' H.R. Rep. No. 1191, 81st Cong., 1st Sess. 8." *Brown Shoe Co.* v. *United States, supra,* at 323. However, despite the anticompetitive thrust of such arrangements, it is clear that they are not illegal per se, since "the Clayton Act does not render unlawful all such vertical arrangements, but forbids only those whose effect 'may be substantially to lessen competition or to tend to create a monopoly' 'in any line of commerce in any section of the country.' " *Brown Shoe Co.* v. *United States, supra,* at 324.

B. Concentration

15. Among the key factors to be considered in determining whether a particular merger falls within the proscription of the statute is the extent of concentration existing in the industry and the extent to which the merger results in an increase in such concentration. As the Supreme Court noted in the *Brown Shoe* case, *supra,* at 315: "The dominant theme pervading congressional consideration of the 1950 amendments [to Section 7] was a fear of what was considered to be a rising tide of economic concentration in the American economy." In the *Philadelphia National Bank* case, *supra,* at 363, the Court held that "[t]his intense congressional concern with the trend toward concentration warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects." Accordingly, it laid down the relatively simple test that "a merger which produces a firm controlling an undue percentage of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects."

16. The records in the instant proceedings disclose that there is a relatively high degree of concentration in the cement industry, nationally and in the relevant local markets. As heretofore found, in 1958 the four largest companies in the cement industry accounted for 32% of total industry shipments and the eight largest companies accounted for 50%. In recent years there has been a significant increase in the number of mergers or acquisitions which have taken place, and the number of cement manufacturing firms has declined from 62 in 1958 to 51 in 1963.

17. In the northeastern section of the country, the top four cement companies, out of approximately 20 serving the NYMA,

accounted for almost 37% of total cement shipments in 1960. In that year none of the vertically integrated cement companies serving the NYMA was among the top four cement companies in the northeast. In 1963, the share of the top four companies (out of the 20 companies serving the NYMA) had declined to 34.5%, with none of the vertically integrated companies serving the NYMA being among these. However, in 1964 the share of the top four companies in the northeast increased to 43.6%, with two of these companies (UAC and Colonial) being vertically integrated.

18. In the NYMA the top four cement companies accounted for 44.6% of cement shipments into the area in 1960. Of these only one (Colonial) was vertically integrated. By 1963 the top four cement companies selling in the NYMA had increased their share to 48.8%, and two of these companies (Colonial and American Cement) were vertically integrated in the market. In 1964 the market share of the top four cement companies in the NYMA increased to 53.3% and two of these (Colonial and UAC) were vertically integrated.

19. The ready-mixed concrete industry, unlike the portland cement industry, is highly fragmented nationally. However, a high degree of concentration exists in various local markets, including the NYMA. In 1958 the four largest ready-mixed concrete producers accounted for 52% of the value of ready-mix shipments into the New York Standard Metropolitan Statistical Area, as defined by the Bureau of the Census (which includes the eight counties in the NYMA, plus Rockland County).

20. Since a major aspect of the competitive thrust in these proceedings is the alleged foreclosure of cement companies from access to ready-mixed concrete customers, it is pertinent to note that in 1962 the top four ready-mix companies accounted for approximately 57% of the portland cement consumed in the NYMA by all categories of customers, and approximately 82% of the cement consumed by ready-mix producers, as a group. The ranks of the top four ready-mix consumers of cement in 1962 included only one vertically integrated company, Colonial. By 1964 the share of the top four ready-mix companies in the NYMA had declined to 51.4% of the portland cement consumed by all categories of customers, and approximately 73% of the cement consumed by ready-mix producers. In that year, three of the top four companies were vertically integrated, *viz*, Colonial, Certified, and Ryan.

21. As the figures above cited indicate, a high degree of con-

centration exists in the portland cement product line, nationally and in the northeastern and NYMA market areas. They also disclose that the degree of concentration in the northeast and NYMA markets has increased in recent years, and that the share of these markets held by the vertically integrated companies is high. Concentration among ready-mix producers in the NYMA is also relatively high. While the record fails to establish any increase in concentration among ready-mix producers in recent years, it discloses that the share of the market accounted for by vertically integrated companies has increased substantially.

22. However, in fairness to the respondents herein, and to place in proper perspective the market picture suggested by the above figures, it should be noted that the increase in concentration accounted for by integrated companies in the NYMA, and to a lesser extent in the northeast, is attributable in large part to the market position of Colonial Sand & Stone Company. Colonial, which did not rank among the top four cement companies in the northeast in 1960, became the third ranking cement shipper in the northeastern area by 1964, accounting for approximately 9% of shipments in that year, compared to approximately 12% by UAC, which was the second largest shipper in 1964. In the NYMA, where Colonial's sales were concentrated, it was by far the top shipper, accounting for approximately 31% of cement shipments compared to 11.3% by UAC and 4.8% by respondent National. Colonial's dominance in the ready-mix field was even more pronounced. It accounted for approximately 49% of cement consumption by ready-mix producers in the NYMA in 1962, and 50% in 1964. UAC's ready-mix affiliate, Certified, accounted for 9.8% of cement consumption in the NYMA by ready-mix producers in 1964, compared to 8.6% in 1962. National's ready-mix affiliate, Ryan, accounted for 6.4% of cement consumption in the NYMA by ready-mix producers in 1964, compared to 10% in 1962.

23. While the evidence establishes that the NYMA was a concentrated market, in both the portland cement and ready-mixed concrete product lines, the examiner cannot conclude, based merely on the statistical evidence as to market shares and concentration, that the acquisitions here involved will have the proscribed statutory effect. The facts here do not present a situation, such as that involved in the *Philadelphia National Bank* case, of a merger which "produces a firm controlling an undue percentage of the relevant market, and results in a significant increase in the concentration of firms in that market," so that illegality may

be presumed without "elaborate proof of market structure, market behavior or probable anticompetitive effects." *United States* v. *Philadelphia National Bank, supra,* at 363. In the *Philadelphia National Bank* case, the merger resulted in a company having a 30% share of the market and in a 33% increase in concentration. Here the UAC Division of U.S. Steel accounted for 7.6% of the cement shipped into the NYMA in 1963 and 11.3% in 1964. The company which it acquired accounted for approximately 12% of the cement consumed by ready-mix producers in the NYMA in 1963, and 10% in 1964. National accounted for 2.4% of the cement shipped into the NYMA in 1963 and 4.8% in 1964. The company which it acquired accounted for 9% of the cement consumed by ready-mix companies in the NYMA in 1963 and 6.4% in 1964. While the Court in *Philadelphia National Bank* indicated (at 365) that its conclusion, that the percentages there involved raised an inference of adverse competitive effect, was "not an arbitrary one," and that such a conclusion might be drawn from lesser market shares or increases in concentration, it is the opinion of the examiner that the market shares held by the acquired and acquiring companies in these proceedings are not of such an order of magnitude as to support, without more, an inference of probable competitive injury.

C. Purpose and Motive

24. In cases involving vertical integration, the "diminution of the vigor of competition" which may result stems not from the increase in concentration, as in horizontal mergers, but, as stated in the *Brown Shoe* decision, "primarily from a foreclosure of a share of the market otherwise open to competitors." 370 U.S. at 328. While an important consideration in determining competitive effect is "the size of the share of the market foreclosed * * *, this factor will seldom be determinative." Where the percentage of the market foreclosed "is neither of monopoly nor *de minimis* proportions, the percentage of the market foreclosed by the vertical arrangement cannot itself be decisive." As stated in *Brown Shoe*, at 329:

> In such cases, it becomes necessary to undertake an examination of various economic and historical factors in order to determine whether the arrangement under review is of the type Congress sought to proscribe. *A most important such factor to examine is the very nature and purpose of the arrangement.* (Emphasis supplied.)

25. It is unnecessary to speculate as to U.S. Steel's purpose in acquiring Certified since its purpose and motive are abundantly

clear from interoffice memoranda and other correspondence written prior to the acquisition.[33] Such evidence must be viewed against the background that U.S. Steel's acquisition of Certified was preceded by the vertical integration of three other companies in the NYMA, *viz*, (a) Colonial's establishment of its own cement facility in 1959 and the later doubling of its capacity, (b) American Cement's acquisition of Hickey in 1960, and (c) National's acquisition of Ryan in 1963. Such evidence must also be considered in the light of the fact that the cement industry was suffering from excess capacity, which was particularly pronounced in the NYMA, and the fact that most ready-mix companies in the NYMA were suffering from declining volume and profits.

26. U.S. Steel's acquisition of Certified's business and assets was an outgrowth of a relationship which began over a year prior to the takeover. As previously noted, in early 1963 U.S. Steel committed itself to guarantee a loan by Bankers Trust Co. to Certified, in the amount of $3.3 million. Its willingness to make this commitment was due to its desire to maintain its position in the New York market, where it was experiencing a loss of business from a former substantial customer, Colonial Sand & Stone Co., due to the latter's declining purchases of cement from outside suppliers. As stated by a U.S. Steel official, in an intracompany memorandum written shortly after arrangements for the loan had been concluded (CX 55):

> Universal Atlas was a supplier of Colonial Sand & Stone, which has its own cement plant at Kingston, New York. With Colonial expanding the capacity of this plant, our deal with Certified looks even better, as well as most timely.

27. U.S. Steel's willingness to assist Certified was based on the natural expectation that it would result in an increase in sales to that company, and help counterbalance its loss of sales elsewhere. As stated in an intracompany memorandum by a U.S. Steel official just prior to the initial loan commitment (CX 51 A):

> This substantial user of cement, the third largest in the metropolitan New York area, is in a precarious financial position * * *. The importance of this account to Universal Atlas Cement Division and the opportunities of

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[33] As stated in *Brown Shoe, supra*, at 329, n. 48: "Although it is 'unnecessary for the Government to speculate as to what is in the "back of the minds" of those who promote the merger' * * * evidence indicating the purpose of the merging parties, where available, is an aid in predicting the probable future conduct of the parties and thus the probable effects of the merger."

increased sales and profits * * * prompt us to assist Certified in improving its financial condition.

Despite Certified's then "precarious financial position," U.S. Steel "entertain[ed] the hope and expectation that some time in the second five-year period [of the loan], this credit [Certified's] will be such as to impel Bankers [Trust Co.] to forego our endorsement."

28. U.S. Steel's optimistic expectations were, of course, never realized. Within a few months after the making of the loan, it was advised by Certified that (CX 56 A):

> Competition in the Greater New York * * * area is getting tougher. This is especially so when going against Colonial and Triangle [Cement Co.]-Transit Mix. * * * Messrs. Litwin and Abramson [Certified's president and vice-president] are much concerned about cost-price relationships in their business and how to deal with integrated or distributorships—ready-mix producer-type competitors.

29. While Certified had been dickering with others regarding a possible merger for some time prior to the time it approached U.S. Steel, the latter did not become aware of Certified's efforts in this direction until August or September 1963, when it heard rumors that American Cement might take over its position as Certified's financial backer in a deal which would involve Certified's acquisition of American's ready-mix subsidiary, M. F. Hickey (CX 57 A, RX 28 A). Certified's president acknowledged to a UAC official that he had received and was considering a proposal from American Cement. The UAC official noted his concern that American "intend[ed] to corner the market" (CX 82). It was in this setting that Certified approached U.S. Steel a month or two later regarding a possible acquisition.

30. As reflected in a U.S. Steel intracompany memorandum written in early November 1963, Certified's management represented to it that they felt "their survival is dependent upon their ability to tie up with a cement company," due to Certified's financial condition and the fact that it (Certified)—

> * * * is now competing against three cement companies,—National Portland (Ryan Ready Mix), American Cement (M. F. Hickey), and Colonial Sand (Hudson Cement). Also Transit Mix Corp., a major competitor, is reported to be receiving volume discounts from its prime supplier,—Triangle Corp.

31. As previously noted, Certified's initial proposal was that U.S. Steel acquire a partial interest in it and advance additional funds of almost $4 million. U.S. Steel's fiscal officials could see "no financial basis for lending additional funds at this time."

From their point of view any further financial commitment to Certified represented "an unattractive investment," and they "wonder[ed] why any company would acquire such an operation when the chance for loss so greatly exceeds the chance for profit." However, they recognized that this factor had to be weighed against that of "how valuable this distribution is to us" (CX 62). The ultimate decision made was to proceed with the acquisition since—

> * * * we can reasonably expect something close to $4,000,000 a year for our Hudson Plant, if Certified stays in business; if Certified ceases operations and with the recognition that the other four major ready-mix operators are so-called "captive" accounts, we would suffer an irreplaceable loss (CX 73 A).

This loss, as one U.S. Steel official viewed it, would result in UAC being "effectively eliminated from the Metropolitan New York area, one of the major markets of UAC for the last sixty years" (CX 75 A).

32. From the foregoing, it is apparent that U.S. Steel became initially involved with Certified through the financial arrangements incident to the Bankers Trust loan, because of its desire to maintain its position in a market in which it was foreclosed from selling in substantial quantities to at least three of the major users of cement due to the latter's vertical integration; and that having become financially enmeshed in Certified's problems, it eventually had no practical alternative other than to acquire Certified if it wished to minimize its own potential loss growing out of its financial commitment to Certified, and to maintain the production of its Hudson plant at a viable level.

National Portland

33. The circumstances and motivation of National's acquisition of Ryan are similar, in some respects, to U.S. Steel's acquisition of Certified. Like U.S. Steel, National found itself confronted with a declining share of the NYMA market, and with access to one of its former important customers, Colonial, largely closed to it (N Tr. 931). However, unlike U.S. Steel, to which the NYMA was an important outlet for its Hudson River and Lehigh Valley plants, but which operated nine other plants and sold in 37 states, access to the NYMA was critical to the survival of National's sole plant in the Lehigh Valley.

34. In 1960 National shipped approximately 435,000 barrels of cement into the NYMA, which represented 31% of its total shipments (CX 41, 42). In 1961 and 1962 its shipments into the

NYMA declined to 323,000 and 243,000 barrels, respectively, representing 24% and 18%, respectively, of its total cement shipments. In 1960 National's cement shipments into the NYMA represented 4.1% of total shipments into the area. Its share of the NYMA market declined to 2.9% in 1961 and 1.8% in 1962. In 1963, prior to the Ryan acquisition, National's plant was operating at 55–60% of capacity (N Tr. 877).

35. In this setting, National sought to associate itself with a ready-mix company in an effort to reestablish its position in the NYMA. While Ryan was not in the same financial condition as Certified, its fortunes were declining. Although it had managed to make a profit in 1963, the year in which it was acquired by National, it had lost $235,000 in 1962. Its net worth was declining and it was having difficulty in raising capital (N Tr. 949). Under the circumstances, it felt its chances for survival would be increased if it could affiliate with a cement company (N Tr. 948).

36. As previously noted in connection with the discussion of U.S. Steel's acquisition of Certified, prior to National's acquisition of Ryan, its principal stockholders had been approached by representatives of Bangor & Aroostock, which was interested in acquiring control of both National and Certified. While National's stockholders were receptive to the proposal and would have taken a minimum of cash in order to dispose of their interest in National (NCX 85 A), the deal fell through because of Certified's unwillingness to accept the proposal. Following the breakdown of these negotiations in early 1963, the individual who had helped introduce the parties became president of National. Having become convinced of the difficulties of a small cement company and an unaffiliated ready-mix company surviving in the NYMA in competition with companies like Colonial, he approached Ryan with a proposal to acquire it (N Tr. 867, 873).

D. The "Failing Company" Doctrine

37. Before completing consideration of the question of whether the acquisitions here involved will have the proscribed statutory effect, it is necessary to consider the application of the "failing company" doctrine, which has been asserted as a defense in the U.S. Steel proceeding. The respondent in that proceeding contends that since the company which it acquired was "a failing company" the acquisition cannot, under any circumstances, violate Section 7 of the Clayton Act. Respondent National, while not contending that Ryan was a "failing company" at the time it

was acquired, claims that due to its and Ryan's declining sales and profits neither could have survived as independent entities without their merging, and that therefore the acquisition does not violate the Clayton Act. Since the failing company doctrine, as such, is asserted as a defense only in the U.S. Steel proceeding, consideration will first be given to the nature of the doctrine and its application to that proceeding.

38. The "failing company doctrine," as it has come to be called, was enunciated for the first time, in a Clayton Act proceeding, in *International Shoe Co.* v. *Federal Trade Comm'n,* 280 U.S. 291 (1930). In that case the Court, after having concluded that there was no probability of competitive injury because the acquired and acquiring companies were not in substantial competition, found as an additional ground for dismissal the fact that the acquired company was "in failing circumstances." Its holding in this latter respect was as follows:

> In the light of the case thus disclosed of a corporation with resources so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure with resulting loss to its stockholders and injury to the communities where its plants were operated, we hold that the purchase of its capital stock by a competitor (there being no other prospective purchaser), not with a purpose to lessen competition, but to facilitate the accumulated business of the purchaser and with the effect of mitigating seriously injurious consequences otherwise probable, is not in contemplation of law prejudicial to the public and does not substantially lessen competition or restrain commerce within the intent of the Clayton Act. (280 U.S., at 302–303.)

39. Complaint counsel contend that the failing company doctrine is inapplicable to the Certified acquisition for the reasons that, (a) the mere fact that a company is in failing condition does not confer immunity on its acquisition if such acquisition would otherwise be illegal because of its probable adverse competitive impact on competition, and (b) even if the fact that a company is in failing condition does confer immunity on an otherwise illegal acquisition, the failing company defense does not apply to U.S. Steel's acquisition of Certified because that acquisition does not meet the requirements of the doctrine. The basis of complaint counsel's first argument is that the failing company doctrine confers a "relative," rather than an "absolute" defense, and that if, despite the failing nature of the acquired company, it can be demonstrated the acquisition will have the proscribed effect on competition, it is illegal (CB, p. 19). Complaint counsel's second argument, that the defense is, in any event, inappli-

cable to the Certified acquisition, is based on their contention that the acquisition does not meet the purported requirements of the doctrine, *viz,* (a) that the acquired company was "imminently and inevitably failing with no hope of rehabilitation," (b) that there were no other available bona fide alternative purchasers, (c) that a good faith effort to find alternative purchasers was maintained as long as possible, (d) that the acquired company did not willingly contribute to its financial difficulties in order to make itself desirable for purchase, and (e) that the acquiring company was not guilty of complicity or knowing acquiescence in a course of events which led to the financial difficulty of the acquired company.

Absolute or Relative Defense

40. The examiner can find nothing in the *International Shoe* decision (from which complaint counsel agree the law concerning the application of the failing company doctrine "stems primarily") to support their position that the failing company doctrine confers a "relative," rather than an "absolute," defense. Although the decision is not free from ambiguity, the examiner considers the basic holding of the Court to be that the acquisition of a company in failing condition "does not substantially lessen competition or restrain commerce within the intent of the Clayton Act." (At pp. 302–303.) The additional factors referred to by the Court, *viz,* that there was "no other prospective purchaser," and that the acquisiton was made "not with a purpose to lessen competition, but to facilitate the accumulated business of the purchaser and with the effect of mitigating seriously injurious consequences [*i.e.,* to "stockholders" and to the "communities] otherwise probable," relate not to the question of competitive impact, but to the question of the public interest in allowing the acquisition to stand, the Court concluding from the latter factors that the acquisition "is not in contemplation of law prejudicial to the public." The Court apparently assumed that the acquisition of a failing company could not, as a matter of law, injure competition. However, it also had to consider the "absence or presence of prejudice to the public interest" which, while Sherman Act criteria, were recognized to be applicable to a Clayton Act case. (At p. 298.) One of the purposes of the amendment to Section 7 was to eliminate the so-called "rule of reason" or "public interest" test, which had crept into the interpretation of that section. *Brown Shoe Co.* v. *United States, supra,* at 317, n. 30.

41. Complaint counsel apparently recognize the possibility that "the Court saw no distinction between the creation of an absolute or a relative defense, for it may well have assumed that it was not possible for the acquisition of a 'failing company' to injure competition." However, counsel suggest that while it might have been possible to conclude that there could not be competitive injury in such a case, under the original language of Section 7, which applied to the elimination of competition between the acquired and acquiring companies, such reasoning would not be applicable to the amended Section 7, in which acquired-acquiring company injury test was deleted.

42. In the opinion of the examiner, there is nothing in the *International Shoe* case to suggest that its holding was intended to be limited to a situation where the competition eliminated was that between the acquired and acquiring company. It may be noted, in this connection, that the original Section 7 was directed not only to acquisitions whose effect may be to substantially lessen competition between the acquired and acquiring companies, but those whose effect may be "to restrain * * * commerce in any section or community, or tend to create a monoply of any line of commerce." While the amendment to Section 7 eliminated the test of a lessening of competition between the acquired and acquiring companies, its "effect's" clause, although somewhat more "lenient," is not entirely dissimilar from the language of the broad "effect's" portion of the original section. *Brown Shoe Co.* v. *United States, supra,* at 317, n. 30, and 318, n. 33.

43. In any event, whether the Court in *International Shoe* intended its holding to be applicable in cases other than those where the competition involved was that between the acquired and acquiring companies, it seems apparent from the legislative history of the amendment to Section 7, and from the decided cases since then, that the holding in *International Shoe* is applicable generally to the acquisition of a failing company. Thus, Senate Report No. 1775, 81st Cong. 2d Sess. (1950), at page 7, states:

Companies in a failing or bankrupt condition

The argument has been made that the proposed bill, if passed, would have the effect of preventing a company which is in a failing or bankrupt condition from selling out.

The committee are in full accord with the proposition that any firm in such a condition should be free to dispose of its stock or assets. The committee, however, do not believe that the proposed bill will prevent sales of this type.

The judicial interpretation on this point goes back many years and is abundantly clear. *According to decisions of the Supreme Court, the Clayton Act does not apply in bankruptcy or receivership cases. Moreover, the Court has held, with respect to this specific section, that a company does not have to be actually in a state of bankruptcy to be exempt from its provisions; it is sufficient that it is heading in that direction with the probability that bankruptcy will ensue.* On this specific point the Supreme Court, in the case of *International Shoe Co.* v. *Federal Trade Commission* (280 U.S. 281) said: [Quoting portion of *International Shoe* opinion quoted at p. 464, *supra.*] [Emphasis supplied.]

After quoting from the *International Shoe* opinion, the Senate Report concludes as follows:

It is expected that, in the administration of the act, full consideration will be given to all matters bearing upon the maintenance of competition, including the circumstances giving rise to the acquisition.

44. Complaint counsel suggest that the above-quoted language from the Senate Report (that it expected "full consideration will be given to all matters bearing upon the maintenance of competition, including the circumstances giving rise to the acquisition"), is subject to the interpretation that the failing company doctrine would not be applicable to failing companies whose acquisition might adversely affect competition. The examiner does not so interpret the language of the Senate Report. It is clear that what the Senate Committee was saying was that in determining whether competition would be affected, it assumed that those administering the Act would consider "the circumstances giving rise to the acquisition" which, under the *International Shoe* decision cited by the Report, meant that it assumed consideration would be given to whether the acquired company was in failing condition. If it was, then, in the language of the Report, "the Clayton Act does not apply."

45. The House Report likewise cites the *International Shoe* decision for the proposition that Section 7, as amended, would not apply to the acquisition of a failing company. Addressing itself to the question of whether "the bill [would] prevent a corporation in failing or bankrupt condition from selling its assets to a competitor," the Report states:

The argument that a corporation in bankrupt or failing condition might not be allowed to sell to a competitor has already been disposed of by the courts. It is well settled that the Clayton Act does not apply in bankruptcy or receivership cases. In the case of *International Shoe* v. *Federal Trade Commission* (280 U.S. 291) the Supreme Court went much further, as is shown by the following excerpt from the decision: [Quoting the portion of the decision set forth at p. 464, *supra*]. (H.R. No. 1191, 81st Cong., 1st Sess. (1949), at p. 6).

46. Complaint counsel suggest that, while the failing company doctrine might provide a complete defense in the case of horizontal mergers (with which the Court was concerned in *International Shoe*), the rationale of the doctrine would not apply to vertical acquisitions, to which the amended Section 7 is now also applicable. The examiner can see no logical reason why the doctrine is not equally applicable to vertical acquisitions. If the acquisition by "the largest manufacturer of leather shoes in the United States" (*International Shoe Co.,* 9 F.T.C. 441, 446), of another shoe manufacturer which is in failing condition, is not deemed to adversely affect competition, then there would appear to be no reason why the acquisition of a failing customer by one of its suppliers should be deemed to be harmful to competition.

47. Not only does the legislative history of the amendment to Section 7 fail to support the distinction sought to be made by complaint counsel, but the decided cases interpreting the amended section recognize no such distinction. In the *Brown Shoe* case the Supreme Court, in the portion of its opinion dealing with "The Vertical Aspects of the Merger," stated that, "the Senate and House Reports * * * evince an intention to preserve the 'failing company' doctrine of *International Shoe Co.* v. *Federal Trade Comm'n,* 280 U.S. 291." *Brown Shoe Co.* v. *United States, supra,* at 331. In *United States* v. *Maryland & Virginia Milk Producers Ass'n.,* 167 F.Supp. 799 at 808 (D.D.C. 1958), the District Court dismissed the complaint, insofar as it involved the vertical acquisition of a dairy company in failing condition, by a milk producers' association, the court stating:

> The acquisition of capital stock or assets of a failing corporation is not within the ban of Section 7 of the Clayton Act. While the statute does not expressly so provide, this conclusion is inherent in the statutory provision because the acquisition of a failing corporation that is on the verge of going out of business cannot result in lessening competition or in creating a monopoly. Be that as it may, the Supreme Court so held in *International Shoe Co.* v. *Federal Trade Commission,* 280 U.S. 291, 298, 50 S. Ct. 89, 74 L.Ed. 431.

No appeal was taken from this portion of the District Court's decision, which was later reversed on other grounds by the Supreme Court (362 U.S. 458).

48. Complaint counsel seek support for their position, that the failing company doctrine provides only a relative, not an absolute, defense, in the holding of the Supreme Court in *United States* v. *Diebold,* 369 U.S. 364 (1962), to the effect that it was improp-

er to grant summary judgment to a defendant asserting the "failing company" defense, where there was "a genuine issue as to ultimate facts material to the rule of *International Shoe Co.* v. *Federal Trade Comm'n.*" In the opinion of the examiner, the *Diebold* decision lends no support to the proposition for which it is cited by complaint counsel. In that case the District Court had granted summary judgment dismissing the complaint, on the ground that the acquired company was a failing company within the meaning of the *International Shoe* case, based on its findings, (a) that the acquired company was "hopelessly insolvent" and (b) that defendant was "the only bona fide prospective purchaser" of the business. In holding that the complaint should not have dismissed on the basis of affidavits since there was "a genuine issue as to the ultimate facts" under the rule of the *International Shoe* decision, the Supreme Court did so not because of any factual issue as to whether there would be any competitive injury despite the failing condition of the acquired company, but because there was a real issue raised as to "whether other offers for [the acquired company's] assets or business were actually made" (at 655). It is implicit in the Court's decision that if not for this issue the failing condition of the acquired company would have been a complete defense.

49. Post-1950 decisions of the administrative agencies have likewise been premised on the full applicability of the failing company doctrine, as established by the *International Shoe* case, to the amended Section 7. In the Commission's decisions in *Farm Journal Inc.*, 53 F.T.C. 26; *Pillsbury Mills, Inc.*, 57 F.T.C. 1274, *Crown Zellerbach Corp.*, 54 F.T.C. 769, *aff'd* 296 F. 2d 800; and *Erie Sand & Gravel Co.*, 56 F.T.C. 437, *rev'd on other grounds*, 291 F.2d 279, the defense was held to be inapplicable because the record failed to establish the failing nature of the acquired company, not because of the limited nature of the defense. In the latter case the court of appeals, referring to the "so-called 'failing company' doctrine of *International Shoe Co.* v. *Federal Trade Commission*," stated:

> That doctrine, as its name suggests, *makes Section 7 inapplicable* to the acquisition of a competitor which is in such straits that the termination of the enterprise and the dispersal of its assets seems inevitable unless a rival proprietor shall acquire and continue the business. (At 280, emphasis supplied.)

In the *United Airlines-Capital Airlines* merger case, CAB Docket No. 11699 (1961), CCH Aviation Law Rep., CAB Cas. 1960–1964, at 14,440, the "failing business" doctrine was cited as the basis for upholding the acquisition of a failing competitor by one of the largest airlines in the United States.

50. Administrative decisions of the Department of Justice, permitting acquisitions involving failing companies, have been premised on the assumption that Section 7 of the Clayton Act is inapplicable to acquisitions meeting the requirements of the failing company doctrine. In discussing the failing company doctrine before a meeting of the New York State Bar Section on Antitrust Law in 1955, the then Assistant Attorney General in charge of the Antitrust Section, referred to acquisitions of companies having financial problems as being "perhaps our single most difficult problem," the problem being expressed as one of "where to draw the line in these situations which do not involve bankruptcy, but [in which] we are asked to agree that the company is 'heading' in that direction." However, despite the difficulties presented in resolving these factual issues, the Assistant Attorney General found no problem in the legal status of the failing company doctrine as a result of the amendment to Section 7, expressing his position as follows:

> With respect to a company in financial distress, the House and Senate Reports on the amendment to Section 7 quote with approval the Supreme Court's holding in the *International Shoe* case * * *. *Thus it is evident that Section 7 is not applicable to the acquisition of a failing company "provided there is no other prospective purchaser."* (Antitrust Law Symposium—1955, Commerce Clearing House, pp. 50–52, emphasis supplied.)

In not opposing the acquisition of International News Service by United Press in 1958, the then Assistant Attorney General in charge of the Antitrust Division, citing the Supreme Court's decision in *International Shoe* and the congressional reports discussed above, stated:

> * * * the Supreme Court has held, and Congress specifically approved by its 1950 amendments to Section 7, that *Section 7 did not proscribe mergers where the acquired company was in so-called "failing circumstances" and where no other purchaser was available.* (1 CCH Trade Reg. Rep., par. 4345.15, emphasis supplied.)

Alleged Failure To Meet Requirements of Failing Company Doctrine

51. As mentioned above, complaint counsel further argue that "even if it is concluded that a well-established failing company defense does create an exemption for an otherwise illegal merger, * * * the public interest requires that such immunity from the

antitrust laws be granted only after stringent conditions are met." Complaint counsel contend that respondent U.S. Steel has failed to establish that the purportedly applicable conditions have been met in its acquisition of Certified. The validity of counsel's contentions regarding the nature of the "stringent conditions" which must be met, and of respondent's alleged failure to establish that these conditions have been met are hereinafter discussed.

Failing Nature of Company

52. The first condition which complaint counsel contend must be met is that the acquired company was "imminently and inevitably failing, with no hope of rehabilitation." While it is clear from the decided cases that the mere fact a company is in some financial difficulty or that there are some adverse pressures on its financial position is not sufficient to establish that it is a failing company, the examiner is not persuaded that it is necessary to establish that it was "imminently and inevitably failing, with no hope of rehabilitation." The proper test, in the opinion of the examiner, is one of the "probability" of business failure, which is laid down in the *International Shoe* case and reaffirmed by the Senate Report above quoted. In the *International Shoe* case, the acquired company was found to be one "with resources so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure." As interpreted in the Senate Report approving the amendment to Section 7, this means that "a company does not have to be actually in a state of bankruptcy * * *; it is sufficient that it is heading in that direction with the probability that bankruptcy will ensue."

53. It is the opinion and finding of the examiner that Certified was in such a poor financial condition, at or about the time of its acquisition, that there was a reasonable probability of its becoming bankrupt within a relatively short period of time. It had been losing money, in substantial amounts and at an increasing rate, for a period of about a year and a half, and there was no visible improvement in the trend of its earnings.[34] By January 1964 it

[34] Set forth below is a table reflecting Certified's losses and the monthly rate of loss during the period in question:

Certified's Losses and Rate of Loss

	12 mos. end. 6/30/63	6 mos. end. 12/31/63	7 mos. end. 1/31/64	4 mos. end. 4/30/64
Total Amount	$655,850	$928,400	$1,141,000	$871,500
Monthly Rate	54,650	154,730	163,000	217,900

had no working capital, since its current liabilities exceeded its current assets by almost $300,000, and it had a deficit in retained earnings of over $1 million. It was unable to meet overdue obligations in excess of $600,000, with some of its creditors threatening to discontinue further credit and to institute legal action. According to the uncontradicted and credited testimony of the only expert witness to testify on the subject (Harry F. Tappen, in charge of the loan administration division of Bankers Trust Company), by the end of 1963 and early 1964 Certified was in a "failing" condition (Tr. 1105).[35]

54. Although complaint counsel purport to question whether Certified was actually a failing company, they concede that it had "suffered large losses in the year and a half prior to the acquisition, had a small and diminishing net worth, and would have encountered substantial difficulty in meeting trade obligations *without additional help from some outside source*" (CB, p. 16, emphasis supplied). Since Certified had been unable to obtain financial assistance from an "outside source," *viz*, Bankers Trust Company, a year earlier without the guarantee of a cement company, it is difficult to see how it could have obtained such assistance in early 1964, when its losses were even higher and its financial condition was much worse. Complaint counsel suggested, during oral argument, that Certified might have been able to carry on by obtaining further credit from cement companies (Tr. 1271). While this is somewhat dubious in view of the state of financial debility it had reached,[36] such leniency would not have aided it in making payment of other substantial obligations due to non-cement companies, unless the cement company were willing

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[35] Complaint counsel suggest that the witness' testimony in this respect is in conflict with his other testimony that in February 1964 he "still had hope for the company," and would have approved a further loan (Tr. 1089). However, it is clear from the witness' later testimony that he was mistaken as to the date about which he was speaking, *viz*, February 1964. His later testimony that he was "starting to become somewhat disillusioned" with Certified's chances of recovery in the "spring of 1964 and into the summer of 1964" (Tr. 1094), indicates that Tappen had misspoken himself in referring to February 1964 as the time when he still had hope for Certified, and meant 1963, since the acquisition took place in April 1964. Complaint counsel himself inadvertently made a similar error in referring to Certified's attempt to sell its business "from November 1964 on," when he meant November 1963 (Tr. 1095).

[36] Complaint counsel refer to the testimony of officials of Alpha and Triangle, as supporting their contention that other cement companies would have been willing to extend credit. The Alpha official testified that Certified's "slowness of payment indicated financial trouble," and that while his company had not reached the point of being unwilling to sell to it "[w]e were careful in selling to them" (Tr. 993). The triangle official who testified on the point was referring to a period in 1963, before Certified's financial condition had reached its low point (Tr. 1059). Other cement officials, whose testimony is overlooked by complaint counsel, testified that they were either reluctant to sell to, or would not sell to, Certified because they "considered them a bad credit risk" (Tr. 300, 392, 436, 482).

to undertake a large-scale program of financial assistance to Certified. It seems evident that no cement company would have been willing to involve itself in financial obligations of the order of magnitude required,[37] without some control over where its money was going. It is also evident that any other cement company which assumed such control of Certified would in all probability have become the subject of a Commission complaint, as complaint counsel conceded during oral argument (Tr. 1254–1255).

55. Complaint counsel further argue that even if it is the fact that Certified "was hopelessly failing *at the time it was acquired* * * * it is our contention that * * * the financial prospects of Certified must be judged as they were at the time the Bankers Trust loan was signed—January 1963." Counsel base this contention on the fact that "because of the extremely aggressive use of financial power by United States Steel prior to the acquisition * * * it was practically certain that effective foreclosure of Certified had taken place" (CB, at p. 27). Complaint counsel note that following the loan, Certified increased its purchases of cement from UAC to over 50% of its cement requirements, and that by January 1964 it was purchasing nearly 80% of its cement from UAC. Counsel argue that "[g]iven the substantiality of this foreclosure and the accompanying trend in the New York market, there is little question that if challenged separately, U.S. Steel's 'deal with Certified' * * * could have been held violative of Section 3 of the Clayton Act."

56. Whether the U.S. Steel-guaranteed loan and the resultant increase in Certified's purchases of UAC cement are violative of Section 3 of the Clayton Act is something the examiner need not determine, since the complaint does not charge such a violation nor was the matter litigated. Complaint counsel make no contention that the making of the loan was responsible for Certified's later financial debacle. The evidence is, if anything, to the contrary, since it is clear that if not for the loan Certified's financial condition would have reached the critical stage many months before it did. Nor do complaint counsel contend that the loan was made as part of any plan or arrangement whereby U.S. Steel would later acquire Certified. While the evidence discloses that U.S. Steel entered into the loan arrangement in the expectation of substantially increasing its sales to Certified, there is not a scin-

[37] Any outside source would have had to take over the $3.3 million obligation to Bankers Trust and be prepared to invest new capital estimated to be in the order of magnitude of $4 million.

tilla of evidence that it did so as a first step to an eventual acquisition. Accordingly, it is the opinion of the examiner that a determination of whether Certified was a failing company must be made on the basis of its financial condition at or about the time of the negotiations for its acquisition by U.S. Steel.

Availability of Other Purchasers

57. Complaint counsel contend that the Certified acquisition does not meet the second important requirement of the failing company doctrine laid down in the *International Shoe* case, *viz*, that the acquiring company was the only available purchaser of the failing company. Complaint counsel make no contention that there was any other purchaser for Certified's business or assets actually available at or about the time of the acquisition of its assets by U.S. Steel. However, they claim that if U.S. Steel had not made it possible for Certified to borrow $3.3 million from Bankers Trust Company in January 1963, Bangor & Aroostock would have been able to acquire Certified at that time, and that thereafter, in the summer of 1963, American Cement might have been able to arrange for a merger except for the fact that it "was not able to obtain anything comparing to the Bankers Trust deal" (CB, at pp. 28–29).

58. In the opinion of the examiner, the fact that U.S. Steel had assisted Certified financially in January 1963, does not establish the availability of other purchasers, nor does it establish that U.S. Steel knowingly contributed to the lack of availability of other purchasers, as complaint counsel suggest at another point (CB, at p. 31). The fact that Certified chose to accept U.S. Steel's financial assistance in January 1963, rather than the Bangor & Aroostock offer, is no reason to fault either Certified or U.S. Steel. As far as Certified is concerned, it made a business judgment that it preferred to continue its independent existence, rather than become part of a vertically integrated operation with National Portland Cement Company, controlled by Bangor & Aroostock. Had its optimistic hopes been realized, its independent existence would have been preserved. This was certainly preferable, from the point of view of maintaining competition in the market, to its becoming the outright property of another company controlling a cement company. There is not the slightest evidence that U.S. Steel was aware of the Bangor & Aroostock offer, or that it arranged for the Bankers Trust loan in order to head off Certified's acceptance of that offer.

59. As far as the American Cement proposal is concerned, the

record fails to establish that U.S. Steel was responsible for Certified's not accepting that proposal. In the first place, it was American Cement, not Certified, which decided not to proceed with the negotiations. In the second place, the inability to reach agreement was based on a number of factors, aside from the U.S. Steel loan, including the fact that both Certified and Hickey (the American Cement subsidiary that was to be acquired) were both losing money and would require substantial financing over and above the amount required to pay off the Bankers Trust loan, and the fact that American Cement had been advised of Government opposition to the proposed merger.

60. Finally, it should be noted that the proposed tie-ups with Bangor & Aroostock and with American Cement would each have resulted in a vertical arrangement which, presumably, would have been subject to the same purported legal disability as the instant acquisition. Any doubt on this point is dissipated by the fact that respondent National's acquisition of a smaller ready-mix company than Certified resulted in the issuance of a complaint against it. Presumably, Bangor & Aroostock's acquisition of both National and Certified with the obvious intention of their vertically integrated operation, would have been equally offensive to complaint counsel. American's acquisition of Hickey had resulted in a Commission proceeding against it. Presumably, the merging of Hickey and Certified under American's aegis would have been equally offensive. The requirement of *International Shoe,* that there be "no other prospective purchaser" available, obviously contemplates another purchaser whose acquisition of the failing company would not offend Section 7.

61. In any event, the record in this proceeding establishes that there was, in fact, no other purchaser available at or about the time negotiations for U.S. Steel's acquisition of Certified were begun in November 1963. Negotiations with all other purchasers had been terminated several months prior to the inception of negotiations with U.S. Steel. Complaint counsel suggest that Certified is to be found at fault in its efforts to be acquired because "after November 1963 it made no affirmative efforts to find a purchaser other than United States Steel" (CB, at p. 29). In the opinion of the examiner neither Certified nor U.S. Steel can be found at fault because no effort was made to find another purchaser after November 1963. The record demonstrates that, by November 1963, Certified had exhausted all efforts to become acquired or to otherwise obtain financial assistance, and any further efforts in this direction would have been fruitless, given its then

financial condition. Certainly there is no evidence that U.S. Steel, to which Certified had made overtures, was precluding Certified from seeking other avenues of assistance. U.S. Steel was under no obligation, as far as the application of the failing company doctrine is concerned, to insist that Certified continue with efforts to seek other sources of salvation.

The Alleged Certified-U.S. Steel "Probable" Conspiracy

62. Complaint counsel further contend that the failing company doctrine should be found inapplicable in this case because, (a) Certified "willingly contributed to its own financial difficulties" in order to "make itself attractive for purchase by United States Steel" and, (b) "United States Steel was guilty of complicity, knowing acquiescence and probable conspiracy in the financial difficulties of Certified Industries" (CB, at pp. 30–31). With regard to their contention that Certified "willingly" contributed to its financial difficulties, complaint counsel claim that Certified's officials "were, from the time of the founding of the company, committed to an aggressive if not reckless policy of expansion," which ultimately led to the company's downfall. In support of this contention counsel cite such facts as Certified's acquisition of the poorly financed Preferred, the increasing of its sales too rapidly from $4 million to $14 million in three years, the incurring of enormous expenses in the opening of new plants in order to expand into New York City, its allegedly bidding too low on a number of jobs, and assert that having "built a house of cards on other people's money and credit * * * [Certified's officials] sold out before it caved in." In support of their contention regarding U.S. Steel's alleged complicity, complaint counsel cite "the history of continuous involvement by United States Steel in the financial matters of Certified Industries."

63. There is nothing in the facts cited by complaint counsel to establish that Certified's officials deliberately set about to create a financial debacle which would make the company more desirable to U.S. Steel or any other prospective purchaser. The examiner cannot imagine anything which would make them less desirable than a debilitated financial structure. It is possible that at times Certified's officials may have engaged in policies which more conservative businessmen would have hesitated to undertake. However, it is not the purpose of this proceeding to censor the business judgment of duly elected officials of a company. There is nothing in the record to show that policies referred to by complaint counsel were undertaken with any motive in mind other than to

advance the normal business interests of Certified. Certainly there is nothing to suggest that they were undertaken with the ulterior motive of creating a financial debacle which would make it possible for U.S. Steel to buy them out without running afoul of the antitrust laws, as complaint counsel apparently concede.[38]

64. There is likewise not the slighest evidence of "complicity," "knowing acquiescence," or "probable conspiracy" by U.S. Steel in Certified's financial difficulties, as asserted by complaint counsel. While U.S. Steel admittedly assisted Certified in getting the Bankers Trust loan, and did so with the obvious purpose of obtaining a substantial increase in its share of Certified's cement purchases, there is nothing in the record to indicate that its purpose was to contribute to Certified's downfall and eventual takeover. On the contrary, the evidence establishes that U.S. Steel's purpose was to help fortify Certified, in the hope that it would share in Certified's prosperity in terms of increased cement purchases. When future events, which neither it nor the knowledgeable officials of Bankers Trust had anticipated, brought Certified to the point where it concluded that only a sale to U.S. Steel would enable it to survive, U.S. Steel, with some reluctance, took the ultimate step of buying out Certified. There is a suggestion in complaint counsel's argument that possibly U.S. Steel could have kept Certified alive with further infusions of capital. However, they suggest no sound basis why U.S. Steel should have done this. Whatever value there might have been in the collateral for the original Bankers Trust loan, Certified's assets did not warrant U.S. Steel's incurring a substantial increase in its potential liability, without a major voice in where its money was to be spent.

Conclusion as to Failing Company Defense

65. The record establishes that the basic requirements of the failing company doctrine have been met in the case of U.S. Steel's acquisition of Certified since it appears, (a) that Certified was a failing company, and (b) that there was no other prospective purchaser available. Despite their peripheral claims, which have been hereinabove found to be without merit (such as whether Certified and U.S. Steel contributed to Certified's financial de-

[38] Despite their attack on the motives of Certified's officials, complaint counsel make the following concession which, in the opinion of the examiner, is inconsistent with their contention that such officials "willingly" contributed to the company's financial difficulties because of a desire to make it attractive for purchase by U.S. Steel:

"It is not crucial to this case to impugn the motives of responsible and respected members of the business community. Nor does experience or logic indicate that it is likely that the president of a company would bankrupt it in the hope of selling out at a minor profit." (CB, at p. 31).

bacle, and whether Certified was failing at the time of U.S. Steel's initial financial assistance through the loan guarantee), complaint counsel do not seriously dispute the fact that Certified was in near-bankrupt condition at or about the time it was acquired. While stopping short of such a concession in their brief (in which they did concede that Certified had "suffered large losses * * * and would have encountered substantial difficulty in meeting trade obligations without additional help from some outside source"), complaint counsel conceded during oral argument that "the grave probability of [Certified's] failure" existed (Tr. 1271).[39] While claiming that the U.S. Steel guaranteed loan prevented two other prospective purchasers from acquiring Certified, complaint counsel make no serious contention that there was any other purchaser available at or about the time of the acquisition. As has been hereinabove found, the facts relied upon by complaint counsel do not establish the availability of other purchasers. Furthermore, even if the companies referred to may be deemed prospective purchasers, an acquisition by them would not have any lesser anticompetitive implications than one by respondent. It is, accordingly, concluded and found, that the requirements of the failing company defense have been met.

Competitive Impact

66. Complaint counsel urge that, even if "the examiner should feel bound by precedent or Congressional intent to immunize this acquisition * * *, [he] should find as a matter of law and fact that the statutory standard of Section 7 has been violated" (CB, at p. 25). In view of the fact that the Commission may disagree with the examiner's conclusions as to the scope of the protection afforded by the failing company defense, the examiner will consider whether, despite Certified's financial condition, its acquisition by U.S. Steel will have the requisite competitive effect.

67. In support of their position concerning the anticompetitive implications of the acquisition, complaint counsel cite the fact that "[u]nder the financial tutelage of U.S. Steel in 1962 and 1963, Certified managed to grow from $4.3 million in sales in 1961 to $9.7 million in 1962, and $14.3 million in 1963, with a corresponding increase in cement consumption." Counsel argue that not

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[39] While conceding that the "grave probability" of Certified's failure existed, complaint counsel contended that this was not the only requirement for establishing that Certified was in failing condition. They contended it must also be shown that there was *no* hope of rehabilitation (Tr. 1270). As the examiner has previously concluded (at p. 471, *supra*), there is no such requirement laid down in the *International Shoe* decision or in the legislative history of the amendment to Section 7.

only will this substantial volume be foreclosed to other cement companies, but that the acquisition will "further the trend of 'defensive' vertical acquisitions or foreclosures in the NYMA." Complaint counsel further contend that "the captive condition of Certified, by lessening significantly the amount of open market for cement in New York, creates barriers to the entry of new competitors or the establishment of new distribution terminals." On the ready-mix level, counsel contend that small, ready-mix firms, particularly in the Long Island area, will be unable to "compete with the dominant firm in their market [Certified] when it is reinforced by integration and by the financial and conglomerate power of one of the nation's largest corporations" (CB, at pp. 24–25).

68. It should be noted at the outset that whatever growth Certified achieved between 1961 and 1963 cannot be attributed, in any significant degree, to U.S. Steel's alleged "financial tutelage." The growth of Certified's sales from $4.3 million in the fiscal year ending June 30, 1961, to $9.7 million in the year ending June 30, 1962, certainly cannot be attributed to the $150,000 credit it received from U.S. Steel in January 1962. Such growth came not from the U.S. Steel credit or from similar extensions of credit by three other cement companies, but principally from the fact that Certified more than doubled its size during that period by its acquisition of Preferred. Nor can Certified's increase in sales from $9.7 million in the year ending June 30, 1962, to $14.3 million in the year ending June 30, 1963, be attributed in any substantial measure to U.S. Steel's "financial tutelage." The $3.3 million loan which Certified received through U.S. Steel's good offices was not finalized until March 1963, by which time Certified's sales were already entering a downward phase, in response to the general decline of ready-mix sales in the NYMA. This trend continued during 1964, both before and after the acquisition by U.S. Steel. Thus, in the calendar year 1964 Certified's total sales were $9,065,400, which is not only $5 million below 1963, but even less than its 1962 sales (CX 32 A–B).

69. There can be no doubt that access to Certified's volume of cement purchases will be substantially closed to other cement companies, as contended by complaint counsel. However, given Certified's financial condition, such volume would have been foreclosed in any event upon Certified's demise. Complaint counsel suggested during oral argument that it would have been less harmful to competition if Certified had been allowed to become bankrupt since its business would in all likelihood have been split

up among various ready-mix companies, which would have then become available as potential customers to all cement companies selling in the NYMA (Tr. 1239–1240). Complaint counsel's argument is not only speculative, but is contrary to the actual testimony of cement company witnesses called by them, who testified that if Certified had gone into bankruptcy most of its business would have been picked up by Colonial, which was by far the dominant ready-mix company in the NYMA, thus further enhancing Colonial's market position (Tr. 1131, 1040). The opinion expressed by these witnesses accords with the business realities of the market in view of the fact that, despite the large number of ready-mix companies in the NYMA, only five or six companies do business in large portions of the area and are the principal competitors for the large-volume projects serviced by the large, area-wide contractors (Tr. 1003; N Tr. 935). Complaint counsel's argument also overlooks the fact that if Certified had gone bankrupt, U.S. Steel, as its major creditor (with a potential liability of $3.3 million and a mortgage on most of Certified's assets) would have had every incentive to purchase most of Certified's assets and to enter the ready-mix business. In that event, as complaint counsel apparently concede (Tr. 1243), the purchase would not have been subject to attack under Section 7, despite the foreclosure which would have resulted.[40]

70. Whether, as complaint counsel contend, the acquisition of Certified will create a barrier to the entry of new cement competitors is something as to which one can only speculate. It seems likely there will be some tendency in this direction. It should be noted, however, that the discouragement of new firms from entering the market (which already has the largest aggregation of cement companies in the northeast) would come largely from the vertical integration of Colonial, which accounts for about half of the cement consumed by ready-mix firms, rather than from the acquisition of Certified, which accounts for less than 10% of cement consumption. It may also be noted that, despite Colonial's vertical integration, Atlantic Cement entered the market in 1962, and in the next two years became the second and third ranking company in the NYMA.

71. With respect to the matter of small, ready-mix companies being placed at a disadvantage by virtue of the fact that Certified

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[40] See *Aluminum Co. of America* v. *Federal Trade Commission*, 299 Fed 361 (3rd Cir. 1924), where it was held that a respondent, which was under a Commission divestiture order in a Section 7 Clayton Act proceeding, could bring suit on a bona fide indebtedness of the acquired company and bid on its plant at a sheriff's sale.

will be "reinforced by * * * the financial and conglomerate power of one of the nation's largest corporations," it is sufficient to observe that this frequently occurs when a large, multiproduct, conglomerate company enters a market. However, unless one is prepared to say that size is per se illegal, this is not, considering the alternatives present here, a sufficient basis for holding the acquisition illegal. If Certified had gone into bankruptcy, the small companies might have benefited by picking up bits and pieces of its business. However, even this is by no means clear, in view of the likelihood that their principal competitor, Colonial, would have enhanced its market position even more. Complaint counsel suggest that U.S. Steel can afford to incur short-term losses by "dump[ing] excess capacity cement into New York by means of low bids by Certified for large jobs," to the disadvantage of small independent companies who cannot afford such losses. While this is possible, there is nothing in the record of the pricing practices of U.S. Steel's UAC Division to suggest that this is likely to occur. The record discloses that UAC was not among the price leaders in cement in the NYMA. While Certified was reportedly among the price leaders in ready-mixed concrete in the NYMA prior to the acquisition, there is no evidence that its policies were affected by its financial relationship with U.S. Steel. If one were to hazard a guess as to what effect its acquisition by U.S. Steel will have, it would be that Certified's pricing policy will likely become more conservative.

Conclusion as to Competitive Impact

72. Considering, (a) the state of the NYMA market in which one company, Colonial, dominated the market, accounting for about half of the cement consumed by ready-mix companies, and almost one-third of the cement sold by cement companies, (b) the fact that while UAC was the fourth-ranking cement supplier in 1963 and the second-ranking company in 1964, with approximately 7 to 11% of cement sales, it was a relatively poor runner-up to Colonial, (c) the fact that while Certified was the second-ranking cement consumer among ready-mix companies, with about 10% of cement consumption, it was a relatively poor second in comparison with Colonial, (d) the fact that Certified was a failing company at the time of its acquisition and for some months prior thereto, and (e) the fact that U.S. Steel's motives in assisting Certified financially, and in later acquiring it, were defensive rather than aggressive in nature, since it was losing market position, with the largest cement supplier in the NYMA,

Colonial, being already vertically integrated and two other cement companies, American and National, being vertically integrated with the fourth and fifth largest ready-mix companies in the market, *viz*, Ryan and Hickey, (f) the fact that after having assisted Certified financially it had little practical alternative, with the worsening of Certified's financial condition, except to acquire the company, if it wished to minimize its own potential financial liability and the adverse impact which Certified's demise would have on the UAC Hudson plant, and (g) the fact that Certified's demise would, in all probability, have resulted in increasing Colonial's market power, it is the finding and conclusion of the examiner that counsel supporting the complaint have failed to sustain the burden of proving that the effect of the acquisition of Certified's assets by U.S. Steel's subsidiary, New Providence Corporation, may be substantially to lessen competition, or to tend to create a monopoly in the NYMA, or any other section of the country, in either the portland cement or ready-mixed concrete product lines of commerce.

E. Competitive Effect of National Acquisition

73. Complaint counsel's position with respect to National's acquisition of Ryan is similar, in most respects, to their position concerning U.S. Steel's acquisition of Certified. Thus, counsel contend that the acquisition resulted in a substantial foreclosure of markets to other cement companies, increased the trend toward concentration, and gave Ryan an advantage over its independent competitors in terms of lower costs and greater financial support.

74. While the National-Ryan combination did not involve the failing company aspect of the UAC-Certified combination, it was, in many respects, a weaker combination. In the broad northeastern cement market area, National ranked fourteenth in 1964, with approximately 3% of cement shipments, compared to UAC which ranked second and accounted for 12.8% of cement shipments. In the narrower NYMA, which is the market most directly involved in this proceeding, National ranked sixteenth in 1963, the year in which it acquired Ryan, and accounted for 2.4% of area shipments, compared to UAC which ranked fourth with 7.5% of area shipments. Of course, as previously indicated, Colonial overshadowed both companies, with 21% of cement shipments in the market in 1963, and 31% in 1964. National's acquisition of Ryan enabled it to increase its market share to 4.8% in 1964 and its rank to sixth place. However, this merely enabled it to return, substantially, to its 1960 share of 4.1%. Ryan, although

the third ranking company in terms of cement consumption by ready-mix companies in the NYMA in 1962, when it accounted for 10% of the cement consumed by such companies, became the fourth ranking company in 1963, with 8.8% of cement consumption, and its share declined still further in 1964 to 6.4%. In all three years it was far outranked by Colonial, which accounted for approximately 50% of cement consumption by ready-mix companies.

75. Although, as previously mentioned, Ryan operated at a profit in 1963, the year in which it was acquired, it had lost approximately $285,000 in the previous year. In the fiscal year ending March 31, 1964, Ryan sustained a loss of almost $11,000, and in the 1965 fiscal year its loss increased to over $400,000. In the latter year its sales declined to $4.9 million, compared to $10.9 million in 1963. While respondent National operated at a profit up to 1964, Ryan's heavy losses in the latter year resulted in a consolidated loss for both companies of almost $120,000. Based on projections made from actual figures for the first five months of the present fiscal year, it was estimated by National's president that the combined operation would sustain a loss of $250,000 in the present fiscal year. The same official predicted that if present prices and volume of sales continue, both companies would have to liquidate by March 31, 1967.

76. It seems evident from the above recitation that if Ryan has gained any advantage over its ready-mix competitors as a result of its acquisition by National, in terms of better cement prices or credit terms, it has not yet begun to manifest itself, over two years after the acquisition. The advantage to National has likewise not yet become apparent. On the contrary, as one of its competitors observed, National actually weakened itself as a competitor by making the Ryan acquisition (Tr. 1036, 1043). The same competitor expressed the opinion that if Ryan had not been acquired by National at the time it was, it would not be in business today (Tr. 1035). While there was considerable testimony by industry witnesses regarding purported difficulties in competing with vertically integrated companies because of their alleged advantage and leadership in price and credit competition, almost none of such testimony was directed to National or Ryan. As far as National is concerned, there is substantial evidence to the contrary in the record, *viz*, that it has not been and is not aggressive in these respects (Tr. 311, 346, 347).

77. Considering (a) the state of the NYMA market, in which the top two groups of companies, Colonial-Hudson and UAC-

Certified, are vertically integrated, (b) the fact that these two combinations appear to be legally unassailable (the former because it developed by internal expansion, and the latter largely because of the failing company defense), (c) the relatively minor position in the market of the National-Ryan combination, vis-à-vis the top two companies, (d) the declining position of both National and Ryan at the time of the acquisition, and (e) the present debilitated state of this combination, it is the opinion and conclusion of the examiner that complaint counsel have failed to sustain the burden of proving that the effect of the acquisition of Ryan and N. Ryan by respondent National may be substantially to lessen competition, or to tend to create a monopoly in the NYMA or any other section of the country, in either the portland cement or ready-mixed product lines of commerce. On the contrary, it is the opinion of the examiner that to order the divestiture of Ryan and N. Ryan would tend to strengthen Colonial's dominant position in the market and be contrary to the public interest.

FINAL CONCLUSIONS OF LAW

A. As to Respondent National

1. Respondent National Portland Cement Company and Ryan Ready Mixed Concrete Corporation, and the latter's affiliate, N. Ryan Company, Inc., were at all times material herein, corporations engaged in commerce, as "commerce" is defined in the Clayton Act, as amended.

2. Counsel supporting the complaint have failed to sustain the burden of establishing, by substantial, reliable and probative evidence, that the acquisition of the stock or assets of Ryan Ready Mixed Concrete Corporation, a corporation, and its affiliate N. Ryan Company, Inc., by respondent National Portland Cement Company, was in violation of Section 7 of the Clayton Act, as amended.

B. As to Respondent U.S. Steel

1. Respondent United States Steel Corporation and Certified Industries, Inc., were at all times material herein, corporations engaged in commerce, as "commerce" is defined in the Clayton Act, as amended.

2. Counsel supporting the complaint have failed to sustain the burden of establishing, by substantial, reliable and probative evidence, that the acquisition of the stock or assets of Certified In-

dustries, Inc., by respondent United States Steel Corporation, was in violation of Section 7 of the Clayton Act, as amended.

ORDER

It is ordered, That the complaint in each of the above-entitled proceedings be, and the same hereby is, dismissed.

ORDER DISMISSING COMPLAINT, VACATING INITIAL DECISION, AND TERMINATING PROCEEDING, DOCKET NO. 8654

Upon consideration of complaint counsel's request that they be permitted to withdraw the appeal to the Commission from the initial decision of the hearing examiner, and that the complaint be dismissed and the initial decision vacated because respondent National Portland Cement Company no longer owns any of the assets or stock of Ryan Ready Mixed Concrete Corporation, the acquisition which formed the basis for this proceeding; and

The Commission having determined that, in the circumstances, this proceeding is now moot, and that it would not be in the public interest to continue with this proceeding:

It is ordered, That complaint counsel's request for permission to withdraw the appeal be, and it hereby is, granted.

It is further ordered, That the complaint be, and it hereby is, dismissed; that the initial decision be, and it hereby is, vacated; and that the proceeding be, and it hereby is, terminated.

Commissioner MacIntyre not participating.

IN THE MATTER OF

EDWARD L. COX

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

Docket C–1190. Complaint, April 3, 1967—Decision, April 3, 1967

Consent order requiring a Columbus, Ohio, distributor of skip-tracing letters to cease using false and deceptive statements in his debt collection forms.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Edward L. Cox, an individual, hereinafter referred to as the respondent, has 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:

PARAGRAPH 1. Respondent Edward L. Cox is an individual residing at 496 South Hamilton, Columbus, Ohio. For some time last past the respondent has been an officer of Intrastate Credit Control Systems, Inc., an Illinois corporation doing business as State Bureau of Credit Control with its principal office and place of business located in Barrington, Illinois. He has formulated, directed and controlled the acts and practices of the corporation, including those acts and practices which are hereinafter set forth and described as the acts and practices of the respondent.

PAR. 2. For some time last past the respondent has been engaged in the advertising, offering for sale, sale and distribution of collection forms to dealers for resale to businessmen and to businessmen directly. The respondent has also been engaged in the operation of a remailing service with respect to such forms.

PAR. 3. In the course and conduct of his aforesaid business, the respondent has caused his said forms, when sold, to be shipped from his place of business in the State of Illinois to purchasers thereof located in various other States of the United States, and at all times mentioned herein has maintained a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondent's forms are designed and intended to be used, and are used, by businessmen and others to whom they are sold for the purpose of inducing the payment of alleged delinquent accounts, with the aid and assistance of the respondent as hereinafter set forth.

Respondent's forms are of two types: (1) those which are designed to accompany a statement of account made by the creditor under his own name; and (2) those which are designed to be inserted in envelopes provided by the respondent, which envelopes show a return address in the capital city of one of the States of the United States.

Among the forms of the first type is one which contains the following statement: "We MUST hear from you within Ten Days or this account will be turned over to—STATE BUREAU OF CREDIT CONTROL."

All of the forms of the second type bear the letterhead of "State Bureau of Credit Control" together with a post office box number in the capital city of one of the States of the United

States. A user of this type of form fills in the appropriate data in the spaces provided, including the name and address of the alleged debtor and the amount of the alleged indebtedness, and sends the completed form to respondent's agent in the capital city of the appropriate State. Respondent's agent then mails the form from that location.

Among and illustrative of respondent's forms, although not all inclusive thereof, are the following:

STATE BUREAU OF CREDIT CONTROL

P.O. BOX 1026, JEFFERSON CITY, MO.

To:	Date ________
________ Name	Creditor ________
________ Address	Address ________
________ City State	Past Due Amount ________
	Collection Charge ________

A routine examination of the above named creditor's delinquent accounts is being made with consideration for legal action to affect settlement.

An unpaid account in amount listed above, which is stated to be just and legally due, appears against you.

Since this may be an oversight on your part, we are sending you this notice TEN (10) DAYS in advance of any proceedings to afford you an opportunity to make settlement *with your creditor*.

Full payment, or arrangements for payment of this account must be made within the specified time limit. Contact *your creditor* immediately to avoid further action.

Very truly yours,

/s/ Alfred L. Burr
ALFRED L. BURR,
State Collection Supervisor.

REFERRED TO FILE OF COUNTY COLLECTION SUPERVISOR

STATE BUREAU OF CREDIT CONTROL

P.O. BOX 835, SPRINGFIELD, ILLINOIS

	Date ________
	Creditor ________
To:	Address ________
________ Name	Past Due Amount ________
	Collection Charges ________
________ Address	Date Serving Writ ________
	Writ Returnable ________
________ City State	Court of Action ________

You have had several requests to contact your creditor for settlement of the above account.

Since we have had no indication that these requests have been heeded, there appears to be no other recourse than to begin court action.

You should therefore assert yourself within the next FIVE (5) DAYS if you believe you have a legitimate reason for not paying this account.

Do not contact this office. We cannot, in the limited time remaining, stop impending action. To avoid expensive court costs, you must arrange payment *with your creditor immediately.*

Very truly yours,

/s/ Alfred L. Burr
ALFRED L. BURR,
State Collection Supervisor.

REFERRED TO FILE OF COUNTY COLLECTION SUPERVISOR

PAR. 5. By and through the use of the aforesaid statements and representations, and others of similar import but not specifically set forth herein, the respondent has represented, and placed in the hands of others the means and instrumentalities by and through which they may represent, directly or by implication, that:

(a) A request for payment or other request regarding an allegedly delinquent account is being made by an agency of State government.

(b) A request for payment or other request regarding an allegedly delinquent account originates with a party other than the creditor.

(c) An allegedly delinquent account has been or is about to be referred to "State Bureau of Credit Control" for collection.

(d) Legal action with respect to an allegedly delinquent account has been or is about to be initiated.

PAR. 6. In truth and in fact:

(a) The request for payment or other request regarding an allegedly delinquent account is not being made by an agency of State, Federal or local government.

(b) The request for payment or other request regarding an allegedly delinquent account originates with the creditor.

(c) The allegedly delinquent account has not been, nor is it about to be referred to "State Bureau of Credit Control" for collection.

(d) Legal action with respect to the allegedly delinquent account has not been, nor in many cases is it about to be, initiated.

Therefore, the statements and representations referred to in Paragraphs Four and Five hereof were and are false, misleading and deceptive.

PAR. 7. The use by respondent of the aforesaid false, misleading and deceptive statements and representations has had, and now has, the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that said statements and representations were and are true and into the payment of substantial sums of money by reason of said erroneous and mistaken belief.

PAR. 8. The aforesaid acts and practices of the respondent, as herein alleged, were and are all to the prejudice and injury of the public and constituted, and now constitute, unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

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

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

The Commission, having reason to believe that the respondent has violated the Federal Trade Commission Act, and having determined that complaint should issue stating its charges in that respect, hereby issues its complaint, accepts said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Edward L. Cox is an individual residing at 496 South Hamilton, Columbus, Ohio. For some time last past he has been an officer of Intrastate Credit Control Systems, Inc., an Illinois corporation doing business as State Bureau of Credit Control, with its principal office and place of business located in Barrington, Illinois.

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

It is ordered, That respondent Edward L. Cox, an individual, and his agents, representatives and employees, directly or through any corporate or other device, in connection with the collection of, or the attempt to collect, accounts, or with the solicitation of information concerning debts or debtors, or with the offering for sale, sale or distribution of forms, or other materials, for use in the collection of, or the attempt to collect, accounts, or in the solicitation of information concerning debts or debtors, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the words "State Bureau of Credit Control," "State Collection Supervisor," "County Collection Supervisor," or abbreviations thereof, or any other words or abbreviations of similar import or meaning which indicate or suggest that respondent is affiliated in any way with any governmental entity, whether State, Federal or local, to refer to respondent's business or to any person connected therewith;
2. Representing, or placing in the hands of others the means and instrumentalities by and through which they may represent, directly or by implication, that any communication with respect to an allegedly delinquent account is being made by, through, under the aegis of, or in connection with any governmental entity or agency, whether State, Federal, or local;
3. Mailing any collection letters, notices of debt due, or any other collection materials to any person indebted to a third party, or otherwise contacting any such person unless respondent has actual authority from the creditor to collect or otherwise compromise the debt; and unless an exact description of the extent and nature of the respondent's authority to act in connection with such debt is conspicuously and prominently stated to the debtor;
4. Offering for sale or selling any form, letter, notice or other document, individually or in package or series form, for debt collection purposes which bears respondent's letterhead or any name other than that of the purchaser or of a person designated by the purchaser which represents in any way directly or by implication that a delinquent account has been referred to respondent or any other third party for collection;

5. Authorizing any creditor to utilize respondent's name or any trade name or style which respondent may adopt or use in connection with any debt collection activity whether directly or through third parties on the part of such creditor;

6. Representing directly or by implication that:

(a) Respondent is engaged in the business of collecting delinquent accounts with authority to effect collection by whatever means necessary;

(b) Any delinquent account has been referred to it for collection;

(c) Any legal or other action will be instituted to effect collection or reflect unfavorably on the credit rating of the debtor;

Provided, however, It shall be a defense hereunder for respondent to establish that it is engaged in the bona fide collection of delinquent accounts, has the authority and good faith intent to take any represented action, and the specific account in question has been referred to it for collection;

7. Engaging in any scheme, practice or business activity by and through which creditors may falsely represent that a delinquent account has been referred to a bona fide, independent collection agency; any third party has the authority to effect collection of a delinquent account; the delinquent account has been referred to an instrumentality of or agency affiliated with any governmental unit.

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

IN THE MATTER OF

SEWING MACHINE COMPANY OF AMERICA DOING BUSINESS AS DOMESTIC CREDIT COMPANY ET AL.

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

Docket 8693. Complaint, July 13, 1966—Decision, April 5, 1967

Order requiring a St. Paul, Minnesota, sewing machine retailer to cease using bait advertising, fictitious pricing and savings claims and other deceptive selling practices as set forth in the order below.