No. 3

In the Supreme Court of the United States

OCTOBER TERM, 1956

UNITED STATES OF AMERICA, APPELLANT

v.

E. I. DU PONT DE NEMOURS AND COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

REPLY BRIEF FOR THE UNITED STATES

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CITATIONS

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INTRODUCTION

A major premise, implied rather than expressed (DP Br. 160–161, 163; GM Br. 32), in the briefs of both appellees is that proof of an illegal restraint depends upon a showing of an adverse effect on General Motors; that is, that du Pont has been working against the best interests of General Motors in order to gain an advantage for itself. Appellees overlook the fact that the antitrust laws are primarily designed to protect the public by outlawing restraints on competition. In this case the inquiry must be, not whether General Motors has been hurt because of du Pont's relationship to it, but whether the relationship is one that diverts trade from the channels where under free

competitive conditions it would ordinarily flow, to the injury of the general public. Hence the protestations that everything that du Pont did was for the benefit of General Motors miss the point. Even assuming it were true, it would not follow that free competition was not restricted to the detriment of du Pont's competitors and ultimately of the public.

Appellees have staked their all on the factual issues, discussing only briefly the application of the antitrust laws to the facts asserted by the government to exist (G. M. Br. 223–239; DP Br. 272–285). Accordingly, this reply will in turn deal mostly with the facts.

The general tenor of both of the briefs is that factually there is nothing to distinguish the du Pont-General Motors relationship from that between du Pont and any other automobile manufacturer, or between General Motors and any other supplier. This patently goes too far. Obviously neither du Pont nor General Motors has with any other company the same stock relationship, the same interlocking directorate, the same volume of trade over a long span of years, the dependence of one upon the other for the same proportion of its trade, the same variety of commercial transactions. There is obviously something special in the du Pont-General Motors relationship, and the question is whether this something special is of the kind and degree to constitute a combination in violation of the Sherman and Clayton Acts.

Appellees' method of dealing with the factual issues seems designed to impress the Court with their assertion that the government is attempting to retry

here a case it lost below. They have squeezed every page of the record to find issues of fact and have spread over 450 pages of briefs every possible difference, big or little, in interpretation of the various documents and testimony which are the evidence in this case. Even issues which were specifically resolved by the court below and not contested by the government here, are rehearsed in order to expand the apparent area of disagreement (GM Br. 45–47; DP Br. 103–109). Then, by an application of Rule 52 (a), appellees seek to escape any critical examination by this Court of whether the conclusions of the court square not only with the appellees' interpretation of the thousands of details, but also with the basic facts on which there is no dispute.

Our first task, in Point I, will be to bring the case back into focus by pointing out specifically what the factual issues are and what findings of the court below are under attack. In Point II, we shall, within limits, deal with appellees' interpretations of some of the events which have a bearing on those issues, and in Point III we shall deal with the legal issues. Point IV deals with the question of relief against Christiana Securities and Delaware Realty.

Point I

THE TRIAL COURT'S CONCLUSIONS ON "CONTROL", "INTENT TO INFLUENCE TRADE", AND THE "EXISTENCE OF RESTRAINTS" ARE NOT SUPPORTED BY ITS DETAILED FINDINGS OF FACT NOR BY THE RECORD

The first step in examining the court's findings is to determine what is in dispute. The government's

case in its present posture is that du Pont formed a combination with General Motors to restrain and monopolize interstate trade in violation of the Sherman and Clayton Acts.[1] In order to make out its case the government had first to prove that there was a combination, which it attempted to do by showing the relationship between du Pont and General Motors whereby the former has the power to influence the latter to give it a preference in their trade relation-

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[1] Appellees argue that the government's limitation of its case here to "combination" without arguing "conspiracy" is a new position not presented to the court below (GM Br. 152–156). Somewhat inconsistently they also argue that "combination" is the same thing as a tacit conspiracy and is covered by the findings of the court (GM Br. 36; DP Br. 33). Not only was the "combination" argument presented in the complaint (R. 219–220), but it was pressed on trial and argument since it is inseparable from the entire issue of control. In the court below we also argued that there was conspiracy; in fact we had to rely on conspiracy for the other aspects of the case dealing with the alleged agreement among the individual du Ponts to restrain trade through manipulation of the three manufacturing companies (United States Rubber was the third). But the combination element was always there and always pressed. Since the government has dropped the other parts of the case, the "combination" issue is the only one that need be supported here. As for appellees' second position, that "combination" and "conspiracy" are the same thing under a different name, it is true that certain evidence is pertinent to both issues, but proof of control is not necessary to prove conspiracy and proof of agreement, tacit or otherwise, is not necessary to prove a combination. Contrary to the suggestion made by General Motors (Br. 156) the railroad and coal cases are instances of non-conspiratorial combination. *United States* v. *Union Pacific R. Co.*, 226 U. S. 61; *United States* v. *Reading Co.*, 253 U. S. 26; *United States* v. *Lehigh Valley Railroad Co.*, 254 U. S. 255; *United States* v. *Southern Pacific Co.*, 259 U. S. 214.

ships. Then it had to prove that this combination was formed with the intent to restrain or monopolize trade. As we point out in our main brief (Br. 113–114), the proof of the power to restrain plus the intent is sufficient to establish the case, without proof of actual restraint. Nevertheless, the presence or absence of actual restraint is indirectly relevant to the other two issues. If, for example, it were established that du Pont and General Motors had never had any commercial dealings, it would be only logical to reexamine the evidence that there was both power to restrain and an intent to do so. Similarly, evidence of the extent and nature of the commercial dealings between the two, particularly where preference was obtained, serves to corroborate the evidence that the intercorporate relationships were a source of influence and that du Pont established the relationship with the intent of using that influence. Therefore, the government introduced evidence to establish that du Pont had enjoyed an actual preference over its competitors in its trade relations with General Motors.

The court below concluded that the government had not established any one of these three points. However, in analyzing the facts to reach this result, the court recognized that certain facts were admitted, and found other facts which are not now in dispute and which materially narrow the field of disagreement. This Court's review can proceed, therefore, on the basis of the following unchallenged facts:

(a) *Control.*—After the initial purchase of General Motors stock, du Pont and Mr. Durant together con-

trolled General Motors. During the early twenties, when du Pont bought out Mr. Durant, and Mr. Pierre du Pont became president, "nominees of du Pont were thrust into positions of responsibility in General Motors which went beyond the financial supervision which had been their earlier role" (R. 307). Continually since the initial investment du Pont has been represented on General Motors' Board of Directors and major committees to the extent indicated in the General Motors exhibits reprinted as Appendix B of our main brief, pp. 154–163.[2] Mr. Alfred P. Sloan, Jr., who was chief executive of General Motors from 1923 until 1946, was recommended for the position by Mr. Pierre du Pont, was throughout that period a director of du Pont, and at one time even referred to himself as "a member of the du Pont family" (GTX 704, R. 624, 4505). The Managers Securities Plan, which resulted in very large bonuses to General Motors' executives, was initiated and supported by du Pont. Du Pont representatives have held many positions, sometimes a majority, on General Motors' committees set up to allot bonuses. No other stockholder, or group of stockholders, holds anything approaching du Pont's 23% of General Motors stock. At annual meetings du Pont has voted from a high of 52% to a low of 30% of the votes cast.

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[2] For ten years, 1919–1929, Mr. Pierre du Pont served simultaneously as both Chairman of the Board of General Motors (and President from 1920–1923), and Chairman of the Board of du Pont. For the next eight years, 1929–1937, Mr. Lammot du Pont served simultaneously as the President of du Pont and Chairman of the Board of General Motors.

(b) *Intent to Influence Trade.*—Appellees deny that du Pont bought its General Motors stock with an intent to influence trade. They do not deny, however, that in approving the purchase both the Finance Committee and the Executive Committee had before them a report prepared by Mr. Raskob and reviewed by Mr. Pierre du Pont which stated:

> Our interest in the General Motors Company will undoubtedly secure for us the entire Fabrikoid, Pyralin, paint and varnish business of those companies, which is a substantial factor. [GTX 124, R. 479, 3221.]

Nor do they deny that in explaining the stock purchase in the annual reports to stockholders for 1917 and 1918, specific reference was made to General Motors' consumption of fabrikoid, paints and varnishes (GTX 1409, 125, R. 479, 5511, 3228).

(c) *Existence of restraints.*—Although there is dispute as to the existence of any connection between the stock relationship and trade, there is at this stage no dispute about the existence of that trade. It is admitted that du Pont sells to General Motors as much as $30,000,000 of materials a year (GM Br. 5). The great majority of this is in paints and fabrics. In paints, du Pont has been the most important single supplier of General Motors (R. 396) and General Motors has been du Pont's largest single customer (R. 394). In automobile fabrics marketed by du Pont, the situation is similar; General Motors buys 40–50% of its requirements for these supplies from du Pont (R. 404) which constitutes over 80% of du

Pont production of that type of product (R. 402–3). And with respect to tetraethyl lead (an anti-knock additive for gasoline) and Freon (a refrigerant), while there is a difference of opinion as to the significance of du Pont's stock relationship with respect to such transactions, there is no dispute that the essential discoveries were made by General Motors and taken over by du Point (or in the case of Freon by a corporation 51% controlled by du Pont) for manufacture.

These, then, are basic facts on which there is no dispute. In addition there are recited in the findings of the trial court hundreds of detailed findings as to which there is likewise no dispute. These deal with communications between the parties, negotiations and contracts, the making of sales and the failure to make sales.

The attack we make on the findings of the court below is with respect to its conclusions where it attempts to sum up the facts which it recites. Appelleees claim that we understate the extent of our disagreement and that in reality we are attacking the findings as a whole (DP Br. 32). In order that there may be no misunderstanding as to the precise and limited extent of the government's attack on the findings, we have reprinted in a separate volume the entire findings of the district court and have underscored the passages which we challenge. The underscored passages constitute 207 lines out of approximately 7350 lines in the entire findings.

We do not mean to minimize the importance of the passages which we attack; they are the places

where the court purported to draw its conclusions from the evidence referred to in the rest of its findings. They include most of the court's conclusions, although not those dealing with United States Rubber, which is no longer in the case, nor those dealing with sales to Fisher Body, where the court appears to have misunderstood our position. Our claim on the court's findings is that the 7143 lines we do not dispute, fail to support the conclusions in the 207 lines we do attack.

We do not believe that the Court need review and make decisions on the myriad of details spread before it by the appellees. On the contrary, the starting point on this appeal consists of the basic facts reviewed above, which are not in dispute, plus the findings of evidentiary facts made by the court below. On these facts we urge that there is at least a *prima facie* showing that the court was wrong in its conclusion and that there was a combination in restraint of trade. We urge, further, that appellees' interpretation of all of the other facts they recite are to a great extent not inconsistent with these conclusions. Where there is inconsistency, the Court will have to resolve the conflict. But the great bulk of the evidence referred to by the appellees is not basically inconsistent with the government's position. Of course, du Pont did not fill all of General Motors' requirements for products manufactured by it, nor did it sell to all General Motors divisions with equal success. That does not prove that du Pont was not given a preference, but only that it did not seek to obtain 100 percent of General Motors' trade. Of course, salesmen for du

Pont were encouraged to sell General Motors on the basis of merit; there was no other way for General Motors to know what products were competitive, and it was only where the products were competitive that the preference could operate.[3] And, of course, it was

[3] Appellees argue that the oral testimony of their witnesses affirmatively proves that no preference was asked of General Motors and none given (GM Br. 36; DP Br. 200–201). It is urged that this testimony is so at odds with the government's position that in order to sustain the government it would be necessary to decide that all of these men lied. A good test of this argument is to examine in detail the specific evidence referred to at page 36 of the General Motors brief, where the oral statements of some twenty witnesses is cited. In part, this testimony consisted in reading to the witness a quotation from the complaint, or a paraphrase thereof, with respect to the allegations that there was an agreement to give a preference to du Pont in purchasing supplies (R. 231) and an agreement to refrain from manufacturing chemicals (R. 234) and then of asking the witness whether he had ever heard of such agreements and whether such restrictions existed. It seems clear from the questions that the witnesses must have believed that they were being asked about either specific agreements or formal rules. We do not argue that there were ever formal rules issued by either du Pont or General Motors. The preference arose from the relationship; and explicit formulation of a rule would have been most extraordinary. And as to the salesmen who testified that they did not ask for special consideration because of the stock interest, they would have been poor salesmen if they had in view of the resentment it would have aroused. These men, and the purchasing agents, undoubtedly carried out their functions with all outward correctness. We do not question their honesty. But that trade was sought on the basis of the stock interest is indicated by written evidence in the record. Nor can the volume of sales which was made by du Pont to General Motors, but not to other automobile manufacturers, be explained if no preference was involved.

the responsibility of all of the General Motors executives, from Mr. Sloan down, to consider first and foremost the welfare of General Motors; du Pont depended upon the success of General Motors for about a third of its income. It is only where a business judgment on the merits of the product is involved that the relationship between the two companies determines the course of trade.

We urge, in short, that even if the details presented by appellees be taken at their face value, that would not alter the conclusions required by the basic facts as to which there is no dispute.

Further, in reviewing the correctness of the conclusions of the court below, this Court should consider whether the appellees or the government is right as to the appropriateness of the standards followed by the district court, particularly with respect to the existence of control. To be sure, the court recited many facts dealing with corporate relations where control makes itself apparent. But when it came to its conclusions, the district court's findings certainly reflect a view, which we believe to be erroneous as a matter of law, that "practical or working control" depended upon du Pont's conducting itself "as though it were the owner of a majority of the General Motors stock" (R. 322).

The same type of appraisal is necessary to determine whether the court was in error in failing to give due weight to the government's argument that there was an illegal "combination" as well as a "conspiracy". Certainly its statement at page 464 of the Record so indicates:

> At the outset of this memorandum the Court stated that the issue of conspiracy permeated the entire case, underlying both the trade and the control aspects thereof. This is so because conspiracy to restrain trade can only be determined after consideration of the entire record of evidence. The Court finds, on the basis of all the evidence of record, that the Government has failed to establish the existence of any such conspiracy.

Point II

THE EXTENSIVE REVIEW OF THE FACTS PRESENTED BY APPELLEES DOES NOT DISPROVE THE EXISTENCE OF A COMBINATION IN VIOLATION OF THE ANTITRUST LAWS

Even if accepted on the basis of appellees' interpretation, the evidence recited in their briefs does not contradict the basic facts recited above (*supra*, pp. 5–8). Both du Pont and General Motors attempt to explain those facts and to nibble away at their edges, but they cannot make them disappear. Moreover, many of the evidentiary details do not detract from, but actually substantiate and confirm, the conclusion that there is an illegal combination.

For purposes of convenience, the evidence will be considered under the headings of control, intent, and the exercise of restraints.

A. THE EVIDENCE REQUIRES A FINDING THAT DU PONT CONTROLS GENERAL MOTORS

As is pointed out in our main brief, control of a large corporation does not require the united holding of a majority of the stock (Br. 87–97). A sizeable minority block, particularly where the remainder is widely scattered, plus a long-continued relationship

among the officers and directors, will often suffice. And, as was also noted previously, the absence of arm's-length bargaining, whether or not there is full working control, is a sufficient interference with the normal course of competition to constitute a combination forbidden by law (Br. 98–103). In attacking our argument, appellees rely mainly on the argument that Mr. Sloan was the real power in General Motors and that he was uninfluenced by the du Pont relationship. (DP Br. 161–174; GM Br. 200–210.)

We do not challenge the court's findings that Mr. Sloan was a strong personality, and an able executive who acted for what he believed to be the best interests of General Motors (R. 316, 321). We do not urge that he was a "toady" (GM Br. 210) or lacking in integrity (DP Br. 162) or credibility (DP Br. 163). He had strong views of his own for which he would fight, as was indicated by his insistence that Mr. Raskob's political activities would not mix with his executive duties with General Motors (GM Br. 18). None of this contradicts the facts that he was selected for the position of president by Mr. Pierre du Pont (R. 307), that he became very wealthy through the grant of special compensation, the initial plan for which was proposed and sponsored by du Pont, and the amount of which over the years was controlled by du Pont (see *infra*, p. 15, fn. 6),[4] that he considered himself one of the du Ponts (GTX 704, R. 624, 4505), and that he was a director of du Pont through-

[4] His class B stock in Managers Securities Plan was worth in excess of $2,000,000 by 1926. (GTX 259, R. 496, 3587.)

out the period in question. Therefore, while it is not asserted that Mr. Sloan would in any way act to the detriment of General Motors, it equally appears that he knew and trusted, and was trusted by, du Pont, and, where a choice between it and its competitors existed, he favored du Pont. None of his testimony is inconsistent with this. We repeat that the crucial test is not whether he favored du Pont vis-a-vis General Motors, but whether he favored du Pont vis-a-vis the latter's competitors.

Appellees argue further that the so-called management directors were chosen by Mr. Sloan, not by du Pont. (DP Br. 167).[5] First, in view of Mr. Sloan's long and close association with du Pont, it supports rather than detracts from the government's case that the nominations originated with him. But secondly,

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[5] Appellees continue to maintain that Mr. Donaldson Brown was accurately listed as a management director in GM Ex. 10, reprinted at pages 154 and 155 of our main brief. (DP Br. 166; GM Br. 25.) Yet they do not deny that he was a director of du Pont and a member of its executive committee before and throughout the period he served with General Motors. Furthermore, this is the man concerning whom Mr. Raskob wrote: "My feeling is that the financial interests of both companies are so closely interwoven that Mr. Brown should be retained as a Director and Member of the Finance Committee of the du Pont Company, in this way being enabled to keep in quite intimate touch with the directions and policies of the owners of the General Motors Corporation." (GTX 181, R. 483, 3408.)

This may suggest something about the standards used by appellees in passing upon a person's affiliations. The court below recognized Mr. Brown as a du Pont representative (R. 313).

It may also be worth noting that both Mr. Pratt and Mr. Johnson, who had been employees of du Pont, are also listed in GM Ex. 10 among the management directors.

appellees overlook that directors are elected by the stockholders. As specifically recognized in the court's findings, du Pont voted an absolute majority of the stock represented at some of the annual meetings (R. 322–323). Certainly, therefore, in 1928, 1929, 1930, 1931, 1932, and 1936, the years when du Pont voted a majority of the shares (GTX 1307, R. 664, 5230), the directors were placed in office by du Pont.

Appellees also attempt to refute the argument that the special compensation plans, initially proposed and sponsored by du Pont (R. 316), have any significance on the issue of control. The argument is that these plans encouraged the executives to work for the success of General Motors to the exclusion of du Pont's interests (DP Br. 180; GM Br. 32–33). So far as this argument asserts that the plans were an incentive to making General Motors a success, this is true and proves nothing in this case. Since du Pont has depended upon General Motors dividends for about one-third of its income, the success of General Motors was also of direct interest to du Pont. But, at the same time, nothing that appellees suggest lessens the fact that the original plan was intended and designed to tie in with du Pont the management of General Motors (GTX 235, p. 8, R. 3502), and that thereafter the executives of General Motors were dependent upon the good will of du Pont nominees for fantastically large extra compensation.[6] First the Finance Committee, where concededly du

[6] Du Pont states that the government was wrong in stating in its main brief (p. 26) that the allotments in the Managers Securities plan were subject to revision by the General Motors

Pont's nominees served in the greatest numbers, and later the Bonus and Salary Committee, passed upon the amount of extra compensation. General Motors' admission that du Pont had "substantial" representation on this committee (GM Br. 30) and du Pont's note that there were du Pont nominees on the committee (DP Br. 182) suffer from understatement; the court below found that from 1941 to 1948 the majority of that committee were du Pont representatives (R. 319). Mr. Sloan's attempt to shrug this off (R. 1380) and the court's indication that it was of no significance (R. 320–321) is in marked contrast with the views expressed in a 1944 letter from Mr. Carpenter, President of du Pont, to Mr. Lammot du Pont, chairman of the du Pont Board, both being members of the General Motors Policy Committee, concerning Mr. H. B. du Pont's becoming a member of the Bonus Committee:

> Belin [Henry Belin du Pont] is our advisor on salaries here and, therefore, has occasion to interest himself actively in this general subject of compensation. In addition this will afford him an excellent opportunity of better familiar-

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Finance Committee (DP Br. 181). The record shows that although the original allotments were passed upon by a special three-man committee, the Finance Committee was required to review the holdings before May 15th of each year and make adjustments where "the stockholding of any manager is disproportionate to the service being currently rendered by him." (GTX 244, p. 10, R. 493, 3558.) "The discretion of the Finance Committee in all these matters shall be final and conclusive." (*Ibid.*) Du Pont dominated the Finance Committee (Govt. Br. 23, 159).

> izing himself with the personnel in General Motors. As a matter of fact, he can, because of his position there carry his inquiry with respect to important personnel as far as he may wish to. This will afford a constructive background with respect to the selection of future important personnel in the General Motors. [GTX 210, R. 489–490, 3475.]

It was not necessary that loyalty to du Pont be considered a specific element in the granting of extra compensation (R. 321); it is sufficient that the power to grant or withhold compensation was subject to du Pont influence.

With respect to the many directorships and committee positions held by du Pont representatives throughout the years, appellees state that du Pont was interested in high finance, not in operations or selling paint (DP Br. 165, fn. 25; GM Br. 25, 27). Mr. Raskob early recognized that "Through our connection on the Executive Committee we will be in close contact with the operating and sales end of the business." (GTX 128, R. 481, 3239.) He was undoubtedly referring to the fact that Mr. J. A. Haskell, former sales manager of du Pont, had become a vice president and a member of the executive committee of General Motors (R. 940) and Mr. Haskell was unquestionably concerned with trade (Govt. Br. pp. 29–32). Mr. Sloan recognized in his testimony that the Finance Committee itself became increasingly concerned with "operating problems." (R. 1000.) And both Mr. Pierre du Pont and Mr. Lammot du Pont demonstrated that their preoccupation with

"high finance" did not preclude their pressing the sale of du Pont products (GTX 421, R. 529, 4012; GTX 434, R. 532, 4054; GTX 437, R. 533, 4059; GTX 447, R. 535, 4073).

Finally, appellees argue that if du Pont had had control it would have exercised it in the course of thirty-five years. As we indicate below (*infra*, pp. 20–29) the record requires a finding that it has.

B. THE EVIDENCE REQUIRES A FINDING THAT DU PONT ENTERED INTO THE RELATIONSHIP WITH THE INTENTION OF GAINING A PREFERENCE

The most important item of evidence with respect to du Pont's intentions was the Raskob report, which stated:

> Our interest in the General Motors Company will undoubtedly secure for us the entire Fabrikoid, Pyralin, paint and varnish business of those companies, which is a substantial factor. [GTX 124, R. 479, 3221.]

But the report does not stand alone, being corroborated by the 1917 and 1918 annual reports to stockholders (*supra*, p. 7). The Raskob report is important not only because it reflects Mr. Raskob's views, and presumably Mr. Pierre du Pont's also as of that time, but because it was on the basis of this report that both the du Pont finance committee and the du Pont executive committee authorized the purchase of the stock. Although there was testimony that there was no discussion of that paragraph of the report (R. 815, 870), that may have resulted from the view that the advantage to du Pont was too obvious to

require discussion, rather than that it was unimportant. Certainly there is no testimony that the finance committee or the board of directors in any way repudiated the paragraph.

Du Pont relies on the fact that both Mr. Pierre du Pont and Mr. Irenee du Pont testified that their votes to buy the stock were not influenced in any way by the prospect of increased sales to General Motors (DP Br. 145). We do not impugn the integrity of either witness. At the time they testified, whatever their earlier views, they were unquestionably convinced as to the purity of their motives. In any event the personal intent of the two individuals is not in issue, but the intent of the group. And the intent of the group can best be judged from the report on the basis of which the group took action.

Indeed, appellees do not deny that du Pont always had, and presumably still has, the intention of selling its products to General Motors (R. 302; DP Br. 234–235; GM Br. 76). When one considers this intent in the circumstances of the continuous active participation by du Pont in General Motors affairs, it cannot be concluded that there was no connection between the two. Much concerning the du Pont state of mind throughout the span of years can also be inferred from the evidence on control in conjunction with the evidence on the volume and variety of trade relationships. All of these factors taken together lead to the conclusion that du Pont intended to gain the advantage of its long-continued and intimate relationship with General Motors.

C. THE EVIDENCE REQUIRES A FINDING THAT ILLEGAL RESTRAINTS HAVE IN FACT BEEN EXERCISED

It would be impossible to reply in detail to the extensive briefs filed by the appellees without burdening the Court with another 200 pages of argument. Fortunately large portions of the material can be laid to one side on the ground that it is irrelevant to the case. We do not contend that du Pont attempted to obtain 100% of General Motors' trade. We only argue that where a du Pont product was competitive with the products of other manufacturers or where du Pont was, on a competitive basis, as capable of performing some service as any other company, then the du Pont-General Motors relationship took the place of competition to determine the flow of trade. What du Pont had working for it was a preference which over the course of years redounded to its advantage and to the disadvantage of its competitors. It is for this reason that very considerable portions of appellees' briefs, where it is alleged that this or that product was not purchased in quantity by General Motors (DP Br. 89–103; GM Br. 41–43) or that particular divisions purchased none or lesser quantities than others (DP Br. 67–75; GM Br. 175), or that the volume of purchases fluctuated widely at various times (DP Br. 62–64; GM Br. 180), need not be contested. If the influence did not invariably get for du Pont all of the General Motors' trade, it still got enough to constitute a material restraint on competition.

By the same token that we argue that the absence of specific sales does not prove that a general preference was not given, we must concede that the existence of sales does not by itself prove that a preference was given. Just as some products were not sold because the General Motors divisions believed the products of other manufacturers were superior for their purposes, so too, some of du Pont's sales were made for the reason that the persons responsible for the buying believed that du Pont products were superior. Thus we do not claim that the $30,000,000 of products sold to General Motors by du Pont in 1948 (DPX 445, R. 2688, 6436) were all sold because of favoritism. But proof that a part of it was is provided by the fact that favoritism is the only reasonable explanation for the fact that in 1947 and 1948 du Pont was selling more than 80% of its automotive fabrics, and an even higher percent of its automobile paints, to General Motors (Govt. Br., pp. 62–64). The close relationship between the companies is the explanation for its ability to sell to General Motors the same products which it was unable to sell to others.[7]

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[7] The appellees argue that Ford and Chrysler bought from other suppliers for special reasons, namely, Chrysler wanted its own supplier not tied up with General Motors and Ford went in extensively for the manufacture of its own materials (DP Br. 54–55, 77, 195–200; GM Br. 75). Despite its apparent plausibility, this explanation doesn't really explain. When du Pont first put Duco on the market it sold everywhere to all the automobile manufacturers. The industry is highly competitive and neither Ford nor Chrysler could afford to permit General Motors to steal a march. But when competitive products appeared, the Ford and Chrysler

In our main brief we propounded a second method of proof of our assertion that where du Pont sales depended solely upon competitive merit, volume of sales fell below the sales to the General Motors divisions. This related to the Fisher Body Company where for years the volume of sales was far below that of the other parts of General Motors (Govt. Br. 65–68). While not denying what the record makes obvious, namely, that Fisher was harder to sell,[8] appellees argue that the fact that it was just as hard to

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market fell off much more sharply than the General Motors market. The answer is not that Duco was not as useful to them, but that, not having the stock incentive to support continued buying, they went where competitive conditions led them as soon as competition appeared.

Nor is the appellees' analysis accurate when they seek to show that the 20% of du Pont sales made to other than General Motors went to the smaller independent automobile manufacturers who produced less than 20% of the cars. (DP Br. 196; GM Br. 75.) The 20% actually goes to Ford and Chrysler and the smaller producers in percentages which are not revealed by the record, although appellees assert that the sales to Ford and Chrysler are substantial (DP Br. 54–55, 78; GM Br. 59; GTX 1382, R. 2825, 5415; DPX 196, R. 1993, 6069).

[8] The General Motors brief takes us to task for giving misleading figures with respect to the 1926 sales of fabrics to General Motors on the ground that we leave out of the computation sales to Fisher Body (GM Br. 69, 164). The government brief was explicit in stating that we were computing the percentage of du Pont products purchased by certain specifically named divisions (Chevrolet, Buick, Cadillac, Oldsmobile, and Oakland). (Govt. Br. 60.) A few pages later we pointed out the contrast with the smaller sales to Fisher Body (Govt. Br. 64–67). Therefore, the fact that in 1926 Fisher took only 37% of its fabric requirements from du Pont while the other named divisions took 89% is in fact the very point we have been trying to make. The 55.5% figure mentioned in the General Motors brief is a percentage made

sell after 1926 as before, although the outstanding minority interest was acquired in that year, shows that stock control had nothing to do with it (DP Br. 207; GM Br. 49). It is true that General Motors had complete corporate control of Fisher Body even before 1926, since the original voting trust giving the Fisher brothers an equal voice expired in 1924. But the important point is that so long as the Fisher brothers remained in control of the operation of the division, the company was operated with a considerable measure of independence (R. 580–581).

Much later than 1926 (the last Fisher brother retired from heading the division in 1944) when the Fishers were largely out of the picture, the pattern of purchases by Fisher became the same as those of the rest of the company. We wholly concur with the findings of the court below that until that time Fisher sales were made on merit alone (R. 381). And that is why the comparison between the sales to Fisher and to the other divisions is of significance.

The argument that, although there was a large volume of sales to General Motors, there was no attempt to make sales on the basis of the du Pont-General Motors combination (GM Br. 37–39) is contradicted by the documentary evidence. For example, there

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up by combining a controlled and uncontrolled market and is meaningless.

The assertion by General Motors on the same page of its brief (GM Br. 69) that by 1930 "Ford was buying more than all the General Motors cars together" is contradicted by one of the exhibits it cites to support the statement; Du Pont Exhibit 281 (R. 2245, 6210) shows that in 1930 General Motors purchased 1,958,555 yards while Ford purchased 1,491,970 yards. Percentagewise Ford's purchases were but 19.1% of its requirements.

was the early report of Mr. A. Felix du Pont, vice president of du Pont, referring to the "partial obligation under which the General Motors units felt themselves to be with respect to using our goods." (GTX 417, R. 526, 3999.) Then there were Mr. Lammot du Pont's two letters to Fisher body urging du Pont paint on the basis of the "stock ownership relations." (GTX 434, 437, R. 532, 533, 4054, 4059.) Even more revealing was the correspondence dealing with the failure of the New Departure Division of General Motors to buy ammonia from a du Pont subsidiary. It was in 1934 when Mr. Pratt (a General Motors vice president, previously employed by du Pont) wrote to New Departure:

> * * * I would be interested if you would look into this and advise me of the reason why it is desirable to give your ammonia business to others than the du Pont subsidiary; namely, The National Ammonia Company. [GTX 371, R. 521, 3912.]

New Departure replied stating that National's product was not suitable, and then added:

> * * * We did not know that the National Ammonia Company was a du Pont subsidiary, but I do not believe that under the circumstances it should have made any difference. [GTX 372, R. 521, 3913.]

Whereupon, Mr. Pratt wrote to National Ammonia:

> * * * First, see whether or not your ammonia really is suitable for the work in our division * * *; and second, that you might inform the management of your relationship to the General Motors Corporation. [GTX 373, R. 522, 3915.]

Alcohol-Glycerin correspondence

Both du Pont and General Motors reply to our argument that the du Pont exercise of influence was illustrated by the alcohol-glycerin correspondence (Govt. Br. 40–47, 129–130) by asserting that the change in the General Motors instructions to its car owners as to the use of antifreeze mixtures was based on further investigation which disclosed new facts (GM Br. 90–100, 184; DP Br. 224–226). The letters in the record speak for themselves, but there are three short comments that may be made:

First.—Mr. Sloan's letter to Chevrolet in August of 1926 (GTX 326, R. 509, 3842) and the change in the Chevrolet instructions in September 1926 (GTX 327, R. 509, 3844) both occurred at a time when the General Motors research corporation was specifically recommending Prestone (a glycerine product). (GTX 321, R. 508, 3835.) The new policy of the General Technical Committee based upon the "facts" was not noted until December (GTX 336, R. 511, 3861.)

Second.—While the impartial policy was stated to be based on the "facts", the General Motors divisions are conceded to have sold the glycerin type of antifreeze exclusively when they went into the business of selling antifreeze in 1933 (DP Br. 86; GM Br. 100–101).

Third.—It is asserted that the instructions decided upon by the General Technical Committee were entirely reasonable and not slanted (GM Br. 100; DP Br. 225–226). The Court may judge for itself what would be the reaction of a car owner to the

warning that alcohol if spilled on Duco may disfigure it, as against the warning that the glycerin compounds if used in strict accordance with the manufacturers' recommendations are satisfactory "but that any air allowed to get into the system would cause decomposition and corrosion of the engine operating parts and further, that the material was likely to clog up the radiator." (GTX 336, R. 511, 3861). Most car owners would buy alcohol and pour it carefully, which was the result that Mr. Sloan admitted "we would much prefer."[9] (GTX 336, R. 511, 3861.)

Tetraethyl Lead

The answer of the appellees to our argument of preference in the antiknock development, is that du Pont was selected and retained as the exclusive manufacturer of lead solely because of its competence and that its profits in the field resulted from the excellence of its performance (DP Br. 111–131, 210–220; GM Br. 102–126, 184–188). It is not realistic to place the responsibility for turning over the development of the discovery to du Pont on the shoulders of Mr. Kettering (DP Br. 112; GM Br. 106). The court below found that Mr. Kettering made the decision to call in du Pont on tetraethyl lead (R. 411), and we do not question that this was so in the sense that the initial contacts and discussions were held with Mr. Kettering. Moreover, we do not question

[9] The argument that the Glycerin Manufacturers Association could find no fault with the findings of the research is of no avail since that report is not in the record and one can only guess at the Association's reaction to the final instructions. (DP Br. 89; GM Br. 99.)

his testimony that he was motivated only by the desire to advance the use of the invention (R. 1584). Obviously, however, a question of such far-reaching economic importance to General Motors was not decided by one man, and that man a scientist rather than a business executive (R. 1264–1265). Mr. Sloan was of course consulted and took an active part in arranging for the contract (GTX 617, R. 613, 4311). And as pointed out in our main brief (Govt. Br. 51) the original contract was signed by Mr. Pierre S. du Pont, President of General Motors and Mr. Irenee du Pont, President of du Pont (GTX 618, R. 613, 4312). The important fact, however, is not who did the deciding but that no consideration was given to, nor negotiations carried on with, other potential manufacturers, except Standard Oil [10] which inserted itself into the picture and was summarily turned down after consultation between General Motors and du Pont (GTX 622, 623, 624, R. 614, 4337–4346).[11]

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[10] The suggestion in the du Pont brief (pp. 119, 214) that "Standard Oil refused a 'similar contract to the one now in force with the du Pont Company' " is based solely on a report by Dr. Midgley, Mr. Kettering's associate (GMX 256, R. 1558, 7346). The full report makes it very clear that no formal contract was offered or refused, but that Dr. Midgley was negotiating with Standard Oil at the time it made its discovery of the improved process for producing lead. Dr. Midgley's report states that his suggestion was "subject of course, to ratification by my principals." What that attitude of his principals was, became fully apparent later when Standard Oil asked for the right to manufacture.

[11] It will not do to argue that since the manufacture of tetraethyl lead was a dangerous operation, du Pont alone was capa-

Both appellees argue at length that the government's position that du Pont used its control to make sure that it should be the sole manufacturer of tetraethyl is disproved by the fact that three attempts were made to get another supplier (DP Br. 214–215; GM Br. 166). One of these attempts was the negotiations between Mr. Kettering and Dr. Midgley and Standard Oil referred to in footnote 10, p. 27, *supra*. As du Pont itself admits Mr. Sloan did not approve (DP Br. 119, 216) and when Standard specifically asked for the right (GTX 624, R. 614, 4346) it was turned down.[12] The other purported attempts to find other manufacturers were by Mr. Webb who, succeeding Mr. Kettering as President of the Ethyl Gasoline Corporation, negotiated in 1926 with Dow Chemical Company and actually entered into an abortive contract with American Research Laboratories in an attempt to find a second source of supply (R. 422). At most these were attempts to supplement, not to displace du Pont.

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ble of performing the job (GM Br. 105). The record shows that the only way to learn how to make tetraethyl lead without deaths from lead-poisoning was through experience. The actual death toll in du Pont's plants was higher than in Standard Oil's. The figures show eight died in du Pont operations, five in Standard Oil's and two in General Motors' (GTX 774, R. 632, 4757). As a du Pont report puts it, "An outstandingly successful job appears to have been done by the Publicity Bureau of the du Pont Company". (GTX 773, R. 632, 4694.)

[12] The permission to Standard Oil to spend $35,000 to $40,000 on a 100 gallon a day plant was to satisfy them from a "psychological standpoint." "Any further thought of developing any real production other than under the auspices of the du Pont Company will be deferred until some later time." (GTX 661, R. 616, 4366.)

But even more important it does not appear that Mr. Sloan had in any way altered his view that du Pont would always be the manufacturing agent for Ethyl (GTX 710, R. 625, 4530).

There is no precise method available to measure how much of du Pont's considerable profits on tetraethyl lead arose from its preferred position and how much from its industrial efficiency. But it seems clear that appellees are not justified in their claim that du Pont could attribute the entire $86,000,000 to its skill in manufacturing. A letter from Mr. Lamont du Pont to Mr. Sloan in 1932 very frankly advanced the idea that du Pont was entitled to approximately one-third of the profits in the tetraethyl lead venture and that it had set its prices for lead on a basis which would develop that amount (GTX 766, R. 631, 4649). It is not conceivable that a corporation dealing with another at arms-length would be able to declare itself in on the profits of the other's invention on any such basis. That is a profit growing out of the relationship, not out of service.

Point III

THE INTERCORPORATE RELATIONSHIPS BETWEEN DU PONT AND GENERAL MOTORS CONSTITUTE A COMBINATION IN VIOLATION OF SECTIONS 1 AND 2 OF THE SHERMAN ACT AND SECTION 7 OF THE CLAYTON ACT

Both appellees take some care to point out the burden on the government under Rule 52 (a) of the Federal Rules of Civil Procedure to establish that the find-

ings of the court below were "clearly erroneous." (DP Br. 268–272; GM Br. 148–152.) Any extended discussion of the Rule is not necessary since this Court is thoroughly familiar with its application. As was stated in *United States* v. *Gypsum Co.*, 333 U. S. 364, at 395, a finding must be reversed, even where there is some evidence to support it, if the reviewing court on the entire record "is left with the definite and firm conviction that a mistake has been committed." And, as was carefully expounded in *Orvis* v. *Higgins,* 180 F. 2d 537 (C. A. 2), certiorari denied, 340 U. S. 810, where there is both documentary evidence and oral testimony, a reviewing court is not precluded from using its own judgment with respect to the issues on which the documentary evidence seems determinative in spite of conflicting oral evidence.

A. THE COMBINATION IS ILLEGAL NOTWITHSTANDING THE ABSENCE OF EVIDENCE THAT THE DU PONT-GENERAL MOTORS TRADE IS A MATERIAL PART OF THE GENERAL MARKET, AUTOMOTIVE AND NON-AUTOMOTIVE, IN THE PRODUCTS AFFECTED

Both appellees cite figures on the total national sales of paint of all kinds and of fabrics of the general kind used in automobiles (GM Br. 8; DP Br. 276). They then point out that the dollar volume of du Pont sales to General Motors is but a minute part of these national sales and therefore incapable of having a restraining or monopolizing effect on that market (DP Br. 275–276; GM Br. 223–228). Passing the question of whether all paint, rather than automotive paint, and all artificial leather, rather than the type specifically produced for automobiles, would be

the relevant market [18] if it were appropriate to make a determination as to the relevant market in this case, it is entirely unnecessary to go into the problem of what constitutes the "market" in a case of this kind.

A determination of the extent of the relevant market is necessary where the government's case depends upon domination of the national market by a manufacturer or group of manufacturers as in *United States* v. *du Pont & Co.* (cellophane case), 351 U. S. 377, or in *United States* v. *Aluminum Company,* 148 F. 2d 416 (C. A. 2). The same type of question arises where there is an alleged domination of the market in a geographic area which is not competitive with the remainder of the nation as in *United States* v. *Columbia Steel Co.,* 334 U. S. 495. In the present case, a definition of the relevant market for the products in question is not important since the gist of the case is that trade between du Pont and General Motors was insulated from the national market by reason of the combination. Therefore, in this respect this case is similar to a patent tying case, where the only question is whether the volume of the trade restrained is appreciable.

The theory of the government's case here is the same as that involved in the first *Yellow Cab* case

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[18] There are no figures in the record on the percentage which General Motors' purchases constitute of the total national sales of automobile paint and automobile fabrics. However, since General Motors sales of automobiles are close to 50% of the national sales (see fn. 12, page 62 of our main brief), it may be assumed that General Motors consumes about half of the paint and fabrics used in the manufacture of automobiles.

(*United States* v. *Yellow Cab Co.*, 332 U. S. 218) where the complaint alleged the purchase of control of taxicab companies in several cities with the object of controlling their purchases of new equipment on behalf of a particular manufacturer. There the argument now pressed by appellees was rejected by this Court in these words (332 U. S. at 226):

> Likewise irrelevant is the importance of the interstate commerce affected in relation to the entire amount of that type of commerce in the United States. The Sherman Act is concerned with more than the large, nation-wide obstacles in the channels of interstate trade. It is designed to sweep away all appreciable obstructions so that the statutory policy of free trade might be effectively achieved. As this Court stated in *Indiana Farmer's Guide Co.* v. *Prairie Farmer Co.*, 293 U. S. 268, 279, "The provisions of §§ 1 and 2 have both a geographical and distributive significance and apply to any part of the United States as distinguished from the whole and to any part of the classes of things forming a part of interstate commerce." It follows that the complaint in this case is not defective for failure to allege that CCM has a monopoly with reference to the total number of taxicabs manufactured and sold in the United States. Its relative position in the field of cab production has no necessary relation to the ability of the appellees to conspire to monopolize or restrain, in violation of the Act, an appreciable segment of interstate cab sales. An allegation that such a segment has been or may be monopolized or restrained is sufficient.

Apparently appellees assert that this view was modified by the Court in *United States* v. *Columbia Steel Co.*, 334 U. S. 495, where the Court did consider the relevant market in order to determine whether a restraint of trade was involved. However, in that case the restraint was alleged to arise from the proposed purchase of a fabricating plant which was to become a part of the manufacturing corporation. Since the new plant was to be 100% owned, there would be no trade between the purchaser and the purchased and the only question, therefore, was whether the acquisition would group together a sufficient segment of the industry to restrain or monopolize trade. This Court specifically pointed out the distinctions from the *Yellow Cab* case, clearly indicating that no modification of its earlier views was intended (334 U. S. at 522):

> * * * In discussing the charge in the *Yellow Cab* case, we said that the fact that the conspirators were integrated did not insulate them from the act, not that corporate integration violated the act. In the complaint the government charged that the defendants had combined and conspired to effect the restraints in question with the intent and purpose of monopolizing the cab business in certain cities, and on motion to dismiss that allegation was accepted as true. Where a complaint charges such an unreasonable restraint as the facts of the *Yellow Cab* case show, the amount of interstate trade affected is immaterial in determining whether a violation of the Sherman Act has has been charged.

The application of the "relevant market" doctrine to antitrust violations is clarified by keeping in mind what has sometimes been called the "central core" of antitrust concepts. *Report of Attorney General's National Committee to Study the Antitrust Laws,* pp. 5–12. As interpreted in *Standard Oil Co. of New Jersey* v. *United States,* 221 U. S. 1, both Section 1 and Section 2 of the Sherman Act were designed to eliminate undue limitations on competitive conditions whereby individuals obtained power to fix prices, limit production, and control quality. If there is sufficient similarity between a particular product and others so that they can to a substantial extent be used interchangeably, an individual does not in fact get control over the part of the commerce consisting of trade in the particular product unless the entire market is brought under control. But where he does get power to isolate from competition a substantial volume of commerce (in this case through an intercorporate relationship) the extent of the rest of the market is no longer significant since it does not compete.

B. APPELLEES' OBJECTIONS TO THE APPLICATION OF SECTION 7 OF THE CLAYTON ACT SHOULD BE REJECTED

In large part the appellees' argument with respect to the application of the Clayton Act depends upon the facts, namely, whether the government sustained the burden of proving the likelihood of restraints from the stock acquisition. We agree that what has occurred since the acquisition is highly significant in determining its original legality, and where we differ from appellees is that we urge that the restraints

which have occurred support our case. If this Court accepts our interpretation of the record and determines that the conclusions of the court below were clearly erroneous, appellees' concern as to whether the illegality existed at the time of the acquisition and whether it continues today will be satisfied.

Du Pont's suggestion (DP Br. 282–283) that the government be relegated to relief under the Sherman Act whenever it fails to invoke the Clayton Act within four years of a stock acquisition finds no support in the language of the Act or its legislative history. We have nothing to add to our original discussion of the "investment" exception, which again depends on the facts (Govt. Br. 145), or of the application of the Clayton Act to the acquisition of stock in a corporation which is not a competitor (Govt. Br. 146–147).

The General Motors brief urges a special necessity for establishing restraint in relation to the entire national market in order to prove a violation of Section 7 of the Clayton Act on the ground that it makes stock acquisitions illegal only where the effect may be to restrain competition (GM Br. 233–235).[14] There might be room for this argument in a case where the acquisition is complete and the restraint on competitors only is involved (cf. *United States* v. *Columbia Steel Co.*, 334 U. S. 495), but it has no application to a case such as this where restraint on the trade of the corporation which is controlled can be shown without reference to the general market.

[14] One answer to this is suggested by this Court's decision in *Standard Oil Co. of California* v. *United States*, 337 U. S. 293, construing precisely the same language in Section 3 of the Clayton Act and finding that proof of the competitive effect

Point IV

CHRISTIANA SECURITIES COMPANY AND DELAWARE REALTY AND INVESTMENT COMPANY SHOULD BE RETAINED AS PARTIES SO LONG AS APPROPRIATE RELIEF MAY INVOLVE AN ORDER DIRECTED TO THEM

Christiana Securities Company and Delaware Realty and Investment Company have filed a separate brief arguing that the appeal as to them should be dismissed since the government has not listed among the questions presented the question whether, if divestment of control through a distribution of General Motors stock to du Pont stockholders is ordered, provision should be included ordering Christiana and Delaware in turn to dispose of the General Motors stock so received. The government does not believe that now is the time to consider that question. Instead it has prayed that the judgment of the district court be reversed and the cause remanded for entry of a decree granting appropriate relief. (Govt. Br. 149.)

It was not intended in footnote 51 to our brief (p. 149) to take any position on whether distribution of the stock to the du Pont stockholders generally

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was not essential. General Motors' citation of *Transamerica Corporation* v. *Board of Governors*, 206 F. 2d 163 (C. A. 3), certiorari denied, 346 U. S. 901, to distinguish *Standard Oil* from the present case is inapposite. In the portion of that case relied on the court of appeals was concerned with the tendency of the stock purchases to create a monopoly and in that regard it was held that the effect on competition must be established. But at the same time the court recognized that exclusive dealing contracts of necessity restrain competition eliminating the need for proof of such an effect (206 F. 2d at 70). There is no logical basis for distinction between a controlled market achieved through an exclusive dealing contract and one based upon a stock relationship.

would give proper relief. However, if that course should be adopted, the government believes that some provision should be included to require additional relief with respect to the holdings which Delaware and Christiana would so acquire. Therefore it seems to us appropriate that they should be retained as parties to the proceeding until it is determined whether relief is to be granted and, if so, whether some special order is required as to them.

CONCLUSION

For the reasons stated in our opening brief and in this reply brief, the judgment of the district court should be reversed and the cause remanded for entry of a decree granting appropriate relief.

Respectfully submitted.

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NOVEMBER 1956.

U. S. GOVERNMENT PRINTING OFFICE: 1956