In the

Supreme Court of the United States

United States Steel Corporation and U. S. Steel Homes Credit Corporation, Petitioners,	)	No. 75-853
v.	)	
Fortner Enterprises, Inc. Respondent.	)	

Washington, D. C.
November 1, 1976

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UNITED STATES STEEL CORPORATION and U.S. STEEL HOMES CREDIT CORPORATION, Petitioners,	:	
v.	:	No. 75-853
FORTNER ENTERPRISES, INC. Respondent.	:	

Washington, D. C.,

Monday, November 1, 1976

The above-entitled matter came on for argument at 1:44 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. B RENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, ASSOCIATE Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

MACDONALD FLINN, ESQ., 14 Wall Street, New York, New York 10005; on behalf of the Petitioners.

KENNETH L. ANDERSON, ESQ., Woodward, Hobson & Fulton, 1805 Kentucky Home Life Building, Louisville, Kentucky 40202; on behalf of the Respondent.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 853, United States Steel Corporation and U.S. Steel Homes Credit Corporation against Fortner Enterprises, Inc.

Mr. Flinn, you may proceed whenever you're ready.

ORAL ARGUMENT OF MACDONALD FLINN, ESQ.,

ON BEHALF OF THE PETITIONERS.

MR. FLINN: Mr. Chief Justice, and may it please the Court:

This antitrust action is before this Court for the second time on writ of certiorari directed to the Court of Appeals of the Sixth Circuit.

In 1969, in a 5 to 4 decision, this Court reversed a summary judgement in favor of the present petitioners who are the defendants below. At the trial which followed in the Western District of Kentucky, a verdict was directed for the plaintiff on the liability issues. The jury found damages in the amount of some $93,000 before trebling, and before the addition of counsel fees and costs.

Upon appeal from that first trial, the Court of Appeals reversed, holding that while the plaintiff had made out a prima facie case of Sherman Act violations, nevertheless, there were material facts in dispute, and the liability issues as well as the damage issue should have been submitted to the jury.

Upon remand at the second trial, however, both sides agreed to waive the jury. Following that second trial, the trial judge signed a photocopy of the plaintiff's proposed findings and conclusions. In adopting those conclusions, he held that the defendants had violated both Sections one and two of the Sherman Act.

Upon the appeal from that second trial, the Court of Appeals affirmed, holding that the plaintiff had in fact made out a prima facie case of a per se tie violation of Section one of the Sherman Act, and that the findings adopted by the trial judge below were not clearly erroneous. As the plaintiff urged, however, the Court of Appeals concluded that having reached the result it did with regard to the Section one finding, it was unnecessary on the appeal to determine whether or not the Section two finding of monopolize could be sustained.

It is with the case in that posture that this Court has granted certiorari. The plaintiff, Fortner Enterprises, is a corporation owned by Mr. A.B. Fortner, a successful Louisville realtor. The defendants are U.S. Steel, which through its homes division sold prefabricated houses; and its wholly owned finance subsidiary, U.S. Steel Homes Credit Corporation, which confined its financing services to promoting the sale of homes division houses.

By written agreements executed in the first instance in October, 1960, and again in August, 1961, Mr. Fortner negotiated with the Credit Corporation certain land loans covering the acquisition and development of two neighboring parcels of land in a subdivision owned by another of Mr. Fortner's corporations, Iriquois Development. This financing was conditioned upon the agreement by the plaintiff to buy and construct a Homes Division prefabricated house on each of the lots unless the underlying loans were repaid. The amount committed under these loan agreements was 100% of the cost at which Mr. Fortner transferred the lots from the one corporation to the other, plus the cost of development of some 150 lots which were involved in the first transaction which were not fully developed at that time.

Mr. Fortner testified that he would not have purchased the defendants houses without this land financing, which is the challenged subject in this lawsuit. Mr. Fortner also testified that only when the defendants had finally accepted his terms during extensive negotiations did he agree to enter into this arrangement.

Fortner contends, both below and here, that this land financing condition upon the purchases of prefabricated houses was a per se tie violation in that the loans were allegedly unique, because 100% loans on equally favorable, equally cheap terms, were not available at the time from traditional Louisville lending sources.

More specifically, Mr. Fortner and other witnesses testified that to the best of their knowledge 100% loans were not available from conventional lenders in Louisville at the particular time it entered into these two transactions with the defendant.

But, as the Court of Appeals noted, soon after the plaintiff had negotiated its 100% terms with the defendant, conventional Louisville lending agencies did, in fact, begin to grant 100% land loans. In fact, it is undisputed on this record that within less than a year of the second loan agreement, in response not only to the alleged terms which the Credit Corporation granted to the plaintiff here, but also in response to 100% loans by other prefabricated house manufacturers, the traditional Louisville lending agencies were indeed making 100% land loans.

We contend that Fortner has failed to make out a prima facie case of the requisite economic power over credit in order to establish a per se tie violation. In holding to the contrary, we respectfully submit that the Courts below have failed to follow the mandate laid down by this Court.

The Court of Appeals, on the most recent appeal, held that even though Fortner had failed to prove that other lenders were in any way prevented from making equally favorable or cheap loans, nonetheless, the requisite economic power over credit could be and was held to be in this case established by solely three elements of proof: first, that the loans were allegedly cheaper or more favorable than available at the time from other sources in Louisville; second, based upon the opinion testimony of Fortner's cosntruction superintendent, that the tied product price, the price for the houses charged by the defendant, was allegedly higher than the price for a comparable conventional house; and, finally, mere acceptance of this tying condition in those circumstances.

I would turn now to what the petitioners believe this Court held was necessary to establish economic power over credit.

QUESTION: Mr. Flinn, before you do that, is it not correct that there was also at least reference in the opinion to additional items of proof, namely, the fact that there were other tie-ins with other -- between your credit division and other purchases at home?

MR. FLINN: Mr. Justice Stevens, I believe that is correct. I intended to subsume that holding by the Court in my statement of the third element, customer acceptance. The plaintiff has contended that uniquely favorable loans were extended by the Credit Corporation to other borrowers. We urge that there is absolutely no evidence in the record of the terms or conditions on which loans were made by the

Credit Corporation to any other borrower; we contend that there is nothing that shows that loan s to any other borrower on land financing were specially unique in the sense that equally favorable terms were not available from other conventional lenders.

QUESTION: But is there not evidence that a certain percentage -- and I don't remember the figure now -- of your Credit Company's loans did have a tie-in feature with them?

MR. FLINN: Plaintiff has, I think, taken the evidence out of record. We have treated this point in some detail in an Appendix. And the reason that we've put it in an appendix to our reply brief, Mr. Justice, is because we are prepared to stand and mount our argument today whether or not other customers acquiesced in tying arrangements under uniquely favorable loan terms.

Our argument is that as a matter of law the result is the same for reasons which I will go into in my argument. But we do take factual issue with the state of the record, and have detailed the record in that appendix.

QUESTION: Your point -- just so I have it clearly in mind -- is that the customer acceptance feature of the proof is the same whether it's this customer or this plus some others.

MR. FLINN: Mr. Justice Stevens, that is my argument today, yes, sir.

Unlike a tying product which is unique or distinctive, and commands a higher price or a premium price, thereby yielding an abnormally high profit to the seller, credit or financing by contrast is the most fungible of all commodities. One dollar is no different than any other dollar. And no lender can long command a higher price or more onerous or costly terms for selling his credit or his financing services than other lenders are asking.

In recognition of that fact, this Court -- both the majority and the defending justices -- stated that the only thing that can be unique about a loan or financing is that it is offered on cheaper or more favorable terms than other lenders are offering at the particular moment.

Indeed, such cheaper offering of terms is the very crux, the very essence, of competition among lenders. In recognition of that fact, and in keeping with that desirable competitive objective, again, both the majority and dissenting justices of this Court rejected Fortner's argument that economic power over credit can be established solely by the fact that the terms offered are cheaper or more favorable than available elsewhere.

In fact, both the majority and dissenting justices recognized that without any economic power over credit, a lender can decide to offer more favorable terms in order to promote the sale of an ancillary or tied product. Such a lender may simply decide to give up some or all of the profit which other lenders are making on the terms that they ask. As Justice Black stated for the majority, a seller who lacks economic power in the credit market can lawfully offer advantageous terms on credit as a means of promoting the sale of his tied products, thereby in effect reducing the price of the tied product, engaging in price competition in the tied product market.

In short, this Court concluded that cheaper, more favorable terms for credit neither prove nor disprove the existence of economic power. They merely pose the decisive question which must then be answered: if in fact the loan terms were cheaper or more favorable than available elsewhere, were they cheaper because the defendants had some unique economic ability, some unique competitive advantage, which precluded other lenders from offering equally favorable terms on a profitable basis?

The issue mandated by this Court, therefore, was not whether equally cheap financing was merely unavailable from other lenders at the particular time. Rather, as the majority held, unless other lenders were legally barred from offering 100% loan terms, the issue then is whether, in the words of Justice Black, the defendants had a unique economic ability to provide 100% financing at cheap rates because they had some cost advantage or economies of scale in their credit operation so that other lenders could not profitably lend money on the risks involved.

The Court of Appeals addressed itself to these factual issues. It correctly concluded that there was no such proof in this trial record. Many lenders were legally free, not subject to any prohibition upon making 100% land loans. Similarly, Fortner offered no evidence that the defendants had any cost advantage or economies of scale arising out of their operations in the credit market. Instead, the record shows affirmatively that the defendants operated at a cost disadvantage and realized a lower rate of profit than conventional lenders did. In fact, what the Courts below found was, that conventional lenders were not making 100% loans at the time of these transactions only because they were unwilling to take the risk of lower profits.

Now, as proof of economic power, as I indicated a moment ago, both of the lower courts relied upon the evidence of the allegedly cheaper, more favorable loan terms which are challenged here, coupled with the allegedly higher price of the tied product, the houses, and customer acceptance of that tying arrangement in those circumstances.

We urge that even if these facts were submitted -- or supported by the record, they are not proof of power over credit. Reduced to their lowest common denominator, they are at most consistent with, or tend to support, the claim that the terms on which the loans were offered were, in fact, cheaper or more favorable.

Proof of cheaper terms, however, as this Court held, does not prove that the defendant had any unique ability to offer loans on such terms. It does not prove that other lenders were precluded in any way from matching those terms.

Where the tying element is offered at a cheaper price, buyers will inevitably be attracted by that fact. Particularly is that true where the tying element is fungible, such as money. Because no borrower, as we've noted, will pay other lenders a higher price than he can obtain from some other lender.

In those circumstances, we urge that acceptance of the tying condition, even by numerous customers attracted by the allegedly lower price of the financing, is at most evidence that the credit terms were, in fact, cheaper or more favorable. It is not evidence of economic power.

Similarly, assume that Mr. Fortner had believed that the defendants houses were overpriced or otherwise non-competitive at the time he negotiated the loan arrangements which are now challenged. I would note that the evidence is to the contrary. Mr. Fortner's disenchantment with the houses appears to have occurred many months after he had negotiated, requested, and entered into the second loan arrangement.

But --

QUESTION: Let me just interrupt you. You say the evidence is to the contrary, but didn't the judge find that they are $455 more expensive? And the witness so testified. So we've got to accept that.

MR. FLINN: I agree. I did not mean to state that there was not a finding that the houses were higher priced. I meant to say, there is no evidence that Mr. Fortner was in any way disenchanted with the houses, deemed them higher priced --

QUESTION: But what difference does that make?

MR. FLINN: It makes a great deal of difference, Mr. Justice Stevens. I believe that if at the time a buyer who enters into a tying arrangement knowingly takes a product which he doesn't want, knowingly takes a product which he believes is over-priced, knowingly takes a product which he deems is non-competitive on any other basis, it can then be urged that an inference that he has been economically coerced by some uniquely attractive singularly compelling aspect of the tying element and an inference of economic power might be drawn from that.

Now, I am saying, first of all, in this case, the evidence shows affirmatively -- though no finding was made on this one way or the other -- that at the time, Mr. Fortner solicited and negotiated not one but two financing arrangements. He was in no way convinced that the houses were anything other than superlative. Indeed, as much as six months after the second loan arrangement, he stated in a letter that his principal competitor, Mr. Swindler, who had houses comparable to his, he was sure anybody who would look at the two houses would conclude that his U.S. Steel houses were both cheaper and better.

Now, I submit Mr. Swindler, in order to survive in the real estate business, notwithstanding that unhappy name, must have had very good houses at very low prices. And I think that Mr. Fortner's own characterization suggests that it was not until long after he had negotiated the loan agreements that he deemed these houses to be in any way defective or overpriced.

My point is solely that no inference of economic power can be drawn from any disenchantment with the houses since that disenchantment did not arrive until after the loan arrangements had been negotiated.

QUESTION: I must have misunderstood your argument. Because I thought you were saying that even if he paid more for the houses and knew it, it really wouldn't make any difference as long as the total package was what the free market would dictate.

MR. FLINN: That's the second part of my argument, Mr. Justice Stevens, that even if at the time he entered into the loan arrangements, Mr. Fortner deemed the houses over-priced or in any other way non-competitive, he would in the circumstances of this kind of tying situation, have agreed to accept that burden of the tied product only if he concluded that the saving on the allegedly cheaper, more favorable tying elements alone at least compensated for that burden he was assuming.

Now, alternatively, where the tying element is allegedly unique because offered on more favorable or cheaper terms than available elsewhere, the only way that a customer knowingly accepting the tying arrangement and knowingly accepting a higher priced tied product, could evidence economic power would be if the premium or the overcharge on the tied product, the houses, exceeded the saving on the tying element. And the evidence is devoid of any such evidence. The record is devoid of any such evidence, and I believe that the plaintiff makes no claim along those lines.

QUESTION: Putting your point a little differently, Fortner could afford to pay more for the houses if he paid less for the credit.

MR. FLINN: Mr. Justice Powell, you state it very succinctly. That is our position.

Even after two trials, there is no evidence here that traditional lenders were ever prevented by a cost disadvantage, legal obstacle, or otherwise, from making 100% loans at a profit. Nevertheless, ignoring this Court's mandate, we urge, the Court of Appeals held, as I've noted previously, that Fortner could prevail even though it failed to show that other lenders were unable to make comparable loans.

We submit that the absence of such evidence by itself is sufficient to destroy Fortner's per se time violation in view of this Court's mandate on the prior review of this case.

Moreover, there is affirmative proof in the record that other lenders were not prevented from making equally favorable 100% loans. As I have mentioned before, even though it was ignored by both the trial court and the Court of Appeals, the evidence is undisputed that traditional lending agencies within a very few months, began making 100% land loans.

The Court of Appeals, incidentally, in its first opinion, had correctly concluded that that evidence was relevant to deciding whether other lenders were free and able to make 100% loans.

QUESTION: Well, do -- you stated that this evidence was ignored by both the District Court and the Court of Appeals. Was it ignored to the extent that they found otherwise?

MR. FLINN: No. There is no contrary finding, and it was ignored, Mr. Justice Rehnquist, by the Court of Appeals only in its second opinion. In our brief we have cited to the portion of the record where in the first Court of Appeals opinion, they specifically averted to the fact that there was no question but that other conventional lenders began making 100% loans shortly after Fortner negotiated his transaction with the defendants.

QUESTION: And what was Judge Gordon's finding at his --

MR. FLINN: No finding one way or the other. The plaintiff did not give him such a finding to sign. We did. It was rejected.

QUESTION: Your inference is that if the plaintiff had given him such a finding to sign, he would have signed it? Or your intimation?

MR. FLINN: I cannot speculate as to that, Mr. Justice. I am saying that the state of the record, however, is clear that other lenders did begin making these loans, and indeed, even the plaintiff's expert witness, Professor Masten from the University of Georgia testified that this became pretty much a general thing, although his testimony as that of the other witnesses, was that at the specific time, the particular time, of these loan transactions, he did not believe that other Louisville lenders were making 100% loans.

QUESTION: Well, Judge Gordon is sitting at the

#395 trial and is free to disbelieve any expert he wants to.

MR. FLINN: This happened to be the testimony of the plaintiff's witnesses. All the evidence as to --

QUESTION: He can disbelieve the --

MR. FLINN: Yes, he can.

QUESTION: -- plaintiff's witnesses even -- and find a fact more favorably to the plaintiff than the plaintiff's witnesses, if there's other evidence to support it, can't it?

MR. FLINN: The trial judge, however, Mr. Justice Rehnquist, predicated none of his findings upon credibility, none of his findings upon disbelieving any of the witnesses, none of his findings upon disavowing any of the evidence that was in the reocrd. He just chose to ignore it, is what the plaintiff said.

QUESTION: Are you suggesting that in order to make a finding of fact stick, the District Court not only has to --

MR. FLINN: No.

QUESTION: -- find the fact, but has to say, I disbelieve the witnesses that testified to the contrary?

MR. FLINN: No, I am not. I am saying that in all the facts and in the procedure of this case, I submit that this is one of those cases where this Court, as any appellate court, is free to look at facts which are not in dispute on the record even though they have not been found by the trial judge.

But let me say this: even without this particular fact, my legal argument remains the same. I'm saying that there was affirmative evidence that other lenders were able to make 100% loans. I believe that all I have to do to sustain my argument that the plaintiff has failed to make a prima facie case is show that there was no evidence that other lenders were prevented from making 100% loans.

QUESTION: And you say that the findings of the District Court are silent on this point?

MR. FLINN: Yes, sir.

However, the first opinion of the Sixth Circuit is not silent on this point.

As I also noted, the Courts below concluded that conventional Louisville lenders were not making 100% loans earlier only because of their unwillingness to take the risk involved. Or indeed, as Fortner conceded in his brief before the Court of Appeals, because such conventional lenders would not take the chance of the loan not being profitable.

We urge that the fact that competing lenders simply chose not to run the risk of lower profit until stimulated by competition to do so demonstrates that they had the ability to offer 100% loans like those allegedly given by the defendants.

In conclusion, we would ask the Court to consider the competitive consequences of Fortner's position, adopted by the courts below, that economic power over credit is shown where equally favorable terms are merely unavailable, and simply because other lenders choose not to run the risk of lower profit. That proposition would mean that the innovator who pioneers lower credit terms to promote the accompanying sale of a product violates the antitrust laws even though his competition stimulates other lenders to lower their prices for financing, a wholly desirable, laudable antitrust and competitive objective.

To sanction that position, we respectfully submit, is simply to stand the Sherman Act on its head.

Thank you very much, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Mr. Anderson.

ORAL ARGUMENT OF KENNETH L. ANDERSON, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. ANDERSON: Mr. Chief Justice, and may it please the Court:

I appear here today for the second time, having been here approximately eight years ago. And before I got here, my client asked me a number of questions. My client said, I understood that the Supreme Court had established the basic groundrules for this case eight years ago. Didn't they? And I said, yes, I thought they had.

My client said, I thought we tried this case twice and had fact findings in our favor, didn't we? And I had to answer, yes we did.

So, rhetorically, of course, to begin with, we ask: why are we here?

QUESTION: What in Justice Black's opinion do you point to to support a directed verdict on liability for the plaintiff?

MR. ANDERSON: I think part of it we could blame on Mr. Justice White, your honor, because in his dissent, his interpretation of the majority opinion was that, in effect, that on the basis of the record that we had, if there were no countervailing proof, the economic power issue as such had been reduced, he -- Mr. Justice White felt -- to a relatively simple level on the scale of things. And that basically, Judge Gordon, at the close of our 30 day trial of this action, felt that we had proved not only all of the evidence which was in the record before this court at that time, but quite a bit more. And that since there was no evidence that -- produced by United States Steel and the Credit Corporation to rebut that, that basically the prima facie case that Judge Gordon felt that Mr. Justice Black had delineated in this Court's opinion had been made, and had not been properly rebutted. And therefore, he sustained the motion for a directed verdict.

QUESTION: Do you think that takes into account adequately the existence of other sources of financing, and the fact that the high price -- if it was high -- was offset by the low -- the favorable interest rate?

MR. ANDERSON: All of these matters were argued ad naseum before Judge Gordon at that time, your honor. Now, this is at the time that he gave the directed verdict. The -- one of the very interesting things about this is that what you have heard today, and what you have read in the briefs, are a great deal -- are Mr. Flinn's and his cohort's economic theories. They are not supported by the record.

But we have argued this case -- and we argued this case time and time again before Judge Gordon in the intervening eight years up to the time that we got here. And he was quite familiar in great depth with all the facts and all of the evidence that had been established.

Judge Gordon was not impressed at all with the very meager evidence that had been presented for example about the subsequent events involving basically the Louisville Mortgage Service Company. And their -- its president testifying that on a few occasions they had, from their own company's money, made some 100% loans, but that those loans were not similar to the Fortner loans with which he was familiar; and very importantly, those loans involved personal guarantees by principals of the borrower, which really made those loans distinguishable.

Now, the only other testimony -- Mr. Flinn rerred to undisputed evidence that the only other testimony about 100% loans at a later time was some very general testimony that was not pinpointed, but it is obvious that it involves loans made a number of years later at a time when we were in an inflationary spiral, and in circumstances totally different than those which existed at the time that these loans were made.

The only expert in this field -- as Mr. Justice Rehnquist pointed out, Judge Gordon was free to ignore or accept his testimony -- but the only competent expert who testified in this case was Dr. Masten, who had been with the University of Kentucky, who at the time of our last trial in the form of the supplemental evidence that we presented, was at -- a professor of banking at the University of Georgia. And Dr. Masten laid out the framework of the economics of this case for Justice Gordon. And, of course, it was quite obvious at the trial itself, when Dr. Masten testified, that Judge Gordon was very much impressed by Dr. Masten's testimony, which buttressed in many ways the arguments that we had previously made.

And I respectfully submit that many things that you have been hearing are Mr. Flinn's economic theories. We get back to the basic proposition that what you have heard today involved arguments as to facts. As Mr. Justice

Rehnquist pointed out in an earlier argument today, normally this Court does not -- when a district judge acts as fact finder -- make fact determinations. And when those fact determinations have been affirmed by the Circuit Court this Court does not go behind those.

Basically, it is our position that what Mr. Flinn is asking you to do is to go behind the Court's fact findings.

QUESTION: Do you think the court followed the mandate of this Court?

MR. ANDERSON: Yes, your honor, I do.

QUESTION: I'd like to hear you on it.

MR. ANDERSON: All right, sir.

First of all, the jist of petitioner's argument is that this Court's 1969 opinion indicated that the only way that we could establish economic power was to establish that the Credit Corporation had some cost advantage in what is described as the credit market.

I would respectfully submit, to start out with, that -- and they rely very heavily on the concept of fungibility of money. I would point out to the Court that Dr. -- that the record does not support this concept of fungibility when it is applied to loans.

There are -- this Court in the Philadelphia bank case, for example, pointed out there are -- that money is the raw material and that loans are the finished product. So we start out, I respectfully submit, with the basic proposition that you have loans on particular terms. Not just cheap loans. Because again, I submit, that while the term, cheap, is used, we are talking about loans that are on particular terms.

One of the unique aspects about the loans in question here were -- was the 100% aspect. A hundred percent of the cost of acquiring the land and of developing it and of building the prefabricated house packages that were bought, were loaned. We're talking about $2,500,000 worth of loans to generate purchases of house packages of about $700,000.

QUESTION: Mr. Anderson, although you dislike the word, cheap, as to the loans, would you not agree that the record indicates that these loans were on more favorable terms than were available elsewhere?

MR. ANDERSON: These loans were certainly on -- it depends on -- we had a series of terms, your honor. We had --

QUESTION: Well, but cutting through the whole thing, what is your position with respect to the net value of these loans to your client? Were they more favorable or less favorable?

MR. ANDERSON: They were more favorable.

QUESTION: So we could translate that to cheaper, and we wouldn't be far wrong then, would we?

MR. ANDERSON: Well, I think that it is -- yes. I think that it is a misnomer to translate more favorable into cheaper.

QUESTION: Why?

MR. ANDERSON: Because if you've got a two million dollar loan, versus a million and a half dollar loan, the two million dollar loan may be at the same interest rate as the million and a half dollar loan. But the two million dollar loan, in certain circumstances, may be more favorable. And that is exactly the situation here.

The volume of money being loaned was just as important as the interest rate and the discount fee. The interest rate was comparable -- 6% at that time was comparable to --

QUESTION: Well, I realize that. But cutting through it all, isn't one of the facts that we start with in this posture of the case that everybody agrees that these were favorable loans for your client?

MR. ANDERSON: Yes, sir. And if I -- but I would like to emphasize favorable as opposed to cheap. One of the reasons for that being the fact that in most instances of this nature, you had -- you have a requirement that there be guarantees of the loan by the person, the individuals, involved in the procedure, the borrower, Mr. Fortner in this instance. In this case, you had something entirely different which created, again, a more favorable situation. You had --

QUESTION: Mr. Anderson, I don't mean to keep interrupting. But in terms of analyzing the case under the antitrust laws, does it matter in your position as to whether the more favorable aspect was simply a reduction in interest rate or a combination of other factors? Wouldn't we have the same legal issue either way?

MR. ANDERSON: Not necessarily, your honor.

QUESTION: Well, then you have to help me. Because I don't understand your position.

MR. ANDERSON: My position is that a favorable interest rate can be one of the factors that makes a loan under these peculiar type circumstances more favorable, but that there are many other circumstances that can add to it, that could even create a situation where the interest rate would be higher, but yet would make the loan more unique, more desirable to the consumer, than the interest rate, than the cost of the money. Depending upon the volume of money that's involved, and the circumstances of the payment. Eliminating the personal risk is a very important factor.

QUESTION: But Mr. Anderson --

QUESTION: Is that why you put so much emphasis on the 100%?

MR. ANDERSON: Yes, sir. That's one of the reasons why we put so much emphasis on the --

QUESTION: And that's why the other side put so much emphasis on the fact that others continued to give a 100% afterwards?

MR. ANDERSON: Others gave 100% afterwards, your honor, a few others did under the evidence. But under conditions where personal guarantees were required by the principals of the borrower.

QUESTION: So you think that's enough of it?

MR. ANDERSON: I -- no, I don't think that's enough of it. I think that is a distinguishing factor as between the loans that were made to my client and offered to my client. And my client was sought out. And they kept asking him, what will it take to get you to go with us? Mr. Fortner, not --

QUESTION: It seems to me, all you're saying is that there are a number of ways that a seller can cut the price of the tying product. He can cut the interest rate, he can eliminate personal guarantees, he can make the principle larger, he can do all sorts of things. But in terms of anti-trust consequences, what differenece does it make which means he takes to cut the price? It's still the same animal, isn't it?

MR. ANDERSON: Well, it could get to that, your honor. And let's follow that up a little bit. If you have someone, then, who cuts the price, as you say, to the point that he has cut the price of his loans below his cost, then, regardless of how he got at the level of cost that he got to, if he is cutting the effective price of his loan below that cost, then we are back to the basic proposition -- or this is a parallel -- to a predatory type of action on his part. He has created for himself economic power, just as the man with the widget, who -- which costs him a dollar to produce -- if he decides that he's going to sell his widget for 80¢, he has created economic power for himself.

And this is exactly what happens in this situation. Again, excepting your premise that however you cut it the combination of terms --

QUESTION: You don't contend that these loans are below cost?

MR. ANDERSON: I don't contend that as such they were below cost. The U.S. Steel and the Credit Corporation have contended -- they admit they come close to it. But my point is that they got themselves down to a level where, economically, the competitors at that time, in the economy that existed at that time, were simply unwilling, because of risk of loss, to make such loans, to offer such loans to people.

This is the record. This is what is in the record in this case. These are the facts in this case. This is what Judge Gordon adopted as a finding of fact. And I submit that those were the facts -- economically and factually.

The problem was compounded by the, again -- in talking about the creation of economic power, the problem was compounded in this situation by the fact that United States Steel itself guarantees to the Credit Corporation the loan. And I emphasize that we have two different, separate corporate entities in this case, not one. And that when they elected to operate under the separate corporate entity principles, they are bound by them.

Now, in this situation, United States Steel Corporation-- and we've cited the figures inthe brief -- with its vast resources, its retained earnings that it had in its kitty to use, put itself again in the same type situation as your predatory price cutter did by making available, where necessary, funds from other sources to recompense the Credit Corporation if it got into trouble in a particular loan, such as it did with Fortner.

So that what we have -- if a bank were making a loan, or a savings and loan association were making a loan to a developer, and that bank or savings and loan association said -- development loan like this, two and a half million dollar loan -- said to that developer: you've got to buy United States Steel prefabricated houses. Clearly, we have two separate entities, we have the tie created. And then, okay: so United States Steel comes back and says, all right, Mr. Bank, I'll guarantee this loan to ensure achieving the tie.

This is the very principle that, it seems to me, the antitrust laws are designed to prevent. Because we're not talking about a simple credit transaction, a simple sale of a product on a deferred time-payment basis. We're talking about a set of loans under particular circumstances.

QUESTION: Let's turn that around. United States Steel was primarily interested in selling those houses, were they not?

MR. ANDERSON: Yes, sir.

QUESTION: And so, they find a customer who wants to buy. However they came together. And they're ready to buy. But they say, we can't finance it. And then U.S. Steel says, all right, we'll finance it for you.

MR. ANDERSON: The purchase of the houses?

QUESTION: Yes.

MR. ANDERSON: Yes, sir. That is the one product principal alluded to in Mr. Justice Stewart's dissent and -- or, rather, in Mr. Justice Fortas' dissent, in which Mr. Justice Stewart referred. And this was one of the fears that Mr. Justice White had in his dissent, that this type of transaction would be either simple -- what I call, sale of product on credit transaction would be attacked under Fortner. This is not proven to be the case, at all. We don't have a series of cases that have been filed over the last eight years applying this decision in that fashion. And I respectfully submit that they're entirely different situations. Here we're got the Credit Corporation being instructed to spend or to commit itself to spend,to put forth, two and a half million dollars to obtain $700,000 worth of sale.

We not only have them doing it with us, and again this -- they all didn't even have to be 100% loans to be attractive to people. The question is, what was sufficient? As their own documents pointed out that we quoted in our brief, what is enough, they said? What is sufficient to do the job? How much is enough to get you to take our product? And in some instances, it may have been eighty percent. In some instances it may have been seventy percent. In some instances it may have been ninety percent. And in some instances it may be a hundred percent.

But we do know this as an uncontradicted fact in the record -- and it's found by the court -- that all of the loans that were made , I mean -- yes, all of the loans that were made, whether under the special financing program, or under the general financing program of U.S. Steel, contained the tie about which we are complaining here today. And that is uncontradicted in the record.

We do know that the special financing program, which is described by their own documents, was the program in which they deliberately set out to attain additional sales of house packages. And we do know that there were 43 loans involving the special terms necessary to obtain sales in situations that were not otherwise generally acceptable. So we -- and of those 43 loans, we know that they involved seven million, seven hundred thousand dollars worth of loans, again involving the land acquisition and development aspects only of this situation.

So it can be seen from the very record, and the findings of the trial court, that many, many other ties were created by this program, and not just Fortner. Fortner happens to be the one that got hurt and is complaining, but there were many others that were affected by this program while it was in effect.

The higher price for the product as is established -- Justice Black, in the majority opinion in this case, said this -- held in this instance that this is evidence for the finder of fact to consider. The finder of fact considered that evidence, and found it to be significant.

Mr. Justice Black said that these other factors that I have referred to were evidence to be considered. I do not read this Court's opinion as saying -- nor has the Sixth Circuit in either of its opinions -- read this Court's opinion as saying that the only way you can prove market power in the lending situation is to prove some cost advantage on the part of the lender. Because -- and I think that if you analyze it, it is obvious that there are many other factors, there are many other pieces of evidence that can prove that economic power just as well as a cost advantage. You can deliberately do something, and create an advantage for yourself. And as Mr. Justice Black points out in his opinion, where a large company has tremendous resources behind itself, it can do things that smaller companies that don't have these tremendous resources behind them cannot do.

And this is e xactly the guarantee program that I described in this -- in my argument here. They were able to underwrite, to the extent necessary, this program if they wanted to. And they elected to do so from funds from other areas of their business.

QUESTION: I think if you -- your position is that Fortner -- our opinion -- Mr. Justice Black's opinion for the Court in Fortner didn't purport to water down the necessity for proving a sufficient amount of economic power in the tying product.

MR. ANDERSON: Thatis correct, your honor. I have never considered the Supreme Court's decision in this case in the slightest to eliminate the requirement of proof of economic power. You have the reference in the opinion to the various factors that Mr. Justice Black, in writing the opinion, referred to as being indicia of economic power, when he held that we had enough proof to go to trial. He lists, in various manners, the indicia of -- some indicia of economic power.

QUESTION: What do you think the critical evidence is of economic power in this case?

MR. ANDERSON: To summarize, your honor, I think that the -- Mr. Justice Black points out --

QUESTION: Well, I don't know about Mr. Justice Black, now. In this case, what do you think the critical evidence is of economic power in the credit market, over the credit market?

MR. ANDERSON: All right. Yes, sir. The -- first of all, the nature of the terms of the loans offered --

QUESTION: All right, now -- just low credit terms, that's one.

MR. ANDERSON: Well -- the --

QUESTION: No, favorable credit terms, that's right.

MR. ANDERSON: -- favorable credit terms offered, your honor. Because --

QUESTION: Not even cheap. Not even cheap credit.

MR. ANDERSON: Right. Including the elimination of the guarantess by U.S. Steel --

QUESTION: Yes, all right, favorable credit terms. You don't think that would be enough by itself, do you?

MR. ANDERSON: Yes, I do.

QUESTION: Oh, you do. You think that's apparent from Mr. Justice Black's opinion?

MR. ANDERSON: Mr. Justice Black's opinion indicates that the uniqueness is evidence of economic power. He doesn't say that it is the only thing.

QUESTION: Well, I know. But do you think he says it would be sufficient by itself?

MR. ANDERSON: It's -- in the context that I --

QUESTION: You think it is?

MR. ANDERSON: I've always thought it is. Because of Loew.

QUESTION: You almost must say so in this case, mustn't you?

MR. ANDERSON: Well, no, because I think --

QUESTION: All right, go ahead, what's the other evidence?

MR. ANDERSON: But I have other evidence. I've got --

QUESTION: What is that? What is that?

MR. ANDERSON: Well, the fact of the higher price for the tied product. The --

QUESTION: And you wouldn't think that would be enough in itself?

MR. ANDERSON: No, sir.

QUESTION: And Mr. Justice Black didn't suggest it?

MR. ANDERSON: He didn't suggest that that was enough by itself, no, sir.

QUESTION: But he said it might be evidence?

MR. ANDERSON: He said that it may well be, I believe is the phrase that he used.

QUESTION: All right. What else have you got?

MR. ANDERSON: We've got the number of tie-ins created by the special financing programs in this case. The numbers of tie-ins. The opinion in this case indicates that the numbers may again be evidence of economic power.

QUESTION: Well, what are the numbers in this case?

MR. ANDERSON: The numbers, your honor, are -- depending on how you want to look at them. One bit of evidence is that all of the loans that they made involved a tie. Another bit of evidence is that the special financing program, which was the program intended to get the business when good banking principles were not applicable, involved -- that we know of -- 43 loans concerning over seven million, seven hundred thousand dollars in loans. And this obviously had to affect a very, very substantial number of house packages. Becau these seven million, seven hundred thousand dollars of loans only involved the land acquisition and development aspect of the program only.

The --

QUESTION: Just so I have it clear: are these 43 loans thatyou refer to to companies other than Fortner --

MR. ANDERSON: Yes, sir.

QUESTION: -- and are they 43 different builders or

43 --

MR. ANDERSON: Yes, sir. They are 43 different builders.

QUESTION: I see.

MR. ANDERSON: I isolated the -- I didn't duplicate. There were more loans that that, because they may have had three loans to one builder. But I cut it down.

QUESTION: I see.

MR. ANDERSON: This is the finding of the trial court also, your honor.

QUESTION: In what area -- over what geographical area were those 43 people -- institutions located?

MR. ANDERSON: West of the Mississippi.

QUESTION: And Fortner is east of the Mississippi.

MR. ANDERSON: I'm sorry. East of the Mississippi, excuse me.

QUESTION: So these other 43 are east of the Mississippi?

MR. ANDERSON: Yes, sir.

QUESTION: That's as much as we know about it?

MR. ANDERSON: Yes, sir. Our discovery as to them was limited to their identity. We got the list because it's an attachment to the underwriting agreement in which the guarantees were made by U.S. Steel to the Credit Corporation, which is a part of the record. We were limited in our discovery in that area. So we did not get into a great deal of depth in the discovery concerning it.

QUESTION: What other evidence do you think you've got?

MR. ANDERSON: The -- well, again --

QUESTION: You've got favorable credit terms. You've got the higher price in a tied product. And you've got the fact that U.S. Steel managed to make a fair number of similar loans, 43 other loans.

MR. ANDERSON: Yes, sir.

QUESTION: That's it?

MR. ANDERSON: No, sir. Well, I again apply the same principle of this guarantee by U.S. Steel itself to the Credit Corporation as being separate evidence of economic power. It's recognized very strongly by Judge Gordon in his findings, simply because there wasn't anybody else in this business that was in a position to --

QUESTION: This is subject to a due process approach?

MR. ANDERSON: Yes, sir. Yes, sir.

QUESTION: If you're rich enough, you've got economic power.

MR. ANDERSON: Well, the way they did it here.

QUESTION: If sour loans wouldn't really break you, you've got enough economic power in the credit market?

MR. ANDERSON: Well, where you deliberately set out to achieve a purpose with a particular program, and are willing to back up that program with funds generated from other aspects of your business, and where it is obvious that because of the risks involved, others at that time and under those circumstances,are not in a position to do this: yes, sir, I think that this is very strong evidence of economic power exercised in this situation, at this time and this place.

This is just like -- this is similar to situations with a trademark or a patent. A trademark or a patent, the jist is, exists -- doesn't really -- isn't really significant unless and until it is promoted or advertised or whatever. And you have to have money to do that. So you take your money and your patent and you create not just by with the patent alone -- but the money and the patent are the situations that create the demand that allow you in those situations to create a tie. Or with a trademark in our franchising cases. But in all of these situations, money is the root, the base, that establishes what you can do with it. And if you don't create the consumer acceptance by letting people know that you've got this patent and what it will do, or by establishing through advertising the acceptability of the trademark, you still don't have any economic base to have a tie.

Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Flinn?

REBUTTAL ARGUMENT OF MACDONALD FLINN, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. FLINN: Mr. Chief Justice, I would add only one thing: these loans were not two million dollars for the financing of land. There is a challenge interposed by the plaintiff in this case only to the land financing. The two land financing transactions together totalled less than three hundred and eighty thousand dollars.

So I submit that on the record it's clear, even on the findings adopted by Judge Gordon it is clear, U.S. Steel did not use $2.2 million worth of its assets to promote the sale of what turned out to be 72 prefabricated houses to this plaintiff.

Thank you.

QUESTION: Mr. Flinn, before you sit down.

MR. FLINN: Yes, sir.

QUESTION: These 43 other loans that your opponent referred to, were they contemporaneous or were they spread over a period of time?

MR. FLINN: They were spread over roughly a five year period according to the face of the particular exhibit. That exhibit was dated in late 1962. It picks up loan commitments, not even loan mades, Mr. Justice, but commitments made as early as 1958. In addition, the two loans that are listed on that particular document for Fortner Enterprises show that the other listings were commitments rather than amounts actually loaned because as the record here clearly demonstrates, Mr. Fortner did not take down the full amount of the three hundred and eighty thousand dollar land loans committed to him. He gave up his project before the development had run its course.

QUESTION: Does the record show whether or not there was a tie with respect to those 43 other loans?

MR. FLINN: I'm sure the record does show that. No land financing was extended other than on the basis that each lot would have a Homes Division house built on it. So we raise no issue about that. We do, however, point out that the $19 million loan figure which my friend, Mr. Anderson, says was the tie is erroneous. Of that $19 million, some $13 or 14 million dollars was for the purchase of the houses themselves. Those were not land loans. Then when we get down to the roughly $5 million of land loans which were outstanding in one of the two years when these loans were negotiated, there is no showing on the record as to how many of those were special land loans, and therefore, by the plaintiff's argument, allegedly unique in any sense. The record is silent on those facts.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:41 o'clock, p.m., the case in the above-entitled matter was submitted.]

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